



MANKO, GOLD, KATCHER & FOX, LLP

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Manko, Gold, Katcher & Fox, LLP, an environmental and energy law practice, regularly publishes our *Client Alert* newsletter to help our clients and friends stay on top of environmental issues that may affect their businesses. *Client Alert* focuses on hot regulatory issues, recent court and agency decisions, current environmental legislation and technical information.

Air

## **EPA Proposes to Regulate GHG Emissions from Major Sources but Significant Questions Remain**

**Also under SUSTAINABILITY**

by TODD KANTORCZYK

The U.S. Environmental Protection Agency ("EPA") took another step towards regulating greenhouse gas ("GHG") emissions from stationary sources by publishing its proposed GHG "Tailoring Rule" in the October 27, 2009 issue of the Federal Register. While EPA states that the proposed rule is an attempt to relieve many sources of permitting burdens that would otherwise be imposed upon smaller sources and regulatory agencies, the proposal currently leaves open a number of issues that could ultimately result in significant permitting burdens being placed upon large and small GHG sources.

Under the Clean Air Act's Prevention of Significant Deterioration ("PSD") program, new major stationary sources and existing major stationary sources that undertake major modifications are required to obtain PSD permits and install Best Achievable Control Technology ("BACT") at the source. For purposes of the PSD program the Clean Air Act defines a major stationary source as a source having the potential to emit 100 or 250 tons per year ("tpy") of a "regulated pollutant." Similarly, the Clean Air Act's Title V program requires major sources, which in this instance are sources that have the potential to emit 100 tpy of a regulated pollutant, to obtain a consolidated operating permit. While there has been some controversy about whether GHGs are regulated pollutants, EPA's current position is that GHGs will become regulated pollutants at the latest when EPA publishes its final light-duty motor vehicle rule in March 2010. According to EPA, if the current 100 and 250 tpy thresholds are applied to GHGs, annual PSD permit applications would increase from 300 to 41,000, and the number of sources required to obtain Title V permits would increase from 15,000 to 6 million. These new sources would include facilities such as office buildings, hospitals and retail establishments.

In an effort to avoid this result, EPA's proposed Tailoring Rule would initially set new major source thresholds of 25,000 tpy of GHGs (measured as carbon dioxide equivalents or "CO<sub>2</sub>e") for purposes of the PSD and Title V programs, meaning that only large sources would initially be subject to the PSD and Title V programs as a result of GHG emissions. Additionally, the EPA indicated that for purposes of the PSD program, the level for determining what constitutes a major modification would fall somewhere between 10,000 and 25,000 tpy.

EPA's proposed Tailoring Rule raises some key issues which will invariably be discussed as part of the public comment period. First, it is unclear whether EPA has the authority to modify the PSD and Title V thresholds in the Clean Air Act for GHG sources without Congress' approval. In the Tailoring Rule, EPA asserts that the potentially huge increase in sources subject to the PSD and Title V programs under the current thresholds allow EPA to make these adjustments under the "long-established judicial doctrines of absurd results and administrative necessity." In addition, EPA has indicated that these new thresholds would only be a temporary first phase that would last at most six years after the rule is promulgated. During this time, EPA would "vigorously" develop streamlining techniques that would allow regulatory agencies to apply the PSD and Title V programs to a much larger number of sources using the 100 and 250 tpy statutory thresholds. These techniques could include how to calculate potential emissions or the use of general permits with presumptive BACT requirements. Despite EPA's efforts to work around the Clean Air Act's thresholds, looking at recent decisions where courts have found EPA to be overstepping its statutory authority, it is not difficult to imagine a court rejecting EPA's Tailoring Rule and requiring the application of the 100 and 250 tpy thresholds.

Additionally, EPA concedes that it is currently unclear as to what constitutes BACT for purposes of controlling GHG emissions. Earlier in October, EPA's Clean Air Act Advisory Committee established a "Climate Change Work Group" comprised of various stakeholders that, among other things, will examine various aspects of the BACT process as it might apply to GHG emissions. A draft report from this group is due before the end of 2009 with a final report due in March 2010. Comments on EPA's proposed Tailoring Rule are due by December 28, 2009.

## **Proposed Consent Decree Could Set New Standards for Power Plant Mercury Emissions**

by CAROL McCABE

Pursuant to a proposed consent decree under consideration in the matter of *American Nurses Assn. v. Jackson*, the U.S. Environmental Protection Agency ("EPA") agrees to propose a rule establishing technology-based standards to control emissions of mercury and other air toxics from power plants by March 2011, with a final rule proposed deadline of November 2011. In addition, the consent decree would settle the suit brought by the American Nurses Association, the Chesapeake Bay Foundation and other health and environmental organizations against EPA to mandate the promulgation of hazardous air pollutant emission standards from electric utility steam generating units, as required under the Clean Air Act. The proposed consent decree was filed in the U.S. District Court for the District of Columbia on October 22, 2009.

## **EPA Finalizes Mandatory GHG Reporting Rule**

**Also under SUSTAINABILITY**

by TODD KANTORCZYK

At the end of September, the U.S. Environmental Protection Agency ("EPA") finalized its mandatory greenhouse gas ("GHG") reporting rule, which, among other things, requires stationary sources that emit 25,000 metric tons of GHGs (measured as CO<sub>2</sub> carbon dioxide equivalents or "CO<sub>2</sub>e") per year to begin monitoring GHG emissions starting January 1, 2010, and to report these emissions and other operational information to EPA annually. The rule and preamble, which spans over 250 pages in the Federal Register, includes detailed requirements, and in some cases options, for sources to measure and report their annual GHG emissions. While the first GHG emissions report is not due until March 2011, the EPA's GHG reporting rule sets a number of fast-approaching compliance deadlines that facilities that are, or may be, subject to the rule will be required to observe over the next two quarters.

As a general matter, the GHG reporting rule, requires annual reporting of stationary source GHG emissions by each facility that falls within one of the following three categories:

- Facilities that contain any specifically identified source categories, such as electric generating facilities subject to the Acid Rain program, aluminum production facilities and petroleum refineries, that EPA believes emit greater than 25,000 tons per year CO<sub>2</sub>e as part of normal operations;
- Facilities that emit 25,000 tons per year CO<sub>2</sub>e or more from stationary fuel combustion sources and any of a number of industry-specific sources in any calendar year starting in 2010. Such sources include cement production, food processing, glass production, iron and steel production and landfills; and
- Facilities that do not include one of the listed sources, but that include stationary fuel combustion sources with an aggregate maximum rated heat input capacity of 30 mmBTU/hour or greater and emit 25,000 tons per year of CO<sub>2</sub>e in any calendar year starting in 2010.

In the preamble of the proposed rule, EPA states that facilities that fall below the 30 mmBTU/hour level will not be required to engage in monitoring and/or reporting activities under the rule. The final rule also notes, however, that facilities with an aggregate stationary combustion capacity that exceeds the 30 mmBTU/hour threshold will be required to calculate their annual GHG emissions starting on January 1, 2010, in accordance with the final rule to determine whether they are required to report their annual GHG emissions.

The final GHG reporting rule is relatively prescriptive with respect to how subject facilities must measure their GHG emissions from enumerated sources. In light of the rule's issuance date, the final rule allows facilities to use "best available data" for purposes of measuring GHG emissions through March 2010, in lieu of the methods listed in the reporting rule. Facilities can request to use best available data for the balance of 2010, but such requests must be submitted before January 28, 2010, and EPA has indicated they will be reluctant to grant such requests. The final rule also requires subject facilities to develop a GHG monitoring plan that at a minimum

identifies persons responsible for the collection of GHG data, an explanation of the processes and methods used to collect data, and a description of the methods used for QA/QC, maintenance and the repair of instrumentation. Because the GHG reporting rule only allows for best available data to be used through March 2010, these GHG monitoring plans are, in effect, required to be in place by April 1, 2010.

