MANKO, GOLD, KATCHER & FOX, LLP May 2010

The design has changed, but the goal remains the same.

As part of celebrating our 20th anniversary, MGKF has created a fresh, new look for our Client Alert *and other updates. As always, we remain committed to keeping you ahead of the curve by informing you about regulatory, legislative, and judicial developments that affect your business, in areas as diverse as Marcellus Shale, sustainability, Superfund and toxic tort litigation, and climate change.*

We also recently celebrated the 5th anniversary of our Environmental Community Service Award with program partners NBC 10 and Wawa. We are proud to have contributed $50,000 to ten area middle school and high school programs that emphasize environmental awareness and community involvement.

We hope you enjoy our "new" design and our "twenty year old" commitment to providing you timely, critical information.

Air

EPA Issues Final GHG Emission Rules for Vehicles and Stationary Sources

by TODD KANTORCZYK

Despite the provisions in the recently released American Power Act (and other pending legislation) that would strip the U.S. Environmental Protection Agency ("EPA") of its ability to regulate greenhouse gases ("GHGs") under its current Clean Air Act authority, EPA has continued to move forward to propose and finalize a number of GHG regulations. At the beginning of April, EPA and the National Highway Traffic Safety Administration ("NHTSA") issued a final rule establishing a carbon dioxide standard for new cars and light trucks starting with the 2012 model year. The final rule was a compromise among EPA, the automobile industry, California, and environmental groups as part of EPA's efforts to address its obligations in the wake of the 2007 Supreme Court decision in *Massachusetts v. EPA*. At about the same time, EPA issued a decision on its reconsideration of the "Johnson Memorandum". The Johnson Memorandum addressed when air pollutants become “subject to regulation” for purposes of triggering the Clean Air Act's Prevention of Significant Deterioration ("PSD") and Title V programs, which require permits and control technology for major stationary sources. In a somewhat surprising move, EPA decided an air pollutant does not become “subject to regulation” until actual compliance with a regulation requiring actual control is required, rather than when the rule is promulgated. Thus, for purposes of the final motor vehicle rule, GHGs do

not become "subject to regulation", triggering PSD and Title V applicability, until the carbon dioxide control requirements kick in starting with the 2012 model year.

EPA's reconsideration of the Johnson Memorandum paved the way for EPA to provide additional flexibility with respect to the final GHG "Tailoring Rule" that EPA issued on May 13. This rule "tailors" the applicable GHG thresholds for PSD and Title V applicability from the 250 and 100 ton thresholds currently in the Clean Air Act in an attempt to limit the number of "major" sources that would otherwise be subject to these permitting programs if these thresholds were applied to GHG emissions. The final Tailoring Rule phases in PSD and Title V permitting requirements for GHG stationary sources in two steps. First, from January 2011 through June 2011, only sources already subject to PSD or Title V permitting requirements would be considered major sources subject to Title V or PSD requirements for their GHG emissions. Furthermore, only projects that result in increases of 75,000 tons per year of GHG emissions (measured as CO_2 equivalent or "CO_2e") would be considered "significant" thereby requiring emitters to determine and implement Best Available Control Technology ("BACT") for their GHG emissions. In step two, which starts July 2011 and extends through June 2013, sources that emit greater than 100,000 tons per year of GHGs would be considered "major" for purposes of the Title V and PSD programs, even if they would not otherwise be subject to these programs due to emissions from other pollutants. And modifications at these facilities that result in increases of at least 75,000 tons per year of GHGs would be subject to the PSD program even if the modifications do not result in significant emission increases of other pollutants. EPA estimates that these step two provisions will require about 550 new sources to obtain Title V permits and will result in about 900 additional PSD permitting actions.

The final Tailoring Rule also includes a third step whereby EPA states that it will undertake another rulemaking that will conclude by July 2012 and address phasing in Title V and PSD permitting requirements, or exclusions, for smaller GHG sources. This additional rulemaking will not require permitting for sources with GHG emissions below 50,000 tons per year, and any smaller sources that are subject to this future rule will not require permits until at least April 30, 2016. In addition, the final Tailoring Rule commits EPA to a study of any remaining GHG permitting issues for smaller sources, including the possibility that streamlining and/or general permits will allow for additional sources to be phased into the PSD and Title V permitting programs for GHGs.

