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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

# 2023 Environmental and Energy Law Forecast

## FEDERAL

### AIR:

### Federal Climate Change to Remain a Priority in 2023

***Katherine L. Vacarro, Esq.***

Addressing climate change will remain among the Biden Administration's top priorities during 2023, and the end goal is the same: reducing greenhouse gas emissions by up to 50 percent by 2030. But after some setbacks in 2022, the Administration was forced to take a step back and reevaluate its options. Notably, instead of Biden's Build Back Better bill which died on the vine early last year without the support of West Virginia Senator Manchin, the Administration will use the Inflation Reduction Act of 2022 (the "IRA") to allocate funding for reducing greenhouse gas (GHG) emissions in every sector of the economy, including electricity production, transportation, industrial manufacturing, buildings, and agriculture. The IRA amends the federal Clean Air Act to create a new program called the "Greenhouse Gas Reduction Fund." The Environmental Protection Agency (EPA) will administer the $27 billion fund by providing competitive grants to encourage projects that reduce GHG emissions, with an emphasis on projects that benefit low-income and disadvantaged communities, which ties nicely with the Administration's other top environmental priority, environmental justice.

Biden's EPA is also expected to pivot in 2023 in response to the Supreme Court's mid-2022 decision in *West Virginia v. EPA*, which concluded that EPA lacks the authority under the Clean Air Act to require broad GHG emission reductions across the power sector by forcing a generation shift away from coal-fired plants. Although the Court stopped short of imposing an outright ban on such an approach, it came close, finding that Congress would first need to amend the Clean Air Act to expressly grant EPA the requisite authority. EPA will therefore need to look closely at future approaches to forcing industry-wide GHG emission reductions from power generation, and indeed, EPA already delayed rolling out a proposal for reducing GHG emissions from existing power plants, which was originally expected in July 2022, and instead created a new regulatory "docket to collect public input to guide the Agency's efforts to reduce emissions of [GHGs] from new and existing fossil fuel-fired electric generating units." The proposal is now expected in March 2023, the same month EPA is targeting to release its plan to limit GHG emissions from cars and trucks beginning with model year 2027.

Outside the Clean Air Act framework, the Administration released just last week, new "Guidance on the Consideration of Greenhouse Gas Emissions and Climate Change" to assist federal agencies better assess and disclose climate impacts when they conduct environmental reviews of permit applications for clean energy and other infrastructure projects. In particular, the new guidance instructs agencies to mitigate GHG emissions to the greatest extent possible and emphasizes that the depth of analysis should be

proportional to a project's impacts. Specifically, projects that will reduce GHG emissions can have less detailed GHG emissions analysis. The Council on Environmental Quality is accepting public comments on the new guidance through March 10, 2023.

With these and other regulatory initiatives underway, the Administration is poised for an active year focused on climate change.

## New Source Review: What to Expect in 2023

***Carol F. McCabe, Esq.***

The coming year is likely to be active in the realm of New Source Review, with the Biden Administration moving forward with several actions that will reverse prior administrations and serve to tighten New Source Review requirements. First, in December 2022, EPA rescinded the policy memo by former EPA Administrator Scott Pruitt titled "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to-Projected Actual Applicability Test in Determining Major Modification Applicability." It was no surprise that EPA rescinded this Trump-era memo, which had as its centerpiece a pronouncement that EPA would not "second-guess" projected actual emissions estimates by permittees, particularly where actual emissions remain below significance thresholds after the change in question. Perhaps an indicator of future enforcement priorities, EPA's recission of the Pruitt memo serves to remind permittees to proceed carefully through NSR applicability determinations because they may be examined in detail after the fact, including calculations of projected actual emissions and the role of the demand growth exclusion in that context.

Second, EPA will move forward with its Reconsideration of Fugitive Emissions Rule (the Reconsideration Rule), for which the comment period closes on February 14, 2023. The proposed Reconsideration Rule would repeal a Bush-era rule that sought to clarify that increases in fugitive emissions need not be counted toward New Source Review significance thresholds in the major modification context for sources that are **not** within source categories that are specifically listed within the regulations. Citing the long and twisted regulatory history of EPA's treatment of fugitive emissions, which includes a "longstanding" interpretive ruling and an "inadvertent" failure to correct the regulatory text over the course of several decades, the Reconsideration Rule would reverse the 2008 rule (which, to add to the confusion, has remained on the books but has been stayed since 2009). In short, under the proposed Reconsideration Rule, fugitive emissions will only be counted toward major source threshold determinations for specific source categories listed in the regulations (such as petroleum refineries, portland cement plants and iron and steel mills), whereas fugitive emission increases will be counted toward significance thresholds in major modification determinations for **all** source categories. In addition, the proposed Reconsideration Rule would remove an exemption from New Source Review for circumstances in which New Source Review would be triggered "*only if fugitive emissions, to the extent quantifiable, are considered in calculating the potential to emit*…" *See* 52.21(i)(1)(vii). While the proposed Reconsideration Rule will promote long-needed clarity within the regulatory language, it is likely to make New Source Review Requirements more difficult to navigate for certain major sources in non-listed source categories. In particular, questions of quantification and modeling of fugitive emissions and determinations of Best Available Control Technology are sure to arise and create additional permitting burden and uncertainty for permittees.

Third, on January 6, 2023, EPA announced its decision to revisit the National Ambient Air Quality Standards (NAAQS) for PM2.5. EPA announced its proposed decision to revise the primary (health-based)

annual $PM_{2.5}$ standard from its current level of 12.0 µg/$m^3$ to within the range of 9.0 to 10.0 µg/$m^3$. EPA also proposed not to change the current secondary (welfare-based) annual $PM_{2.5}$ standard, primary and secondary 24-hour $PM_{2.5}$ standards, and primary and secondary $PM_{10}$ standards. As part of the proposal, EPA would require a change to the PM2.5 air monitoring network design criteria, to add an environmental justice component to ensure that monitors are sited in communities that are subject to increased risk of PM2.5 related health effects. While the NAAQS revision will not immediately affect permittees, EPA monitoring shows that 62 counties, including several located in Pennsylvania, would not meet a tightened NAAQS PM2.5 standard of 9.0 µg/$m^3$. Once these counties are designated nonattainment, major sources of PM2.5 or its precursors will face new requirements for nonattainment New Source Review. EPA will accept comment on the proposal for 60 days after its publication in the Federal Register.

Fourth, the Biden Administration has set its sights on the Trump-era Project Emission Accounting Rule, which was finalized in November 2020, allowing permittees to account for increases *and* decreases in emissions (the "sum of the difference") in "Step 1" of the two-step analysis for determining whether a project causes a significant net emission increase triggering New Source Review requirements. Importantly, if a project increase is determined not to be significant in Step 1, then the permittee need not proceed to the Step 2 netting analysis to consider all increases and decreases during the contemporaneous period against the New Source Review significance threshold for major modifications. While generally favored by industry, the Project Emission Accounting Rule was strongly criticized by certain states and was the subject of a Petition for Reconsideration submitted by a coalition of environmental advocacy groups in January 2021. The Petitioners argued that the Project Emission Accounting Rule: 1) failed to ensure that decreases considered in Step 1 are related to the proposed project; 2) would allow a source to avoid New Source Review by using non-contemporaneous decreases in Step 1; and 3) failed to ensure that claimed emission decreases would actually occur and be maintained. In a letter to Petitioners dated October 12, 2021, EPA denied the Petition for Reconsideration on the basis that the Petition did not meet the Clean Air Act criteria for mandatory reconsideration under Section 307(d)(7)(B). However, EPA indicated that it would undertake a rulemaking to review the Project Emission Accounting Rule consistent with President Biden's Executive Order 13990 *Protecting Public Health and the Environment by Restoring Science to Tackle the Climate Crisis.* Based on EPA's Fall 2022 Regulatory Agenda, the rulemaking will be forthcoming in the near term. Although EPA has not provided detail on its planned proposal, it seems likely that the scope of EPA's effort will address concerns expressed in the Petition, along with related concepts affecting the manner in which emission increases are calculated in the NSR context.

Finally, EPA has announced an initiative to clarify minor New Source Review program requirements for state and local air permitting agencies. This effort would seek to ensure accountability in meeting the NAAQS and transparency in ensuring meaningful engagement by the public in minor source permitting actions. EPA's focus will include synthetic minor sources, non-major modifications at major sources, "true minor" sources, and even general permits. EPA action on this initiative is expected in the summer of 2023.

## After More than Six Long Years, EPA Scheduled to Finalize the Risk Management Program (RMP) Accidental Release Prevention Requirements

***Michael Dillon, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP***

As most recently reported in our 2021 forecast, major revisions to the Risk Management Program (RMP) regulations have been batted around since early 2017 when, as one of the final actions of the Obama Administration, EPA proposed major revisions to the program. The RMP Rule implements Section 112(r)

of the 1990 Clean Air Act amendments and requires facilities that use extremely hazardous substances to develop a Risk Management Plan to prevent accidental release to the adjacent community. Two administrations and over six years since the 2017 amendments to the rule, EPA is planning to issue a final rulemaking on significant revisions to the RMP Rule that appear slated to become final in August 2023.

On January 13, 2017, the EPA published a final RMP Rule (2017 Amendments) to prevent and mitigate the effect of accidental releases of hazardous chemicals from facilities that use, manufacture, and store them. The 2017 Amendments were a result of Executive Order 13650, *Improving Chemical Facility Safety and Security*, which directed EPA (and several other federal agencies) to modernize policies, regulations, and standards to enhance safety and security in chemical facilities. The 2017 Amendments contained various new provisions applicable to RMP-regulated facilities addressing prevention program elements, emergency coordination with local responders, and information availability to the public. On December 19, 2019, EPA promulgated a final RMP rule (2019 Revisions) that repealed several major provisions of the 2017 Amendments and retained other provisions with modifications. Upon taking office in January 2021, President Biden issued Executive Order 13990, *Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis* (EO 13990), which directed federal agencies to review existing regulations and take action to address priorities established by the new administration including bolstering resilience to the impact of climate change and prioritizing environmental justice.

As an outgrowth of its review efforts under EO 13990, EPA is expected to publish an update to the RMP Rule later this year that will include many of the elements from the 2017 Amendment, as well as new provisions that are intended to bolster the existing program and provide additional safeguards. Some of the proposed requirements include identifying safer technologies and chemical alternatives, more thorough incident investigations, and third-party auditing, all of which EPA purports would benefit nearby communities. In addition, the final rulemaking is expected to require regulated facilities to consider natural hazards (including those that result from climate change) and loss of power among the hazards that must be addressed in the RMP.

## HAZARDOUS SUBSTANCES and REMEDIATION:

## Federal Regulation of PFAS Will Continue to Accelerate in 2023

***John F. Gullace, Esq. and Alice F. Douglas, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP***

In November 2022, EPA released a Progress Report on its 2021 *PFAS Strategic Roadmap* which sets forth EPA's plans to regulate per- and polyfluoroalkyl substances (PFAS) through 2024 as well as updates to its regulatory actions for 2023. While regulation of PFAS during 2022 occurred at a breakneck pace, 2023 appears to be no different as EPA is planning a number of significant actions to address PFAS contamination across environmental media. Notably, EPA is seeking to finalize a rulemaking designating two PFAS as CERCLA hazardous substances. In addition, EPA plans to advance a notice of proposed rulemaking seeking to establish national primary drinking water maximum contaminant levels (MCLs) for PFOA and PFOS. The EPA also plans to continue to roll-out over $10 billion in dedicated funding from the Bipartisan Infrastructure Law (BIL), known as the *Infrastructure Investment and Jobs Act,* for investments in drinking water, wastewater, and stormwater infrastructure, as well as funding dedicated to addressing emerging contaminants at legacy Superfund and brownfield sites.

Other notable actions will include EPA's release of the final Effluent Limitation Guideline (ELG) Plan 15, which will contain key steps for addressing PFAS wastewater discharges from a range of industrial categories and establishment of pre-treatment requirements for sources of PFAS (such as chemical manufacturing, landfills, and metal finishing categories). Lastly, EPA will remain focused on improvements to chemical data availability and public access to such data through release of analytical tools that integrate data on PFAS reporting, testing, and occurrences in communities.

Set forth below is a more detailed summary of the regulatory actions that EPA plans to take under each of the following federal legislative programs by the end of 2023.

**Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)**

- In the Fall of 2022, EPA published a Notice of Proposed Rulemaking in the Federal Register seeking to designate two PFAS—perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS), including their salts and structural isomers—as CERCLA hazardous substances. The designation of PFOA and PFOS as hazardous substances would require facilities to report PFOA and PFOS releases that meet or exceed a reportable quantity, would trigger remediation obligations, and would enable EPA and private parties to recover costs incurred in cleaning up contamination of these substances. EPA anticipates finalizing a rulemaking designating these two PFAS as CERCLA hazardous substances in the Fall of 2023.

- EPA also plans to develop an advance notice of proposed rulemaking in the first quarter of 2023 requesting public input on whether the agency should consider designating as hazardous substances precursors to PFOA and PFOS, whether the agency should consider designating other PFAS as CERCLA hazardous substances, and whether there is information that would allow the agency to designate PFAS as a class or subclass of hazardous substances.

**Safe Drinking Water Act and Clean Water Act (SDWA / CWA)**

- EPA intends to develop a proposed rule establishing a maximum contaminant level goal (MCLG) for PFOA and PFOS by March 3, 2023 as required by the SDWA, to support a national primary drinking water regulation (NPDWR) for PFOA and PFOS. Thereafter, EPA is required to promulgate a NPDWR for those two substances within 18 months after the proposal, which would be September 3, 2024. However, EPA has announced it is targeting finalizing the NPDWR by the end of 2023.

- On June 15, 2022, EPA issued updated interim drinking water health advisory levels (HALs) for PFOA and PFOS, replacing those EPA issued in 2016. These updated advisories were based upon new data which, according to EPA, suggests that lifetime exposure to even near-zero levels of these chemicals can cause certain adverse health effects. The interim HALs have been challenged by various entities and the data and draft analyses used by EPA to establish the non-enforceable HALs are currently undergoing EPA Science Advisory Board (SAB) review. EPA is reviewing and will respond to the SAB comments on the interim HALs as the Agency moves forward to develop MCLGs to support the NPDWR for PFOA and PFOS as referenced above.

- EPA will begin release of the much-anticipated PFAS occurrence data for public drinking water systems starting in mid-2023 through the Unregulated Contaminant Monitoring Rule 5 (UCMR 5). UCMR 5 requires public water systems to monitor their systems for an expanded list of PFAS compounds. The UCMR 5 effort will identify the presence of 29 different PFAS compounds in the

nation's drinking water systems and their concentrations. The release of UCMR 5 data in real-time, along with quarterly rolling data releases to the public, is sure to generate great interest and is anticipated to further drive regulatory actions and decision-making.

- Also in the offing is the potential development of a Regulatory Determination decision for drinking water for a large group of PFAS. In November 2022, the EPA published its Contaminant Candidate List 5 (CCL 5). The CCL is a list of contaminants that are currently not subject to any proposed or promulgated NPDWR but are known or anticipated to occur in public water systems. In a major development, the EPA's publication of the CCL 5 includes PFAS as a group, which according to EPA's structural definition of PFAS, would include over 10,000 individual chemical PFAS substances. EPA must now determine whether or not to regulate at least five contaminants from the CCL 5 (including PFAS as a group) in a separate process called a Regulatory Determination. The Agency will make Regulatory Determinations for the CCL 5 contaminants for which there are sufficient health effects and occurrence data and which present the greatest public health concern.

- Validation of Draft EPA Method 1633 will continue in 2023. This method is a single laboratory validated, direct injection EPA method for detection of 40 PFAS in wastewater, surface water, groundwater, soil, biosolids, sediment, landfill leachate, and fish tissue. EPA is also anticipated to continue with validation of Draft EPA Method 1621, which is a single laboratory validated method to screen for organofluorines in wastewater. The draft method is labeled as a screening method because it does not quantify all organofluorines with the same accuracy and has some known interferences.

- The final ELG Plan 15 is expected to be released in 2023, The Plan will describe analyses, studies, and rulemakings related to ELGs and pretreatment standards. ELGs are national, technology-based regulations developed to control industrial wastewater discharges to surface waters and into publicly owned treatment works. ELGs are intended to represent the greatest pollutant reductions that are economically achievable for an industry. Notably, ELG Plan 15 will seek to revise the ELGs for the (1) Organic Chemicals, Plastics, and Synthetic Fibers (OCPSF) category to address PFAS wastewater discharges from facilities manufacturing PFAS, (2) revise the Metal Finishing ELGs to address PFAS discharges from chromium electroplating facilities, and (3) conduct detailed studies on PFAS in wastewater discharges from landfills as well as textile and carpet manufacturers.

- Development of final national recommended ambient water quality criteria for PFOA and PFOS to protect aquatic life will continue in 2023. Draft ambient water quality criteria were previously published in April 2022. EPA will now prepare a response to public comments document, update the draft PFOA and PFOS criteria documents considering public comments, and consider new toxicity data published since September 2021 prior to the agency issuing final recommended criteria. Once finalized, states and authorized tribes can adopt the recommended criteria into water quality standards to protect against effects on aquatic life.

**Clean Air Act (CAA)**

- While originally referenced in the *PFAS Strategic Roadmap* for a target date of Fall 2022, EPA is anticipated to continue evaluating options during 2023 to regulate PFAS under the Clean Air Act, including listing certain PFAS as hazardous air pollutants (HAPs).

- As part of this effort, EPA is developing test methods to detect PFAS in stack emissions and ambient air. These include Other Test Method-50 (OTM-50), which the EPA's Office of Research and Develop is currently developing for detection of PFAS products of incomplete combustion (PICs), anticipated for publication in 2023. OTM are EPA test methods that have not yet gone through the agency's rulemaking process but are urgently needed to support agency initiatives. EPA is also considering development of sampling and analysis methods for targeted and non-targeted PFAS ambient air measurements. Applications will include fence-line monitoring for fugitive emissions, deposition, and receptor exposure using field deployable Time of Flight/Chemical Ionization Mass Spectrometer and summa canisters and sorbent traps techniques.

- An update of EPA's *Interim Guidance on Destroying and Disposing of Certain PFAS and PFAS-Containing Materials That Are Not Consumer Products* is planned by December 2023. EPA's Interim Guidance originally published in December 2020 outlined the current state of the science on techniques and treatments that may be used to destroy or dispose of PFAS and PFAS-containing materials from non-consumer products, including Aqueous Film Forming Foam , soil and biosolids, textiles, spent filters, membranes, resins, granular carbon, and other waste from water treatment, landfill leachate containing PFAS, and solid, liquid, or gas waste streams containing PFAS from facilities manufacturing or using PFAS. The guidance does not apply to consumer products, such as non-stick cookware and water-resistant clothing. The guidance generally describes thermal treatment, landfill, and underground injection technologies that may be effective in the destruction or disposal of PFAS and PFAS-containing materials. EPA plans to update this important guidance based on the evolution of PFAS treatment techniques, research and development, and analytical techniques to measure PFAS.

**Resource Conservation and Recovery Act (RCRA)**

EPA plans to issue one of two planned Notices of Proposed Rulemaking designating certain PFAS as Hazardous Constituents under the RCRA program in response to a June 23, 2021 petition by Governor Michelle Lujan Grisham of New Mexico for PFAS to be regulated under RCRA, either as a class or as individual chemicals. The first proposed rulemaking would add PFOA, PFOS, PFBS, and GenX to the RCRA Hazardous Constituents list under Appendix VIII. This action is anticipated to be published through a Notice of Proposed Rulemaking in August 2023 that would subject these four chemicals to corrective action requirements and would be a necessary building block for future work to regulate PFAS as a listed hazardous waste. The second rulemaking would clarify that the RCRA Corrective Action Program has the authority to require investigation and cleanup for wastes that meet the statutory definition of hazardous waste, as defined under RCRA section 1004(5). This modification would further clarify that emerging contaminants such as PFAS can be cleaned up through the RCRA corrective action process.

**Emergency Planning and Community Right-to-Know Act (EPCRA)**

A final rule to strengthen PFAS reporting required under the Toxic Release Inventory (TRI) will be developed in 2023. EPA's proposed rule (published in December 2022) would eliminate the de minimis exemption for PFAS manufacturing, processing, or other use reporting thresholds of 100 pounds for each of the listed PFAS subject to TRI reporting. The current reporting framework allows facilities that report to TRI to disregard certain de minimis concentrations of PFAS chemicals in mixtures or trade name products (below 1 percent concentration for each of the TRI-listed PFAS). The final rule would presumably eliminate the availability of the de minimis exemption and require facilities to report on PFAS regardless of their concentration in products. Also important, the EPA's proposed rule removed the availability of the de

minimis exemption for purposes of the Supplier Notification Requirements for all chemicals on the list of chemicals of special concern. This change is designed to help ensure that purchasers of mixtures and trade name products containing such chemicals are informed of their presence in mixtures and products they purchase. Normally, if these constituents are below certain de minimis levels, they are not published or reported on documents such as Safety Data Sheets (SDS) and similar documents provided by suppliers of raw materials.

**Toxics Substances Control Act (TSCA)**
EPA is engaged in several actions related to PFAS under TSCA. See our 2023 TSCA forecast for further information.

## TSCA Actions Expected to be Plentiful in 2023

***Todd D. Kantorczyk, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP***

The Toxic Substances Control Act (TSCA) promises to be the source of much regulatory activity in 2023 with more "whole chemical substance" risk determinations, risk management rules, updates to TSCA rules on confidentiality, and PFAS reporting expected. The expected activities are summarized below.

**TSCA Risk Evaluation and Management Rule Status**
At the end of 2022, EPA announced the availability of the final revision to the risk determination for carbon tetrachloride whereby it was found to present an unreasonable risk of injury to human health when evaluated under its condition of use. The carbon tetrachloride determination is the latest risk determination made in accordance with EPA's June 2021 announcement that it would revisit the risk evaluations for the "first ten" high priority substances completed during the Trump administration. Like the previous revised risk determinations, the revised risk determination for carbon tetrachloride utilized a "whole chemical approach," which at this stage does not differentiate between conditions of use and assumes that workers will not always wear the appropriate personal protective equipment. Industry groups have questioned whether these policy choices implemented as part of the revised risk determinations are consistent with TSCA, and legal challenges may be forthcoming. Nevertheless, additional final revised risk assessments using this approach, including for trichloroethylene, are expected in 2023.

In addition to the remaining risk determinations referenced above, EPA is expected to release several proposed Risk Management Rules to address the unreasonable risk of injury to health the agency has identified in the final risk evaluations. Proposed rules are anticipated in early 2023 for methylene chloride, perchloroethylene (PCE), trichloroethylene (TCE), carbon tetrachloride, and several others.

**CBI Claims under TSCA**
In addition, in May 2022 EPA published a proposed rule concerning submitting and supporting confidential business information (CBI) claims under TSCA. The proposed rule, which is expected to be finalized in 2023, attempts to consolidate the TSCA CBI provisions currently found in other TSCA regulations and EPA's FOIA regulations into a new Part 703. Substantively, the proposed regulations are generally consistent with the guidance and forms EPA has been using to implement the confidentiality provisions of the 2016 Lautenberg Act amendments to TSCA. In particular, the new rules confirm that CBI claims must be accompanied by substantiation at the time of submission and provide standardized questions that must be answered on items such as the extent and likelihood of competitive harm upon release of the

information. Consistent with the standardized approach, the proposed rule contemplates using the electronic Central Data Exchange (CDX) platform to submit nearly all substantiation information and for EPA to use it to communicate to submitters any follow-up questions, determinations, or notices of the pending expiration of CBI claims. If a CBI claim is deemed deficient, it will be communicated through CDX and the submitter will have ten days to correct the deficiency.

**TSCA Fee Rule**

In November 2022, EPA issued supplemental notice of proposed rulemaking addressing changes to the TSCA fee rule first proposed in January 2021. EPA is required to reassess TSCA implementation fees every three years, with the initial fees having taken effect in 2018. Ultimately this proposed rule will promulgate a significant increase in fees manufacturers, importers, and certain processors are required to pay to fund EPA's costs to implement TSCA. The EPA's purpose for supplementing the originally proposed rule is due to revenue shortfalls of about half of what was estimated when EPA first established fees in 2018. The proposed TSCA fee increases are significant and will cover regulated entities required to submit information under Section 4 (test orders/rules), Section 5 notices (pre-manufacturing and exemptions), and Section 6(b) risk evaluations. There proposed rule contemplates some relief for small businesses with reduced fees. Of note, Section 5 Pre-manufacturing Notice (PMN) review fees will jump from $19,020 to $45,000 per chemical. For low-volume exemption (LVE) requests and modifications, the fees will jump from $5,590 to $13,200 per chemical. Lastly, for Section 6 risk evaluations, the EPA is proposing to increase the fee from $2,560,000 to a whopping $5,081,000 for EPA-initiated risk evaluations.

