MANKO | GOLD | KATCHER | FOX LLP

AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

30th ANNIVERSARY

2020 Environmental and Energy Law Forecast

Manko, Gold, Katcher & Fox takes a look at some of the key issues to watch in 2020 at the Federal level and at the state level in Pennsylvania, New Jersey and Delaware.

FEDERAL FORECAST

Overview of Federal Activities

Carol F. McCabe, Esq. and Zachary J. Koslap, Esq.

The Trump administration and the EPA ended the decade with a number of policy announcements and rulemaking that we predicted in our 2019 forecast. In particular, EPA's repeal of the Obama administration's Waters of the United States (WOTUS) rule became final in December. EPA also undertook rulemaking actions and issued several memoranda relating to certain New Source Review permitting policies under the Clean Air Act at the end of 2019. Additionally, EPA promulgated the final Affordable Clean Energy rule, which replaced the Clean Power Plan implemented during the Obama administration. Although EPA largely continued its deregulatory focus during 2019, EPA also took steps to address the emergence of per- and polyfluoroalkyl substances (PFAS), and announced the next chemicals to undergo risk evaluation under the Toxic Substances Control Act (TSCA).

This year, we can expect continued efforts to address PFAS contamination from both EPA and Congress. EPA is also likely to issue rulemaking implementing many of the key policy objectives raised during the first year of the Trump administration, such as a finalized new WOTUS rule, and proposed rules addressing vehicle emissions standards and review of federal actions under the National Environmental Policy Act (NEPA). Changes made to the Endangered Species Act regulations in late 2019 also are expected to significantly alter federal decision-making under that statute in 2020. Finally, Two Executive Orders addressing how federal agencies develop, publicize and use guidance documents could radically change the nature, scope and effect of these important documents.

We may also see a significant decision from the Supreme Court impacting EPA's ability to implement its remediation plans under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) and a separate decision under the Clean Water Act that could bring the discharge of pollutants to groundwater within the ambit of that Act's NPDES permitting program. Further, litigation related to climate change and the jurisdictional reach of the federal and state courts will continue to occupy the judiciary in 2020.

The articles in this Federal Forecast discuss many of the significant federal activities that we expect to see unfold in 2020.

Legal Fights Over Clean Water Act Rule Expected to Continue in 2020

Todd D. Kantorczyk, Esq.

2020 promises to bring more action in the ongoing saga over rules intended to define the extent of Waters of the United States (WOTUS) subject to federal Clean Water Act (CWA) jurisdiction. Readers may recall that back in 2015 during the Obama administration, USEPA and the Department of the Army published a rule that attempted to define waters, including wetlands, that were subject to CWA jurisdiction because they had a "significant nexus" to a navigable water, a standard originally announced in the 2006 Supreme Court decision in *Rapanos v. United States*.

The 2015 rule spawned a series of lawsuits arguing that the rule improperly expanded federal authority, some of which resulted in court rulings that enjoined enforcement of the 2015 rule in certain jurisdictions. Additionally, in 2017, the Trump administration issued an executive order directing USEPA and the Army to review and either revise or rescind the 2015 rule. The agencies subsequently issued a series of notices that stated the agencies would repeal and recodify the 2015 rule, and then published a final rule that postponed the applicability date of the 2015 rule until February 2020. The rule postponing the applicability of the 2015 rule was also challenged in several district courts. The legal challenges resulted in a patchwork framework leaving the 2015 rule in effect in 22 states, but subject to preliminary injunctions in 27 states.

In October 2019, the USEPA and Department of the Army issued the final rule repealing the 2015 rule and reinstating 1986 regulations. That action resulted in its own series of legal challenges, including lawsuits by environmental groups in South Carolina and landowners in New York challenging the repeal, a lawsuit by a cattle growers association in New Mexico arguing that simply reverting back to the 1986 rules (as opposed to issuing new rules) was unlawful, and a recent lawsuit by sixteen states and cities filed in the southern district of New York, challenging the repeal and return to the 1986 regulations.

Notwithstanding these legal challenges, the USEPA and the Army have continued to work on a replacement for the 2015 rule. The agencies signed a proposed new WOTUS rule in December 2018, for which the comment period ended in April 2019. The agencies have indicated that this new rule could be published as a final rule in February 2020, which will undoubtedly trigger more lawsuits and potentially more jurisdiction by jurisdiction decisions. And looming over all these activities is the 2020 election and the possibility that a new administration might change course yet again. So, while events in 2020 may not provide final answers on all WOTUS questions, they will bear watching as they will likely lay the groundwork on the scope of CWA jurisdiction for years to come.

CERCLA Litigation

Carol F. McCabe, Esq. and Zachary J. Koslap, Esq.

At the end of 2019, the Supreme Court heard oral argument in Atlantic Richfield Company [ARCO] v. Christian, et al. which addressed the question of whether CERCLA prevents individuals from seeking restoration damages under state common-law claims. The Supreme Court's decision is expected in 2020 and has the potential to upend implementation of site remediation under CERCLA.

In this case, ARCO is seeking to overturn a Montana Supreme Court decision which allowed landowners to proceed with their 2008 lawsuit seeking restoration damages from ARCO's allegedly inadequate cleanup of the Anaconda Smelter Superfund site, asserting state common-law trespass, nuisance, and strict liability theories against ARCO as bases to secure restoration of their nearby properties to a pre-contamination condition.

In its petition to the Supreme Court, ARCO claimed that Section 113 of CERCLA grants exclusive jurisdiction to federal courts over "controversies arising under" CERCLA, making the landowners' state-court claims jurisdictionally barred. Additionally, ARCO argued that the landowners are potentially responsible parties under Section 122(e)(6) of CERCLA as the owners of polluted land, which prohibits the landowners from challenging EPA's remediation of the site. ARCO also claimed that CERCLA preempts state-law remedies that would work against EPA's cleanup plan. In particular, ARCO argued that a state-law obligation to restore the landowners' property would cause ARCO to violate EPA's cleanup plan.

