

2022 Environmental and Energy Law Forecast

PENNSYLVANIA

Pennsylvania's Climate Change Initiatives Entering 2022

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In 2021, Pennsylvania advanced significant regulatory and executive initiatives that will carry through 2022. Some of these actions focus on greenhouse gases (GHGs) generally, while others are more specific to particular GHGs, such as CO₂ or methane.

Regional Greenhouse Gas Initiative (RGGI)

On July 13, 2021, the Environmental Quality Board (EQB) voted to approve a final rulemaking titled "CO₂ Budget Trading Program," which would allow Pennsylvania to join as the newest member of the Regional Greenhouse Gas Initiative (RGGI). The [final rulemaking](#) is now making its way through the regulatory review process outlined in the Regulatory Review Act.

RGGI is an intergovernmental organization consisting of ten member-states (CT, DE, ME, MD, MA, NH, NJ, NY, RI, VT) that has established a market-based cap-and-trade program for CO₂ emissions from fossil fuel-fired power plants that have 25 megawatts or more of nameplate capacity and send at least 10 percent of their gross generation to the grid. In October 2019, Governor Tom Wolf signed Executive Order No. 2019-07 which directed the Pennsylvania Department of Environmental Protection (PADEP) to develop and present to the EQB a proposed rulemaking that would enable Pennsylvania to join RGGI.

The rulemaking would aim to reduce CO₂ emissions from RGGI sources by 25.5 percent between 2022 and 2030. Based on an analysis conducted by a consultant retained by PADEP, most emission reductions are expected to come from reductions in coal use, while a smaller percentage would come from natural gas. While Pennsylvania would expect to see a total statewide emissions reduction of 183 million tons of CO₂ by 2030, approximately 96 million of that 183 million tons of CO₂ emissions would be shifted (i.e., leaked) to other states within PJM territory. PJM is a regional transmission organization that coordinates the movement of electricity in Pennsylvania, all or parts of 12 other states, and the District of Columbia. In fact, nearly all the anticipated reductions in natural gas emissions and generation in Pennsylvania are expected to be leaked to other PJM states.

PADEP expects the auctions of RGGI credits to yield annual revenues of between approximately \$131-\$187 million through 2030, which is considerably less than what PADEP expected earlier in the rulemaking

process. The Air Pollution Control Act requires that all auction proceeds be directed to the Clean Air Fund “for the use in the elimination of air pollution.” PADEP is in the process of developing a reinvestment plan for the auction revenues which is expected to include reinvestment in energy efficiency, renewable energy, and greenhouse gas abatement. Although PADEP has taken the position that the allowances amount to fees that are authorized under the Air Pollution Control Act, opponents of the final rulemaking argue that the anticipated revenue from the auctions exceeds an authorized fee and instead amounts to an unauthorized tax.

Relatedly, still pending before PADEP and the EQB is a rulemaking petition that was submitted by a group of individuals and organizations in 2018 that asked the EQB to establish a cap-and-trade program that would encompass a much broader set of sources than RGGI. For a more detailed explanation of this pending rulemaking petition, please refer to our prior article [here](#). On November 17, 2020, PADEP informed the EQB that PADEP intended to present a report analyzing the costs and benefits of the rulemaking petition by early 2021. On October 19, 2021, PADEP revised that anticipated deadline to early 2022.

Methane Emissions

On May 23, 2020, the EQB initiated a public comment period on a proposed rulemaking to reduce methane emissions by setting emissions standards for volatile organic compounds and other pollutants (along with co-benefits of methane reductions) from existing oil and natural gas production facilities, compressor stations, processing plants, and transmission stations. PADEP received extensive comments during the public comment period, which closed on July 27, 2020. PADEP is planning to submit the final-draft rulemaking to the EQB in first quarter 2022 and finalize the rulemaking by second quarter 2022.

Mobile Sources

On December 21, 2020, a group of three northeastern states, including MA, CT, RI, and the District of Columbia, formed the Transportation and Climate Initiative (TCI) by signing on to a Memorandum of Understanding (MOU) with a goal of creating a cap-and-invest program to reduce CO₂ emissions from the transportation sector. The program would specifically target fuel suppliers. Pennsylvania and seven other states have opted not to sign on to the MOU at this time and instead intend to continue to work with the TCI states to develop the details of the program while pursuing their own state-specific initiatives. TCI issued a draft model rule in March 2021 and a final Model Rule in 2021. Updates on efforts to implement the Model Rule can be found [here](#).