Importantly, the final Tailoring Rule does not establish BACT requirements for GHGs. Late last year, EPA convened an advisory committee to examine issues associated with establishing BACT for GHGs. That group released its initial report earlier this year, but the group did not come to consensus on a number of issues. Since that time, EPA has indicated that BACT for GHGs would likely involve energy efficiency measures (as opposed to carbon capture and sequestration or other technologies). The final Tailoring Rule states that EPA plans to issue guidance and other information on BACT for GHGs by the end of 2010.

Finally, in March, EPA proposed rules that would subject three additional industrial sectors—oil and natural gas wells, carbon sequestration facilities, and facilities that produce and use fluorinated gases—to EPA's GHG reporting rule, which requires sources that emit 25,000 tons per year of GHGs to monitor and report their annual GHG emissions to EPA. More recently, EPA sent to the U.S. Office of Management and Budget proposed rules that would subject four more

sectors—industrial landfills, wastewater treatment facilities, underground coal mines, and magnesium production facilities—to the GHG reporting rule.

Senate Climate Change Legislation Released Amid Uncertain Prospects

by TODD KANTORCZYK

On May 12, after months of negotiations and some false starts, Senators John Kerry and Joe Lieberman finally unveiled climate change legislation, called the American Power Act, that they hoped would garner enough votes to clear the U.S. Senate. Recent events, however, have raised additional doubts as to whether this "compromise" legislation will be passed by the Senate in 2010. By the beginning of April, negotiations with industry representatives and other senators on key points of the bill had progressed well enough that the three original drivers behind the bill—Senators Kerry, Lieberman and Lindsey Graham—had announced that they would unveil the new bill on April 26. On April 24, however, Senator Graham abruptly withdrew his support for the bill citing the Democrats' efforts to push immigration reform legislation ahead of the climate and energy bill. Senator Graham's withdrawal forced the cancellation of the April 26 announcement, while Senators Kerry and Lieberman worked to bring Senator Graham back to the table. Senator Harry Reid has since announced that immigration reform legislation is on hold for now, but Graham has not yet announced his support for the bill and has publicly expressed doubts as to whether the bill could pass.

In addition, the BP oil spill in the Gulf of Mexico raises additional obstacles for the bill. It was originally expected that the bill would contain provisions allowing for the expansion of offshore drilling to entice moderate Republicans to support the bill. In the wake of the oil spill, however, three prominent Democrat coastal Senators, Senators Menendez and Lautenberg from New Jersey and Senator Nelson from Florida, announced that they would oppose any bill that expands offshore drilling. While the American Power Act continues to include incentives for offshore drilling, the drafters added provisions that allow individual states to prohibit offshore drilling within 75 miles of their coastlines. Senator Nelson has recently indicated that these provisions satisfy his concerns.

Other provisions of the 987 page discussion draft are consistent with what has been reported over the past few weeks. The bill is designed to reduce greenhouse gas ("GHG") emissions to 20 percent below 2005 levels by 2020 and 80 percent below by 2050 primarily through a cap and trade mechanism. The bill sets a price floor for allowances of $5 per ton and a ceiling of $25 per ton, both of which increase at rates keyed to inflation. Utilities would not be subject to the program until 2013 with other industries not subject until 2016. Oil and gas companies would also be required to purchase allowances, but outside of the carbon trading market, in an effort to reduce volatility in that industry. The bill also precludes EPA and state regulation of GHG emissions so long as industries subject to the cap are meeting the required reductions. In addition, the bill includes a number of incentives for construction of new nuclear power plants and the deployment of carbon capture and storage technology for coal fired power plants. Finally, the draft legislation includes provisions that would prohibit EPA from regulating GHGs under various provisions of the Clean Air Act, and at the same time prohibit individual states from enforcing their own cap and trade programs (*e.g.*, the Regional Greenhouse Gas Initiative, commonly referred to as "RGGI").