The landowners' asserted that Section 113 of CERCLA permits state law claims, and cited to legislative history to argue that Congress did not intend for CERCLA to bar claims made in state courts. The landowners alleged further that the definition of potentially responsible parties under CERCLA extends only to those parties that face actual risk of liability, and that as innocent parties, CERCLA does not contemplate involving them in its allocations of responsibility. Lastly, the landowners disagreed with ARCO's assertion that any obligation imposed on ARCO would cause it to violate EPA's cleanup plan, claiming that the payment of damages does not categorically interfere with EPA's cleanup plan.

Climate Change Litigation - Uncertainty and Jockeying will Continue in 2020 on Jurisdictional Questions

Garrett D. Trego, Esq.

2019 saw certain landmark decisions in the realm of climate change litigation, but many essential threshold questions remain – principally, who has legal rights to challenge corporations' or governments' roles in climate change, and in which jurisdiction(s) may those challenges be heard? Expected decisions in 2020 will likely move these questions forward but resolution likely remains years away.

2019 was highlighted by some of the following key developments.

- Exxon Mobil successfully defended the New York state attorney general's securities fraud claims regarding disclosure of the financial risks associated with climate change. *People v. Exxon Mobil Corp.*, 2019 N.Y. Slip Op. 51990(U), 2019 WL 6795771, at *30 (N.Y. Supr. Ct. Dec. 10, 2019) ("In sum, the [OAG] failed to prove, by a preponderance of the evidence, that ExxonMobil made any material misstatements or omissions about its practices and procedure that misled any reasonable investor.").

- At least three groups of state and municipal governments defeated attempted removals that would have relegated their claims against corporate defendants to less favorable federal venues, where the corporate defendants would argue that federal common law and statutes preempt state law climate change claims. *See Bd. of Cty. Comm'rs v. Suncor Energy (U.S.A.) Inc.*, 2019 U.S. Dist. LEXIS 151578 (D. Colo. Sep. 5, 2019); *Rhode Island v. Chevron Corp.*, 2019 U.S. Dist. LEXIS 121349 (D.R.I. July 22, 2019); *Mayor of Balt. v. BP P.L.C.*, 388 F. Supp. 3d 538, 556 (D. Md. 2019). As explained further below, these decisions are key waypoints in an ongoing jurisdictional struggle over the proper venue for climate change cases.

- The overall quantity of cases directly and indirectly implicating climate change vastly proliferated in 2019. As a representative example, in a class action claim against the Keurig coffee company filed in California state court, a putative class alleges that the company misrepresented the ease with which its "K-cups" could be recycled, thereby increasing the amount of methane emissions as compared to the

class's expectations. *Smith v. Keurig Green Mountain, Inc.*, No. RG18922722 (Cal. Super. Ct. Alameda 2018). With so many cases like this one addressing climate change in an indirect way, the number of "climate change litigation" matters become increasingly difficult to track.

In 2020, we can expect federal circuit courts to weigh in with key decisions. Already a circuit court decision was issued in January 2020 in the regularly-reported children's climate change litigation that began in federal court in Oregon, where a group of 21 children alleged constitutional claims against the federal government for the failure to prevent climate change. After hearing oral arguments in mid-2019, the Ninth Circuit held in January that the children lack Article III standing to pursue their claims because the federal courts are not positioned to order and oversee a sufficient remedy for their claims. Juliana v. United States, No. 18-36082, -- F.3d --, 2020 WL 254149 (9th Cir. Jan. 17, 2020). The Ninth Circuit placed the burden on the executive and legislative branches to tackle the issue. Id. at *8 ("[A]ny effective plan would necessarily require a host of complex policy decisions entrusted, for better or worse, to the wisdom and discretion of the executive and legislative branches."). Similar cases that have sprouted across the country face an uphill battle to survive a district court judge's scrutiny, after the Ninth Circuit's decision here.

Also in the Ninth Circuit, a decision is likely in 2020 on consolidated cases from municipalities regarding the federal preemption of state common law claims related to climate change against corporations. *County of San Mateo v. Chevron Corp., et al.*, No. 18-15499 (9th Cir.). In the Second Circuit, the court is likely to issue its decision on similar jurisdictional and standing issues in New York City's case against a similar group of corporate defendants. *City of New York v. BP P.L.C., et al.*, No. 18-2188 (2d Cir.). These federal circuit court cases are especially important as more states and municipalities consider litigation against private entities to recover costs or obtain assistance related to infrastructure improvements in response to climate change.

We are not aware of any case against a government or group of corporations directly seeking damages or injunctive relief in response to climate change having been finally resolved by trial. Courts are split over the proper jurisdiction for these claims – if any – and whether state common law climate change claims are preempted by federal law. The threshold questions remain unresolved, and no final resolution is likely coming in 2020, as they may ultimately be destined for the U.S. Supreme Court.

Groundwater Discharge - U.S. Supreme Court May Decide *Maui* Case in 2020

Garrett D. Trego, Esq.

The United States Supreme Court heard oral arguments on November 6, 2019, in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, No. 18-260 (U.S.), and may issue a decision in 2020. The principal question at issue is whether the Clean Water Act's regulation of discharges to the navigable "waters of the United States" extends to circumstances where the discharge is made to groundwater which ultimately reaches a navigable water of the United States.

The case arises from a citizen suit brought against the County of Maui for failing to obtain Clean Water Act permits for wastewater treatment plant discharges of treated wastewater to groundwater injection wells. It was undisputed that the treated wastewater, through the groundwater, ultimately reached the Pacific Ocean. The parties' arguments rise and fall on the definition of "discharge" under the Clean Water Act, which "means … any addition of a pollutant to navigable waters from any point source," 33 U.S.C. § 1362(12), and whether the effluent from the wastewater treatment plant is *from* any *point source*.

Having lost in the lower courts, Maui, joined by the United States Environmental Protection Agency, which issued a policy statement in April 2019 declaring that discharges to groundwater were excluded from the Clean Water Act's definition of a point source discharge, argued that regulation of discharges to groundwater would be a vast overreach of the federal government. The citizen advocacy organizations argued that exempting these discharges would create a gaping regulatory loophole. As the Supreme Court Justices acknowledged throughout the oral argument, the decision, which could be rendered by June 2020, could have far-reaching impact on large and small dischargers across the country.

Federal PFAS Legislative and Regulatory Developments

John F. Gullace, Esq. and Shelby L. Hancock, Esq.