There are a number of other exceptions and issues described over the thousands of pages of supporting materials associated with the GHG reporting rule, including, among others, GHG calculation methods for different types of combustion sources, when emergency generators can be excluded, what constitutes a "facility" for reporting purposes, the types of operational data (some of which may include confidential business information) and when a facility can opt out if emissions fall below 25,000 tons per year of CO<sub>2</sub>e in future years. The nature of these potential exceptions and other issues associated with EPA's final GHG reporting rule underscore the need to obtain and maintain the right operational records. Moreover, with the prospect of federal climate change legislation and EPA GHG regulations on the horizon, as well as ongoing state activity in the climate change area (including proposed state specific GHG action plans and reporting rules in Pennsylvania and New Jersey), strategic calls on these monitoring and reporting issues carry added significance because any annual GHG emission reports have the potential to "lock in" sources for purposes of these GHG programs going forward.

## **Environmental Groups Petition EPA to Regulate GHGs as Criteria Pollutants**

**Also under SUSTAINABILITY**

by TODD KANTORCZYK

On December 2, 2009, two environmental groups filed a petition with the U.S. Environmental Protection Agency ("EPA") requesting that EPA regulate greenhouse gases (GHGs) as "criteria pollutants" under the Clean Air Act ("CAA"). If EPA ultimately sides with the petitioners, individual states would be required to develop state implementation plans (i.e., regulations) to meet national GHG standards set by EPA similar to the way that states do for other criteria pollutants such as sulfur dioxide, nitrogen dioxide, particulate matter and lead. While it is too early to tell whether the petition will lead to any sweeping regulatory changes, at a minimum the threat that such regulations may be required under the existing provisions of the CAA places increased pressure on Congress to pass legislation that specifically addresses climate change.

The petition states that EPA is required to issue an "endangerment finding" for GHGs under Section 108(a) of the CAA primarily because EPA has already concluded under Section 202(a) of the CAA that GHGs emitted from mobile sources endanger public health and welfare as part of its response to the Supreme Court's decision in *Massachusetts v. EPA*, and that the "endangerment" standards of Section 108(a) and 202(a) are nearly identical. The petition next argues that once EPA makes this "endangerment finding," Sections 108 and 109 require EPA to add GHGs to the list of criteria pollutants, and to issue air quality criteria and national ambient air quality standards (NAAQS) for GHGs within twelve months. According to the petitioners, each GHG should have its own NAAQS, with the NAAQS for carbon dioxide set at 350 parts per million. Once EPA sets these NAAQS, Section 110 then requires each state to update their state

implementation plans (i.e., adopt new regulations) to achieve the NAAQS for GHGs. More specifically, due to the global dispersion of GHG emissions, EPA should allocate to each state a proportional GHG emission reduction target and each state would then adopt regulations to meet that target. The petition notes that many states are already implementing GHG reduction plans, thereby demonstrating the feasibility of this approach.

This petition is the latest illustration of the potential "cascade" of new regulations that many fear will be required under the Clean Air Act now that EPA has finalized its proposed "endangerment finding" under Section 202(a). Notably, when the debate over climate change legislation began in earnest earlier this year, some argued that the possibility of GHG regulation under the CAA would spur Congress to pass a cap-and-trade bill. While climate change legislation was passed by the House in June, similar legislation is currently stalled in the Senate, with an eye towards a floor vote in Spring 2010. For an update on federal climate change legislation, click this [link](#).

## **EPA Finalizes Rule for Flexible Air Permits**

by BART CASSIDY

On January 13, 2009, at the end of the Bush Administration, the U.S. Environmental Protection Agency ("EPA") issued a final rule authorizing states to issue air quality operating permits which "pre-authorize" sources to institute certain operational changes and alternative operating scenarios. The rule sought to clarify EPA's position that air quality operating permits issued under Title V of the Clean Air Act could include provisions governing various operating conditions, as well as reflecting approved replicable methodologies. EPA observed that the objective of these provisions of the Title V permit program was to provide sources with greater flexibility to institute changes without additional permit approvals in order to promptly respond to market changes.

Shortly following the transition to the Obama Administration, however, EPA determined to reconsider this rulemaking action. EPA's announced reconsideration caused significant uncertainty among permitting agencies, since they had understood EPA's final regulation to merely clarify pre-existing regulatory authority. On October 6, 2009, EPA resolved any uncertainty in this context by finalizing the January 2009 regulation, and affirming the authorization afforded state permitting authorities to include these flexible permitting provisions within air quality operating permits.

Flexible air permitting provisions can provide significant benefit to facilities by allowing rapid transition among operating scenarios, without the need for securing prior permitting approval from state agencies. In order to secure these benefits, facilities must properly request inclusion of relevant operating scenarios in the context of original permit applications, and work with state permitting authorities to ensure that the permit provisions accurately account for foreseeable operating scenarios and consider applicable regulatory standards under each such scenario.

## **EPA Scrutinizes Emission Aggregation Under New Source Review**

by BART CASSIDY

The U.S. Environmental Protection Agency ("EPA") appears to be moving toward a more stringent approach regarding New Source Review applicability, at least as it relates to the aggregation of emission increases from multiple activities. Under the Clean Air Act, the more stringent and time consuming New Source Review permitting program applies if a proposed modification to an existing major stationary source would result in a "significant net emission increase." In order to determine whether a proposed net emission increase will be significant, the facility operator must account for all creditable emission increases from the "project." Specifically, to the extent that the operator undertakes several changes at the same facility, and each results in an emission increase, the operator must aggregate the emission increases from all such changes if they constitute a single project.

On January 15, 2009, EPA issued a final regulation which clarified that emission increases from separate activities need not be aggregated in this context unless the activities are "substantially related" from an economic or technical standpoint. Further, the final rule provided that activities undertaken at least three years apart are presumed not to be substantially related. However, shortly following the inauguration of President Obama, the new EPA administration determined to reconsider this regulation in response to a petition for reconsideration from the Natural Resources Defense Council, and stayed the effectiveness of the final rule until May 18, 2010.

More recently, EPA revoked a 2007 policy governing aggregation of emissions at oil and natural gas facilities. The 2007 EPA policy directed state permitting authorities not to aggregate emission increases experienced at physically-separate oil and natural gas facilities under common ownership, *unless* the facilities are physically adjacent or contiguous. EPA has now determined that emission increases must be aggregated from different oil and natural gas facilities if they are interconnected by pipeline and share facilities, such as pumping stations. In essence, EPA has determined to focus on whether such facilities are under "common control," regardless of whether they are physically separated, even by hundreds of miles. To the extent that the facilities are under common control and physically interconnected, then EPA believes they should be evaluated under the Clean Air Act as if these locations constitute a single facility. This change in policy is likely to result in the determination that New Source Review applies to many more projects at oil and gas facilities, and may also result in the classification of more facilities as major stationary sources for purposes of hazardous air pollutant regulation and Title V air permitting.

