CLIENT ALERT
on the environment
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Air

Senate Fails to Pass Climate Bill while Challenges Mount to EPA GHG Rules

by TODD KANTORCZYK

While some anticipated earlier this year that the U.S. Senate would pass climate change legislation this summer, efforts to garner sufficient support to bring any climate change bill to a vote on the Senate floor before the August recess failed. In May, Senators Kerry and Lieberman unveiled an economy-wide cap and trade program for greenhouse gases ("GHGs") as part of a broader bill entitled the American Power Act ("APA"). Over the next month, however, it became clear that the Senators would not be able to secure a filibuster-proof majority for an economy-wide cap and trade program. Accordingly, negotiations began among utilities and environmental groups to establish a more limited cap and trade program for the utility sector through a scaled-down version of the APA. Once utility groups began pushing for additional relief related to the allocation of free GHG allowances and New Source Review provisions under the Clean Air Act, however, it became clear that a compromise bill would not be reached before the timelines imposed by Senator Reid for climate-change legislation to be introduced before the August recess. While Senator Reid left open the possibility of introducing climate-change legislation in September or after the November elections, the prospects of such legislation remains murky, especially in light of the Senate's failure to pass an oil spill/energy bill that was stripped of cap and trade and renewal energy standard programs before the August recess.

In the face of the Senate's inability to move forward on climate change legislation, the U.S. Environmental Protection Agency ("EPA") has continued to move forward to implement its "Tailoring Rule," which would regulate GHG emissions from large sources using existing authority under the Clean Air Act starting in 2011. The Tailoring Rule, which was published in the Federal Register on June 3, 2010, "tailors" the applicability threshold for GHGs under the Prevention of Significant Deterioration ("PSD") and Title V permitting programs so that only the largest GHG sources would be subject to these programs (for more detail on the specifics of the final Tailoring Rule, click here). As part of the Tailoring Rule, EPA asked states to inform EPA whether they believed that their current regulations could accommodate implementation of the Tailoring Rule without revisions. Ultimately, thirteen states either indicated that they could not implement the Tailoring Rule (or in the case of Texas, stated in a scathing letter that they refused to implement the rule) or failed to meet the August 2nd deadline. EPA recently announced that it would proceed with an expedited "SIP-Call" that would require those thirteen

– more –

states to submit proposed regulatory revisions to EPA for review. EPA on the same day proposed a Federal Implementation Plan that would be imposed upon any state that could not (or would not) implement the Tailoring Rule starting January 2011.

Despite the activity surrounding the Tailoring Rule, it remains unclear as to whether and how it will ultimately be implemented. Dozens of lawsuits are currently pending against EPA related to the Tailoring Rule and other agency actions related to GHG emissions that serve as the foundations of the Rule. In addition, bills are pending in both houses of Congress that would either delay or strip EPA's authority to regulate GHGs under the current provisions of the Clean Air Act, and Senator Reid has reportedly indicated that one of the bills that delays EPA's authority, sponsored by Senator Jay Rockefeller, will be brought to the floor for a vote by the end of 2010. Furthermore, both the climate change bill that was passed in the House, the American Clean Energy and Security Act, and the proposals that have been circulated in the Senate contain provisions that would limit EPA's authority to proceed with the Tailoring Rule and other types of GHG regulations proposed under the Clean Air Act. Finally, the Climate Change Work Group, convened by EPA to provide recommendation as to what should be considered Best Available Control technology ("BACT") and imposed upon sources subject to the PSD portions of the Tailoring Rule, is due to issue its final report by the end of the year. Preliminary reports indicate that the recommendations will focus on energy efficiency measures as opposed to fuel switching or other control technologies such as carbon capture and storage.