In 2019, Congress considered a variety of proposed bills that touched on a class of emerging chemicals known as per- and polyfluoroalkyl substances (PFAS). Many of those bills were which were included in early versions of the National Defense Authorization Act for 2020 (NDAA), a piece of must-pass legislation. After months of negotiations to consolidate the House and Senate versions of the NDAA, Congress released a compromise bill, which President Trump signed into law on December 20, 2019. The compromise NDAA contains fewer PFAS provisions than either the House or Senate versions, and notably, removed provisions which would have required EPA to promulgate drinking water standards for PFAS or to classify any PFAS as hazardous substances under CERCLA. The Act does, however, add certain PFAS to the Toxics Release Inventory (TRI) of the Emergency Planning and Community Right-to-Know Act and establishes a procedure for EPA to add other PFAS compounds to this inventory. Importantly, the Act tagged a number of PFAS provisions — including PFOA, PFOS, GenX, PFNA, and PFHxS — for inclusion on the TRI beginning January 1, 2020, which means covered facilities will be required to include those PFAS chemicals in the TRI report that they submit to EPA and relevant states on July 1, 2021. Although many provisions were removed from the final version of the NDAA, those provisions are likely to resurface in 2020. Notably, on January 10, 2020, the House passed H.R. 535 — the PFAS Action Act— was re-introduced in the House.

While Congress negotiated PFAS legislation, EPA moved forward with its PFAS Action Plan, which outlines the agency's short- and long-term goals for investigating and regulating PFAS compounds. In November, EPA published advance notice of proposed rulemaking, soliciting information from the public on whether and to what extent EPA should add certain PFAS to the Toxics Release Inventory. And in December, the agency sent a proposed regulatory determination for PFOA and PFOS in drinking water to the Office of Management and Budget. The agency also issued interim recommendations for addressing groundwater contaminated with PFOA and PFOS, establishing a screening level of 40 ppt and a preliminary remediation goal of 70 ppt for contaminated groundwater that is a current or potential source of drinking water, where no state or tribal MCL are available.

In 2020, we expect EPA to further expand its regulation of PFAS while legislation is introduced in Congress to move more aggressively.

Toxic Substances Control Act Developments

Carol F. McCabe, Esq. and Zachary J. Koslap, Esq.

At the end of 2019, EPA announced the next twenty chemicals to undergo risk evaluation under TSCA. The twenty high priority chemicals that will undergo risk evaluation include seven chlorinated solvents, six

phthalates, four flame retardants, formaldehyde, a fragrance additive, and a polymer precursor. Under the Frank R. Lautenberg Chemical Safety for the 21st Century Act, which amended TSCA on June 22, 2016, EPA is required to carry out a prioritization process for chemical substances that may designed as high priority for risk evaluation. In 2020, EPA plans to finalize the scoping documents for the twenty high priority chemicals, which will include the hazards, exposures, conditions of use, and the potentially exposed or susceptible subpopulations EPA expects to consider during each chemical's risk evaluation. Additionally, in early 2020 EPA expects to finalize the list of low-priority chemicals it proposed in August 2019. A final designation of "low-priority" means that risk evaluation for a chemical substance is not warranted because the risks associated with the chemical are low.

National Environmental Policy Act Rulemaking to Revamp Environmental Project Reviews

Carol F. McCabe, Esq. and Zachary J. Koslap, Esq.

In early January, the Trump administration and the Council on Environmental Quality (CEQ) proposed new regulations related to the process and implementation of NEPA. CEQ published an advance notice of proposed rulemaking in 2018 soliciting public comment on suggested revisions of NEPA regulations "to update the regulations and ensure a more efficient, timely, and effective NEPA process." CEQ also asked for public comment on the potential revision of key NEPA terms involving the scope of NEPA, cumulative impacts of proposed projects subject to NEPA review, and major federal action. The rulemaking proposed in early January of this year includes a number of revisions intended to streamline the process and implementation of NEPA on federal agency actions, including establishing page limits for environmental assessments (EAs) and environmental impact statements (EISs) (75 pages and 300 pages, respectively), and time limits for the completion of EAs and EISs (1 year and 2 years, respectively). Additionally, the proposed rulemaking modifies the definition of "effects" by simplifying the definition and striking references to direct, indirect, and cumulative effects. The purpose of the revision is to focus NEPA reviews on effects that are reasonably foreseeable and have a reasonably close causal relationship to the proposed action or alternative. CEQ states explicitly in its rulemaking that an analysis of cumulative effects is not required under NEPA. Ultimately, the proposed rulemaking effectively narrows the range of projects subject to review under NEPA and no longer considers the cumulative impact that proposed projects will have on climate change. Such revisions will ease the review of major energy infrastructure projects such as natural gas pipelines that require federal approvals subject to NEPA review.

Vehicle Emissions Standards

Carol F. McCabe, Esq. and Zachary J. Koslap, Esq.

The year 2020 may be the year that the Trump administration moves forward with rolling back vehicle greenhouse gas emissions standards set during the Obama administration in 2012. In August 2018, EPA and the National Highway Traffic Safety Administration (NHTSA) proposed the "Safer Affordable Fuel-Efficient Vehicles Rule for Model Years 2021-2026 Passenger Cars and Light Trucks" (SAFE Vehicles Rule). The proposed rule would amend the fuel economy and tailpipe carbon emissions standards for passenger cars and light trucks through model years 2021 through 2026. The SAFE Vehicles Rule would maintain the fuel economy and tailpipe emissions standards applicable to vehicle model year 2020 through model years 2021 to 2026, while taking comment on a range of alternative fuel economy and carbon dioxide emissions standards.

As part of the SAFE Vehicles Rule, EPA proposed to withdraw the waiver it previously provided to California for its state greenhouse gas and zero emissions vehicle programs under Section 209 of the Clean Air Act. That withdrawal of the waiver became final in September 2019, although the remainder of the SAFE Vehicles Rule relating to fuel economy and tailpipe carbon emissions is expected to be finalized in 2020. The waiver allowed California to set vehicle emissions standards that were more stringent than the federal government standards. EPA first granted California a waiver in 2009, which covered emissions standards for greenhouse gasses. As EPA withdrew the waiver, NHTSA finalized regulatory text making it clear that state fuel economy standards are preempted under the Energy Policy and Conservation Act. At the end of 2019, California and at least 22 other states filed a lawsuit in the Court of Appeals for the D.C. Circuit challenging EPA's revocation of the waiver. Whether EPA's withdrawal of the waiver can withstand judicial scrutiny will be one of the many developments to follow in 2020.