**New Procedural Regulations**

EPA is planning to propose rules in early 2023 to further streamline new chemical reviews. Due to the Lautenberg amendments to TSCA and increased responsibilities for new chemical reviews, EPA is facing significant challenges in completing reviews within 90 days. EPA intends to propose a rulemaking seeking to revise the new chemicals procedural regulations in 40 CFR part 720 to improve the efficiency of EPA's review process and to align its processes and procedures with the new statutory requirements. The rulemaking will purportedly seek to increase the quality of information initially submitted in new chemicals notices and improve the EPA's processes to reduce unnecessary rework in the risk assessment and the length of time that new chemicals are under review. EPA anticipates this effort will be particularly helpful for Low Volume Exemptions (LVEs), which constitute about 60 percent of TSCA section 5 submissions annually.

**PFAS Activities**

Under TSCA Section 8(a)(7), which was added as part of National Defense Authorization Act for fiscal year 2020, EPA was required to promulgate a rule by December 31, 2022, requiring each person that has manufactured any of the per- or polyfluoroalkyl substances (PFAS) since January 1, 2011, to report certain information to EPA. The Agency published a proposed rule on June 28, 2021, that required manufacturers and importers of PFAS in any year since 2011 to report chemical identity, categories of use, volumes manufactured or imported, and other information, without any exclusion for small manufacturers. However, based on initial feedback EPA subsequently convened a Small Business Advocacy Review panel and on November 25, 2022, and released and sought comment on an Initial Regulatory Flexibility Analysis (IRFA), which now estimates that small businesses, primarily consisting of article importers, would incur approximately $864 million to complete the one-time reporting. As result of the revised figures, EPA is considering revisions to the PFAS reporting rule recommended by the panel that would limit its applicability through a number of provisions that are analogous to the current Chemical Data Reporting rule exemptions, including creating a list of subject PFAS, establishing a reporting threshold, setting exemptions

for small businesses based on annual sales, and incorporating other exemptions for byproducts, impurities, recyclers, intermediates, and research and development substances. Comments on the IRFA were due by December 27, 2022, meaning that a final rule will likely be promulgated sometime in 2023.

EPA is also developing a significant new use rule (SNUR) under section 5(a)(2) of TSCA for certain uses of Inactive Inventory PFAS. Persons subject to the Inactive Inventory PFAS SNUR would be required to notify the EPA at least 90 days before commencing the manufacture or processing of PFAS for any use that EPA has determined is a significant new use. The required notifications would initiate EPA's evaluation of the intended use within the applicable review period. Manufacturing and processing for the significant new use could not commence until EPA had conducted a review of the notice, made an appropriate determination on the notice, and taken such actions as are required in association with that determination.

**PCB Regulations**

Finally, we described EPA's proposed revisions to expand the available PCB analytical methods and to amend the PCB cleanup and disposal program requirements in last year's Forecast. Those revisions are currently planned to be finalized in May 2023 and may lead to some much needed updates to the federal PCB analytical and remediation regulations.

## Will the Regulated Community Feel the Influx of Superfund Funding in 2023?

***Garrett D. Trego, Esq.***

Across the first two years of the Biden Administration and Congress' passage of the Infrastructure Investment and Jobs Act and the Inflation Reduction Act, the Superfund tax has been reinstated and billions of new or additional funding has been allocated to the federal Superfund program. The focus of the new funding is to bolster cleanups in environmental justice communities and to kickstart remedial projects where no solvent potentially responsible party has been identified or work is not proceeding at a pace satisfactory to EPA.

Despite the new sources of funding secured in 2021 and 2022, many regulated entities have yet to see significant changes in the Superfund program during these years, even as compared against the prior federal administration. That could change in 2023. Of the Biden EPA's stated priorities from its 2023 budget — "advancing environmental justice, tackling climate change, protecting public health, improving infrastructure, and rebuilding the EPA workforce"—it is perhaps the expanded workforce and the availability of funds to enable EPA to do work itself at sites that will lead to the most significant, practical impacts on the large caseload of the Superfund program. In 2023 and beyond, it is possible that the new sources of funding trickle down to more tangible results, including efforts by EPA to (1) begin work at sites for which remedies have been selected but at which no solvent parties exist to do the work, (2) seek to speed up remediations at sites where cooperating parties have been slow (In EPA's opinion) to proceed by having EPA take over (or threaten to take over) the work, (3) threaten to initiate work at sites for which Unilateral Orders are issued but parties either will not or are otherwise slow to proceed with remediation, (4) push for the more rapid completion of phased work and to initiate work at new operable units within existing sites, and (5) be more ambitious about adding sites to the National Priorities List.

## A Look Ahead at FIFRA in 2023

***Garrett D. Trego, Esq.***

Several developments to watch under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) are summarized below.

**Registration Review**

FIFRA Section 3(g)(1)(A)(iii) requires that EPA perform 15-year reviews of registered pesticides, including by October 1, 2022, for the more than 700 pesticides registered prior to amendments that took effect in 2006. This large swath of reviews will extend into 2023 and will consider the safety and efficacy of the pesticides through the process enumerated in 40 C.F.R. § 155.40. EPA is also engaged in evaluating the potential effects of registered pesticides on endangered and threatened species (ETS), as well as the potential effects of per- and polyfluoroalkyl substances (PFAS) in pesticides, with a specific EPA 2023 fiscal year budget allocation of $4.9 million directed to the former and a $126 million allocation to PFAS impact studies in general.

**Enforcement**

Consistent with annual federal civil monetary penalty inflation adjustments, base civil statutory monetary penalties assessed under FIFRA on or after January 6, 2023, will increase to $23,494 (7 U.S.C. § 136l((a)(1)). Since the advent of the Covid-19 pandemic, EPA has taken a more active role in the enforcement of FIFRA against manufacturers, importers, and retailers of unregistered pesticides, particularly those that claim antimicrobial (or virus-fighting) qualities. The high base civil penalties associated with these potential violations can result in surprisingly lucrative civil penalty settlements with the agency. While the pandemic is waning, this more aggressive enforcement approach is likely to continue into 2023.

**Preemption of State Tort Claims**

A push for the Supreme Court's consideration of the federal preemption defense to toxic tort failure to warn lawsuits under FIFRA will continue. The argument was well articulated in the *certiorari* petition filed in 2021 by Monsanto Company. *Monsanto v. Hardeman*, 142 S.Ct. 2834 (2022) (cert. denied). Monsanto argued that because FIFRA prohibits states from establishing independent pesticide labeling requirements, and pesticide manufacturers are bound to adhere to their EPA-approved labels, state tort failure to warn lawsuits should be preempted. The Ninth Circuit rejected the argument, before the Supreme Court denied *certiorari*. *Hardeman v. Monsanto Co.*, 997 F.3d 941 (9th Cir. 2021). In 2023, defendants are expected to continue to seek review of this important issue in other cases.

## ENVIRONMENTAL JUSTICE:

## Feds Continued to Integrate Environmental Justice Considerations in 2022, but will Implementation in 2023 Continue on a Similar Pace?

***Todd D. Kantorczyk, Esq.***

At this time last year, we noted that environmental justice (EJ) concerns would be a top priority at the federal level in 2022, and both EPA and the US Department of Justice (DOJ) in particular did not disappoint. In 2022, both agencies announced significant structural changes and issued major strategy and guidance documents that are intended to elevate EJ concerns when it comes to permitting,

enforcement, funding and regulatory development. With this infrastructure in place, the federal government is poised to push EJ considerations even more forcefully in 2023 when implementing and enforcing federal environmental laws. In the continued absence of a federal EJ statute, however, it will be interesting to see how far EPA and DOJ are willing to press EJ considerations, and whether affected stakeholders such as state governments or the regulated community will challenge federal actions based on EJ concerns.

**EPA**

In 2022, EPA took a number of steps to—in the words of Administrator Regan— "bake environmental justice and civil rights into the DNA of the Agency." From a structural perspective, on September 24, EPA announced the establishment of a new Office of Environmental Justice and External Civil Rights (EJCR). The new office combines three existing EJ-related offices, and importantly will be headed by a new assistant administrator to be nominated by the President and confirmed by the Senate. These actions elevate the EJCR to the same level as the traditional major EPA programs such as the Office of Water, the Office of Air and Radiation, and the Office of Enforcement and Compliance Assurance, meaning that the EJCR will have a direct line to the Administrator. The new EJCR will have approximately 200 employees and will be responsible for areas related to the Biden Administration's EJ goals, including among other things, compliance with and enforcement of federal civil rights laws with respect to environmental permitting, and overseeing distribution of the $2.7 billion in environmental justice grants related to climate change funding provided by the Inflation Reduction Act.

In addition to making structural changes, EPA also issued a number of policy and guidance documents in 2022 that signal how EPA intends to approach EJ considerations in 2023. For example, in May the USEPA Office of General Counsel released a document entitled *EPA Legal Tools to Advance Environmental Justice*, updating a document originally issued in 2014. The almost 200-page guidance document explores how EPA can address EJ concerns under existing federal environmental statutes such as the Clean Air Act, the Clean Water Act, CERCLA, and Toxic Substances Control Act, emphasizing instances where EPA has the authority to assess, consider and address cumulative impacts and risks. And most recently, on January 11, 2023, EPA released additional guidance on assessing cumulative impacts as an addendum to the *Legal Tools* document. This addendum is intended to provide "further detail and analysis, and some illustrative examples of the Agency's authority to advance environmental justice and equity by addressing cumulative impacts."

Another EJ guidance document for the Office of General Counsel that has received significant attention recently is the *Interim Environmental Justice and Civil Rights in Permitting Frequently Asked Questions* (EJ FAQs), released in August. The EJ FAQs include eighteen questions and responses that are intended to provide federal, state and local environmental permitting agencies EPA's views on how to integrate requirements under civil rights laws when administering environmental permitting programs. Importantly, the EJ FAQ explicitly states that a permitting authority's compliance with federal environmental laws and regulations does not necessarily mean that federal civil rights laws have been satisfied, meaning that permitting agencies must also establish compliance with federal civil rights laws as part of its environmental permitting programs. Furthermore, the EJ FAQs endorse the use of EJ screening tools, such as EJScreen and the identification and assessment of cumulative impacts as part of the permitting process. Most notably, the EJ FAQs raise the prospect of permit denial in instances where a permit decision will have a disparate impact, there are no mitigation measures the permitting authority can take to address the disparate impacts, and the permitting authority cannot identify a "substantial legitimate justification" for the permitting action. The EJ FAQs assert that a decision to deny a permit based upon unjustified disparate impacts is a fact specific determination. EPA goes on to list a number of proactive mitigation measures that

could address a disparate impact, including additional controls or limits, continuous or periodic monitoring, recordkeeping or reporting, a website with real time monitoring data, or third-party monitoring.

**DOJ**

In 2022, DOJ also implemented structural changes and policies to promote EJ considerations in the context of environmental enforcement. Specifically, on May 5 Attorney General Garland announced three major EJ items. First, he released the Department's "Comprehensive Environmental Justice Enforcement Strategy." The strategy is comprised of four principles:

1. Prioritize cases that will reduce public health and environmental harms to overburdened and underserved communities;
2. Make strategic use of all available legal tools to address environmental justice concerns;
3. Ensure meaningful engagement with impacted communities; and
4. Promote transparency regarding environmental justice enforcement efforts and their results.

Each of the principles is accompanied by a number of actions including the creation of an EJ Steering Committee, the use of Title VI and other civil rights authorities, and tracking progress on cases brought and outcomes achieved under the strategy.

DOJ's second announcement related to the creation of a new Office of Environmental Justice. This office will be charged with implementing the new EJ Enforcement Strategy.

Finally, the Attorney General announced that DOJ would be issuing an interim final rule that would restore its ability to use supplemental environmental projects (SEPs) as part of environmental enforcement settlements and rescind the Trump Administration rule that had removed this authority. In tandem with the final rule, DOJ released a related guidance memorandum on settlement agreements involving payments to non-governmental authorities, in an attempt to provide more procedural safeguards to protect against alleged violations of the Miscellaneous Receipts Act, which was ostensibly the basis for the Trump Administration abandoning SEPs. In the new EJ Strategy document, DOJ touted SEPs as being able to secure significant environmental and public health benefits for impacted communities.