EPA Issues Proposed Rule to Identify Non-Hazardous Secondary Materials Burned in Combustion Units as Solid Wastes

by KATE VACCARO

On June 4, 2010, the U.S. Environmental Protection Agency ("EPA") published a proposed rule in the Federal Register (the "Proposed Rule") to identify which non-hazardous secondary materials burned as fuels or ingredients in combustion units constitute solid wastes under the Resource Conservation and Recovery Act ("RCRA"). The determination of whether non-hazardous secondary materials constitute solid wastes under RCRA is important because it determines how combustion units are regulated under the Federal Clean Air Act ("CAA"). That is, combustion units that burn non-hazardous secondary materials that are classified as solid wastes under RCRA are regulated as commercial or industrial incineration units under Section 129 of the CAA. By contrast, combustion units that burn non-hazardous secondary materials that are classified as non-wastes under RCRA are regulated as commercial, industrial, or institutional boilers under Section 112 of the CAA. CAA Sections 112 and 129 impose different emission limits and other standards on affected units and EPA is proposing air emission requirements pursuant to these statutory provisions concurrent with the Proposed Rule.

The Proposed Rule would substantially narrow the current category of non-hazardous secondary materials that would be identified as non-wastes under RCRA. Specifically, under the Proposed Rule, non-hazardous secondary materials burned in combustion units are generally identified as solid wastes unless they meet certain exemption criteria. These criteria take into account a number of factors, including but not limited to: (a) whether the non-hazardous secondary materials remain within the control of the generator; (b) whether they are used as an

ingredient in a manufacturing process; (c) whether they have been sufficiently processed; and, (d) whether they are considered discarded and indistinguishable from a fuel product. The comment period for the Proposed Rule closed on August 3, 2010.

PADEP Continues Work to Finalize Air Quality Permitting Exemption Guidance

by MIKE NINES

On May 29, 2010, the Pennsylvania Department of Environmental Protection ("PADEP") re-issued its Air Quality Permit Exemptions Draft Technical Guidance Document for public comment. Pursuant to 25 Pa. Code 127.14(d), the PADEP may establish a list of sources and physical changes meeting permitting exemption criteria. This guidance document was re-issued and subject to public comment based on additional changes to the originally proposed revisions of November 22, 2008.

Of note, PADEP is proposing revisions to this guidance document to include more restrictive exemption criteria for oil and gas exploration and production facilities and operations under Category No. 38. The owners and operators of internal combustion engines, flares, and/or liquid storage tanks not meeting the requirements identified in Category No. 38, are required to submit a request for determination ("RFD") to the department. If the RFD is not approved by PADEP, an application seeking authorization to use a general permit or plan approval must be submitted to the appropriate PADEP regional office.

Additional changes include the requirement to submit an RFD for internal combustion engines, and all exempted internal combustion engines regardless of size at a facility with combined nitrogen oxide ("NOx") emissions less than or equal to 100 lbs/hr, 1,000 lbs/day, 2.75 tons during the ozone season (i.e., the period beginning May 1st of each year and ending on September 30th of the same year). In addition, annual NOx emissions at the facility must not exceed 6.6 tons on a 12-month rolling basis. This category of emission sources would not include peak shaving engine generators. In the event that internal combustion engines are exempted from permitting through the RFD process, the owner or operator must maintain an operating log that includes the dates the unit operated, total operating hours per day, and total number of days of operation per year.

The proposed revisions to the guidance document also provide a conditional exemption for uncontrolled volatile organic compound ("VOC") emissions at a single facility less than or equal to 2.7 tons per year. VOC emissions containing hazardous air pollutants ("HAPs") at the facility must be less than 1,000 lbs/yr of a single HAP or one ton per year of a combination of HAPs. VOC emissions from sources containing HAPs including polychlorobiphenols, chromium, mercury, lead, polycyclic organic matter or dioxins and furans will not be eligible for the limited VOC exemption.

Although the public comment period officially closed on July 18, 2010, the PADEP anticipates that the final document will be available prior to the end of 2010.