Revisions to Endangered Species Act Regulations

Megan A. Elliott, Esq.

Final revisions to the federal Endangered Species Act's implementing regulations were published by the U.S. Fish and Wildlife Service (USFWS) in August 2019. *84 Fed. Reg. 45020.* The recent changes primarily involve four significant revisions:

Consideration of Economic Impacts

Before the recent rule changes, the Endangered Species Act (ESA) regulations required that the USFWS base its decision on whether to list a species as threatened or endangered on the best currently available scientific and commercial data "without reference to possible economic or other impacts of such determination." Under the revised regulations, this "economic impacts" clause has been removed. Some have interpreted this deletion to mean that USFWS is now permitted to consider economic impacts when making listing determinations.

Defining "Foreseeable Future" to Potentially Limit What is a Threatened Species

A threatened species is "any species that is likely to become endangered within the foreseeable future throughout all or a significant portion of its range." The phrase "foreseeable future" was previously undefined. In the revised regulations, this phrase has been defined so as to extend "only so far into the future as [USFWS] can reasonably determine that both the future threats and the species' responses to those threats are likely."

Loss of Blanket Protections for Threatened Species

Section 9 of the ESA prohibits the "taking" of endangered species. To "take" means to "harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct." Section 9 also includes several other protections for endangered species, including prohibitions on importing, possessing, or selling an endangered species. These protections used to also be automatically extended to threatened species under the ESA's blanket rule, but this no longer applies, and newly-listed threatened species will each get species-specific conservation rules.

Designation of Unoccupied Critical Habitat

In the last of these significant changes, the USFWS is reverting to a two-step process for designating unoccupied critical habitat. Now (as was the case until 2016), when designating critical habitat, USFWS will first evaluate areas that are currently occupied by the species. If the occupied critical habitat is found to be inadequate, then unoccupied critical habitat can be considered.

Federal Agencies Scheduled to Revamp Use of Guidance Documents

Todd D. Kantorczyk, Esq.

In October 2019, President Trump issued two executive orders addressing how federal agencies develop, publicize and ultimately use interpretive guidance documents that are routinely issued by those agencies to "clarify" obligations under enacted laws and promulgated regulations. While it remains to be seen whether the two executive orders will have a near-term meaningful impact on the use of guidance documents in enforcement contexts, they have set out some important deadlines and requirements for agencies, including USEPA, that will play out in 2020.

Executive Order 13891, entitled "Promoting the Rule of Law Through Improved Agency Guidance Documents" in large part establishes a framework that requires federal agencies to evaluate and publicize existing guidance, and develop procedures with respect to the development of new "significant guidance" going forward. And the issuance of OMB's implementation memorandum for EO 13891 at the end of October 2019 established some key 2020 deadlines for federal agencies on these points. In particular:

- By February 28, 2020, federal agencies must establish a single, searchable, indexed website that includes, or contains links to, guidance documents currently in effect. Availability of the website must be published in the Federal Register as well as the agency's typical means of publicizing important announcements.
- As part of establishing this database, agencies are required to perform some housekeeping by evaluating existing guidance documents and rescinding those that should no longer be in effect.
- After establishing the database, federal agencies have until June 27, 2020, to reinstate any guidance that may have been left off the initial database. After that date, any additional guidance documents must follow the procedures for developing new guidance.
- To that end, agencies are supposed to promulgate regulations for issuing new guidance documents by April 28, 2020. These regulations must provide a 30-day notice and comment period for "significant guidance", which is defined as guidance that has an annual effect of the economy of $100 million or more, or adversely affects in a material way, among other things, the economy, jobs, the environment, or public health or safety.

Executive Order 13892, entitled "Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication" includes several directives that arguably reflect current law with respect to the use of guidance documents in enforcement proceedings. But this EO also includes some notable items and deadlines that could have an effect in 2020. For example, Section 6 of the EO requires agencies to provide an opportunity to be heard *before* taking any action that has "legal consequence," which includes no-action letters and notices of non-compliance (although there is an exception in cases of a serious threat to health safety or other emergency). In addition, within 270 days (July 13, 2020), federal agencies are supposed to propose procedures that: encourage voluntary self-reporting in exchange for reduction or waiver of civil penalties; encourage information sharing among regulated parties; and provide for pre-enforcement rulings (although all procedures only need to be "to the extent practicable.") Furthermore, by February 12, 2020, agencies are required to publish a rule of agency procedure regarding civil administrative inspections.

It is not unusual for agencies to miss EO imposed deadlines, especially in an election year, but how these guidance document directives play in out in 2020 may bear watching.

PENNSYLVANIA FORECAST

Pennsylvania's Climate Change Initiatives Entering 2020

Thomas M. Duncan, Esq.

On October 3, 2019, Governor Wolf issued an Executive Order directing the Pennsylvania Department of Environmental Protection (PADEP) to propose a rulemaking to the Environmental Quality Board (EQB) by no later than July 31, 2020 to join the Regional Greenhouse Gas Initiative (RGGI). RGGI is a collection of northeastern states that have instituted a cap and trade program to reduce CO_2 emissions from fossil fuel-fired electric power generators with at least 25 megawatts of capacity. The Executive Order is intended to further Gov. Wolf's goal of reducing statewide greenhouse (GHG) emissions by 26 percent by 2025 and by 80 percent by 2050, based on 2005 levels. If PADEP in fact proposes a rulemaking to the EQB by July 31, 2020, the EQB would likely provide a public comment period in the fall of 2020. PADEP currently expects that the RGGI rule would take effect in the first quarter of 2022.

For now, a rulemaking petition submitted by a group of individuals and organizations in 2018 that requests that the EQB establish a cap-and-trade program to reduce statewide GHG emissions will be held in abeyance while PADEP and the EQB work on the RGGI rule. For a more detailed explanation of this pending rulemaking petition, please refer to our article from late 2018.