**Federal EJ Enforcement in 2022**

2022 saw an increase in federal efforts to enforce the EJ principles embodied in the structural and policy changes referenced above. First, EPA continued its more aggressive oversight of state environmental permitting processes that, in EPA's view, do not sufficiently assess and address disparate impacts. For example, as part its evaluation of three civil rights complaints filed by Louisiana residents, on October 12, EPA issued a 56-page "Letter of Concern" stating that their initial investigation of the Louisiana Department of Environmental Quality and the Louisiana Department of Health "raises concerns" that administration of their air permitting programs "may have an adverse and disparate impact on Black residents…." The Letter notes that it is part of an Information Resolution Agreement negotiation process and recommends a series of targeted changes to the Louisiana environmental permitting process for the emission units at issue.

Similarly, in July DOJ announced that it had begun an investigation of Houston city agencies in response to complaints that the agencies had policies that resulted in discriminatory responses to reports of illegal dumping in Black and Latino neighborhoods as compared to more affluent, predominantly White neighborhoods. Specifically, DOJ was going to examine whether the Houston Police Department, the

Department of Neighborhoods, and the Solid Waste Management Department had violated Title VI of the Civil Rights Act when implementing their illegal dumping policies.

**Federal EJ Enforcement in 2023—Any Limits?**
Based on the recent structural and policy announcements, one can expect in 2023 more of the aggressive federal EJ enforcement seen in 2022. In the context of resolving Title VI complaints, or possibly its own investigations, we will likely see EPA continue to take a more active role in state permitting actions. Likewise, 2023 will likely bring more high-profile DOJ Title VI enforcement matters rooted in EJ concerns. To date, these matters have been addressed without much push back from the targeted entities. However, as both EPA and DOJ advance these EJ policies on the ground in 2023, given the changes in Congress and a Presidential election process beginning to heat up, it will be interesting to note any challenges arguing that either agency has exceeded their authority under existing environmental laws by advancing EJ outcomes.

## WATER:
## EPA and Army Corps Finalize Clean Water Act Jurisdiction Rule Ahead of Upcoming Supreme Court Decision
***Todd D. Kantorczyk, Esq.***

At the close of 2022, the EPA and the Department of the Army took the latest step in the ongoing efforts to define the extent of Waters of the United States (WOTUS) subject to federal Clean Water Act (CWA) jurisdiction and announced a final rule that reverts to the WOTUS definition in place before 2015.

Consistent with the draft WOTUS rule, the final WOTUS rule essentially codifies the 1986 WOTUS definition as applied and articulated in guidance following the Supreme Court's 2006 *Rapanos* decision. The framework of the final WOTUS rule establishes five categories of WOTUS:

1. Traditional navigable waters, the territorial seas, and interstate waters ("(a)(1) waters");
2. Impoundments of WOTUS ("(a)(2) impoundments")
3. Tributaries to (a)(1) waters or (a)(2) impoundments when the tributaries are relatively permanent or have a significant nexus to those waters ("jurisdictional tributaries");
4. Wetlands that are either:
    - adjacent to (a)(1) waters
    - adjacent to and with a continuous surface connection to relatively permanent (a)(2) impoundments
    - adjacent to tributaries that meet the relatively permanent standard; or
    - adjacent to (a)(2) impoundments or jurisdictional tributaries when the wetlands meet the significant nexus standard; and
5. Other intrastate lakes and ponds, streams or wetlands that meet either the relatively permanent or significant nexus standards

This WOTUS framework incorporates two standards dating back to the *Rapanos* decision, the "relatively permanent" standard and the "significant nexus" standard. As articulated in the final WOTUS rule, relatively permanent waters are "waters that are relatively permanent, standing or continuously flowing,"

while waters with a significant nexus are described as waters that "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity" of (a)(1) waters. The proposed rule also provides for eight categorical exclusions such as dry land ditches that do not carry a relatively permanent flow of water, and swales and erosional features. According to EPA, the final WOTUS rule considered over 114,000 public comments on the proposed rule that was published on December 7, 2021. And contrary to previous statements, EPA has recently indicated to the press that they do not expect to issue a second rule that potentially would expand upon the pre-2015 WOTUS definition.

Nevertheless, the final WOTUS rule will likely not be the last word in 2023 on the scope of CWA jurisdiction, as the Supreme Court is scheduled this term to issue its decision in *Sackett v. EPA*. In that case, the Sacketts appealed a Ninth Circuit decision affirming EPA's decision that a wetland on their property qualified as a WOTUS. As part of their appeal, the Sacketts directly challenged the use of the "significant nexus" test from *Rapanos* that was used as part of the final WOTUS rule framework and instead proposed a third test that asks whether the wetland is "inseparably bound up" with a WOTUS. Notably, the final WOTUS rule released in December devotes a significant chunk of text to argue why a WOTUS definition that solely relies on the "relatively permanent" standard and fails to incorporate a "significant nexus" test is inconsistent with the objectives of CWA, and the Acting Solicitor general advised the Court in writing of the availability of the new rule and analysis. Of course, the Sackett's responded with their own letter, arguing that the proposed rule and preamble ignores relevant legislative history.

Once the Supreme Court rules in *Sackett*, EPA and the Corps will likely evaluate the decision and decide whether the final WOTUS rule can stand or needs to be revised in the near term. Regardless of the Supreme Court's decision and the agencies' reaction, if the past is any indication, there will likely be multiple legal challenges filed in response, which could continue to raise questions about the scope of WOTUS under the CWA.

## EPA Proposes to Amend its Water Quality Standards Regulation to Better Protect Tribal Reserved Rights

***Brenda Hustis Gotanda, Esq.***

The United States Environmental Protection Agency (EPA) has proposed amendments to its federal water quality standards (WQS) regulation at 40 C.F.R. Part 131 that are intended to better protect tribal reserved rights by setting forth a uniform approach for establishing WQS in waters where tribal reserved rights to aquatic or aquatic-dependent resources apply. The proposed rulemaking would require that WQS protect water and water-dependent resources reserved to tribes through federal law (e.g., treaties, statutes, executive orders, etc.) in waters of the United States and clarify how EPA and the states must ensure protection of those rights. Some examples of tribal reserved rights identified by EPA include the rights to fish, gather aquatic plants, and to hunt for aquatic-dependent animals. Whereas protection of such reserved rights has previously been addressed on a case-by-case basis, the proposed requirements would establish a nationally-applicable regulatory framework, which EPA believes would provide clarity, predictability and transparency in its review of state WQS and in its own promulgation of WQS in waters where reserved rights apply.

Under the Federal Clean Water Act (CWA), states are required to establish WQS for rivers, lakes, estuaries, and other waters of the United States within their jurisdiction. EPA's regulations set forth certain baseline federal requirements for WQS, which include the designated uses of the waterbody (such as fishing, drinking supply or other uses), water quality criteria necessary to support those uses (such as pollutant limits), and anti-degradation requirements to protect water quality. States must review their WQS at least every three years (triennial review) and, if appropriate, revise or adopt new standards. Any new or revised state WQS must be submitted to EPA for review. In cases where states do not establish required WQS or where state WQS fail to meet applicable requirements, EPA is required to establish WQS under the CWA.

In its rulemaking, EPA proposes to specifically require that WQS protect tribal reserved rights where applicable and to clarify and prescribe regulatory requirements for setting WQS that provide such protection. EPA proposes to define "tribal reserved rights" as "any rights to aquatic and/or aquatic-dependent resources reserved or held by tribes, either expressly or implicitly, through treaties, statutes, executive orders or other sources of Federal law." EPA, however, is not proposing to require WQS that protect the waterbody condition that may have existed at the time a reserved right was established. Rather, EPA intends to protect reasonably anticipated future uses, taking into account factors that may have substantially altered a waterbody. (Relatedly, EPA's regulatory agenda indicates that it plans to issue a separate proposed rulemaking in March 2023 to establish baseline WQS to protect waters on Indian reservations that do not currently have WQS under the CWA. EPA states that over 80 percent of Indian reservations lack such CWA protections.)

In the preamble to the proposal, EPA observes that tribal reserved rights could potentially be impaired by decreased water quality and that some courts have recognized that the right to a specific resource necessarily includes attendant protections in order to be rendered meaningful. As such, the proposal would also require that, to the extent supported by available data and information, WQS protect the exercise of tribal reserved rights unsuppressed by water quality or availability of the aquatic or aquatic-dependent resource. EPA has stated that the unsuppressed level should balance heritage use of a resource with what is currently reasonably achievable for a particular waterbody. Further, determining the unsuppressed level requires consideration of past, present, and reasonably-anticipated future use of the resource, together with what is currently reasonable to achieve for the waterbody.

EPA's proposed rulemaking would also require that WQS protect the health of the tribal reserved right holders to at least the same risk level as provided to the general population of the state. EPA anticipates that this new provision will primarily be used in determining cancer risk levels for purposes of calculating human health criteria. EPA does not propose treating rights holders as a highly exposed population. EPA notes, however, that there may be circumstances where WQS may need to be adjusted to protect tribal reserved rights such as where tribes with reserved fishing rights consume more fish and, therefore, are exposed to greater levels of contaminants in fish, such that there is a differential health risk between rights holders and the general population.

In addition, the proposal includes new documentation requirements applicable to state WQS submissions to EPA designed to aid EPA in evaluating whether the state WQS protects tribal reserved rights, including information about the scope, nature, and current and past use of the tribal reserved rights, as informed by the rights holders, and data and methods used to develop the WQS. Further, the proposal provides that EPA will initiate tribal consultation with rights holders in reviewing state WQS submissions to determine if they protect tribal reserved rights. States would also be required, during their regular WQS triennial

reviews, to re-evaluate whether any WQS needs to be revised to protect any applicable tribal reserved rights.

EPA notes that the proposal does not establish any new requirements that apply directly to regulated point or nonpoint sources of pollution. Such sources, however, could potentially be impacted in the future as a result of changes to WQS implemented to comply with the rulemaking. Where applicable, WQS can serve as the basis for establishing water quality-based effluent limitations in discharge permits or total maximum daily loads under the CWA.

EPA is inviting public and tribal comments on the proposed rulemaking. Written comments must be submitted to EPA on or before March 6, 2023. Two public hearings have also been scheduled (on January 24 and 31) to receive oral comments from interested parties. To attend the public hearing, you must register in advance on EPA's website. EPA is likewise inviting continued consultation with tribes, with the tribal consultation period ending on February 28, 2023.

If you have questions concerning the proposal or the comment opportunity, please contact Brenda Gotanda at 484-430-2327 or Steve Daly at 484-430-2306.

## LITIGATION:

## Greenwashing Class Actions Forge Ahead in Court

***Kate Campbell, Esq.***

As companies continue to face pressure to make Environmental, Social and Governance (ESG) disclosures and to market themselves as environmentally sustainable, class action lawsuits for so-called "greenwashing" will continue to make their way through the courts in 2023, with potentially significant decisions on class certification and the merits of these claims expected in the coming year. Among the cases to keep an eye on are:

- *Woolard v. Reynolds Consumer Prods., Inc.*, *et al.*, No. 22-CV-1684 (S.D. Cal.): This is a putative nationwide class action lawsuit against the manufacturer of Hefty trash bags for allegedly misrepresenting that its "Recycling" trash bags are recyclable. According to the complaint, Hefty "Recycling" trash bags are made from low-density polyethylene and are not in fact recyclable. Instead, the complaint alleges, "the bags and all of the otherwise recyclable items within them are not delivered to a recycling facility but are treated as regular solid waste materials," finding their way to landfills or incinerators.

- *Dorris v. Danone Waters of America*, No. 7:22-cv-08717 (S.D.N.Y.): In this case, the manufacturer and seller of Evian Natural Spring Water has been targeted for making the allegedly false and misleading representation that its water bottles are "carbon neutral" and charging a price premium based on this representation. Seeking class certification on behalf of all persons nationwide who purchased the water bottles at issue, the plaintiff alleges that the product causes carbon dioxide to be released into the atmosphere, making the "carbon neutral" claim not true. The complaint further alleges that even if the defendant relied on carbon offsets in making its claim of carbon neutrality, "that too would be false and misleading, as experts note carbon offsets are 'awash with challenges, fuzzy math and tough-to-prove claims…' "

The plaintiffs in these cases will be pursuing their greenwashing claims in the face of a recent defeat, albeit in a state court case that the federal courts may or may not embrace. In *Earth Island Institute v. The Coca-Cola Co.*, No. 2021 CA 001846 B (D.C. Super. Ct. Nov. 10, 2022), a Washington D.C. trial court rejected a non-profit organization's claims that statements made on Coca-Cola's website and on social media were false and deceptive. The court found that neither the company's general statements about sustainability, nor its more specific statements espousing its recycling goals, were sufficient to support a valid consumer fraud claim under D.C. consumer protection laws. According to the court, the statements at issue were "aspirational, limited and vague," and nothing in the law "prohibits an entity from cultivating an image" or branding itself.