Energy

Offshore Wind Energy Moves One Step Closer in New Jersey

by BRYAN FRANEY

On August 19, 2010, Governor Chris Christie signed the bipartisan Offshore Wind Economic Development Act (the "Act") (S.B. 2036), which is expected to support the initial deployment of offshore wind energy projects off the New Jersey coast. New Jersey is competing with several other states in the region, including Delaware, Rhode Island, Massachusetts, and New York, to be the first to construct a large offshore wind farm.

To attract project developers and related businesses, the Act provides several incentives for offshore wind energy projects. First, the Act directs the Board of Public Utilities ("BPU") to develop an Offshore Wind Renewable Energy Certificate ("OREC") program that supports at least 1,100 megawatts of generation from qualified offshore wind projects. The OREC program will require New Jersey electric suppliers (electric power suppliers and basic generation service providers) to supply a certain percentage of electricity from offshore wind resources, as they are already required to do for solar and other types of renewable energy. With construction costs estimated to exceed $10 billion for a proposed 300-350 megawatt wind farm, supporters of the Act argue that ORECs are absolutely essential to the viability of offshore wind power in New Jersey.

Second, the Act authorizes the New Jersey Economic Development Authority ("EDA") to provide up to $100 million in corporation business tax credits for the development of "qualified wind energy facilities" in "wind energy zones." To be eligible for the credit, a business must, among other things, make or acquire capital investments of at least $50 million and employ at least 300 new full-time employees. The Act also authorizes the EDA to utilize proceeds from the sale of greenhouse gas allowances under the Regional Greenhouse Gas Initiative, to support qualified offshore wind projects and related businesses in New Jersey.

Litigation

State DOT Liable as Superfund Arranger for Design and Construction of Highway Stormwater System Known to Convey Contaminated Stormwater

by JOHN GULLACE

In the recent *U.S. v. WSDOT* case in the Ninth Circuit, the United States asserted claims under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") against the Washington State Department of Transportation ("WSDOT") for the discharge of contaminated stormwater from highways into the Commencement Bay-Nearshore Superfund Site. On June 7, 2010, the U.S District Court for the Western District of Washington ruled on cross-motions for summary judgment that WSDOT is an arranger under CERCLA because it designed and constructed a highway stormwater system with knowledge that the system would convey contaminated stormwater from the highways to nearby waterways.

The decision is one of the first to find a governmental entity liable as an arranger by virtue of owning a stormwater system. If followed by other courts, this decision could have significant legal and financial ramifications for the typical municipality where stormwater is discharged untreated to surface waters through a municipal stormwater system.

New Jersey District Court Orders Insurance Company to Pay Attorneys' Fees Incurred by Insureds in Environmental Coverage Dispute

by MICHAEL CARTER

Recently, the District Court of New Jersey ordered United States Liability Insurance Company ("USLI") to pay attorneys' fees incurred by its insureds, Becky and Stephen Baughman, during an environmental coverage dispute. *Baughman v. United States Liability Ins. Co.*.

In 2006, the Baughmans were forced to close their daycare center because the building had been contaminated with mercury by a former tenant. Subsequently, several state court actions were brought against the Baughmans and others, primarily seeking medical monitoring on behalf of children exposed to mercury at the site. Following USLI's denial of coverage under the Baughmans' comprehensive general liability ("CGL") policy, the Baughmans filed an action asserting, *inter alia*, claims for breach of contract. Last year, the District Court held that the Baughmans were entitled to coverage for the state court actions because these actions sought "damages" for "bodily injury" as defined in the CGL policy and because the absolute environmental exclusion contained in the policy applied only to "traditional environmental pollution," not indoor contamination like that at issue in the underlying state court actions.