On December 17, 2019, the EQB voted to approve proposed regulations to reduce methane emissions by setting volatile organic compound emissions standards for existing oil and gas operations. A 60-day public comment period is forthcoming.

More recently, on December 19, 2019, a group of northeastern states, including Pennsylvania, which together have formed the Transportation and Climate Initiative, issued a draft Memorandum of Understanding (MOU) with a goal of creating a cap-and-invest program to reduce CO_2 emissions from the transportation sector. The program would specifically target fuel suppliers. A final MOU is expected in the spring of 2020, at which time states could decide whether to participate in the program.

PADEP Issues New Management of Fill Policy

Michael M. Meloy, Esq. and Will Hitchcock, Technical Consultant

Sweeping changes to Pennsylvania's Management of Fill Policy went into effect on January 1, 2020. The Policy is critically important because it defines when and under what circumstances fill material can be moved and used without being regulated as a waste under the Pennsylvania Solid Waste Management Act. Work involving earth disturbance, excavation, and demolition activities, as well as Brownfields, development, infrastructure, and utility projects fall within the scope of the Policy. The changes to the Policy will have broad impacts within the regulated community, affecting, among others, real estate developers, land owners, railroads, port operators, public utilities, municipalities, excavation contractors, and environmental consultants who regularly support such entities.

One of the most notable changes to the Policy is the elimination of the numeric standards defining "clean fill" that were found in the prior version of the Policy. Instead, the new Policy incorporates by reference certain of the numeric values established under the Land Recycling and Environmental Remediation Standards Act (Act 2) to implement the statewide health cleanup standards for residential properties. This means that each time the cleanup standards under Act 2 change, the clean fill standards will change at the

same time. The immediate impact of incorporating by reference the numeric standards under Act 2 has been dramatic. The clean fill standards for various regulated substances are now significantly lower under the new Policy than they were under the prior version of the Policy including the standards for substances such as various semi-volatile organic compounds and metals that are ubiquitous in urban and suburban environments. The changes in the clean fill standards for benzo[a]pyrene and vanadium are particularly significant. The clean fill standard for benzo[a]pyrene has decreased from 2.5 mg/kg to 0.58 mg/kg which is below the background level of benzo[a]pyrene typically found in many developed areas in Pennsylvania. The clean fill standard for vanadium has decreased from 1,500 mg/kg to 15 mg/kg which is substantially less than typical naturally occurring background levels.

Other important changes to the Policy include changes to the list of materials that can qualify as "clean fill," new procedures for identifying and sampling "historic fill," new requirements for performing due diligence at donor sites, increased reporting requirements, new definitions that determine whether the Policy applies to movement of material within a right-of-way or "project area," alternative analytical methods, and grandfathering provisions to address fill that had already been determined to qualify as clean fill under the existing Policy but not yet placed. The new Policy is the subject of a pending appeal before the Environmental Hearing Board based on the theory that the new Policy is effectively a regulation that should have gone through a formal rulemaking process, and that the new Policy imposes other unreasonable conditions. In the meantime, PADEP is implementing the new Policy and attempting to address numerous questions that are arising as the regulated community moves ahead with steps to comply with the new Policy.

Changes Coming to Act 2 Requirements and Cleanup Standards

Michael M. Meloy, Esq. and Will Hitchcock, Technical Consultant

On November 19, 2019, the Pennsylvania Environmental Quality Board (EQB) adopted in proposed form changes to the regulations that implement the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2). The changes include revisions to the medium-specific concentrations (MSCs) that the Pennsylvania Department of Environmental Protection (PADEP) has developed to implement the statewide health standard under Act 2, as well as various changes to the administrative requirements of the Act 2 program. By regulation, updates to the MSCs are to occur approximately every three years. The last set of updates to the MSCs were finalized and became effective in August 2016.

Proposed changes to the MSCs include new values for emerging contaminants known as per- and polyfluoroalkyl substances (PFAS), optional soil numeric values for total concentrations of polychlorinated biphenyls (PCBs) in addition to the existing aroclor-specific values for PCBs, a broad reduction to all of the ingestion-based groundwater MSCs based on increased groundwater ingestion estimates, and other changes based on the availability of updated chemical toxicity information. Contrary to the recommendation of the Cleanup Standards Scientific Advisory Board, PADEP chose not to revise the MSCs for vanadium. The MSCs for vanadium in soils were reduced by two orders of magnitude in 2016 to levels that are below typical naturally-occurring background levels in Pennsylvania. The MSCs for vanadium have created extensive issues for remediators since 2016. These issues recently have become even more acute with the new Management of Fill Policy taking effect on January 1, 2020 and incorporating by reference the very low numeric values for vanadium under the Act 2 program as "clean fill" concentration limits.

Proposed changes to the administrative requirements include a new definition of a "volatile compound" which matches the definition used by U.S. Environmental Protection Agency, updates to the procedures for determining the practical quantitation limit for a chemical analysis, increased public involvement in certain stages of the Act 2 process, clarifications regarding the appropriate sequence of reports and handling of combined reports, and other clarifying changes.

Following publication of the proposed changes to the regulations in the Pennsylvania Bulletin and consideration of public comments that are submitted, PADEP will likely make any final adjustments to the regulations and submit them to the EQB for approval in final form. We anticipate that the changes are likely to take effect in late 2020 or early 2021.

PFAS Picking Up Steam in Pennsylvania

John F. Gullace, Esq. and Shelby L. Hancock, Esq.

In 2019 Pennsylvania DEP continued to address PFAS contamination in the State through Governor Wolf's PFAS Action Team. In April, PADEP's Bureau of Safe Drinking Water announced its PFAS Sampling Plan, which proposes sampling at more than 300 public water supplies across the State. In December, the Governor released an initial report and recommendation from the PFAS Action Team, along with the results from the first round of water system sampling. Only one of the 96 sampled sites tested above EPA's health advisory level of 70 ppt for PFOA and PFOS. PADEP expects to complete sampling in June 2020 and will continue to periodically release sampling results. In addition to that sampling, PADEP's Bureau of Waste Management is expected to initiate its own sampling plan in 2020, mapping landfills across Pennsylvania and proposing a strategy for sampling PFAS in landfill leachate.