Although the analysis can at times be nuanced, there is likely a meaningful distinction between the aspirational, forward-looking statements that were challenged in *Earth Island Institute* and measurable, verifiable statements that promote a company's past or present results. As we embark on a new year, it is a good time for companies of any size to take a hard look at their ESG disclosure programs.

## Ramifications of *West Virginia v. EPA*

***Alice F. Douglas, Esq.***

In June of last year, the U.S. Supreme Court's issued its decision in *West Virginia v. EPA*, 142 S.Ct. 2587 (2022). In overly simple terms, this case was the effective tiebreaker in a years-long battle between the Obama and Trump administrations' respective plans for reducing greenhouse gas (GHG) emissions from electric generating facilities. Obama's Clean Power Plan (CPP) sought to reduce GHG emissions by requiring actions not only at affected facilities but also more broadly across the power sector, by forcing a generation shift away from coal-fired plants. The latter category of reductions is commonly referred to as "beyond the fence line." Trump's Affordable Clean Energy (ACE) rule, by comparison, who have stopped short of requiring any emissions reductions that could not be achieved at the facility level.

Both regulations got held up in litigation and, remarkably, neither one ever took effect. Biden's EPA also stated that it had no plans to revive the CPP. Some were surprised, therefore, that the court agreed to hear West Virginia at all, with Justice Elena Kagan herself observing in her dissent that the court's "docket is discretionary, and because no one is now subject to the [CPP's] terms, there was no reason to reach out to decide this case."

Even more surprising, however, was the legal theory the court relied upon in reaching its decision: that is, the major questions doctrine. Essentially, this doctrine stands for the proposition that agency discretion must be curtailed when an agency has stretched the boundaries of statutory interpretation to claim new authority to address important problems of the day that were not within the agency's jurisdiction previously according to the express language of the statute. While this sounds logical enough, if we look at how the major questions doctrine could take shape in the framework of environmental law, the doctrine seems poised to encroach upon territory that was previously accepted as belonging to the EPA for two main reasons.

First, the major environmental statutes are old and have not been amended in several years. Although it has generally been understood that Congress purposefully drafted these statutes broadly so the EPA would

have the discretion to address the environmental problems of tomorrow, West Virginia could signal the majority of the court's desire for a paradigmatic shift.

Second, the types of problems that EPA seeks to address fall directly under the major questions doctrine umbrella – they are issues of vast economic and political significance that involve complex and difficult-to-foresee policy implications. While it has also been generally understood that the EPA, rather than Congress, had the technical expertise necessary to address these significant environmental policy issues, the majority's reasoning in West Virginia could cut against that premise.

Notably, the West Virginia court did not completely ban the EPA from pursuing the energy-shifting approach described in the CPP as a means of climate regulation. Instead, it said that for the EPA to do so, Congress would need to amend the Clean Air Act to expressly grant the EPA the requisite authority. However, Congress has not amended the Clean Air Act in more than 30 years. We will therefore need to watch how the court's West Virginia decision impacts the Biden administration's climate regulatory agenda more broadly, particularly given the EPA's ambitious goals to reduce GHG emissions from current levels.

## Will the Supreme Court Offer Further Guidance on Federal Courts' Climate Change Jurisdiction in 2023?

***Garrett D. Trego, Esq.***

A variety of plaintiffs, including states and municipalities, are increasingly targeting energy companies with common law lawsuits seeking damages associated with responding to climate change. Plaintiffs generally seek to avoid federal jurisdiction by limiting their claims to purely state common law claims, like negligence and nuisance. The defendants, on the other hand, generally assert that climate change issues are inherently federal—if not global—and thus belong in federal court, if in any domestic jurisdiction at all.

The Supreme Court has not yet ruled on the merits of this jurisdictional issue, but that may change in 2023. In 2011, the Supreme Court held that plaintiffs had no *federal* common law nuisance claims against energy companies based on climate change. *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410 (2011). And in 2021, the Supreme Court held that federal circuit courts had jurisdiction to consider the parties' removal/remand arguments in these types of cases, but it declined to address the merits and remanded the case to the Fourth Circuit. *BP P.L.C. v. Baltimore*, 593 U.S. ___, 141 S. Ct. 1532 (2021). In 2022, *certiorari* petitions were filed in cases involving *state* common law nuisance claims, originated by state or municipal governments in Colorado, Maryland, and Hawaii, and the Supreme Court may be poised to take up the merits of the ultimate jurisdictional issue for state common law climate change claims.

In an interesting twist, on October 3, 2022, the Supreme Court invited the Solicitor General to file a brief on behalf of the Biden Administration "expressing the views of the United States" on this jurisdictional issue. *Suncor Energy (U.S.A.) Inc. v. Boulder*, 143 S. Ct. 78 (2022). This request may hint at the Court's intention to revisit the issue. The Court's current makeup suggests that it may strongly consider overturning the current decisions from the Fourth and Tenth Circuit Courts in support of remanding the cases for the state courts' adjudication of the state common law climate change claims.

## OSHA:

## OSHA Continues to Address Staffing Shortage

***Jill Hyman Kaplan, Esq. and Brandon P. Matsnev, Esq.***

In 2022, the Occupational, Safety and Health Administration (OSHA) added 142 inspectors to its ranks, as part of an effort to reverse a downtrend in agency manpower brought on principally by retirements. The Biden administration's announced goal is to nearly double the number of inspectors by 2024.

According to a November 2022 Department of Labor report, titled "U.S. Department of Labor's Top Management and Performance Challenges," OSHA has faced a staffing shortage. Namely, the total number of inspectors fell from 860 in 2014 to an all-time low of 750 in 2021 (this does not include States with OSHA-approved State Plans). Compounding the problem is that it can take five years for an inspector to become fully trained. As a result, the Department is concerned that this can ultimately lead to fewer inspections and reduced workplace safety compliance.

To address these and other challenges, OSHA's budget has increased in recent years. Its $632 million budget for FY 2023 reflects a $20 million increase from FY 2022—although the Biden administration sought a nearly $90 million increase.

OSHA's recruitment efforts appear to be paying off thus far. Bloomberg Law reports that the total number of federal OSHA inspectors grew from 750 in 2021, to 892 in 2022. It remains to be seen whether OSHA can meet President Biden's goal of doubling its inspector ranks, to around 1500 within the next two years.

Employers should continue to ensure documentation of compliance with OSHA requirements, particularly given OSHA's aggressive efforts to increase manpower and, consequently, inspection numbers. Moreover, anecdotal evidence suggests OSHA is citing more willful and repeat violations as well as assessing higher penalties. This underscores the importance of proactively seeking legal counsel when first learning of an upcoming OSHA inspection, rather than waiting until after receiving a citation, to hopefully help limit the scope of any citation.

## OSHA Continues Work on Proposed Updates to its Process Safety Management (PSM) Standard

***Michael Dillon, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP***

Since its publication over 30-years ago, OSHA's PSM standard, 40 C.F.R. § 1910.119, has not been updated. That could change based on developments expected to occur in 2023.

Employers are covered by the PSM standard when they have a process with a threshold quantity of a listed chemical or flammable material, or manufacture explosives or pyrotechnics. The PSM standard requires a comprehensive management program that integrates technologies, procedures, and management practices to help assure safe and healthy workplaces. A 2013 ammonium nitrate explosion at a fertilizer storage facility in West, Texas focused attention on the shortcomings of PSM standard and led to an Obama-era Executive Order, which required OSHA to "identify issues related to modernizing the PSM standard."

Since then, the Agency has published a Request for Information (RFI) and subsequently convened a Small Business Advocacy Review (SBAR) Panel to review potential changes needed to the PSM standard. More recently in October 2022, OSHA held an informal stakeholder meeting and invited comments, following which a substantial set of comments from various stakeholders were received by OSHA, which are now under review. During 2023, the Agency is expected to continue this review along with analysis of comments from the RFI and SBAR process.

The potential changes to the scope of the current PSM standard that OSHA is considering include the following: clarifying the exemption for atmospheric storage tanks; expanding the scope to include oil and gas-well drilling and servicing; resuming enforcement for oil and gas production facilities; expansion of PSM coverage and requirements for reactive chemical hazards; updating and expanding the list of highly hazardous chemicals in Appendix A; amending paragraph (k) of the Explosives and Blasting Agents Standard (§ 1910.109) to extend PSM requirements to cover dismantling and disposal of explosives and pyrotechnics; clarifying the scope of the retail facilities exemption; and defining the limits of a PSM covered process.

Potential changes to the PSM standard that OSHA announced it is considering in the September 20, 2022 Federal Register announcement of the October meeting include the following revisions to the noted subsections of 40 C.F.R. § 1910.119:

- Subsection (b) – add a definition of recognized and generally accepted as good engineering practices (RAGAGEP) and a definition of critical equipment;
- Subsection (c) - strengthen employee participation and add stop work authority;
- Subsection (d) - require evaluation of updates to applicable RAGAGEP and continuous updating of collected information;
- Subsection (e) - require formal resolution of Process Hazard Analysis team recommendations that are not utilized; require safer technology and alternatives analysis; clarification to require consideration of natural disasters and extreme temperatures in PSM programs;
- Subsection (j) - add coverage of mechanical integrity of any critical equipment and clarification to better explain ‘‘equipment deficiencies;’’;
- Subsection (l) – clarification to cover organizational changes;
- Subsection (m) - require root cause analysis;
- Subsection (n) - require coordination of emergency planning with local emergency-response authorities;
- Subsection (o) - require third-party compliance audits, include requirements for employers to develop a system for periodic review of and necessary revisions to their PSM management systems, and require the development of written procedures for all elements specified in the standard identification of records required by the standard along with a records retention policy.

OSHA intends to finish analyzing comments received in November 2022 by the late Fall of 2023 in consideration of preparing a proposed rulemaking.

## OTHER FEDERAL ISSUES:

## Inflation Reduction Act Presents New Funding Opportunities, Fees, and Tax Credits for Green Energy and Infrastructure Improvements in 2023

***Diana A. Silva, Esq. and Brielle A. Brown, Esq.***

On August 16, 2022, President Biden signed the Inflation Reduction Act (the "Act") into law, marking what is being touted by the Administration as the most significant legislation dedicated to climate investments in U.S. history. Building on the climate and clean energy actions contained in the bipartisan Infrastructure Investment and Jobs Act signed in November 2021, the Act allocates $369 billion dollars for energy security and climate change programs. The stated overall objectives of these investments are to lower consumer energy costs, accelerate private investment in clean energy solutions, and create new jobs.

The climate and energy provisions fall into five general categories that include domestic clean energy manufacturing, decarbonization, targeting investments in environmental justice communities, support to energy consumers, and investments in farmers and forest landowners.

Notable provisions for domestic clean energy manufacturing, which also indirectly promote carbon emission reduction, include (1) production and investment tax credits to accelerate the building of facilities to manufacture solar panels, turbines and batteries, facilities to produce clean fuels, and facilities to process critical minerals and to capture and sequester carbon, and (2) various grants and loans for electric vehicle manufacturing plants.

More directly aimed at decarbonization, funds are also dedicated to the purchase and installation of zero-emission equipment at ports, funding of clean energy technology enhancement and research and Department of Energy building efficiency programs. Rebates and tax credits will be available to consumers to subsidize their transition to clean energy equipment at home (HVAC) and on the road (electric vehicles) which also will indirectly spur the manufacture of the targeted products and enhance carbon reduction efforts. Other incentives to reduce carbon emissions include tax credits for clean energy technology such as solar, wind, hydrogen, nuclear, and carbon capture utilization and sequestration.
The Act also seeks to significantly reduce emissions of methane, which, in the short term, has been reported to be 80 times more potent at global warming than carbon dioxide, through a new methane emissions reductions program. The program creates an annual fee to be charged to nine types of petroleum and natural gas facilities and pipelines, already subject to greenhouse gas reporting requirements, that emit 25,000 metric tons of carbon dioxide equivalent. The methane emissions fee begins in 2024, starting at $900 per metric ton, increasing to $1,200 in 2025, and $1,500 in 2026 and beyond. An exemption to the fee would be available only if the Environmental Protection Agency (EPA) adopts a finalized rule for methane emissions that is in effect in all states where facilities subject to the fee are located that will result in equivalent or greater methane emission reductions.