Relatedly, PADEP has developed a draft proposed rulemaking that would amend PADEP’s Clean Vehicles Program at 25 Pa. Code Chapter 126, Subchapter D, by establishing a requirement for automakers to offer for sale a percentage of Zero Emission Vehicle (ZEV) Program-eligible light duty vehicles as part of their model offerings. The draft proposed rulemaking, which can be found [here](#), was presented to PADEP’s Air Quality Technical Advisory Committee on October 14, 2021.

Hydrofluorocarbons (HFCs)

PADEP has halted development of a proposed rulemaking that would amend 25 Pa. Code Chapters 121, 129, and 130 to impose additional requirements for the control of hydrofluorocarbons (HFCs) by preventing

the future use of HFCs in sources such as air conditioning and refrigeration. PADEP intends to wait for U.S. EPA to develop a national rule to address HFCs.

PADEP is Finalizing its Reasonably Available Control Technology Requirements

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PADEP has developed three separate pending regulatory packages to meet EPA's Reasonably Available Control Technology (RACT) requirements. First, PADEP is finalizing additional RACT requirements for major sources of nitrogen oxides (NO_x) and volatile organic compounds (VOCs) to meet the RACT requirements for the 2015 8-hour ozone NAAQS (RACT III). The RACT III rulemaking will amend Chapter 129 of PADEP's air quality regulations to establish additional presumptive RACT requirements and emission limitations for certain major stationary sources that were in existence on or before August 3, 2018, and that emit or have the potential to emit 100 tons per year of NO_x or 50 tons per year of VOC. The RACT III rule establishes presumptive RACT requirements and emission limits for combustion units, municipal solid waste landfills, municipal waste combustors, process heaters, turbines, stationary internal combustion engines, cement kilns, glass melting furnaces, lime kilns, and direct-fired heaters, furnaces or ovens. For all other sources, PADEP will require the submittal of case-by-case RACT determinations. The proposed rulemaking would require facilities to submit their RACT proposals within six months and demonstrate compliance no later than January 1, 2023. The comment period for the proposed rule closed on October 12, 2021. Three public hearings were held on September 7, 8, and 9, and no public commentators participated. The Department anticipates presenting the draft final-form rulemaking in the second quarter of 2022. Additional information regarding PADEP's RACT III proposal can be found [here](#).

PADEP is separately proposing presumptive RACT requirements and emission limits for the following control technique guideline (CTG) sources: shipbuilding and ship repair surface coating; synthetic organic chemical manufacturing industry (SOCMI) air oxidation distillation, and reactor processes; and dry cleaners that consume 32,493 gallons or more of petroleum solvent annually. PADEP is proposing to amend its regulations applying to surface coatings, 25 Pa. Code § 129.52, to add an additional category for shipbuilding and ship repair surface coating. The proposed rule will apply to owners and operators of shipbuilding and repair coatings who use or apply more than 264 gallons of coatings annually and will impose specific recordkeeping requirements and VOC-content limits. The proposed rule will incorporate EPA's New Source Performance Standards and CTG requirements for SOCMI facilities, and the CTG requirements for large petroleum dry cleaners. The EQB adopted the proposed rule on September 21, 2021. The EQB is expected to publish the proposed rule in the Pennsylvania Bulletin in early 2022, which will be subject to a 60-day public comment period.

PADEP is also proposing emission limitations and other requirements consistent with the RACT recommendations in the CTG for the Oil and Gas Industry that were finalized by EPA on October 27, 2016. The proposed rulemaking would establish RACT requirements for VOCs and other pollutants (along with co-benefits of methane reductions) from existing oil and natural gas production facilities, compressor stations, processing plants, and transmission stations. The proposed rule, approved by the EQB on December 17, 2019, received extensive public comments. PADEP has made certain revisions to the proposed rule based on public comments, which were presented to the Air Quality Technical Advisory Council on December 9, 2021. Notable revisions include applying a 95 percent VOC control requirements for all storage vessels, regardless of location, with the potential to emit more than 2.7 tons per year, and amending its LDAR requirements to require quarterly or annual LDAR inspections depending upon the

average barrels of oil equivalent produced per day. PADEP is planning to submit the final-draft rulemaking to the EQB in first quarter 2022 and finalize the rulemaking by second quarter 2022.