As for proposed regulations, throughout 2019 PADEP worked with the State's Cleanup Standards Scientific Advisory Board to draft proposed cleanup standards for PFOA, PFOS, and PFBS. On November 19, 2019, those standards were considered and adopted by the Environmental Quality Board as part of a broader amendment to PADEP's Land Recycling Program. The Department is expected to open public comment on the proposed regulations in the coming months, with an estimated implementation of winter 2020-2021. As we move into 2020, we expect Pennsylvania's regulation of PFAS to pick up steam.

Applying the Environmental Rights Amendment in 2020

Thomas M. Duncan, Esq.

After two years of rapidly developing case law involving the Pennsylvania Environmental Rights Amendment, Pennsylvania courts, and particularly the Pennsylvania Supreme Court, pulled back in 2019.

Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA), states:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In 2017, the Pennsylvania Supreme Court, in *Pa. Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF II*), overturned a decades old balancing test and instead focused on the text of the ERA, splitting it into two parts – the individual right embodied in the first sentence, and the Commonwealth's trustee obligations embodied in the second and third sentences. The Court applied private trust principles that existed at the time the ERA was enacted in 1971 and struck down as unconstitutional statutory enactments that directed oil and gas royalties to the Commonwealth's general fund rather than a fund used exclusively for conservation purposes. The Court found that "royalties – monthly payments based on the gross production of oil and gas at each well – are unequivocally proceeds from the sale of oil and gas resources," and must therefore remain in the trust. The Court remanded to the Commonwealth Court the issue of whether rental payments and up-front bonuses received under those oil and gas leases constituted trust assets that must also be used exclusively for conservation purposes.

On July 29, 2019, as we reported, the Commonwealth Court, in *Pa. Envtl. Defense Found. v. Commonwealth*, 214 A.3d 748 (Pa. Cmwlth. 2018) (*PEDF III*), held that two-thirds of rental payments and up-front bonuses received by the Commonwealth as proceeds from oil and gas leases on state forest and park lands must be reserved for conservation purposes under the ERA. The Pennsylvania Environmental Defense Foundation has sought an appeal, which could give the Pennsylvania Supreme Court an opportunity to weigh in on this issue in 2020.

One question left open by the Supreme Court's decision in *PEDF II* is the extent to which the ERA imposes obligations on municipalities and state agencies other than the Pennsylvania Department of Environment Protection (DEP). On May 14, 2019, as we reported, the Supreme Court issued an order refusing to hear an appeal of the Commonwealth Court's decision in *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Cmwlth. 2018), in which the Commonwealth Court held that municipalities lack the authority to regulate in the areas of environmental protection reserved to DEP. The Commonwealth Court, in *Frederick*, upheld a zoning ordinance that renders oil and gas development a permitted use by right in all zoning districts, including residential and agricultural districts, finding that the zoning ordinance did not violate the ERA. The Court had held that, "as a creature of statute, the Township can exercise only those powers that have been expressly conferred upon it by the General Assembly." To that end, the Court stated that zoning necessarily requires municipalities to account for the natural, scenic, historic and esthetic values of the environment. But, as to the remaining environmental issues covered by the ERA – i.e., clean air and pure water – the Court found that "[m]unicipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies."

The Commonwealth Court later reiterated this holding in *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*, No. 2609 C.D. 2015 (Pa. Cmwlth. June 26, 2019), in *In re Andover Homeowners' Ass'n, Inc.*, 217 A.3d 906 (Pa. Cmwlth. 2019), and again in *Protect PT v. Penn Township Zoning Hearing Board*, No. 1632 C.D. 2018 (Pa. Cmwlth. Nov. 14, 2019). The Supreme Court's refusal to hear an appeal of the Commonwealth Court's decision in *Frederick* leaves that decision in place as the primary guidance by which municipalities will continue to assess their duties and authority under the ERA.

Looking into 2020, the relative decreasing trend in ERA case law may continue, but still expect additional challenges to local land use decisions and General Assembly budgetary measures. There are also still a number of unanswered questions in the aftermath of the Supreme Court's decision in *PEDF II*, such as better defining the terms "Commonwealth" and "public natural resources," and determining the extent to which the ERA imposes independent obligations on DEP and other state agencies.

NEW JERSEY FORECAST

Site Remediation Program Reform in 2020

Bruce S. Katcher, Esq.

Last year saw the first significant set of revisions to the New Jersey Site Remediation Reform Act since it was enacted in 2009, aka SRRA 2.0. 2020 portends further fine tuning of those revisions in the way of implementing regulations and the possibility of other reforms as industry stakeholders continue to press for further changes in site remediation program requirements via regulation. In either event, a regulatory package seems likely to be proposed in the coming year.

Examples of areas that SRRA 2.0 implementing regulations might address include what are the documents and other information that municipalities have a right to request from the party responsible for conducting the remediation (PRCR); what are the contents of the written summary status report that a PRCR may provide when faced with a public inquiry about its remediation; further detail on how a PRCR may qualify for relief from direct oversight when a mandatory time frame is missed; when might both signs and letters to surrounding property owners be required instead of just one or the other (as currently required); and how will NJDEP encourage green remediation.

Examples of areas not directly addressed by SRRA 2.0 but in which industry is likely to continue to press for reform in the coming year include making the remedial action permit process more efficient through the use of mechanisms such as general permits, permits by rule or other mechanisms; simplifying the process for remediation of historic fill and historically applied pesticides; elimination of unnecessary limitations on the use of alternative fill; reform of remediation requirements for innocent developers and greater use of sound risk based principles in making remediation decisions.

Regulating and Remediating PFAS in New Jersey

John F. Gullace, Esq. and Shelby L. Hancock, Esq.