EPA Releases Proposed Boiler MACT and Related Rules

by CAROL McCABE

In response to the U.S. Court of Appeals for the D.C. Circuit's vacatur of the maximum achievable control technology for boilers (the "Boiler MACT") almost three years ago, the U.S. Environmental Protection Agency ("EPA") has proposed a revised version of the Boiler MACT and associated rules that will impact a broad segment of combustion sources. Specifically, on April 29, 2010, EPA took the following actions: (1) EPA proposed a rule that would govern the types of non-hazardous materials that are solid waste, and are therefore subject to the Commercial and Industrial Solid Waste Incineration Rules; (2) EPA proposed emission standards for area source commercial, institutional and industrial boilers; (3) EPA proposed the new Boiler MACT governing major source commercial, institutional and industrial boilers; and (4) EPA proposed new emission standards for commercial and industrial solid waste incineration units. These rules are long-awaited by state air permitting agencies and industry alike, and will be subject to comment for a forty-five day period after publication in the Federal Register

EPA Takes Action on New Source Review Issues

by CAROL McCABE

In a series of recent actions, the U.S. Environmental Protection Agency ("EPA") has advanced its efforts to reconsider certain aspects of new source review ("NSR") rulemakings generated at the end of the Bush administration. First, on March 31, 2010, EPA issued an 18-month stay of the Fugitive Emissions Rule, which would require the inclusion of fugitive emissions in calculating modification project emission increases only for specific source categories identified in the federal regulations. EPA has indicated that it will propose, take comment on, and finalize a new rulemaking which would likely revert to EPA's prior policy of including fugitive emissions in calculating emission increases for all sources. Second, in a proposed rulemaking issued on April 15, 2010, EPA indicated its intent to revoke the NSR Aggregation Rule, which established certain presumptions with respect to the aggregation of emissions from nominally separate projects under NSR. EPA will thereby return to its prior case-by-case approach for the aggregation of emissions from nominally separate projects. Finally, on February 11, 2010, EPA published a proposed rulemaking that would repeal the PM2.5 Grandfathering Provision in states implementing the federal prevention of significant deterioration ("PSD") program, and would end the PM-10 Surrogate Policy in states with EPA-approved state implementation plans. Pursuant to this rulemaking, pending and newly filed PSD applications would be required to quantify PM2.5 emissions, rather than using PM-10 as a surrogate.

Energy

Pennsylvania House Bill Seeks to Increase the Use of Alternative Energy

by BRYAN FRANEY

On April 23, 2010, State Representative Eugene DePasquale introduced House Bill 2405 ("H.B. 2405"), which would significantly increase the supply of alternative energy in Pennsylvania.

H.B. 2405 would amend Pennsylvania's Alternative Energy Portfolio Standards Act to increase the percentage of electricity that Pennsylvania utilities must supply from "Tier 1" sources from 8 percent to 15 percent by 2024. Tier 1 sources include solar, wind, biologically derived methane, and biomass. H.B. 2405 would also increase the percentage of electricity that must be derived from solar power from 0.5 percent to 3 percent by 2024 (commonly referred to as the "solar share" or "solar carve-out").

H.B. 2405 is substantially similar to House Bill 80 ("H.B. 80"), which was introduced by State Representative Greg Vitali in March 2009. H.B. 80 would have set the Tier 1 requirement at 20 percent while the solar carve-out was an identical 3 percent. Because of these similarities, H.B. 2405 will likely face the same strong opposition as H.B. 80. Opponents of H.B. 80, including several business and industry groups, argued that the government should not create markets for only certain types of energy, particularly higher cost energy sources such as solar. On the other hand, bill proponents argued that the increased portfolio standards send a strong market signal to investors in alternative energy resources in Pennsylvania, while simultaneously reducing greenhouse gas emissions and decreasing dependence on foreign energy sources.

New Jersey Legislative Efforts to Promote Alternative Energy

by CHRISTOPHER BALL

Under New Jersey's renewable portfolio standard, the State mandated that 20 percent of its energy will be renewable by 2020. With that commitment as a backdrop, New Jersey Governor Chris Christie has described building the State's energy industry as one of his administration's top priorities. To make New Jersey a "magnet for renewable energy manufacturers," Governor Christie has called for tax incentives for clean energy manufacturers and regulatory changes to streamline the permitting of alternative energy projects. A recently passed bill and several pending pieces of legislation reflect the New Jersey Legislature's similar focus on increasing alternative energy incentives and removing current obstacles to renewable energy development.