Significant Changes Coming to Act 2 Cleanup Standards and Management of Fill Policy

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The Pennsylvania Department of Environmental Protection (PADEP) and the Cleanup Standards Scientific Advisory Board (CSSAB) are working on several significant changes to the Act 2 Cleanup Standards, which are expected to be finalized and take effect sometime in 2022. Because the numeric values on which the residential cleanup standards for soils under Act 2 are incorporated by reference in PADEP's Management of Fill Policy, these changes will also have significant impacts on construction and redevelopment projects outside of the Act 2 program.

The first significant change is a modification to the toxicological model and risk thresholds that are used to quantify exposures to lead in soils. Lead is a unique contaminant in that specific models have been developed by EPA to quantify health risks in adults and children from exposure to lead from a variety of sources. PADEP is proposing to use the updated IEUBK model with a CDC-recommended target blood lead level to calculate a new cleanup standard for lead in soils at residential sites (in the range of 200 mg/kg, which is a significant decrease from the current standard of 450 mg/kg). Use of the IEUBK model will likely necessitate changes to the characterization and attainment sampling procedures required by the Act 2 regulations because the input concentrations for the model are based on average concentrations of lead. Because of the critical importance of these issues, PADEP published in the Pennsylvania Bulletin an advance notice of proposed rulemaking on October 30, 2021, seeking information regarding appropriate models to use, target blood lead levels to use and appropriate attainment methods to implement. The comment period closes on January 28, 2022.

The second significant change is an update to the toxicological values used to calculate cleanup standards for polycyclic aromatic hydrocarbons (PAHs). The cancer potency of many PAHs has been assessed relative to the toxicity of benzo[a]pyrene, a PAH reference compound that has been studied extensively. EPA updated the consensus toxicity values for benzo[a]pyrene in 2017, and PADEP incorporated this change into the updated regulations under Act 2 that were published on November 20, 2021, resulting in significantly less stringent cleanup standards for benzo[a]pyrene. However, the cancer potencies of other PAH compounds have not been adjusted relative to the new benzo[a]pyrene values. Therefore, it is expected that several other PAH toxicity values will undergo similar adjustments, potentially resulting in less stringent cleanup standards and clean fill concentration limits for these ubiquitous contaminants.

The final and perhaps most significant change is an expected increase to the cleanup standards for vanadium. The toxicity values previously used by PADEP have resulted in cleanup standards that are often below naturally-occurring background concentrations of vanadium in soils in Pennsylvania, resulting in costly site cleanup and fill management decisions to address vanadium concentrations that are not the result of a spill or release. However, PADEP and CSSAB have identified alternative toxicity values that are currently in use by EPA and other states. A rulemaking effort is underway to incorporate an alternative toxicity value recommended by CSSAB, which will relieve these issues in the Act 2 program once the new standards are approved and published. The changes that are proposed are expected to be considered by the Environmental Quality Board in the form of a proposed rule in the near future.

Separately, PADEP is considering policies that will address the exceedingly low clean fill standards for vanadium under the Management of Fill Policy. These policies may provide relief on an interim basis while the rulemaking process under Act 2 to amend cleanup standards for vanadium is completed.

Pennsylvania Is Moving Ahead with Regulating PFAS

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Pennsylvania is taking steps to regulate PFAS. As recently discussed in a [Special Alert](#), on November 20, 2021, amendments to regulations implementing the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2) went into effect, which add for the first time groundwater and soil medium-specific concentrations (MSCs) for perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS) and perfluorobutane sulfonate (PFBS). 51 Pa. Bulletin 7173 (Nov. 20, 2021). These new standards have broad implications for projects, both within and outside of those arising under Act 2. Any property participating in the Act 2 program and using the statewide health standard will now be able to demonstrate attainment with these MSCs to be afforded liability relief for releases of these types of compounds. In addition, through the incorporation of the numeric values under Act 2 into PADEP's Management of Fill Policy, PFOA, PFOS and PFBS will now need to be evaluated as part of a clean fill demonstration if there is a reason based on due diligence to believe that a release of these compounds may have occurred.