The Baughmans subsequently filed a motion for the assessment of attorneys' fees incurred during the coverage dispute, and the District Court ordered USLI to pay over $200,000 in fees (plus another $80,000 in fees incurred by the Baughmans in defending the underlying state court actions). The Court held that the Baughmans were entitled to attorneys' fees under New Jersey Court Rule 4:42-9(a)(6), which expressly provides that a successful claimant may recover fees in an action upon a liability or indemnity policy of insurance. The Court rejected USLI's good faith defense, concluding that the absence of bad faith and the existence of complex legal issues are not grounds to deny the award of attorneys' fees and that the assessment of fees was necessary to ensure that the insureds received the full benefit of their coverage. Although the Court slightly reduced the lodestar amount of attorneys' fees requested by the Baughmans, it applied a thirty-five percent enhancement to the lodestar in light of the complexity of the case and risk that the attorneys, who took the case on a contingency basis, would not receive any payment.

Coupled with the District Court's decision last year that an absolute environmental exclusion does not apply to indoor contamination, the Court's award of attorneys' fees to the insureds – notwithstanding USLI's alleged good faith denial of coverage in the face of a complex legal scenario – will certainly impact the generally broad scope of defenses to coverage available to insurers under New Jersey law.

New Jersey State Court Dismisses NRD Claim Against Essex Chemical Corp.

by NICOLE MOSHANG

On July 23, 2010, the New Jersey Superior Court issued findings of fact and conclusions of law in the matter of *NJDEP v. Essex* dismissing in its entirely the New Jersey Department of Environmental Protection's ("NJDEPs") complaint against Essex Chemical Corporation ("Essex"). After a full trial on the merits, in which Essex did not dispute liability but objected to the calculation of damages, the Court found, *inter alia*, that NJDEP did not meet its burden to prove its claim for primary and compensatory restoration damages (collectively, "natural resource damages" or "NRD"), brought pursuant to the New Jersey Spill Compensation and Control Act (the "Spill Act"). In reaching its decision, the Court agreed with Essex that: (1) NJDEP ignored the knowledge, expertise, and judgment of the Site Remediation Program ("SRP"), (2) NJDEP's experts prepared their reports hastily and proposed a remediation plan that ignores the history of remediation efforts at the site, and (3) that NJDEP's compensatory restoration claim ignores lost services due to contamination of the groundwater at the site.

As to the first point, NJDEP sought to require Essex to undertake a remedy proposed by NJDEP's Office of Natural Resource Restoration ("ONRR"), the estimated cost of which was magnitudes higher than the cost of the remedial action Essex was already implementing at the site under the approval of SRP personnel. The Court agreed with Essex finding that there was a long history of cooperation between Essex and the SRP which was not considered by the ONRR in proposing a different remedy. Indeed, the Court remarked that "[t]o allow the ONRR to mandate a remediation plan above and beyond what has been approved by the SRP sends mixed messages to defendants, such as Essex, and may discourage other companies from working with the NJDEP" which the Court reasoned "could not be the intention behind the development of the two departments." As to Essex' second argument, the Court again agreed with Essex finding that NJDEP's experts issued their reports without ever visiting the site, talking to SRP personnel for input as to what had been done at the site, or even considering alternative technologies and cost effectiveness.

Lastly, while the Court reiterated its previous decision that compensatory restoration claims are *not* limited solely to loss of use damages but could be awarded for a non-use related harm or loss, the Court took great issue with NJDEP's approach to computing such loss in this case. Specifically, the Court rejected NJDEP's expert's use of Resource Equivalency Analysis in this case for calculating the compensation allegedly required to offset the injured groundwater (proposed by NJDEP as the purchase of 15.4 acres of land) because NJDEP's experts failed to explain how values were assigned to things that are normally invaluable.

While the Court's decision is significant on several grounds, it is perhaps most pertinent to parties facing NRD claims seeking to impose different remedial obligations than those already being implemented by the party under SRP oversight and/or approval.