On April 22, 2010, the Governor signed into law a bill exempting solar panels from being calculated as an impervious surface for purposes of regulations governing municipal land use, stormwater management, coastal and waterfront development, and Pinelands and Highlands activities. The law, which enjoyed notable bi-partisan support, removes a significant impediment to solar power projects because the prior regulatory framework frequently limited the total amount of land that could be developed with impervious surface. Where the full square footage of solar panels could previously be considered impervious, the new law exempts all but the base or foundation of a solar panel from the impervious designation, enabling the installation of elevated solar panels more widely in New Jersey, and potentially easing the permitting requirements facing solar projects in certain areas such as the Pinelands.

Legislation currently pending in both the New Jersey Senate and Assembly could further promote alternative energy development by joining New Jersey with other states including California, New York and Colorado in enacting a "Property Assessed Clean Energy" or "PACE" program. The proposed PACE program in New Jersey would create a financing mechanism for municipalities wishing to facilitate the purchase of solar energy systems by homeowners or groups of property owners. Through PACE programs, renewable energy improvements are

typically funded by taxable municipal bonds or other municipal debt, repaid by the property owner over an extended period of time through a special assessment charged to their property tax bill. By enabling property owners to pay for renewable energy projects through low, fixed assessments spread out over years, PACE programs greatly reduce the upfront capital requirements that frequently deter homeowners from solar panel installation. The pending PACE program legislation sponsors include Senator Bob Smith, Chair of the Senate Environment and Energy Committee where the Senate bill is currently being considered.

On May 13, 2010, the Senate Environment and Energy Committee considered the referenced legislation and heard testimony from the New Jersey Department of Environmental Protection Commissioner Robert Martin on the State's environmental priorities. Like the Governor, Commissioner Martin expressed support for continued prioritization of alternative energy development and for additional energy-oriented legislation, citing the Department's work on legislation to help the financing of offshore wind energy projects as an example of its recent activities and accomplishments.

Litigation

Third Circuit Vacates $13 Million Judgment under CERCLA for Failure to Meet Burden of Proof

by KATE CAMPBELL

On April 12, 2010, the U. S. Court of Appeals for the Third Circuit decided two issues of first impression at the appellate level concerning the scope of recovery for potentially responsible parties ("PRPs") under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), filling certain gaps left open by the U.S. Supreme Court's seminal 2007 decision in *U. S. v. Atlantic Research*. The opinion highlights the complexity of the interaction between the two cost recovery provisions of CERCLA -- § 107(a) and § 113(f) -- and underscores the significant ramifications that can follow from a determination as to which of the two provisions is available to a private cost recovery litigant.

The case, *Agere Systems Inc. v. Advanced Environmental Technology Corp.*, is an appeal from a judgment entered against Carpenter Technology Corporation ("Carpenter") in the U.S. District Court for the Eastern District of Pennsylvania concerning the Boarhead Farms Superfund site (the "Site"). In that action, the District Court entered judgment against Carpenter for 80 percent of the costs incurred and to be incurred to investigate and remediate environmental contamination at the Site.

After the trial and judgment, Carpenter retained MGKF as appellate counsel. The appeal raised numerous issues, including whether the plaintiffs' claims were in part barred by the applicable statute of limitations and whether the district court improperly devised and inconsistently applied its equitable allocation. However, the appeal centered largely on the procedural circumstances in which PRP plaintiffs can successfully assert a § 107(a) cost recovery claim or a § 113(f) contribution claim. Ruling on two issues of first impression post-*Atlantic Research*, the Third Circuit held that: (1) a PRP that performs a cleanup pursuant to a consent decree with the U.S. Environmental Protection Agency ("EPA"), and is therefore entitled to statutory contribution protection under § 113(f)(2) of CERCLA, is limited to a contribution claim under §

113(f) and cannot also assert a claim for joint and several liability under § 107(a); and, (2) a PRP that has not been sued by or settled with EPA, but that nonetheless contributes funds toward a cleanup pursuant to a private settlement agreement with other PRPs, has "incurred" its own response costs and, thus, can assert a § 107(a) claim under *Atlantic Research*.