## **EPA Accelerates Review of Air Quality Standards for Fine Particulate Matter**

by KATE VACCARO

In October 2009, the U.S. Environmental Protection Agency ("EPA") announced an accelerated schedule for issuing new National Ambient Air Quality Standards ("NAAQS") for fine particulate matter, or "PM2.5." Specifically, EPA intends to propose new NAAQS for PM2.5 by July 2010 and implement a final rule by April 2011. Particulate matter is a mixture of microscopic solids and liquid droplets suspended in the air. Particulate matter is produced through all types of combustion activities and certain industrial processes. According to EPA, exposure to particulate

matter can cause a variety of serious health problems, including heart and lung diseases, decreased lung function, asthma attacks, and even premature death. Fine particles are believed to pose the greatest health risks, because they are small enough to lodge deeply in the lungs.

In October 2006, EPA revised the NAAQS for PM<sub>2.5</sub> (the "2006 PM<sub>2.5</sub> NAAQS"). The 2006 PM<sub>2.5</sub> NAAQS tightened the primary and secondary daily standards from 65 micrograms per cubic meter ("µg/m<sup>3</sup>") to 35 µg/m<sup>3</sup>, but retained the primary and secondary annual standards of 15 µg/m<sup>3</sup>. Several groups, including environmental groups and states and state agencies, among others, filed petitions for review in the U.S. Circuit Court of Appeals for the District of Columbia Circuit, challenging the 2006 PM<sub>2.5</sub> NAAQS. On February 24, 2009, finding that EPA failed to adequately explain why an annual level of 15 µg/m<sup>3</sup> is required to protect the public health, the Court remanded the primary annual PM<sub>2.5</sub> standard to EPA for reconsideration. The Court also remanded the secondary PM<sub>2.5</sub> standards, determining that EPA unreasonably concluded that the NAAQS are adequate to protect the public welfare from adverse effects on visibility.

## **EPA to Complete Review of Air Quality Standards for Six Criteria Pollutants by 2011**

by KATE VACCARO

Under the Clean Air Act, the U.S. Environmental Protection Agency ("EPA") is required to establish National Ambient Air Quality Standards ("NAAQS") for pollutants considered harmful to public health and the environment. EPA's Office of Air Quality Planning and Standards set NAAQS for six principal pollutants. These pollutants, which are known as "criteria pollutants," are carbon monoxide, lead, nitrogen dioxide, particulate matter ("PM") (both PM<sub>10</sub> and PM<sub>2.5</sub>), ozone, and sulfur dioxide. In October 2009, EPA announced that it will complete a review of the NAAQS for all six criteria pollutants by the end of 2011. In doing so, EPA intends to focus on coordinating its review of the six pollutants, rather than evaluating each pollutant independently.

EPA already finalized a new NAAQS for lead in 2008 and is currently reevaluating the NAAQS for ozone and PM. In particular, EPA recently announced plans to promulgate revised standards for ozone and PM by August 2010 and April 2011, respectively. EPA has also commenced the process of reviewing the standards for carbon monoxide, nitrogen dioxide, and sulfur dioxide.

## **PADEP Issues Climate Change Action Plan**

**Also under SUSTAINABILITY**

by BRYAN FRANEY

On October 9, 2009, the Pennsylvania Department of Environmental Protection released its *Climate Change Action Plan* (the "Plan") for public comment. The Plan, which was prepared pursuant to the Climate Change Act of 2008 (Act 70), identifies 52 specific recommendations for reducing greenhouse gas ("GHG") emissions in Pennsylvania. The recommendations were reviewed and approved by a majority of the Climate Change Advisory Committee ("CCAC"), a 21 member advisory panel that was established by Act 70. The recommendations impact several

business sectors of Pennsylvania including waste, agriculture, forestry, transportation, industry, residential/commercial, electricity generation, transmission and distribution.

If implemented, the recommendations are projected to reduce GHG emissions in Pennsylvania by 36 percent by 2020 as compared to GHG emissions in 2000. This projected reduction would exceed the non-binding, aspirational target established by the CCAC of a 30 percent reduction in GHG emissions by 2020, as compared to 2000 levels.

The public comment period on the Plan closed on November 9, 2009. The CCAC reviewed the public comments from November 19 to December 4, 2009 and the final action plan was delivered to the Governor's Office, Legislature, and the public on December 18, 2009.

## Energy

### **U.S. Senate Makes Limited Progress Towards Vote on Energy and Climate Change Legislation; Spring 2010 New Target**

**Also under SUSTAINABILITY**

by TODD KANTORCZYK

After the U.S. House of Representatives passed the American Clean Energy and Security Act of 2009 ("ACES") at the end of June, the U.S. Senate engaged in an effort to pass its own version of comprehensive energy and climate change legislation. Despite an initial ambitious schedule that targeted a floor vote before the United Nations' December climate change meetings in Copenhagen, limited progress towards a vote has been made, due in part to the congressional focus on health care legislation. Senate Majority leader Harry Reid has conceded that climate change legislation is unlikely to get to the Senate floor before Spring 2010.

In July 2009, the Senate Energy and Natural Resources Committee passed the American Clean Energy Leadership Act ("ACELA"), which included provisions similar to the energy titles of ACES, including a federal renewable portfolio standard, energy efficiency measures for buildings, appliances, manufacturing and other sectors, plus other energy incentives. Senate leadership, recently confirmed their preference to address energy and climate change in one comprehensive bill, and thus a floor vote on the ACELA provisions will likely be on hold pending further action on climate change legislation.

At the end of September 2009, Senators Barbara Boxer and John Kerry introduced the Clean Energy, Jobs and American Power Act (S. 1733) as a basic framework for a cap-and-trade program, but many key details were reserved for consideration by Senate committees with jurisdiction. Subsequently, on October 23, 2009, Senator Boxer released a "Chairman's Markup" for review by the Senate Environment and Public Works committee starting November 3, 2009. The republicans on the committee, boycotted the hearings, arguing that more detailed economic analysis was necessary. As a result, committee rules required the bill to be voted upon without consideration of additional amendments, and the October 23, 2009 version was passed by the committee on November 5, 2009. Several other Senate committees including, (Finance; Commerce, Science and Transportation; Agriculture, Nutrition and Forestry; Foreign



Relations; and Energy and Natural Resources) have jurisdiction over the climate change bill and have not yet held hearings. Senator Max Baucus, chairman of the Senate Finance committee has said he intends to hold a markup meeting in January 2010 in preparation for a floor vote in Spring 2010.

Separately, in an October 11, 2009 op-ed piece in the New York Times, Senators Kerry and Lindsey Graham described a bipartisan "framework" for climate change legislation that focused more upon domestic energy security. It has recently been reported that these two Senators, along with Senator Lieberman, have been negotiating with the Obama Administration and working on compromise language that could be added to S.1733 in an effort to gain 60 votes in the Senate.

## **Marcellus Shale Developments**

by DARRYL BORRELLI

Pennsylvania is in the midst of a land rush, the likes of which have not been seen in the Commonwealth since the coal barons of the 1800s amassed huge mineral rights. Gas exploration and production companies are busily signing leases to drill and extract gas from the Marcellus Shale formation, the heart of which extends from southwest to north central Pennsylvania (as well as extending into West Virginia and New York). Natural gas is being extracted from a formation a mile beneath the ground surface which is so tight that it requires a technology called "hydraulic fracturing" or "fracing" to make the collection of the gas cost effective. Fracing requires the injection of "frac fluids" into the Marcellus Shale at high pressures to prop open voids which allow the gas to flow. These fluids are stored in above ground ponds prior to their use and recovered, along with formation fluids, after the fracing occurs. The use of this technology, and the public scrutiny it has brought, makes the industry susceptible to lawsuits and government regulation.