Environmental justice is addressed through a variety of mechanisms, including grants to state and local governments to develop and implement pollution reduction strategies, grants to nonprofit private agencies, institutions, and organizations, and to individuals, for technical assistance, monitoring and other projects in disadvantaged communities, grants to reduce air pollution at ports, as noted earlier, and grants to address air pollution at schools in low-income communities. EPA announced the availability of $100 million in these grants on January 11, 2023 and is hosting pre-application assistance webinars on January 24 and 26, 2023

In addition, many of the clean energy tax credits mentioned above include either a bonus or set-aside structure to drive investments and economic development in disadvantaged communities.

Finally, the Act makes sizeable investments to support agriculture and rural community responses to climate change. These investments include grants and other financial assistance to support (1) farm use of renewable energy, energy efficient and zero-emission equipment, and carbon capture and storage systems, (2) rural cooperatives' access to renewable energy and associated infrastructure, (3) promotion of fire resilient forests, and (4) natural carbon sequestration through forest conservation.

On November 30, 2022, the Department of Treasury issued initial guidance on the labor standards that facilities must meet to qualify for the clean energy and climate tax incentives. The guidance leaves numerous questions to be answered such as classifications for construction and how to enforce prevailing wage and apprenticeship requirements. However, it is currently the only guidance from a federal agency that details an implementation strategy for the funds outlined in the Act. Throughout 2023, it is expected that guidance from other federal agencies, such as the EPA and HUD, should begin to roll-out, so that businesses can apply for funding allocated in the Act.

## Northern Long-Eared Bat Listed as Endangered Species in January 2023

***Diana A. Silva, Esq.***

On November 30, 2022, the U.S. Fish and Wildlife Service (USFWS) issued a final rule designating the Northern Long-Eared Bat (*Myotis septentrionalis*) as an endangered species under the Endangered Species Act of 1973 (ESA). The Northern Long-Eared bat has habitat in 37 U.S. states, spanning nearly the entire eastern seaboard through the Midwest – including significant habitat in all of Pennsylvania, New Jersey, New York, and Delaware. The species spends most of the winter season hibernating within caves, mines, and sinkholes, and lives the remainder of the year in forested habitats. The bat was previously listed as a "threatened" species in April 2015, with corresponding regulations and restrictions on activities occurring in the bat's habitat that was adopted through implementing rules in 2016. But now, the Northern Long-Eared bat will receive the highest level of protection under federal law, with the endangered species designation becoming effective on January 30, 2023.

To receive an "endangered species" designation, a plant or animal must be determined to be in danger of extinction throughout all or a significant portion of its habitat based on an evaluation of five factors. The Northern Long-Eared Bat is listed as an endangered species primarily due to a specific disease impacting the bat, known as "white nose syndrome," which the USFWS has confirmed has spread throughout the bat's territory, particularly concentrated in the Appalachian Mountains region. The USFWS has also determined that the bat is negatively affected by wind-turbines used for energy production (from direct collisions with turbine blades), climate change, and habitat loss. Reclassifying the bat from "threatened" to the heightened "endangered" status will impact various projects, including logging, wind power, and other development projects, which will lose some flexibility that was granted by the prior designation.

The ESA and its implementing regulations establish a series of prohibitions on activities effecting endangered species, and generally deem it illegal to "take" any endangered species. The definition of "take" includes any action to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to do any of those activities. If an activity will result in an "incidental take" in connection with otherwise lawful activities, a party must apply for a permit from the USFWS to cover that potential impact to

the endangered species. The most common impact from a project on the bat's territory relates to tree clearing for development activities, which can range from a local commercial or residential development, a utility infrastructure project, or a new roadway that traverses through forested lands.

When the Northern Long-Eared Bat was previously listed as only "threatened" (vs. endangered), Section 4(d) of the prior rule established certain area and timing restrictions for tree clearing, and compliance with those provisions would allow a project to proceed without obtaining a permit from the USFWS. The primary measure to avoid impacts under the prior Section 4(d) rule was a seasonal prohibition on tree clearing during the warm weather months (April through November), when the bats utilize the trees for their primary habitat. But now with the listing of the bat as an endangered species, the previous Section 4(d) rule will no longer apply, such that projects that will involve a potential impact to habitat – including most tree clearing activities – will now be regulated and potentially subject to permitting.

The final rule listing the Long-Eared Bat as an endangered species includes a non-exclusive list of activities that if carried out in accordance with existing regulations and permit requirements, are determined to be "unlikely" to result in a "take" or other violation of the ESA. The rule also conversely lists those activities that may potentially result in a violation of the ESA. Activities deemed "unlikely" to result in a violation or "take" include, for example, "minimal" tree and vegetation removal any time of year outside of the bat's habitat and more than five miles from hibernacula, "insignificant" amounts of suitable forested habitat removal if it occurs during the bat's hibernation period, tree removal in urban areas, activities that may disturb hibernation areas if the activity occurs during non-hibernation season, removal of human structures so long as the structure does not provide roosting habitat, and wind turbine operations at facilities that follow a USFWS-approved avoidance strategy.

The USFWS is slated to develop and publish additional guidance on the impact of the new classification of the Northern Long-Eared Bat as an endangered species in 2023, which will further delineate the scope and effect of the designation for development projects that occur in the bat's habitat.

## PENNSYLVANIA

### Shapiro Administration Policy on Energy and the Environment

***Robert D. Fox, Esq.***

Governor Shapiro's overriding perspective is as follows: He "refuses to accept the false choice between protecting jobs or protecting our planet – we must do both." Within that framework, he supports the following:

- Ensuring that Pennsylvania has a comprehensive climate and energy policy that will invest in clean energy, including promoting solar projects and adopting measures to increase access to renewable energy sources.
- Working with stakeholders to demonstrate the best way to move forward to update Pennsylvania's Alternative Energy Portfolio Standards Act to set a target to generate 30 percent of Pennsylvania's energy from renewable sources by 2030 and set a goal for Pennsylvania to reach net-zero emissions by 2050.
- Investing in plugging abandoned well across the state to curb emissions.

- Investing in zero-carbon technology and providing financial incentives to help bring zero-carbon technologies to commercial readiness.
- Investing in research, development, and design for advanced renewables, advanced nuclear, hydrogen, carbon capture, and other zero-carbon technologies.
- Steering clean energy and infrastructure investments to underserved communities.
- Expanding weatherization assistance programs and energy efficiency projects for families and small businesses throughout the Commonwealth.
- Ensuring that while implementing these policies, Pennsylvania remains an energy hub as one of the most important energy-producing states in the entire country. The Commonwealth is the second largest natural gas producing state in the nation and the largest electricity exporter in the entire country.

## Environmental Rights Amendment Trends Entering 2023

***Diana A. Silva, Esq., Thomas M. Duncan, Esq., and Danielle N. Bagwell, Esq.***

In recent years, Pennsylvania courts have grappled with numerous challenges to local ordinances as violating Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA). In 2022, the Pennsylvania Commonwealth Court appeared to settle on the application of a balancing test that assesses whether the challenged governmental action unreasonably impairs the values enumerated in the ERA. In practice, this standard constitutes a high bar to ERA-based challenges, which may dissuade potential plaintiffs from bringing ERA-based challenges to local ordinances in the future.

For decades, Pennsylvania courts applied a three-factor balancing test to ERA-based challenges, first enunciated in *Payne v. Kassab*, 361 A.2d 263, 246 (Pa. 1976). In 2017, the Pennsylvania Supreme Court, in *Pa. Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) ("*PEDF II*"), held that local and state government agencies have an obligation under the ERA to act as trustees for the environment and the natural resources of the state, and as such must prohibit their degradation and affirmatively act to protect them. In so holding, the Court effectively struck the decades-old *Payne v. Kassab* three-part test.

In 2017, the Court applied a new standard to regulatory challenges in *UGI Utilities, Inc. v. City of Reading*, 179 A.3d 624 (Pa. Cmwlth. 2017), a case in which the City of Reading argued that a local ordinance could not be preempted because "it implicates its protection of historic resources under Article I, Section 27 of the Pennsylvania Constitution." The court disagreed, holding that the ERA "does not immunize local regulation from preemption" and making clear that "Article I, Section 27 can bar preemption of a local regulation" only where the "statute or regulation on which preemption is based so completely removes environmental protections that it violates the state's duties under that constitutional provision."

The following year, in *Frederick v. Allegheny Twp. Zoning Hearing Bd*., 196 A.3d 677 (Pa. Cmwlth. 2018), the Commonwealth Court upheld a zoning ordinance that rendered oil and gas development a permitted use by right in all zoning districts. A plurality of the court explained that municipalities do not have affirmative duties under the ERA but further held that when the government acts, "it must reasonably account for the environmental features of the affected locale..." The court explained that a "municipality may use its zoning powers only to regulate where mineral extraction takes place," but a "municipality does not regulate how the gas drilling will be done." Applying a two-step test which differed from the standard

applied in *UGI Utilities*, the court held it must "determine, first, whether the values in the first clause of the [ERA] are implicated and, second, whether the governmental action unreasonably impairs those values." Ultimately the court upheld the ordinance, holding plaintiffs had failed to prove the zoning ordinance unreasonably impaired the natural, scenic, historic, and esthetic values of the municipality's environment, crediting expert testimony showing a long history of oil and gas development safely coexisting with agricultural uses in the township.

The Commonwealth Court subsequently applied the *Frederick* test in several decisions to uphold other local ordinances, including one case this year, finding that they did not "unreasonably impair" individuals' rights under the ERA. *See Delaware Riverkeeper Network v. Middlesex Twp. Zoning Hearing Bd*., No. 2609 C.D. 2015, 2019 WL 2605850 (Pa. Cmwlth. June 26, 2019) (unreported); *Protect PT v. Penn Twp. Zoning Hearing Bd*., 220 A.3d 1174 (Pa. Cmwlth. 2019); *Murraysville Watch Committee v. Municipality of Murrysville Zoning Hearing Board*, No. 579 C.D. 2020, 2022 WL 200112 (Pa. Cmwlth. Jan. 24, 2022) (unreported).

The court also subsequently fleshed out the *UGI Utilities* standard with respect to challenges to regulations. In *City of Lancaster, et al. v. Pa. Pub. Util. Comm'n*, No. 251 MD 2019 (Pa. Cmwlth. Feb. 21, 2020) (unreported), which involved a challenge to the same regulation at issue in the *UGI Utilities* case, a group of municipalities argued that the ordinance failed to sufficiently protect historic resources under the ERA. The Court held that the Pennsylvania Public Utility Code preempted any local regulation or ordinance that falls within the ambit of that field. The court, citing to *Robinson Twp. v. Commonwealth*, 83 A.3d 901 (Pa. 2013), also stated that "the duties to conserve and maintain natural resources under the ERA 'do not require a freeze of the existing public natural resource stock' and 'are tempered by legitimate state interests.'" The Court, citing the standard in *UGI Utilities*, ultimately dismissed the municipalities' challenge, finding that they failed to establish that the regulation unreasonably degraded historic values protected under the ERA.

In November 2022, in *Pa. Envtl. Defense Found. v. Commonwealth*, No. 447 M.D. 2021, 2022 WL 16752900 (Pa. Cmwlth. Nov. 8, 2022), the Commonwealth Court dismissed an ERA challenge to a legislative enactment that authorized snowmobile use on state lands. While the plaintiffs made general factual allegations that ATVs are noisy and degrade the environment, the court found the conclusory allegations insufficient. The Court stated that, "[t]o succeed in its facial challenge, the Foundation must show that the statutes in question cannot be valid under any set of circumstances," and that, on their face, the statutes "meet the standards set forth in *PEDF II* and *Robinson Township*."

The Commonwealth Court will continue to fine-tune the standard for ERA-based challenges, with several important cases to be heard on appeal in 2023. Looking ahead to 2023, given the heightened standards applied by the Commonwealth Court, plaintiffs may be dissuaded from bringing ERA-based challenges to local ordinances without being prepared to demonstrate via scientific and expert evidence the alleged environmental degradation the ordinance would cause.

## Pennsylvania's Climate Change Initiatives Entering 2023

***Thomas M. Duncan, Esq., Brandon P. Matsnev, Esq., and Technical Consultant Michael C. Nines, P.E., LEED AP***

In 2022, Pennsylvania advanced significant regulatory and executive initiatives, the fate of which will be decided in 2023. Some of these actions focus on greenhouse gases (GHGs) generally, while others are more specific to particular GHGs, such as $CO_2$ or methane.