EPA Issues Draft Guidelines for Fiscal Year 2011 Brownfields Grants

by BRETT SLENSKY

On June 22, 2010, the U.S. Environmental Protections Agency ("EPA") published its draft guidelines for 2011 Brownfield grants. The grants, which are authorized under Section 104(k) of the Comprehensive Environmental Response Compensation and Liability Act, provide financial assistance to eligible entities such as states and local governments, redevelopment agencies, and non-profit organizations in some cases, for brownfield revitalization activities. Under the grant programs, three types of brownfield grants are available: (1) assessment grants for inventory, characterization, assessment, planning and community involvement-related activities; (2) Revolving Loan Fund ("RLF") grants that provide capital for a recipient's revolving fund and allow the recipient to provide loans or subgrants to other eligible entities, property owners or developers for site cleanup activities; and, (3) cleanup grants for cleanup activities at specific brownfield sites.

In general, under the draft guidelines, assessment grants of up to $200,000 may be awarded on a community-wide or site-specific basis for assessment activities related to hazardous substances, pollutants, or contaminants, and up to an additional $200,000 may be awarded for assessment activities related to petroleum contamination (coalition applicants may be awarded up to $1,000,000). RLF grants of up to $1,000,000 per entity and cleanup grants of up to $200,000 per site are also proposed to be available.

It is anticipated that EPA will release the final funding and proposal guidelines by the end of summer 2010, and that grant proposals will be due to EPA in October 2010.

Permit Extension Act Breathes New Life Into Pennsylvania Environmental Approvals

by JONATHAN RINDE and MICHAEL GROSS

In an effort to salvage countless real estate projects throughout the Commonwealth which have stalled due to economic conditions, Governor Rendell signed into law the Permit Extension Act which automatically extends the expiration date of certain permits issued by the Pennsylvania Department of Environmental Protection ("PADEP") until July 1, 2013. With limited exceptions, this law explicitly applies to approvals, agreements, permits, authorizations and decisions (collectively "Approvals") for development or construction projects issued under various Pennsylvania environmental statutes including the Pennsylvania Clean Streams Law, the Sewage Facilities Act, and the Dam Safety and Encroachment Act. Equally important, the extension also covers non-environmental Approvals issued pursuant to other Pennsylvania statutes such as the Municipalities Planning Code and the Pennsylvania Construction Code.

Effect of Extension and How to Confirm. The new law applies to Approvals that were in effect on January 1, 2009, or after. These Approvals are now automatically extended,

regardless of expiration date, without any notice required to the applicable agency (except if the Approval was issued by the City of Philadelphia) until July 1, 2013. Approval holders are authorized, but not required, to request written verification from the issuing government agency of the extension. If the government agency does not respond in 30 days, the extension of the Approval is "deemed approved." For Philadelphia-specific Approvals, extensions are valid twenty days after the Approval holder provides written notice to the applicable City agency of its intent to suspend the expiration date.

Approvals to which the Extension Applies and Exclusions. Pennsylvania environmental permits impacted by the new law include (and are not limited to) Dam, Water Obstruction and Encroachment permits, and General Permit authorizations issued under 25 PA Code Section 105, Water Quality Certifications under Section 401 of the federal Clean Water Act for General Permits, various authorizations for the beneficial use of residual waste, deadlines for the construction in public water systems construction permits, and Part II permits for the construction of sewage treatment facilities. Significantly, PADEP has stated that NPDES permits for the discharge of stormwater from construction sites *are not* subject to the Permit Extension Act.

There are several noteworthy limits on extensions for PADEP Approvals: Approvals to facilitate discharges into "Exceptional Value" or "High Quality" waters of the Commonwealth or wetlands are not being extended. Approvals for connections to public sewer systems are also not automatically extended and are dictated by current capacity constraints. In addition to exceptions applicable to environmental Approvals, specific exceptions also apply to PENNDOT permits, "one call" determinations and benefits/approvals impacting Keystone Opportunity Zones.