Upon recovery, the frac fluids contain formation waters which contain elevated chlorides and other total dissolved solids ("TDS"). There are also reports of radionuclides being present in the recovered fluids which, combined with TDS issues, make the treatment of recovered fluids at conventional wastewater treatment plants difficult. Landowners have filed lawsuits claiming that their drinking water has been fouled by the fluids and methane produced by the gas recovery. The Pennsylvania Department of Environmental Protection ("PADEP") has issued notices of violation ("NOVs") for the release of frac fluids at drill sites. Senator Casey has introduced a bill entitled the Fracturing Responsibility and Awareness of Chemicals ("FRAC") Act which would in essence repeal certain exemptions for frac fluids contained in the Pennsylvania Safe Drinking Water Act. Certain permits have been challenged by members of the environmental community based on alleged ecological impacts resulting from the construction of gas transmission pipelines, which connect the wells to a distribution source.

The speed at which the Marcellus Shale exploration is advancing in Pennsylvania will undoubtedly continue to create environmental hurdles for the companies involved in natural gas production and transmission. So far, the industry is facing these challenges head on in a manner necessary to satisfy Pennsylvanians that their new found riches will not leave permanent scars on the landscape reminiscent of Pennsylvania's coal mining legacy.

## **NJDEP Proposes Regulatory Changes to Facilitate the Development of Renewable Energy in Coastal Areas of the State**

**Also under SUSTAINABILITY**

by BRETT SLENSKY

On September 8, 2009, the New Jersey Department of Environmental Protection ("NJDEP") issued proposed amendments to the Coastal Permit Program Rules, ("CPPR"), the Coastal Zone Management Rules, ("CZMR"), and the Flood Hazard Area Control Act Rules, ("FHACA"), intended to facilitate the development of renewable energy generation capacity in certain coastal areas of New Jersey.

The proposed amendments to the CPPR include: (1) carve-outs from permitting requirements under the Coastal Area Facility Review Act and the Waterfront Development Law for certain wind turbines constructed on or structurally attached to existing buildings and for certain solar panel installations; (2) a new Permit-by-Rule ("PBR") for the construction of certain wind turbines that are less than 200 feet in height and have cumulative rotor swept area of no greater than 2,000 square feet; (3) two new coastal general permits for certain other wind turbines constructed on land; and (4) a new PBR for the installation of solar panels in certain designated areas at a single family home or duplex lot.

The proposed amendments to the CZMR include: (1) an amendment to the existing special area rule for Atlantic City that would allow the construction of certain wind turbines on the City's ocean piers; (2) changes to the existing energy facility siting requirements and standards for certain wind and solar energy facilities; and (3) provisions that would allow the construction of up to five offshore wind turbines in the ocean waters between Seaside Park and Stone Harbor. Finally, the proposed amendments to the FHACA include a new PBR for the construction of certain wind turbines on land.

### **Litigation**

## **Property Management Services Company Not Liable as "Owner" under CERCLA, but Could be Liable as an "Operator"**

by JOHN GULLACE

In *Scarlett & Assoc., Inc. v. Briarcliff Center Partners*, the U.S. District Court for the Northern District of Georgia held on summary judgment that under both Georgia law and federal common law, the property management services company for a shopping center contaminated by a dry cleaning business was not responsible for the contamination as an "owner" of the center under the Comprehensive Environmental, Response, Compensation and Liability Act ("CERCLA"). The defendant could not sign leases, evict tenants or spend significant sums of money without authorization and therefore, did not have the characteristics of an owner. However, the Court held that there may be enough evidence to let the case proceed on a theory that the management company was an "operator" of the dry cleaning business under

CERCLA. The district court held that under the Supreme Court's decision in *Best Foods*, the fact that the property manager once advised the dry cleaning tenant of reporting obligations to the U.S. Environmental Protection Agency and requested documentation of compliance with these requirements, may have raised the management company's status to that of an "operator" under CERCLA with the requisite level of involvement in the environmental affairs of the dry cleaner.

## **Connecticut Federal Court Issues Strong Ruling in Cost Recovery Action for Remediation Costs**

by KATE CAMPBELL

Historically, spoliation of evidence has been an issue raised primarily in products liability cases, where the plaintiff destroys or fundamentally alters the allegedly defective product and thereby prejudices the defendant's ability to defend the claims asserted against it. But in the past few years, several federal district courts have issued significant spoliation rulings in environmental cost recovery actions, reminding parties of the need to take appropriate measures to preserve all types of evidence – documentary, electronic and tangible – whenever litigation is reasonably anticipated, and particularly when remediation will eliminate potential future sampling.

The most recent of these cases was *Innis Arden Golf Club v. Pitney Bowes, Inc.*, a cost recovery action brought pursuant to the Comprehensive Environmental, Response, Compensation and Liability Act ("CERCLA") brought by Innis Arden Golf Club, which discovered extensive PCB contamination on its century-old golf course in late 2004. In the action, Innis Arden alleged that Pitney Bowes, which had formerly conducted operations on an adjacent property, was the source of the contamination, and sought to recover the cost of remediation from Pitney Bowes and several other defendants. To establish the causal link to Pitney Bowes, Innis Arden relied upon soil samples its environmental consultant collected from the golf course and from the Pitney Bowes property beginning in early 2005. By comparing the chemical profile of the PCBs found on both properties, the consultant, who also acted as Innis Arden's proffered expert on causation, sought to correlate the contamination on the golf course to releases on the Pitney Bowes property. In accordance with laboratory protocol, the soil samples in question, once analyzed, were disposed of after one month.

Prior to trial, Pitney Bowes filed a motion for sanctions against Innis Arden for spoliation of evidence, charging the golf club with destroying the soil samples upon which its expert was relying and failing to retain all of the analytical data associated with the testing of those samples. According to Pitney Bowes, the destruction of this evidence precluded it from running potentially exculpatory tests that could have established that the PCBs on the golf course property predated Pitney Bowes' operations.

The court agreed with Pitney Bowes, and sanctioned Innis Arden by precluding all evidence based on the soil samples that had been collected from the golf course property and subsequently destroyed. According to the court, Innis Arden's own documents established that the golf club knew that the soil sampling was a critical part of possible cost recovery litigation, and the duty to preserve such evidence attached at the latest by mid-2005, by which time counsel was actively involved in the investigation and analysis of the samples in preparation for legal action against Pitney Bowes. Further, although Innis Arden did provide Pitney Bowes with

notice and an opportunity to conduct its own pre-remediation sampling on the golf course property, to which Pitney Bowes did not respond, the court found that sanctions were still warranted. According to the court, such notice did not satisfy Innis Arden's obligation to preserve relevant evidence, nor did Pitney Bowes' inaction constitute a disclaimer of interest in the evidence.

After issuing its spoliation ruling, the court granted a *Daubert* motion filed by Pitney Bowes to preclude Innis Arden's causation expert from testifying at trial, concluding that his proffered testimony was inadmissible because, *inter alia*, the soil samples and full data packages that the expert relied upon were no longer available, which meant that Pitney Bowes could not test or attempt to validate his methods or conclusions. Absent admissible expert testimony on causation, the court then granted Pitney Bowes' motion for summary judgment, and dismissed the case. The outcome of the case is astonishing for a CERCLA cost recovery claim brought by an innocent landowner.

## **RCRA Cleanup Obligation Not Dischargeable in Bankruptcy**

by ANGELA PAPPAS

The U.S. Court of Appeals for the Seventh Circuit recently affirmed a federal district court decision holding that a cleanup obligation imposed pursuant to the Resource Conservation and Recovery Act ("RCRA") against Apex Oil Company ("Apex") was not discharged by the Chapter 11 bankruptcy of Apex's corporate predecessor.