**Regional Greenhouse Gas Initiative (RGGI)**

In 2022, the Pennsylvania Commonwealth Court enjoined a final rulemaking titled "$CO_2$ Budget Trading Program," which would have allowed Pennsylvania to join as the newest member of the Regional Greenhouse Gas Initiative (RGGI). The rulemaking remains enjoined while litigation proceeds in the Pennsylvania appellate courts. the courts are likely to decide the rulemaking's fate in 2023.

RGGI is an intergovernmental organization consisting of ten member-states (CT, DE, ME, MD, MA, NH, NJ, NY, RI, VT) that has established a market-based cap-and-trade program for $CO_2$ emissions from fossil fuel-fired power plants that have 25 megawatts or more of nameplate capacity and send at least 10 percent of their gross generation to the grid. The rulemaking would aim to reduce $CO_2$ emissions from RGGI sources by 25.5 percent between 2022 and 2030. Based on an analysis conducted by a consultant retained by the Pennsylvania Department of Environmental Protection (PADEP), most emission reductions are expected to come from reductions in coal use, while a smaller percentage would come from natural gas. Pennsylvania itself would expect to see a total statewide emissions reduction of 183 million tons of $CO_2$ by 2030, but approximately 96 million of that 183 million tons of $CO_2$ emissions would be shifted (i.e., leaked) to other states within PJM territory. PJM is a regional transmission organization that coordinates the movement of electricity in Pennsylvania, all or parts of 12 other states, and the District of Columbia. Specific to natural gas, nearly all the anticipated reductions in natural gas emissions and generation in Pennsylvania are expected to be leaked to other PJM states.

PADEP expects the auctions of RGGI credits to yield hundreds of millions of dollars in revenues through 2030. The Air Pollution Control Act requires that all auction proceeds be directed to the Clean Air Fund "for the use in the elimination of air pollution," and PADEP would intend to develop a reinvestment plan for the auction revenues including reinvestment in energy efficiency, renewable energy, and greenhouse gas abatement. Although PADEP has taken the position that the allowances amount to fees that are authorized under the Air Pollution Control Act, opponents of the final rulemaking argue that the anticipated revenue from the auctions exceeds an authorized fee and instead amounts to an unauthorized tax.

A number of members of the Pennsylvania General Assembly, unions, and powerplants appealed the rulemaking to the Commonwealth Court and sought an injunction. On July 8, 2022, the Commonwealth Court issued an order enjoining the implementation of the rulemaking. In its opinion, the Court suggested that PADEP and the Environmental Quality Board had the authority under the Air Pollution Control Act to issue the rulemaking, but the Court ultimately suggested that the RGGI allowance auction proceeds amounted to an unauthorized tax. PADEP appealed that decision to the Pennsylvania Supreme Court (Docket Nos. 79 MAP 2022 and 80 MAP 2022). That appeal has been briefed and should be scheduled for argument in 2023. Meanwhile, on November 16, 2022, the Commonwealth Court held en banc argument on cross-motions for summary relief, and a decision on those motions is expected in 2023.

**Methane Emissions**

During 2022, PADEP had a rocky road of sorts with respect to implementation of two rulemakings related to reduction of volatile organic compound (VOC) emissions from both conventional and unconventional oil and gas operations. The rulemakings, one of which was issued as an emergency regulatory action on November 30, 2022, seek to simultaneously target significant methane emissions from the oil and gas industry. Sources subject to regulation include natural gas-driven continuous bleed pneumatic controllers, natural gas-driven diaphragm pumps, reciprocating compressors, centrifugal compressors, fugitive emissions components and storage vessels installed at conventional well sites, gathering and boosting stations and natural gas processing plants, as well as storage vessels in the natural gas transmission and storage segment. These regulations require operators to identify and stop leaks in their equipment that can allow methane and VOCs to escape into the atmosphere. While the regulations specifically target VOCs, PADEP believes that by reducing leaks of natural gas from wells and pipelines, that it will ensure a significant reduction of methane emissions as a co-benefit.

PADEP was required to adopt reasonably available control technology (RACT) requirements and RACT emission limitations for conventional and unconventional oil and natural gas sources in order to address VOC emission limitations and other RACT requirements consistent with the United States Environmental Protection Agency's (EPA) recommendations in the 2016 "*Control Techniques Guidelines for the Oil and Natural Gas Industry*," (2016 Oil & Gas CTG), which addresses control requirements to meet the 2008 and 2015 ozone National Ambient Air Quality Standards. The regulations incorporating the requirements of the 2016 Oil & Gas CTG were originally required to be incorporated into the Commonwealth's State Implementation Plan (SIP) by June 16, 2022 in order to avoid imposition of federal sanctions under the Clean Air Act.

Of note to the rulemaking process, PADEP originally proposed a final rulemaking, which contained regulations applicable to both conventional and unconventional oil and natural gas sources of VOC emissions. However, after the final rulemaking was submitted to the Independent Regulatory Review Commission (IRRC) for final consideration, the House Environmental Resources and Energy Committee voted to send a letter to IRRC disapproving the regulation. The Committee's primary concern centered on language in Act 52 of 2016, which the Committee believed required DEP to submit two rulemaking packages – one that applies only to conventional oil and natural gas sources and the other which would cover all other sources in the rulemaking.

Thus, PADEP embarked upon splitting the rulemaking into two separate rules. Due to the delays in the rulemaking processes and splitting of the rulemaking into two separate rules, the Commonwealth was subject to federal sanctions as of June 16, 2022, which included an increase in emission reduction offset ratios (from 1.3:1 to 2:1) for regulated facilities triggering non-attainment New Source Review permitting. A second more substantial deadline loomed for the imposition of federal highway funding sanctions (estimated at over $800 million) in the event that PADEP did not finalize the regulations and submit a SIP revision by December 16, 2022. Thus, the PADEP worked feverishly through the regulatory processes, which culminated in the final rulemakings being published on December 10, 2022, and subsequent submission of a SIP revision to the EPA on December 12, 2022.

EPA lifted offset sanctions and staved off what could have been a disastrous imposition of federal highway funding sanctions that were set to otherwise take effect on December 16, 2022. Implementation of the two oil and gas rulemakings will continue in earnest moving forward.

**Mobile Sources**

Last year, we reported that in October 2021, PADEP prepared a draft proposed rulemaking that would amend PADEP's Clean Vehicles Program at 25 Pa. Code Chapter 126, Subchapter D, by establishing a requirement for automakers that would adopt the California Air Resource Board (CARB) Zero Emission Vehicle (ZEV) program by adding a sales percentage requirement for Program-eligible light duty vehicles as part of their model offerings beginning for model year 2026 and requiring motor vehicle manufacturers to demonstrate compliance with the already adopted CARB greenhouse gas (GHG) fleet average requirement. During 2022, the proposed rulemaking did not advance beyond the advisory committee review stage and has yet to be presented to the Environmental Quality Board (EQB) for review and adoption. This proposed rulemaking no longer appears on PADEP's current regulatory agenda; however, this may be due to recent major amendments to CARB's *Advanced Clean Cars II* regulations, which require all new passenger vehicles sold in California to be zero emissions by 2035. Based on the changes in California, it appears that PADEP would need to propose a new rulemaking to incorporate all or part of California's low-emission and zero-emission vehicle regulations. Previously, PADEP indicated that it did not intend to eliminate the use of internal combustion engines. This will be one to watch closely during 2023.

## Pennsylvania Adopts Maximum Contaminant Level for PFOA and PFOS in Drinking Water and EPA is Not Far Behind

***Bryan P. Franey, Esq.***

On January 14, 2023, Pennsylvania adopted a final rule establishing a Maximum Contaminant Level (MCL) for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS) in drinking water. The final rule establishes an MCL of 14 parts per trillion (ppt) for PFOA and 18 ppt for PFOS. Pennsylvania joins a growing list of states to adopt MCLs. By comparison, New Jersey has adopted slightly lower MCLs for PFOA (13 ppt) and PFOS (14 ppt). Pennsylvania's MCLs for PFOA and PFOS apply to all community, nontransient, noncommunity, and bottled, vended retail, and bulk water systems.

At the federal level, the Environmental Protection Agency (EPA) is also planning to establish MCLs for both PFOA and PFOS. EPA had hoped to propose MCLs for PFOA and PFOS by the end of 2022 with a final rule adopted by the end of 2023. In its recent Regulatory Agenda, EPA moved its target to publish a proposed MCL to March 4, 2023 and a final MCL to September 2024. To the extent that EPA's MCL is more stringent than Pennsylvania's MCL, Pennsylvania will likely have to adopt EPA's standard. To the extent there are other conflicts between the two MCL rulemakings, it is unclear how such conflicts will be resolved.

## Act 2 Changes Anticipated in 2023

***Jonathan H. Spergel, Esq. and Technical Consultant Will Hitchcock***

The Pennsylvania Department of Environmental Protection (PADEP) is working on several programmatic and regulatory changes to its Land Recycling Program, commonly known as Act 2. Some of these efforts will take effect in 2023, while others will likely not become effective until 2024.

Based on feedback received from the regulated community, PADEP is working to improve Act 2 report review times by hiring additional toxicologists, risk assessors, and chemists to assist with report review. Although Act 2 has specified statutory review periods, many in the regulated community have observed that, in recent years, the vast majority of report review times take nearly the entire statutory review period, often resulting in the issuance of technical deficiency or denial letters. PADEP is also working to improve consistency and standardize regulatory interpretation across regions by developing additional training materials, as well as a Q&A database that should be a helpful resource to remediators and regulators alike. Our firm will likely be involved in development of the Q&A database through participation in the Cleanup Standards Scientific Advisory Board (CSSAB), so if there is an issue you would like clarified, please contact us to discuss.

There are many anticipated changes to the Medium-Specific Concentrations (MSCs) that serve as cleanup targets for Act 2 Statewide Health Standards. First, the much-anticipated increase to the vanadium MSC is likely to take effect in the second quarter of 2023. The residential soil MSC for vanadium has been set at 15 mg/kg for several years, a concentration that is often below the naturally occurring content of vanadium in soils throughout Pennsylvania. This has created significant difficulties for Act 2 projects as well as other construction projects involving the movement of fill under the Clean Fill Policy. The proposed rulemaking has already been approved by the Environmental Quality Board and no adverse public comments were received. When the final rulemaking takes effect, the residential soil MSC will increase to 1,100 mg/kg, providing substantial relief to many project sponsors.

PADEP and the CSSAB have been working on several other changes to Act 2 MSCs that will likely take effect in mid-2024. The interim Heath Advisory Limits (HALs) for PFOA and PFOS in drinking water that were published by EPA in June 2022 are not anticipated to replace the current groundwater MSCs until they are published as final HALs. Until that time, the groundwater MSCs for PFOA and PFOS are likely to remain at 0.07 µg/L (for used and nonuse aquifers with TDS ≤ 2,500 µg/L). The final HALs for GenX and PFBS (0.01 and 2 µg/L, respectively) will be incorporated as Act 2 groundwater MSCs (for used and nonuse aquifers with TDS ≤ 2,500 µg/L).

As a result of updated biokinetic models for lead exposures to children, the current residential soil MSC for lead is likely to decrease significantly in mid-2024, from 500 to 200 mg/kg. However, the PADEP and CSSAB have recommended the use of an arithmetic average soil concentration to demonstrate attainment of the Statewide Health Standard, which is consistent with the intended use of the biokinetic model.

Other anticipated changes include a significant decrease to the soil MSC for cadmium due to updated toxicity information, slight changes to the MSCs for several Polynuclear Aromatic Hydrocarbons (PAHs) whose toxicity is benchmarked to that of benzo[a]pyrene, and a few other MSCs changes to compounds where EPA has recommended the use of sub-chronic instead of chronic toxicity values. At this time, PADEP is finalizing the regulatory text for presentation to the EQB, public comment, and adoption. Once a

regulatory package is presented to the EQB, it often takes more than one year before it becomes an effective regulation.

## Pennsylvania Reasonably Available Control Technology Requirements

***Katherine L. Vaccaro, Esq.***

As we previously reported here and and discussed on our podcast here, PADEP has issued its new final regulations requiring the application of Reasonably Available Control Technology (RACT) by all major sources of NOx and VOC in Pennsylvania. The regulations are referred to as "RACT III," because they are the third iteration of Pennsylvania's RACT rule. The initial compliance deadline for RACT III, December 31, 2022, was the date by which all affected sources were required to submit to the Department their initial notifications, designating each source at the facility as either subject to RACT III or qualifying for a regulatory exemption. For non-exempt sources, the initial notification also needs to specify how the source will demonstrate compliance with the regulation – i.e., by meeting the applicable presumptive standards or seeking a source-specific determination of what constitutes RACT. Requests for such source-specific determinations, which are commonly referred to as "case-by-case proposals," were due by January 1, 2023.