Fees and Miscellaneous. Government agencies can charge a fee for extension of Approvals--up to 25 percent of the application fee (50 percent within the City of Philadelphia) up to a maximum of $5,000. The enforcement authority of government agencies is not altered by the legislation (e.g. Approvals can still be revoked for noncompliance).

On August 7, 2010, PADEP published a notice in the Pennsylvania Bulletin specifying which PADEP Approvals are covered by the Permit Extension Act. Concurrently, PADEP issued a document entitled, “Guidance for Implementation of Act 46” which describes in summary detail the permits and authorizations covered and not covered by the Permit Extension Act, and the procedure to confirm the extension. In this document, PADEP stated that Section 404 permits issued by the Corps of Engineers through the Pennsylvania State Programmatic General Permit (PASPGP) will also be extended concurrently with the related state Section 105 permits.

For more information regarding the potential applicability of the Permit Extension Act to existing environmental Approvals, please contact Jonathan Rinde (jrinde@mgkflaw.com) at 484-430-2325 or Michael Gross (mgross@mgkflaw.com) at 484-430-2321.

New Jersey Governmental Site Remediation Oversight Fees – Any Relief?

by DARRYL BORRELLI

For those with site remediation projects in New Jersey, you are likely all too familiar with the invoices you receive from the New Jersey Department of Environmental Protection ("NJDEP") presenting their fees for providing project oversight services. Some may have even experienced a degree of sticker shock when they see the bill. But there are ways to provide relief from these fees, especially for projects which have a longer history of governmental oversight.

1. Review the bills. Do not hesitate to ask for backup or an explanation of any charges that you do not understand. NJDEP is open to discussions regarding oversight costs.

2. Consider whether opting into the Licensed Site Remediation Professional ("LSRP") program, for cases not currently required to use an LSRP, will reduce the NJDEP fees. While there are still NJDEP administrative fees associated with using an LSRP, the costs of these fees could be considerably less and certainly more predictable than the standard case management oversight costs.

3. At project completion, determine whether NJDEP oversight fees have exceeded the statutory maximum. By law, NJDEP oversight fees for oversight services provided after July 1, 2002, cannot exceed 7.5 percent of the project costs incurred after that date. In cases where the maximum has been exceeded, NJDEP will refund the overage, but only if asked.

NJ Site Remediation Deadlines Approaching for "Existing" Cases

by BRUCE KATCHER

The new Site Remediation Reform Act regulations promulgated in November 2009 included several new deadlines applicable to both new and existing cases. One of the more important deadlines requires the submission of a receptor evaluation ("RE") that meets the requirements of the new regulations for most "existing cases" by November 26, 2010 (or by submission of the site investigation report, whichever is later). With some exceptions, an "existing case" is any case that was already under New Jersey Department of Environmental Protection ("NJDEP") oversight before November 4, 2009 (new cases, e.g., those initiated after November 4, 2009, must submit the RE by March 1, 2011). If you are responsible for conducting a remediation for an existing case, in most instances you only have a little over three months left to submit the RE.

Failure to submit the RE by the regulatory deadline could subject the non-complying party to enforcement action, including civil penalties, and does not bode well for compliance with the associated "mandatory" deadline, which will come into play on March 1, 2011. The RE must be submitted on a new form developed by NDJEP for this purpose. The various components of the

RE, together with some of the new reporting and notification requirements and the severe consequences of missing the mandatory deadline, are described below. Similar deadlines to address free product are also discussed below. As this article goes to press, reports are circulating that NJDEP may extend both regulatory and mandatory deadlines (into 2011 for regulatory deadlines and into 2012 for mandatory deadlines), however, nothing has yet been published of an official nature.

RE Components: The RE has four components under the new regulations – land use, ecological, groundwater, and vapor intrusion ("VI"). The land use component requires that all existing and proposed changes in land uses (as approved by the municipality) within 200 feet of the site boundary be identified and mapped. For the ecological component, a qualitative baseline ecological evaluation is required based on data collected in connection with a site investigation of the property.