The main issue addressed in *U.S. v. Apex Oil Co.*, was whether an injunction issued by the U.S. Environmental Protection Agency ("EPA"), requiring Apex to clean up contamination at a former Hartford, Illinois refinery, constituted a "claim" under section 101(5) of the Bankruptcy Code, and was thus dischargeable in bankruptcy. Apex argued that, based on the Bankruptcy Code's definition of "claim," the injunction was a "right to payment" because it would require Apex to expend approximately \$150 million to comply, and was therefore properly discharged by the bankruptcy proceedings of its corporate predecessor. The Seventh Circuit disagreed and concluded that a RCRA injunction is equitable in nature because it does not allow the government to seek payment in lieu of performance, irrespective of Apex's cost to comply. Accordingly, the cleanup obligation imposed by the injunction was not discharged and Apex must now comply.

The decision is significant because it undermines the overarching "fresh start" policy of the Bankruptcy Code, particularly at a time when companies are increasingly looking to bankruptcy to shed some of its debt in the hopes of surviving these difficult economic times. Those companies faced with potential RCRA liability and considering Chapter 11 reorganization will now need to evaluate whether bankruptcy is a viable option in light of this opinion.

## **Jury Awards Significant Damages Verdict for MTBE Contamination**

by LYNN ROSNER RAUCH

In October 2009, a federal court jury found ExxonMobil Corp. ("Exxon") liable for \$104.7 million in compensatory damages to plaintiff New York City for polluting city drinking water wells with

the gasoline additive methyl tertiary butyl ether ("MTBE"). Exxon's decision not to settle with the city left it the lone company (of among more than 20) to go to trial. The jury concluded that Exxon was liable for spilling gasoline from six service stations in Queens Borough and as a supplier for failing to adequately warn of the dangers posed by the product. Exxon defended the claims arguing that its service stations were not the source of MTBE contamination of drinking water and that the concentration of MTBE was too low to constitute a "legally cognizable injury." These defenses were rejected by the Court and the jury.

The jury award did not include punitive damages but was based on Exxon's portion of the \$250 million projected cost to construct and operate a water treatment system for the City. The jury also factored in preexisting conditions and responsibility of other entities in determining its award. Despite not being assigned 100 percent of the costs, this award may influence defendants in other similar pending and anticipated cases in federal courts to settle their claims, rather than risk such significant awards.

## **Two Federal Courts of Appeal Permit Greenhouse Gas Litigation to Proceed**

**Also under AIR and SUSTAINABILITY**

by MICHAEL CARTER

The U.S. Court of Appeals for the Second and Fifth Circuits recently issued decisions permitting governmental and private plaintiffs to assert nuisance and related tort claims against sources of greenhouse gas ("GHG") emissions. The Second Circuit case, *Connecticut v. American Electric Power*, involved federal common law nuisance claims by eight states, New York City and three private not-for-profit land trusts against five electric power producers. The plaintiffs sought an injunction to abate the alleged nuisance. The district court dismissed the complaint on political question grounds. The Second Circuit reversed, concluding that the case was not barred by the political question doctrine because resolution of the case required only adjudication of whether GHG emissions from a limited number of coal-fired electric plants caused a public nuisance, and it therefore presented an issue that was constitutionally committed to the judiciary and that was subject to manageable common law tort standards. The court further concluded that the plaintiffs had standing to assert their nuisance claims because they alleged concrete injuries resulting from global warming, that the defendants' emissions contributed to global warming and that the requested injunction would provide some relief. Next, the court concluded that all the plaintiffs, including the private land trusts, had stated a claim for public nuisance because they alleged that the defendants had unreasonably interfered with public rights. Finally, the Second Circuit held that federal common law was not displaced by federal statute or regulation unless and until Congress or the Executive Branch regulates stationary sources of GHG emissions.

In the Fifth Circuit case, *Comer v. Murphy Oil*, a class of private plaintiffs owning land along the Gulf Coast sought monetary damages from a number of energy and petrochemical companies, asserting Mississippi common law claims for public and private nuisance, trespass, negligence, unjust enrichment, fraudulent misrepresentation, and civil conspiracy. The district court dismissed the complaint under the standing and political question doctrines. The Fifth Circuit reversed in part. Dealing first with standing, the Fifth Circuit rejected the defendants' argument

that the injuries alleged in the complaint were not fairly traceable to the defendants' GHG gas emissions, concluding that it was sufficient that the plaintiffs alleged that the defendants' conduct contributed to the injuries. Thus, because the plaintiffs alleged that the defendants' GHG emissions contributed to global warming, which in turn contributed to rising sea levels, the severity of Hurricane Katrina and ultimately property damage suffered by the plaintiffs, the Fifth Circuit concluded that the plaintiffs had standing as to their nuisance, trespass and negligence claims. However, the court concluded that the plaintiffs lacked standing for their remaining claims, which raised only a generalized grievance related to the alleged dissemination of false statements about global warming. Finally, the Fifth Circuit held that the political question doctrine was inapplicable because "ordinary tort suits" like this one should be resolved by the courts, particularly where plaintiffs seek damages, not injunctive relief.

Although these decisions may represent a sea change in the receptivity of the federal courts to climate change litigation, the plaintiffs in both cases face significant obstacles on the merits, particularly proving that the defendants' GHG emissions were the proximate cause of the injuries alleged. Further, federal and state common law may be displaced or preempted by future climate change legislation by Congress or regulatory action by the U.S. Environmental Protection Agency.

## **PA District Court Allows States' Clean Air Act Suit Against Reliant to Move Forward**

**Also under AIR**

by CHRISTOPHER BALL

On September 30, 2009, the U.S. District Court for the Eastern District of Pennsylvania issued a ruling on several motions to dismiss in the Clean Air Act ("Act") litigation captioned *State of New Jersey v. Reliant Energy Mid-Atlantic Power Holdings, LLC*. The case involves Reliant's Portland Generating Station on the Pennsylvania side of the Delaware River in Northampton County. The States of New Jersey and Connecticut allege violations of the Act's New Source Review provisions due to modifications of the Portland Station conducted between 1985 and 2005. The States contend that the modifications in question required pre-construction permits under the Act that were never obtained, and which would have mandated the installation of pollution controls at the plant. The States also allege that both the current and former owners of the Portland Station violated the Act's permitting requirements by failing to include required information in the plant's permit application and renewals.

Reliant sought to have several counts dismissed on the basis that: the statute of limitation expired on all but the most recent modification at issue in the case; Reliant should not be held liable for the permitting actions of the previous owner/operator of the Portland Station, Metropolitan Edison ("Met Ed"); and, the District Court lacked subject matter jurisdiction over the States' claims related to the plant's permit. Met Ed also filed motions to dismiss echoing Reliant's statute of limitations and jurisdictional arguments and further arguing that the States' claims for injunctive relief against Met Ed should be dismissed because Met Ed no longer owned or operated the plant and, accordingly, could not fulfill any injunctive relief order by the Court.

While portions of the motions to dismiss by Reliant and Met Ed were granted, the Court rejected their primary arguments and allowed the majority of the States' case to move forward. Key aspects of the opinion include the following determinations by the Court:

(1) The five-year statute of limitations found at 28 U.S.C. § 2462 only applies to claims for legal relief and not the States' claims for equitable relief. Defendants argued that the States' legal remedies for the older modifications were barred under the five-year statute of limitations, and that the States' equitable remedies were "concurrent" with their legal claims and therefore also time-barred under the concurrent remedy doctrine. The Court disagreed, and held that the injunctive relief claims were not subject to the five-year statute of § 2462.