In the case before the Court, four of the five plaintiffs had been sued by EPA and agreed to perform a cleanup of the Site pursuant to consent decrees. According to the Court, those parties were therefore limited to contribution claims under § 113(f) and could not also rely upon the joint and several liability scheme under § 107(a). As a consequence of its legal determination that the consent decree signatories were limited to contribution claims under § 113(f), the Court then held that those parties bore the burden of proving each party's equitable share of liability at the Site, including their own. After analyzing the factual record before it, the Court concluded that the consent decree signatories did not meet this burden because they failed to introduce competent volumetric evidence for several parties. The Court then vacated the $13 million judgment against Carpenter and remanded the case to the district court for further proceedings. Petitions for rehearing have been filed and are currently pending before the Court of Appeals.

Site Remediation

New Jersey Cleanup Laws May be Trumped Again by Federal Citizen Suit

Also under LITIGATION

by BRUCE KATCHER

In *Interfaith Community Organization Inc. (ICOI) v. PPG Industries, Inc.*, a New Jersey citizen's group has fended off a challenge to its use of a federal citizen suit under the imminent and substantial endangerment provision of the federal Resource Conservation and Recovery Act ("RCRA") to secure a more stringent remedy than was agreed to between the New Jersey Department of Environmental Protection ("NJDEP") and the responsible party under state cleanup laws. The cleanup was embodied in a state court consent judgment entered at the time the federal suit was filed. In its decision, the court denied PPG's motion for summary judgment or alternatively for abstention or a stay.

At the time the suit was filed, PPG and NJDEP had just concluded negotiations over the consent judgment, entered in a case filed by NJDEP in 2005, which required the remediation of chromium wastes at multiple former chromium production sites, including a site on Garfield Street in Jersey City (the "Site"). The consent judgment required a cleanup of soils and sources of contamination in compliance with all applicable statutes, laws, and regulations, including the NJDEP's Chromium Policy, pursuant to which the most stringent cleanup level was 20 parts per million (ppm). Among other things, NJDEP released its RCRA claims against PPG.

In its suit, the citizens group alleged an imminent and substantial endangerment pursuant to RCRA at the Site, and, according to the court, sought full delineation of chromium hazards, permanent removal of all contaminated soils, remediation of indoor air contamination and complete remediation of contaminated groundwater. Plaintiffs apparently took the position that the 20 ppm soil remediation standard was inadequate and that a standard of 1 ppm, as reflected in a NJDEP risk assessment for hexavalent chromium finalized in April 2009, was the appropriate standard.

PPG asserted multiple grounds why the federal court should defer to the state consent judgment and dismiss the suit, including mootness, res judicata and full faith and credit or, in the alternative, abstain from taking jurisdiction of or stay the suit. The court rejected each of PPG's assertions. In summary, it found that in allowing a citizen suit under RCRA, (1) Congress had afforded plaintiffs a remedy that was not available in state court, (2) that the federal courts had exclusive jurisdiction over such an action, which was therefore not precluded by a state court consent judgment, and (3) that the policies underlying abstention (primarily the desirability of avoiding piecemeal litigation and the disruption of an important and complex state regulatory scheme or deferring to administrative bodies with special competence) were not so compelling or clearly applicable as to support the dismissal of the case.

ICOI v. PPG is somewhat reminiscent of the 2005 decision in *ICOI v. Honeywell International, Inc.* In that case, ICOI successfully used RCRA to require Honeywell to implement a large scale soil excavation remedy in lieu of a remedy using engineering and institutional controls, implementation of which had allegedly been long delayed by the responsible party. While the ultimate outcome of *ICOI v. PPG* has yet to be determined, the court acknowledged that PPG could ultimately be subject to a more stringent remediation standard than applies under the consent judgment. While it viewed the potential for inconsistent remedies as "not a significant concern," it does appear to present a significant concern to PPG, which must decide how to proceed under its state consent judgment in view of the possibility of a different federal outcome. To further confuse matters, the NDJEP announced last June that it would initiate the process of developing a new final soil remediation standard for chromium at the start of 2010, and it is unclear how or whether that process will proceed under the new administration and how the outcome, if any, might affect the remedy agreed to by PPG under the consent judgment.

While the outcome of *ICOI v. PPG* may be largely dictated by *ICOI v. Honeywell,* it is troubling that the federal district court was prepared to second guess the outcome of NJDEP's remedy determination, which was embodied in a court order entered contemporaneously with the filing of ICOI's citizen suit. If anything, the case suggests using extreme caution in attributing finality to an NDJEP remedy determination where there is a realistic risk of a federal citizen suit being brought to secure a more stringent remedy.