For groundwater, a well search is required where any sampling has identified groundwater contamination in excess of Class II groundwater standards. The well search may trigger notification requirements and sampling of potable wells and the latter may trigger compliance with the requirements applicable to immediate environmental concerns ("IECs"), which trigger further testing, reporting, notification and mitigation requirements.

The VI component may require a VI investigation under the NJDEP's Vapor Intrusion Guidance document where groundwater contamination discovered in excess of the NJDEP's groundwater VI screening levels or free product in groundwater is detected within 30 feet (for petroleum hydrocarbon plumes) or within 100 feet (for free product or non-petroleum based VOCs) of a building. A VI investigation may also be required under other circumstances, such as when soil gas or indoor air levels exceed the NJDEP VI soil gas or indoor air screening levels or landfill gas is implicated. Various sampling, notification and reporting requirements may be triggered (including groundwater contamination delineation requirements) and in the case of indoor air screening level exceedences, the IEC requirements may also apply.

Extensions of the Regulatory Deadline: The regulations authorize extensions of regulatory deadlines, such as the deadline for submission of the RE. A request for an extension must be submitted at least 30 days before the deadline on an appropriate form, specify the amount of time needed (but not an amount that would exceed a mandatory deadline, (as discussed below), state the reason(s) why more time is needed and the steps taken to minimize the time needed. If the NJDEP does not respond, the request is deemed approved.

Mandatory Deadline: In addition to the November 26, 2010 regulatory deadline for submission of an RE for an existing case, there is also a mandatory deadline for submission of an RE of March 1, 2011. If a party responsible for conducting the remediation fails to submit the RE by the mandatory deadline, the case becomes subject to "direct oversight." This means that even where the case is being managed under the new Licensed Site Remediation Professional ("LSRP") program, a NJDEP case manager will be assigned who must review and approve all submissions to NJDEP, a feasibility study evaluating site remedies must be prepared, the NJDEP will select the remedy, and a trust fund to cover financial assurance for remedy completion must be posted. The regulations also provide a mechanism to request an extension of the mandatory deadline, which must be made at least sixty days prior to the deadline.

Upcoming Deadlines for Free Product: A similar set of deadlines apply to addressing light non-aqueous phase liquid ("LNAPL") at sites where such conditions were identified to exist prior to March 1, 2010. For these sites, by November 26, 2010, free product delineation must be completed, an LNAPL recovery system installed and operating and a report submitted to NJDEP. Interim deadlines are also specified and a mandatory deadline for these requirements has been set for March 1, 2011.

Sustainability

Green Building Update: A Push Towards Adoption of Local Green Building Codes

by ANGELA PAPPAS

According to a projection released by EL Insights, a subscription report published by Environmental Leader, the market value in the United State's green building sector is expected to climb from 71.1 billion in 2010 to about 173 billion by 2015. If this forecast proves accurate, how, if at all, will local governments respond in revamping their building codes to account for this anticipated increase in green building? In recent months, guidance materials and other resources have been released to both encourage and assist local governments in evaluating their current building codes and incorporating green building mandates as part of code revisions. For example:

- In July 2010, the U.S. Environmental Protection Agency ("EPA") Region 4 released a *Sustainable Design and Green Building Toolkit for Local Governments* (the "Toolkit"), which according to a recent news release by EPA, "is designed to assist local governments in identifying and removing permitting barriers to sustainable design and green building practices." The Toolkit includes an Assessment Tool to help local governments in reviewing their permitting process, a Resource Guide that provides links to additional guidance information, and an Action Plan that provides a roadmap for the implementation of regulatory changes. The Toolkit can be found here.

- In June 2010, Columbia Law School's Center for Climate Change Law released a Draft Model Municipal Green Building Ordinance which is based on an empirical analysis of existing municipal green building regulation and is structured in such a way as to avoid certain legal impediments affecting green building practices. The draft model ordinance along with a legal analysis can be found here.