(2) The "discovery rule" applies to those State claims for legal relief otherwise subject to the federal five-year statute of limitations. When applicable, the discovery rule delays the commencement of a statute of limitations for a cause of action until such time that an injured party discovers or reasonably should have discovered the injury, and can therefore significantly extend the period of time in which a suit can be filed. Defendants in *Reliant* argued that the discovery rule was not applicable in this matter and that the statute of limitation commenced at the time the modifications at issue were conducted; a position which would have barred the States' claims related to all but the most recent modification at the Portland Station. The Court rejected this argument and, applying the discovery rule, refused to dismiss the States' claims for legal relief even where those claims related to almost 25 year-old modifications because the date on which the States discovered those modifications was unclear on the face of the complaint.

(3) A current owner or operator of a facility can be held liable for the failure of a former owner or operator to comply with its obligation under the Act to obtain pre-construction permits prior to commencing certain modifications. The Portland Station's current owner/operator, Reliant, argued that it should not be liable for the alleged failure of the prior owner/operator, Met Ed, to secure a pre-construction permit prior to commencing the modifications at issue in the case. However, because the pre-construction permit would have required the installation of emission controls on the Portland Station, the Court determined that the use of those emission controls was a continuing permit obligation effective even after a modification is completed. In the context of ruling on motions to dismiss, Reliant was thus held liable for compliance with pre-construction permitting obligations pre-dating the company's involvement at the plant.

(4) The States' claims for injunctive relief against Met Ed were unfounded. This issue turned on the distinction between the *legal* relief sought by the States (*e.g.*, money damages) and the *injunctive* relief sought (*e.g.*, installation of pollution controls). Met Ed took the position that, as only a former owner of the plant, it could not effectuate or comply with any orders for injunctive relief requiring new control technologies at the Portland Station. In response, the States contended that Met Ed could be required to fund the installation of control technologies, and that such a funding requirement could be categorized as injunctive relief. The Court disagreed and dismissed the injunctive relief claims against Met Ed.

(5) The States' objections to the permit information submitted in the companies' initial permit application and subsequent applications for permit renewals were not properly before the District Court. The Act and its implementing regulations establish a process for commenting on and challenging permits. Through this required process, an objector must petition the U.S.

Environmental Protection Agency ("EPA") Administrator and subsequently pursue any appeal of EPA's actions to the U.S. court of appeals for that jurisdiction. The Court therefore determined that there was no jurisdiction for a district court to hear the States' permitting challenges under the Act's required process, and granted defendants' motions to dismiss those portions of the States' complaints.

## Site Development & Brownfield Redevelopment

### **HUD Policy Change to Stimulate Multifamily Development on Brownfields Sites**

by MICHAEL GROSS

The U.S. Department of Housing and Urban Development ("HUD") recently implemented a policy change that is expected to increase the construction of multifamily housing developments on brownfields sites. Specifically, HUD's revision to the environmental requirements in its Multifamily Accelerated Processing Guide repeals a previous prohibition on the building or redevelopment of HUD financed multifamily housing on sites with active groundwater remediation. In addition, incomplete removal of contamination through the use of engineering controls is now permissible at HUD-financed multifamily construction sites if the costs to remove such contamination are deemed excessive, if removal is impractical or if there is no known or expected risk of off-site contamination. Developers seeking to leave contaminants in place are required to submit justification for incomplete removal to HUD with a remediation plan, demonstrating that the costs of incomplete removal are sufficiently below the costs of complete removal.

## Site Remediation

### **New Jersey LSRP Program Gets Underway; NJDEP Issues Extensive Site Remediation Reform Regulations**

by BRUCE KATCHER

With the potential for more efficient processing of site remediation cases in New Jersey, "interim" regulations implementing the Licensed Site Remediation Professional ("LSRP") Program established under the Site Remediation Reform Act ("SRRRA") went into effect on November 4, 2009. At that time, the New Jersey Department of Environmental Protection ("NJDEP") issued an extensive regulatory package addressing how the LSRP program will work and providing for new annual case fees, permits and fees for engineering and institutional controls, mandatory and regulatory timeframes for completing various stages of a remediation, modifications to the agency's technical regulations and more.

Most importantly, with limited exceptions, any party initiating a site remediation on or after November 4 must hire an LSRP to oversee the case and NJDEP will no longer provide full departmental oversight of and issue no further action letters for those cases. Instead, an LSRP will issue a response action outcome (RAO) when the remediation is complete (or has advanced far enough to be governed by the new remedial action permits for soil or groundwater remedies



to be issued by NJDEP). A new limited class of "direct oversight cases" remains subject to full NJDEP oversight with new and more stringent requirements. Pre-existing cases may continue under the old NJDEP oversight regime without an LSRP until May 7, 2012, although the new regulations allow those cases to "opt-in" to the LSRP program, with NJDEP approval. The decision as to whether to opt-in to the new LSRP program could have significant consequences.

The interim regulations include (1) Administrative Requirements for the Remediation of Contaminated Sites ("ARRCS") that implement the LSRP program and address critical procedural issues integral to the many other SRRA reforms, (2) extensive changes to the NJDEP's Technical Requirements for Site Remediation, including key changes to the requirements for dealing with immediate environmental concern conditions such as vapor intrusion and potable well contamination and (3) modifications to the regulations under the Industrial Site Recovery Act ("ISRA") and the regulated underground storage tank program. These interim regulations will apply until final regulations are issued which must be done prior to November 2010. NJDEP is also issuing many new and revised guidance documents that will apply to investigatory and cleanup activities and forms that must accompany all submissions, whether by an LSRP or a non-LSRP.

Further details concerning the various reforms enacted under SRRA can be found in our [March 18](#), [May 12](#) and [November 12](#) Special Alerts.

## Sustainability

### **New SEC Guidance Impacts Shareholder Resolutions on Business Risk**

by MEREDITH DuBARRY HUSTON

Publicly traded companies may increasingly be faced with responding to shareholder resolutions addressing exposure to business risks related to climate change, water scarcity, or other environmental issues following the October 27, 2009, release of a U.S. Securities and Exchange Commission ("SEC") staff guidance document. Under previous guidance, the SEC granted companies' no-action requests on shareholder proposals when proposals related to a companies' evaluation of risks. The SEC viewed such shareholder proposals as outside of the purview of shareholder involvement because evaluation of risk is an ordinary business operation.

Citing a marked increase in corporate requests to exclude shareholder proposals related to an evaluation of risk, the SEC has revised its prior guidance. The SEC noted that its prior analytical framework "may have resulted in the unwarranted exclusion of proposals that relate to the evaluation of risk but that focus on significant policy issues." Going forward, the SEC will evaluate shareholder proposals based on their underlying subject matter and, where a "proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote," the SEC will decline to grant a company's no-action request.

Shareholder advocates suggest that the revised guidance will allow shareholders to require companies to address proposals regarding the potential risks created by greenhouse gas emissions, climate change and related legislation. Companies arguing that such proposals should be excluded now show that the underlying subject matter of the proposal involves an ordinary business risk. The revised guidance may be particularly important as federal lawmakers move toward the regulation of greenhouse gas emissions, regulations which will likely have either positive or negative impacts on corporate bottom lines in major segments of the economy.