In addition, on November 16, 2021, the Environmental Quality Board approved a proposed rule to set Pennsylvania-specific maximum contaminant levels (MCLs) for PFOA and PFOS in drinking water. The proposed MCL for PFOA is 14 parts per trillion (ppt) and 18 ppt for PFOS. These proposed MCLs are slightly higher than New Jersey's MCL of 13 ppt and 14 ppt for PFOA and PFOS, respectively. The proposed rule will be published in the Pennsylvania Bulletin in early 2022, which will trigger a 60-day public comment period. Once finalized, the rule will apply to all community, nontransient, noncommunity, and bottled, vended retail, and bulk water systems. It is also likely that the state MCLs will also become cleanup standards for groundwater under Act 2 and may have influence on other state regulatory programs. Because federal MCLs for PFAS are in the works, it is unclear how conflicts between state and federal MCLs, to the extent that they exist, will be resolved.

Amendments to Pennsylvania Stream and Wetlands Permitting Program Expected in 2022

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The Pennsylvania Environmental Quality Board (EQB) is expected to finalize a proposed rulemaking in 2022 to amend the Pennsylvania Department of Environmental Protection's (PADEP) Chapter 105 regulations, which are the Commonwealth's wetland and aquatic resource permitting regulations. The proposed amendments amount to the first substantive revisions to the Chapter 105 regulations in nearly 30 years.

In the preamble of the notice for the Chapter 105 rulemaking, the EQB positioned the proposed amendments as simply an update to improve the clarity, consistency, and efficiency of the implementation of Chapter 105 by reflecting guidance and practices already adopted by PADEP in administering the Chapter 105 program. Nevertheless, many of the proposed changes have the potential to place additional

requirements on obtaining necessary approvals or create uncertainty as to what projects are permissible. Notable changes include:

- A new definition for the term “project,” which includes not just the area of the proposed activity, but also reasonably foreseeable areas planned to contain future development that would require 105 permits. While the Chapter 105 program has always required PADEP to consider reasonably foreseeable development within the affected watershed in evaluating an application, changing the scope of an applicant’s project to include this future development could have unintended consequences.
- A new definition of the term “water dependent,” a key concept that PADEP is required to evaluate for every 105 permit application.
- Additional details on what is required to be submitted as part of a 105 application to better reflect the details that PADEP has been requesting to date through published instructions associated with permit application forms, with a focus on alternatives analysis, which requires the applicant to examine whether other locations or designs could avoid or minimize environmental impacts without affecting the basic purpose of the project.
- An update to provisions concerning compensatory mitigation for aquatic resource impacts that cannot be avoided to be consistent with PADEP guidance and 2008 federal regulations, focuses on aquatic resource functions, and now references direct, indirect and secondary impacts. The new regulation explicitly provides for the in-lieu fee program and the use of approved mitigation banking sites as options for compensatory mitigation and replaces the 1:1 wetland area replacement ratio with a “no net loss” standard that was previously articulated as a PADEP strategy and as a goal in the 2008 federal rule.
- New types of projects that are eligible for permit waivers including geotechnical or environmental site investigations, recreational trails, and temporary pads at wetland crossings. The new waiver provision also includes some additional restrictions, however, that exclude waivers for projects in certain areas, including threatened and endangered species habitats and identified historic, cultural or archaeological sites.

Pennsylvania Environmental Justice Update

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On October 28, 2021, Governor Wolf issued an Executive Order that prescribes a process to revise the existing Environmental Justice Public Participation Policy, and permanently establishes the Office of Environmental Justice within PADEP. The Order directs the Office of Environmental Justice to take certain actions and allows it to take others. Among those actions that are mandated are:

- making recommendations to PADEP on the integration of Environmental Justice (EJ) considerations throughout PADEP’s programs;

- working with PADEP to identify economic development and funding opportunities and consider EJ in the grant awarding process;
- developing and publishing an EJ strategic plan every five years;
- along with other stakeholders, revising the existing Environmental Justice Policy to define and establish criteria for EJ Areas, and to develop an enhanced public participation plan for EJ Areas potentially affected by development projects and industrial operations.

The Office of EJ is also directed to develop standardized mitigation and/or restoration practices for consideration by applicants and permit application reviewers in the permitting or cleanup context. The Order allows the Office to establish an EJ mapping tool to examine environmental and health impacts on vulnerable Pennsylvania communities and an online repository of EJ information and data. The Order also permanently establishes the Environmental Justice Advisory Board and the Environmental Justice Interagency Council.

The current draft of the [EJ Public Participation Policy](#) is posted on PADEP's website. PADEP held two discussion sessions in 2021 and has solicited public comments. PADEP is expecting to finalize and start implementing the EJ Public Participation Policy in the summer of 2022.

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