- Also in June 2010, the U.S. Green Building Council released a white paper, entitled *Greening the Codes*, which discusses a history of building codes and details the role that green building rating systems such as LEED (Leadership in Energy and Environmental Design) can play in constructing more comprehensive building codes that incorporate sustainable and green building practices. The white paper can be found here.

With these resources made available by reputable players in the green building arena, we may start to see more local governments reviewing their current building codes and considering the adoption and enforcement of green building mandates.

Water

Federal Appeals Court Rules on EPA Regulation Governing Cooling Water Structures

by BART CASSIDY

On July 23, 2010, the U.S. Court of Appeals for the Fifth Circuit issued an opinion governing the U.S. Environmental Protection Agency's ("EPA") regulation of cooling water intake structures under the Federal Clean Water Act. EPA had issued the so-called "Phase III" Cooling Water Intake Rule to regulate cooling water intake structures at existing industrial facilities and small power plants, as well as new offshore oil and gas production facilities. In the case of *ConocoPhillips v. EPA,* the Court affirmed the provisions of EPA's Phase III rule applicable to the offshore oil and gas facilities, and remanded, consistent with EPA's request, the provisions of the Phase III rule applicable to existing facilities. The Court's decision rejected arguments by industry petitioners that the provisions of the Phase III rule applicable to new offshore oil and gas facilities were arbitrary and capricious because EPA did not engage in an appropriate cost-benefit analysis in establishing the proposed standards.

With respect to the regulation of cooling water intake structures at existing industrial facilities, EPA had requested that the Court remand that portion of the rule to allow EPA to proceed with additional rulemaking. EPA had previously stated that it had intended to propose a new rule governing these sources during 2010, but that schedule appears to be slipping. Indeed, EPA recently announced that it is planning to conduct a public survey in an attempt to determine the willingness of the public to pay for substantially-improved cooling water intake structures and the corresponding reduction in fish kill. EPA appears to recognize that enhanced technology will substantially increase the cost of certain industrial operations, and, as part of its cost benefit analysis, will reportedly proceed with the public survey to determine the public perception of the resulting benefit. This process will likely further delay the promulgation of Phase III standards for cooling water intake structures at existing industrial facilities and small power producers.

NJDEP Pilot Program to Streamline Stormwater Management Reviews

by BRIDGET DORFMAN

The New Jersey Department of Environmental Protection ("NJDEP") has taken steps to act upon recommendations set forth in both the Final Report of the Permit Efficiency Review Task Force issued in August 2008, and the Final Report of the Transition Subcommittee for Governor Christie issued in January 2010, to eliminate duplicative stormwater management reviews. NJDEP has instituted a Stormwater Certification Partnership Program ("Program") in which

twenty-one municipalities across the state will participate. Each participating municipality has an approved Stormwater Management Plan and Stormwater Control Ordinance, in accordance with the Stormwater Management Rules provided at N.J.A.C. 7:8, and their Municipal Engineer ("ME") must fulfill certain educational requirements.

Applicants with projects that require stormwater management approval will submit an application to the ME for municipal approval, which has always been a necessary step of the approval process. Under the Program, however, the consultant submitting the application will use a new checklist intended to streamline the ME's review. Notably, consultants across the state will be asked to use the new checklist, which should be available in about a month, whether or not the project they are submitting an application for is located in a participating municipality. The checklist will become mandatory a year from now if the Program is implemented more broadly. Instead of conducting a duplicative review, which it had done in the past, NJDEP's Division of Land Use Regulation will use the checklist to audit the ME's review of the stormwater management application and will approve, deny, or conditionally approve the stormwater management application based on the ME's review. If the Program works as NJDEP hopes, the result will be faster reviews and approvals. NJDEP will evaluate the success of the Program in one year and will take further steps to implement the Program more broadly, if appropriate, at that time.

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