## **Green Remediation Strategy from EPA Aims to Limit Impact**

by MEREDITH DuBARRY HUSTON

Recognizing that site cleanup activities have their own environmental impact, the U.S. Environmental Protection Agency ("EPA") released for public comment its Superfund Green Remediation Strategy ("Strategy") on September 8, 2009. Through the action items set forth in the Strategy, which is not a regulation, EPA hopes to clarify how green remediation practices fit within the regulated cleanup process, improve an understanding of the potential resource and energy demands of remedial measures; and to establish metrics that can be used to measure and evaluate green remediation activities. EPA defines green remediation as "the practice of considering all environmental effects of remedy implementation and incorporating options to minimize the environmental footprints of cleanup actions."

Manko, Gold, Katcher & Fox, LLP, has historically counseled clients on many of the elements of green remediation now being promoted by EPA. These elements include: reduced waste generation and material consumption; improved energy efficiency and use of renewable energy; reduction of onsite and offsite emissions of greenhouse gases and air pollutants from treatment processes, operation of heavy machinery and transportation; and reduction of water usage in treatment processes through water reuse and improved efficiency.

EPA Regions 2, 9, and 10 have already implemented their own green remediation policies. Moving forward, EPA is likely to continue to look for ways to reduce the environmental impacts of cleanup activities. EPA's efforts to ensure that cleanup remedies minimize environmental impacts also provide opportunities to maximize land reuse and to reduce project costs.

### **Waste**

## **Federal Court Upholds Hazardous Waste Penalty Based on EPA Interpretation of "Spent Material" Definition**

by RODD BENDER

On September 23, 2009, a federal court upheld a significant penalty against a manufacturer that failed to follow Resource Conservation and Recovery Act ("RCRA") hazardous waste requirements for shipments of a used industrial cleaning solution, based on the U.S. Environmental Protection Agency's ("EPA's") interpretation of the RCRA "spent material" definition. The manufacturer, Howmet Corp., utilized liquid potassium hydroxide ("KOH") to

clean metal turbine casings. When the KOH became too contaminated for continued use as a cleaner, Howmet would send some of the used KOH for disposal at a hazardous waste facility, and would ship other used KOH to a fertilizer manufacturer for use as a fertilizer ingredient. EPA brought an enforcement action against Howmet in 2003, asserting that the used KOH shipped as a fertilizer ingredient was a "spent material" that when recycled falls within the RCRA definition of "solid waste" and therefore is a hazardous waste (under the corrosivity characteristic) subject to hazardous waste transportation requirements.

Pursuant to 40 C.F.R. § 261.2(c), a spent material is defined as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." Howmet argued that "the purpose for which [the used material] was produced" is ambiguous. The company contended that KOH is manufactured for multiple uses, including both as a cleaning solution and as a fertilizer ingredient, and that under the regulation the "purpose" for which a used material can no longer serve should be interpreted to encompass all purposes for which the material may have been produced. By contrast, EPA asserted that the correct interpretation centers on whether the material can still serve the initial use to which the material was put in the particular case at issue. Therefore, in EPA's view because Howmet's KOH was initially used as a cleaning solution, it became a spent material when contamination prevented it from continuing to be used as a cleaning solution, even though it could later be used for a different purpose, i.e., as a fertilizer ingredient.

EPA supported its position by referring to the regulatory history of the spent material definition, as well as various EPA rulings and guidance documents, to demonstrate that the agency has consistently interpreted the word "purpose" with reference to the initial use of the material. EPA's position, and a \$309,000 penalty, was upheld by an administrative law judge and the agency's Environmental Appeals Board ("EAB"). Applying the traditional judicial deference given to an agency's interpretation of its own regulations, the U.S. District Court for the District of Columbia found that EPA's interpretation was not "arbitrary, capricious, or an abuse of discretion," and therefore upheld the EAB's decision that Howmet's shipments of used KOH to the fertilizer manufacturer were subject to RCRA hazardous waste regulation. In addition, the court found that while the spent material definition is somewhat ambiguous, Howmet could have ascertained EPA's interpretation of "purpose" as equating to "initial use" by analyzing the 1980s regulatory preambles, rulings, and guidance documents evaluated by the court. Thus, the court rejected Howmet's due process claim that it had not been given "fair notice" that EPA would treat the used KOH as a spent material.

## **New Requirements Governing the Beneficial Use of Coal Ash Anticipated**

by MICHAEL MELOY

On November 7, 2009, the Pennsylvania Environmental Quality Board ("EQB") published in the Pennsylvania Bulletin extensive proposed changes to Pennsylvania's residual waste regulations governing the beneficial use of coal ash. The proposed regulations continue to authorize the beneficial use of coal ash for various purposes but add a variety of new and expanded requirements that must be met. For example, the proposed regulations include various analytical and testing requirements for coal ash, limit locations where coal ash may be beneficially used, impose expanded coal ash certification requirements, include new

performance standards for coal ash storage, impose extensive groundwater monitoring requirements at sites where coal ash is beneficially used, increase annual fees and include new performance standards for certain uses of coal ash. As such, the proposed regulations are likely to have a significant impact on those that generate coal ash as well as those that use coal ash for various purposes.

The preamble to the proposed regulations acknowledges that large amounts of coal ash has successfully been beneficially used under Pennsylvania's existing regulations. The preamble to the proposed regulations also estimates that the regulated community is saving at least \$220,000,000 per year by being able to beneficially use coal ash rather than having to dispose of coal ash in landfills. The thrust of the preamble suggests that the expected increase in costs to comply with the new regulations will be more than offset by the savings resulting from being able to continue to beneficially use coal ash. Public meetings regarding the proposed regulations are scheduled to take place in early December, and are open for public comment until December 22, 2009.

At the same time that Pennsylvania is moving forward with expanding its regulatory requirements regarding the beneficial use of coal ash, the U.S. Environmental Protection Agency ("EPA") is considering whether coal ash should be regulated as a hazardous waste. On the heels of the massive coal ash release from an impoundment in Tennessee in late 2008, EPA has focused on developing new standards for managing coal ash. According to a recent U.S. Government Accountability Office report to Congress regarding the status of EPA's efforts to regulate the disposal of coal combustion residues, EPA is considering an array of options, including regulating coal ash as a hazardous waste, continuing the current regulation of coal ash as a non-hazardous waste or adopting a hybrid approach where coal ash could be considered non-hazardous in certain circumstances and hazardous under other scenarios. Many of those in the regulated community are strongly opposed to the potential regulation of coal ash as a hazardous waste based on the lack of technical justification for such a determination and the chilling effect such a determination would likely have on the ability to beneficially use coal ash. EPA is expected to unveil its proposed regulations by the end of 2009.

## **Overhaul of Municipal and Residual Waste Regulations Suspended; More Limited Changes Anticipated**

by MICHAEL MELOY

Pennsylvania's multi-year efforts to consolidate and overhaul the existing municipal and residual waste regulations have come to a halt. In 2006, the Pennsylvania Department of Environmental Protection ("PADEP") began the daunting task of attempting to consolidate the municipal and residual waste regulations while maintaining separate requirements for the two distinct categories of non-hazardous wastes in Pennsylvania. In addition, PADEP included in this process numerous substantive changes to the existing regulations, many of which were quite controversial. PADEP worked with a number of organizations and stake-holder groups to solicit input regarding the proposed changes to the regulations.

PADEP expected during 2009 to present to the Pennsylvania Environmental Quality Board ("EQB") for approval a package of thousands of pages of proposed regulations. However, the process has ground to a halt. With a change in administration looming next year, prospects for moving forward with the proposed regulations in the near term appear to be remote.