New Jersey DEP proposed its own regulations for PFOA and PFOS in 2019. In April, NJDEP proposed amending the Safe Drinking Water Act regulations to establish MCLs for PFOA of 14 ppt and for PFOS of 13 ppt; establishing groundwater quality criteria for PFOA of 14 ppt and PFOS of 13 ppt; and adding PFOA and PFOS to the List of Hazardous Substances. The agency also published interim groundwater quality standards for PFOA and PFOS of 10 ppt, which are in effect while its rulemaking proceeds. The Department has one year from the date of publication to take final action on a proposed rule, so the proposed regulations for PFOA and PFOS will likely be finalized in the first half of 2020. NJDEP is also requiring PFAS generally to be considered in conjunction with site remediations. New Jersey also grabbed headlines with orders and lawsuits filed against manufacturers associated with PFAS in the State. In 2020, we expect New Jersey to continue to be at the forefront of efforts to regulate and remediate PFAS.

Natural Resource Damages in 2020

Maria C. Salvemini, Esq.

We can expect the Murphy Administration's heightened focus on natural resource damages (NRDs) to continue in 2020. Last year, the New Jersey Department of Environmental Protection (NJDEP) and Attorney General's Office initiated eight lawsuits seeking NRDs—double the number filed in 2018. Some of the lawsuits filed in 2019 were not the "traditional" NRD cases practitioners are accustomed to seeing.

Rather, the State expanded its allegations of impacted natural resources in some cases to include air, sediments and soils, forests, and even wetlands. Similarly, the state expanded the counts it alleged to include abnormally dangerous activity, strict products liability for defective design and failure to warn, as well as tortious interference. While the State will likely continue to include similar non-traditional allegations in future NRD recovery actions, it is unclear at this time whether it will ultimately be successful.

Decisions on motions challenging the State's claims will continue to shape how NRD cases are litigated in New Jersey. Two motions to dismiss challenging whether the state can bring a claim for trespass over land it does not own resulted in a split among sister trial courts. *See New Jersey Department of Environmental Protection v. Hess*, MID-L4579-18 (N.J. Super. Ct. Law Div. Dec. 21, 2018) (granting motion to dismiss common law trespass claim because State lacked exclusive possession over the land); *New Jersey Department of Environmental Protection v. Deull Fuel*, No. ATL-L-1839-18 (N.J. Super. Ct. Law Div. Aug. 8, 2019) (denying motion to dismiss common law trespass claim because Public Trust Doctrine supersedes exclusivity element of trespass). The State sought interlocutory appeal of the trial court's decision in *Hess*, which is pending before the Superior Court, Appellate Division. It is likely that the appellate court will render its decision in 2020, thereby resolving the split and shaping not only how litigation will proceed in the other pending NRD lawsuits but impacting what claims the State asserts in future NRD cases. It is anticipated that motion practice will continue to shape the law with respect to NRDs in the coming year.

While 2019 was a big year for the initiation of NRD litigation, efforts to address NRDs through legislation have seemingly stalled. During the New Jersey Senate Environmental and Energy Committee's meeting on January 24, 2019, the NRD Task Force provided an update on the group's efforts. After that update a year ago, the Task Force has not publicly provided any additional updates nor has any legislation been proposed regarding NRDs.

Although it is unclear whether there will be any developments regarding NRD legislation in 2020, it can be expected that the Murphy Administration will continue to bring lawsuits seeking to recover NRDs in the new year.

Environmental Justice in New Jersey in 2020

Maria C. Salvemini, Esq.

Last year we reported on the Murphy Administration's efforts in carrying out the 2018 Executive Order which directed the New Jersey Department of Environmental Protection (NJDEP) to develop guidance "for all Executive branch departments and agencies for the consideration of Environmental Justice in implementing their statutory and regulatory responsibilities." Exec. Order No. 23 (Apr. 20, 2018), 50 N.J.R. 1241(b) (May 21, 2018). Although it was expected that the draft guidance would be finalized in 2019, this was not the case. NJDEP held draft guidance document listening sessions in the early months of last year and public comments were accepted on the draft until March 22. As of this date, however, the guidance document remains in draft and there are no updates on the Office of Environmental Justice's website.

Efforts to address Environmental Justice via legislative action have similarly stalled since early 2019. Bill S-1700, which imposed obligations on DEP with respect to "burdened communities," was introduced into the Senate and referred to the Senate Environment and Energy Committee in 2018. The bill, as amended, was approved by the Environment and Energy Committee and sent to the Senate Budget and Appropriations Committee in late January 2019. Since that time, however, the bill has not moved so its fate will depend on whether it is reintroduced in the next legislative session.

While agency and legislative action stalled in 2019, on October 25 the Attorney General's Office and NJDEP announced the filing of six environmental justice lawsuits involving sites in Newark, Trenton, East Orange, Kearny, and Camden, as discussed elsewhere in this Forecast.

Practitioners and industry members can expect to see a continued focus on environmental justice in New Jersey in 2020, but whether that will solely be through the initiation of additional litigation by the Murphy Administration or by agency or legislative action is unclear.

New Jersey's Climate Change Resilience Strategy

Maria C. Salvemini, Esq.

On October 29, 2019—the seventh anniversary of Superstorm Sandy—New Jersey Governor Phil Murphy signed Executive Order No. 89 to address climate change concerns in the state. Executive Order No. 89 is the main driver that initiated a state focus on climate change in late 2019 which is anticipated to gather steam moving into 2020. Exec. Order No. 89 (Oct. 29, 2019), 51 N.J.R. 1707(a) (Dec. 2, 2019). The Executive Order establishes a Chief Resilience Officer, Climate and Flood Resilience Program within the Department of Environmental Protection (DEP), an Interagency Council on Climate Resilience, Statewide Climate Change Resilience Strategy, and a State Development and Redevelopment Plan. David Rosenblatt, the DEP Assistant Commissioner for Climate and Flood Resilience, has been designated as the Chief Resilience Officer, The Executive Order tasked the Climate and Flood Resilience Program with developing and delivering a Scientific Report on Climate Change to address current and future effects of climate change in the state.