Sustainability

Legal Protections and Incentives for Sustainable Businesses

by MEREDITH DuBARRY HUSTON

In response to increasing corporate interest in sustainability and social responsibility, "Benefit Corporation" legislation enacted in Maryland on April 13 creates a new class of corporations that must generate social or environmental benefits in addition to profits. Similar legislation has been proposed and is being considered in Vermont. Benefit Corporation measures are also under consideration in other states, and momentum is reportedly building for introduction of a similar measure in the Pennsylvania General Assembly.

Under the enacted Maryland legislation, Benefit Corporations are obligated to consider environmental, community, or employee interests in making business decisions in addition to shareholder financial interests. Benefit Corporations thus have increased protection from shareholder lawsuits for business decisions that favor sustainability principles over profits. Benefit Corporation charters must define their corporate values and annual reports prepared by Benefit Corporations must comply with recognized third-party sustainability standards including, for example, the Global Reporting Initiative.

Although Pennsylvania has yet to propose Benefit Corporation legislation, businesses in Philadelphia that are certified as sustainable businesses by the City's Office of Sustainability are now eligible for the country's first financial incentive for sustainable businesses. The Sustainable Business Tax Credit provides eligible businesses with a tax credit of $4,000 to be used against the gross receipts portion of the City's Business Privilege Tax. The tax credit is in effect for tax years 2012 through 2017, after which it will be reviewed for possible extension.

Waste

EPA Issues Proposal to Regulate Coal Ash

by BRETT SLENSKY

On May 4, 2010, the U.S. Environmental Protection Agency ("EPA") issued its long-awaited draft proposal to regulate the disposal of coal combustion residuals ("CCRs," more commonly referred to as coal ash) under the Resource Conservation and Recovery Act ("RCRA"). The proposal represents EPA's first effort to regulate the disposal of coal ash at the national level and includes two alternative regulatory approaches for these materials when destined for disposal in a landfill or surface impoundment: a regulatory scheme enacted under RCRA Subtitle C and one enacted under RCRA Subtitle D.

Under the Subtitle C proposal, the regulatory framework would generally entail the development of state or federal permit programs, include requirements for related storage, manifest, transport, and disposal activities, and include mechanisms for corrective action and financial responsibility. The Subtitle D proposal would generally be limited to the establishment of national performance standards for coal ash landfills and surface impoundments. Notably, as part of the proposed rule, EPA is not proposing to regulate the beneficial use of coal ash;

however, the agency is seeking public comment on certain beneficial use issues and topics (e.g., the appropriate means to characterize beneficial uses that are both protective of human health and the environmental and provide benefits, information on successful state beneficial use programs, etc.), which could lead to future regulation of this important activity.

EPA released its proposed rule as an unofficial pre-publication version. The official draft proposal is expected to be published in the Federal Register in the near future. Given the numerous tensions and divisions between those on both sides of this issue and the important policy choices that EPA will weigh as it crafts a final rule, extensive public involvement and comment on the draft proposal is anticipated.

Water

NJDEP Issues Administrative Order Extending WMP Submission Deadline

by BRIDGET DORFMAN

On March 24, 2010, the New Jersey Department of Environmental Protection ("NJDEP") issued an administrative order (the "Order") that immediately extended the submission deadline for all wastewater management plans ("WMPs") until April 7, 2011, a move with significant ramifications for New Jersey developers. During the extension period, NJDEP will work with the designated wastewater management planning agencies at the county and municipal levels to assist in the development of WMPs on an expedited basis. Pursuant to the Order, NJDEP has also committed not to withdraw any wastewater service area designation prior to April 7, 2011. Further, any property that is already included in an adopted sewer service area in an existing WMP will not be removed from a future sewer service area as part of an updated WMP if the property owner can demonstrate that the project has the approvals required by the regulations. Finally, NJDEP has provided for greater public participation in the wastewater service area delineation process. All of these changes are aimed at improving the quality of WMP submissions and eliminating uncertainty regarding the potential withdrawal of wastewater service area designations, which is a source of concern to both public and private entities. New Jersey property owners should evaluate their projects in light of this Order and determine whether their sewer service area affects the development potential of their properties.

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