Instead of proceeding with the massive regulatory overhaul that was originally envisioned, PADEP has indicated that it hopes to extract from the larger regulatory package several limited sets of proposed amendments to the municipal and residual waste regulations that can be considered by the EOB on an expedited basis. These proposed amendments are expected to include changes to Pennsylvania's regulations governing infectious and chemotherapeutic waste, and Pennsylvania's regulations governing the responsibilities of generators of residual waste.

Since 1992, generators of residual waste in Pennsylvania have been subject to extensive chemical analysis, record-keeping and paperwork requirements. PADEP has signaled that it is considering changes to the existing regulations that will eliminate certain of these requirements and streamline still other requirements. For example, PADEP has indicated that it plans to dispense with the need to prepare source reduction strategies. Accordingly, on balance, the proposed amendments to the residual waste generator requirements are likely to be viewed in a favorable light by the regulated community. However, whether the proposed amendments can be completed in time to make it through the regulatory process before the end of the current administration next year remains to be seen.

## Water

### **EPA Moving Forward on Cooling Water Intakes Standards**

by CHRISTOPHER BALL

In the latest step of a multi-tiered regulatory process enmeshed in legal challenges, the U.S. Environmental Protection Agency ("EPA") has indicated that it plans to propose a rule in mid-2010 regulating cooling water intake structures at thousands of power plants and manufacturing facilities across the nation.

The current rulemaking process follows an April 1, 2009 U.S. Supreme Court ruling, in which the Court reviewed EPA's use of cost benefit analyses when setting national performance standards for cooling water intake structures under section 316(b) of the Clean Water Act. In ruling that EPA could permissibly consider costs and benefits, the Court reversed an earlier ruling by the U.S. Court of Appeals for the Second Circuit that had greatly limited the Agency's discretion. The Supreme Court ruling also supported EPA's previous determination not to mandate the use of closed-cycle cooling water towers for the existing power plants using more than 50 million gallons per day of cooling water that were subject to the EPA rule at issue.

EPA subsequently asked the Court to remand the cooling water rule for agency reconsideration, and is concurrently reviewing a separate rule, issued in June 2006, that addressed cooling water intake structures at smaller power plants and other existing manufacturing facilities. While EPA had previously determined that uniform national cooling water intake structure standards were not warranted for the smaller power plants and existing manufacturing facilities, it has since indicated that the Obama Administration is seeking a comprehensive look at the regulation of all existing facilities under section 316(b), leaving the scope and framework of the anticipated rulemaking unclear.

## **Pennsylvania Proposes New Wastewater Treatment Requirements for Total Dissolved Solids**

by MARC GOLD and MICHAEL NINES

On November 7, 2009, the Pennsylvania Environmental Quality Board ("EQB") published for public comment proposed regulations that would establish significantly more stringent Total Dissolved Solids ("TDS") standards for certain wastewater treatment plant operations. Comments on the proposed regulations may be submitted until February 5, 2010.

High TDS wastewaters subject to the new regulations are defined as a "new discharge" of high TDS that did not exist on April 1, 2009, and include TDS concentration that exceeds 2,000 mg/l or a TDS loading that exceeds 100,000 pounds per day. The proposed regulation also extends to expanded or increased discharges from a facility in existence prior to April 1, 2009. If finalized in their current form, the proposed regulations would largely be implemented by the Pennsylvania Department of Environmental Protection ("PADEP") through the National Pollutant Discharge Elimination System ("NPDES") permit program.

Under the proposed regulations, high TDS effluent criteria have been established along with provisions for exceptions to the effluent criteria where industries are already subject to federal criteria for TDS, total chlorides, and total sulfates. In addition, the section establishes specific criteria for new sources of high TDS wastewater from fracturing, production, field exploration, drilling, or completion of oil and gas wells (e.g., the Marcellus Shale formation). The proposed high TDS effluent requirements for new discharges are as follows:

- discharge may not contain more than 500 mg/l of TDS as a monthly average;
- discharge may not contain more than 250 mg/l of total chlorides as a monthly average; and
- discharge may not contain more than 250 mg/l of total sulfates as a monthly average.

As a result of these proposed regulations, new or increased discharges will be required to install advanced treatment (e.g., reverse osmosis or ultra filtration) to meet the effluent requirements. PADEP projects that the costs for treatment of high TDS wastewaters would be approximately \$0.25/gallon. New or expanded high TDS wastewater sources will not be permitted under the proposal unless the applicant proposes to install adequate treatment of TDS by January 1, 2011.

MGKF plans to attend a series of public hearings that the PADEP will be holding in December 2009. If you have questions or concerns regarding the proposed regulations or would like to submit comments to the EQB, either individually or as part of a group, please contact Marc Gold ([mgold@mgkflaw.com](mailto:mgold@mgkflaw.com)) or Michael Nines ([mnines@mgkflaw.com](mailto:mnines@mgkflaw.com)) at (484) 430-5700.

## **New Pennsylvania Stormwater Rules are Proposed**

**Also under SITE DEVELOPMENT & BROWNFIELDS REDEVELOPMENT**

by BRIDGET DORFMAN

On August 29, 2009, the Pennsylvania Environmental Quality Board ("EQB") published proposed regulations for public comment that, if finalized in their current form, would significantly change the current rules governing erosion and sedimentation control and stormwater management in Pennsylvania. Developers, farmers, land owners and anyone involved with earth disturbance activities (e.g., land clearing, grading, soil stockpiling, oil and gas activities, or any other human activity that disturbs the land surface) will be affected if these proposed regulations are adopted. The proposed changes would largely be implemented by county conservation districts and the Pennsylvania Department of Environmental Protection ("PADEP") under the National Pollutant Discharge Elimination System ("NPDES") permit program. The proposed changes would require: (1) the imposition of mandatory riparian forest buffers in areas 150 feet from each side of surface waters classified as Exceptional Value, (2) the submission of a Post-Construction Stormwater Management Plan with a NPDES permit application for stormwater discharges during construction activities, (3) the creation of a new "permit-by-rule" option for certain low impact projects, and (4) other important administrative changes, including an increase in permit application fees. The public comments period on the proposed rulemaking closed November 30, 2009, and we anticipate that the final regulations will be issued sometime in Spring 2010.

## **EPA Seeks Comments on a Proposed Information Collection Request on Stormwater**

**Also under SITE DEVELOPMENT & BROWNFIELDS REDEVELOPMENT**

by BRIDGET DORFMAN

The U.S. Environmental Protection Agency ("EPA") has committed to propose a rule to control stormwater from newly developed and redeveloped sites by November 2012. In support of this anticipated rulemaking EPA published a notice in the Federal Register on October 30, 2009, announcing its intent to submit a new Information Collection Request ("ICR") regarding current stormwater management practices to the Office of Management and Budget ("OMB") for review and approval. The ICR will be comprised of three separate questionnaires to be sent to the following three groups: (1) members of the homebuilding and construction industries, as identified by certain North American Industry Classification System ("NAICS") codes; (2) owners or operators of municipal separate storm sewer systems ("MS4s"); and (3) states and territories. Responses to the questionnaires will be mandatory, and EPA estimates that it will take each recipient fifty-three hours on average to respond to the questionnaire. EPA is not distributing the questionnaires or requiring responses at this time, but EPA will be accepting public comments on the need for and the scope of the proposed ICR until December 29, 2009. EPA will then review the public comments and submit the final ICR package to OMB for review and approval. The public will also have the opportunity to submit additional comments directly to OMB.



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