While 2019 kicked off New Jersey's focus on climate change impacts within the state, we can expect to see many of the obligations imposed by Executive Order 89 play out in 2020. For example, the new year will bring the development of a Statewide Climate Change Resilience Strategy "to promote the long-term mitigation, adaptation, and resilience of New Jersey's economy, communities, infrastructure, and natural resources throughout the State in a manner consistent with the Scientific Report on Climate Change." Exec. Order No. 89. The Strategy must include recommendations of actions the state should take to mitigate and adapt to the effect of climate change, including but not limited to the following measures:

- Identify methods to strengthen resilience;
- Provide guidance and strategies for Executive Branch departments and agencies, municipalities, and regional planning agencies;
- Promote long-term water and energy resource security;
- Reduce the risk of wildfires in state forests;
- Reduce the risks to the health of New Jersey residents that may accompany climate change;
- Support sustainable and resilient economic development;
- Identify financing mechanisms, strategies, and opportunities for coordination to support climate resilience measures, mitigation, and adaptation; and
- Any other measures the Chief Resilience Officer determines necessary to prepare for, mitigate, and adapt to the impact of climate change.

Additionally, the Statewide Climate Resilience Strategy must include a Coastal Resilience Plan that recommends "a specific long-term strategy for climate change resilience and adaptation in the coastal

areas of the State, i.e., tidal and non-tidal waters, waterfronts, and inland areas along the coast." The Chief Resilience Officer with the aid of the Interagency Council must provide The Statewide Climate Change Resilience Strategy to the Governor by September 1, 2020. Subsequently, state agencies and municipalities will need to grapple with issues of how to implement the Strategy.

Stormwater Utilities – Progress Expected in 2020

Bruce S. Katcher, Esq.

In early 2019, the Clean Stormwater and Flood Reduction Act was signed into law by Governor Murphy. The Act authorizes (but does not require) counties and municipalities to establish stormwater utilities "for the purposes of acquiring, constructing, improving, maintaining, and operating stormwater management systems" and to impose fees on property owners or occupants to cover the costs of managing stormwater that enters the stormwater management system or waters of the State. Given the heavy flooding that some major New Jersey municipalities have experienced in recent years, the addition of this enabling legislation has been viewed by some as a major advance toward addressing this problem, though viewed by others as nothing more than a new taxing mechanism.

To date there has not been much activity associated with the passage of this legislation. This could change in the coming year as a renewed emphasis is placed on resiliency planning by the Murphy Administration (see article above). To that end, in a recent stakeholder invitation, NJDEP indicated that during 2019 it had begun the process to develop guidance in a number of areas crucial to establishing stormwater utilities as required by the Act. That included researching existing stormwater utilities across the country, holding preliminary conversations with other State agencies and interested parties and beginning to develop the framework for a website to serve as a guidance repository. Stakeholder meetings are expected to begin in January.

DELAWARE FORECAST

New Stormwater Regulations Set to Take Effect in Delaware

Austin W. Manning, Esq.

The Department of Natural Resources and Environmental Control's (DNREC) revised stormwater regulations went into effect on February 11, 2019. The revision corrected a procedural flaw relating to the DNREC's imposition of mandatory requirements contained in its Technical Documents. The Technical Documents, which prior to the revision were not formally adopted, are now incorporated into the stormwater regulations. Any stormwater management plan that was approved under the previous regulations where construction did not commence by December 31, 2019 must be resubmitted and approved under the new regulation. Construction is deemed commenced when structures or infrastructure is visible. "General earth moving" is not sufficient to be considered commenced construction.

Further, approvals for multi-phase projects which have begun construction are extended, however, any phase which has not commenced construction may only be extended provided that phase's plan was approved with the project's overall stormwater management plan. If the phase was not included in the project's overall plan, then a separate approval must be sought in 2020.

PFAS Contamination Leading to Investigations and Litigation in Delaware

Stephen D. Daly, Esq.

In December 2019, the U.S. Environmental Protection Agency (EPA), with support from the Delaware Department of Natural Resources and Environmental Control (DNREC), held a public meeting to address the proposed listing of the Blades Groundwater Site in Sussex County, Delaware to the federal Superfund National Priorities List primarily on account of discovery in the local groundwater of elevated concentrations of various contaminants, including PFOA and PFOS, two types of per- and poly-flouoralkyl substances (PFAS). PFAS chemicals have not yet been declared hazardous under the federal Superfund program, although DNREC has identified certain PFAS chemicals, including PFOA and PFOS, as hazardous substances subject to its state cleanup program.

To date, the source of the PFAS contamination in Blades has not been confirmed, although EPA has identified two electroplating facilities in the area, one closed and one still in operation, that may have contributed to the groundwater contamination. In June 2019, residents of Blades filed a putative-class action lawsuit against one of the electroplating companies, Procino Plating Inc., as well as other companies allegedly associated with the manufacture and distribution of PFAS chemicals. The residents claim that they have been exposed to harmful amounts of PFAS through well water and the municipal water supply.

The town of Blades is one of three sites where PFAS chemicals have been detected in elevated concentrations in public water supplies in Delaware. The chemicals have also been found in water supplies in and near the New Castle County Airport as well as the Dover Air Force Base.

Carney Administration Continues to Push Climate Change Initiatives in Delaware

Stephen D. Daly, Esq.

Since taking office in January 2017, Governor Carney has emphasized the threat that climate change poses to Delaware as the nation's lowest-lying state. In July 2019, Governor Carney continued efforts to curb climate change in the First State by directing Delaware's Department of Natural Resources and Environmental Control (DNREC) to adopt regulations curbing the use of hydrofluorocarbons (HFCs), greenhouse gases that are commonly used in a variety of applications, including refrigeration, air-conditioning, building insulation, fire extinguishing systems, and aerosols. HFCs were adopted by industry as replacements for ozone-depleting substances, although HFCs have high global warming potential, according to the U.S. Environmental Protection Agency.

Governor Carney directed DNREC to propose regulations by March 2020 that will eliminate the use of HFCs in Delaware. Delaware will join several other states that have introduced or are developing HFC phase-out rules, including California, New York, Maryland, Connecticut, Vermont, and Washington.

Meanwhile renewable energy projects continue to develop and expand in and around Delaware. The Bruce A. Henry Solar Farm, which is located outside of Georgetown, Delaware in Sussex County, announced plans to nearly double the size of the 23-acre solar facility. A proposed offshore wind farm project located off the coast of Bethany Beach is also in the works. The current plans for the wind farm involve installing an electric grid under Delaware's Fenwick Island State Park. DNREC is currently reviewing public comments on the proposed changes.

Please feel free to forward this information to your colleagues and encourage them to subscribe to our mailing list.