Although the first compliance dates are already passed, the exceptionally short period between the promulgation of RACT III in mid-November 2022 and the initial compliance deadline less than two months later does not appear to be lost on PADEP, as key program staff from Central Office have signaled, albeit informally, a seeming recognition that enforcement discretion may be necessary for delayed compliance. Still, facilities subject to RACT III should act fast to make the required submittals if they haven't done so already. Please take a look at the links above for additional details on RACT III's presumptive standards, case-by-case proposals, including PADEP's "streamlined" option for certain sources subject to *RACT II*, emissions averaging for NOx, and other information.

## Air Management Services Expected to Continue Advancement of Air Toxics Regulations Requiring Health Risk Assessments

***Carol F. McCabe, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP***

As published in our Special Alert in May 2022 and subsequently updated, the City of Philadelphia's Air Management Services (AMS) is anticipated to continue advancement of a substantive rulemaking package into 2023 seeking revisions to existing Air Management Regulation VI *Control of Emissions of Toxic Air Contaminants* (the "AMR VI").

Under the proposed AMR VI, permit applicants seeking an air permit or license, or any permit renewal required by the AMS code (with limited exceptions) – including Title V renewals – would be required to determine whether their facilities have the potential to emit any one of the more than 200 listed air toxics in an amount above the designated pollutant-specific applicable threshold. If so, then an applicant would be required to conduct a health risk assessment for which AMS' "Risk Screening Workbook" may be used and must demonstrate that the proposed activity does not pose an unreasonable risk as compared to published inhalation reference values for the relevant air toxics. Notably, the proposed AMR VI would require AMS to review the existing air toxics concentrations surrounding an applicant's facility prior to acting on the permit application. Although the proposed rule language and supporting documents lack critical detail on how this assessment would be completed, this evaluation would suggest that AMS must account for, and

make decisions based on, emissions generated by other emission sources, in addition to those emitted by the applicant source itself.

The proposed AMR VI rulemaking presumably caught many potentially regulated entities by surprise, as the rulemaking was published at the Department of Records with a date of final effectiveness by June 1, 2022, unless a public hearing was requested. Potentially impacted entities and those interested in the regulatory changes requested a public hearing in advance of the June 1 deadline. A virtual public hearing subsequently was held in August 2022, with formal written comments due to AMS by September 2022. We understand that a substantial number of comments were received by AMS and that the City is analyzing these submissions and will make a final determination as to whether or how the proposed AMR VI will need to be modified further to address the comments received. As for next steps, Section 8-407(c) of the Home Rule Charter requires that a report of the hearing be provided that either reaffirms the proposed regulations or modifies them with approval of the Law Department. Then the Department of Public Health will summarize the comments provided by each commenter (or in the case of written comments, incorporate the written comments), provide a short response to comments, and prepare a summary of the changes AMS intends to make to the proposed regulations and explanation of the reasons for the changes. It is unclear at this time if a modification of the proposed AMR VI will be subject to the same public notice and publication on the Department of Records website as the original May 2022 proposal, or whether the rule will simply be finalized without additional opportunity for comment.

Due to the scope of the proposed AMR VI rulemaking and potential inclusion of novel "cumulative" risk assessment approaches, AMR VI warrants close attention in 2023.

## Amendments to Pennsylvania Stream and Wetlands Permitting Program and Changes to Mitigation Protocol on Hold; Future Uncertain

***Todd D. Kantorczyk, Esq. and Diana A. Silva, Esq.***

At this time last year, the Pennsylvania Environmental Quality Board (EQB) was expected to finalize a proposed rulemaking in 2022 to amend the Pennsylvania Department of Environmental Protection's (PADEP) Chapter 105 regulations, which are the Commonwealth's wetland and aquatic resource permitting regulations. The proposed amendments would have amounted to the first substantive revisions to the Chapter 105 regulations in nearly 30 years. In the fall, however, PADEP indicated that the proposed revisions have been tabled indefinitely. Additionally, the corresponding technical guidance documents concerning Chapter 105 alternative analyses and trenchless technology for pipeline projects have been put on hold despite being published in draft for public comment in 2021 and 2022, with no indication as to when they may be finalized. It should be noted that while these documents are an outgrowth of a 2018 PADEP settlement with environmental groups over the Mariner East 2 pipeline project, under the terms of the stipulation, the decision to publish final guidance documents rests solely with PADEP and that decision is not subject to appeal.

Likewise, at the outset of 2022, PADEP announced that its draft Function-Based Aquatic Resource Compensation Protocol would become final guidance effective as of March 1, 2022. The new protocol was a significant departure from PADEP's previous method for determining the necessary compensation for losses of aquatic resources, which was based primarily upon acreage and linear feet. Implementation of the new protocol, however, was hampered by the absence of updated application forms and met with push

back from affected entities, including mitigation banks and permittees such as PennDOT and the Turnpike Commission. As a result, PADEP quietly delayed full implementation of the protocol in 2022 and instead formed a stakeholder workgroup to reevaluate the protocol. And on January 7, 2023, PADEP announced that they were officially rescinding the final guidance "to reevaluate its effectiveness and review potential revisions through stakeholder outreach."

In short, the status of the significant updates to the Chapter 105 program expected in 2022 appear to be on indefinite hold, with the new schedule subject to the policy priorities of the incoming Shapiro administration.

## Pennsylvania Commonwealth Court Finds Local Stormwater Charge Constitutes a Tax Not a Fee for Service

***Diana A. Silva, Esq., Danielle N. Bagwell, Esq., and Technical Consultant Michael C. Nines, P.E., LEED AP***

On January 4, 2023, the Pennsylvania Commonwealth Court in *Borough of West Chester v. Pa. State System of Higher Education and West Chester University of Pa. of the State System of Higher Education*, No. 260 M.D. 2018 (Pa. Cmwlth. Jan. 4, 2023), ruled that a stormwater charge enacted by the Borough of West Chester was not a fee for service, but rather a local tax, and therefore could not be charged to West Chester University, a tax-exempt state university. The decision also rejected the use of impervious surface area coverage as a measure of the respective burden (and corollary benefit) that municipal stormwater systems provide to the given properties that are charged stormwater fees. This is the first decision in Pennsylvania to squarely evaluate stormwater charges that many municipalities and municipal authorities throughout the Commonwealth of Pennsylvania are currently charging to residential and commercial property owners, which were enacted largely as an effort to help fund improvements to the municipal separate storm sewer systems and to meet related regulatory obligations. The impact of this decision will have major implications throughout Pennsylvania, where over 50 municipalities or municipal authorities are currently charging stormwater fees, and many others have announced they are planning to do so in the future. For more information, please see our comprehensive review of this very important case, which is available here.

## PADEP Reissues PAG-03 General Permit for Industrial Stormwater

***Michael Dillon, Esq. and Technical Consultant Will Hitchcock***

On December 24, 2022, PADEP published the renewed PAG-03 general permit for stormwater discharges associated with industrial activity. The new permit goes into effect on March 24, 2023, and the existing permit expires at that time. Existing PAG-03 permit holders will need to submit a Notice of Intent (NOI) for coverage under the renewed PAG-03 before March 23, 2023, to maintain permit coverage and authorization to discharge stormwater. Permittees will also need to update and submit their Preparedness, Prevention, and Contingency (PPC) Plans to the PADEP as part of their NOI packages.

The NOI includes a requirement to report existing analytical data for the past two years for existing permittees, and to collect new data for pollutants that are considered the cause of impairment to waters receiving stormwater, as PADEP claims this information may be used to determine if the applicant is causing or contributing to the impairment for eligibility purposes. Applicants for renewal will need to act

quickly to determine if additional sampling and analysis needs to be performed prior to the NOI due date of March 23, 2023.

Additionally, the PADEP added a requirement to report details on structural best management practices (BMPs), such as post-construction stormwater management practices, and the amount (in acres) of impervious area each BMP treats. Permit applicants are encouraged to secure relevant design information for structural BMPs sooner rather than later from their respective design engineers where practicable.

Finally, please note that facilities that are currently exempted from stormwater permitting through a No Exposure Certification (NEC) will maintain status under their existing NEC, which will remain valid until the expiration date identified on PADEP's approval letter. Facilities wishing to maintain their NEC status beyond the expiration date are required to apply to renew the NEC no later than 180 days prior to the expiration date of the NEC.

The renewed permit is substantially similar to the existing PAG-03, with a few notable changes. The new PAG-03 now requires monitoring for Total Nitrogen and Total Phosphorus in all covered industrial sectors. The new permit also specifies Target Quantitation Levels (TQLs) for many monitoring parameters that must be met or exceeded by the laboratory performing the analysis. There is an additional, expanded Corrective Action Plan process that takes effect when a facility has four or more consecutive benchmark exceedances at a monitored outfall. The new process requires a more systematic and thorough evaluation of stormwater BMP alternatives than the existing process, which begins after two or more benchmark exceedances. There are also new requirements for managing certain authorized non-stormwater discharges as well as valve-controlled discharges from stormwater retention structures.

Covered facilities should review the new permit and discuss the new monitoring requirements and TQLs with their laboratory and/or consultant performing stormwater monitoring. Prior to submitting the NOI for renewed PAG-03 coverage, facilities are also required to update their exiting PPCs Plans to conform with the new permit.

## Philadelphia LNG Export Task Force Act Becomes Law

***Shoshana (Suzanne Ilene) Schiller, Esq.***

On November 3, 2022, Governor Wolf signed into law the Republican-sponsored Philadelphia LNG Export Task Force Act. The Act creates a Task Force to identify and examine the economic feasibility and impact, as well as obstacles, involved with making the Port of Philadelphia a Liquified Natural Gas (LNG) export terminal. The Task Force, which will be comprised of a wide variety of industry players, would also identify potential partners in developing an LNG terminal in Philadelphia. The passage of the Act and the work of the Task Force bodes well for the future of Philadelphia, and Pennsylvania, in becoming a leader in LNG exports.

## NEW JERSEY

### New Jersey Environmental Justice Permit Review Program Expected to Kick Off in 2023

***Jill Hyman Kaplan, Esq. and Brielle A. Brown, Esq.***

Over two years ago, Governor Murphy signed New Jersey's landmark Environmental Justice Law (EJ Law), which requires the New Jersey Department of Environmental Protection (NJDEP) to engage in a specialized and rigorous EJ permitting review process pursuant to regulations to be adopted by the agency. The process is intended to address cumulative environmental and public health stressors associated with locating certain new or expanded facilities in areas the law designates as "overburdened communities" before it may issue environmental permits covered by the law (see our summary of the EJ Law here). The EJ Law does not go into effect until the final regulations are issued, which, as described below, is expected to occur early in 2023 and could create much uncertainty for covered facilities.

Covered facilities primarily include major sources of air pollution, a wide range of solid waste and recycling facilities, and scrap metal facilities. Covered permits include most individual permits, registrations or licenses issued under a broad range of state environmental laws. The EJ Law defines overburdened communities as those census tracts in which (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a state recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency.

Under the EJ Law persons seeking any of the applicable permits from NJDEP for covered new or expanded facilities in an overburdened community must develop an Environmental Justice Impact Statement (EJIS) as part of any permit application. The EJIS must assess the potential environmental and public health stressors associated with the new or expanded facility, and with the existing source. For new facilities, if NJDEP finds that the facility would "together with other stressors cause or contribute to adverse cumulative environmental or public health impacts" in the community "that are higher than those borne by other" communities in the State, county or other geographic units as determined by NJDEP, then NJDEP *must* deny the permit (an exception is made for certain facilities serving a compelling public interest, although permits for such new facilities may be conditioned). If NJDEP makes the same finding in the context of an existing facility seeking a permit for an expansion or a permit renewal, then NJDEP may only apply permit conditions on the construction and operation of the facility to protect public health.

The EJ regulations address the details of the implementation strategies for the substantive requirements of the law. They were proposed in June 2022 following a stakeholder process. The proposed regulations then went through an extensive public comment process, which included over 1,500 comments. The regulations and NJDEP's responses to public comments are expected to be issued in final form early this year and trigger the commencement of the EJ review process for covered facilities and permits.

Pending the finalization of the regulations, NJDEP has been overseeing a hybrid environmental justice review process as mandated under a 2021 administrative order issued by the agency. The order, which purports to have been issued under the authorization of pre-EJ Law environmental permitting programs, applies to the same facilities as defined in the EJ Law that seek the same authorizations covered under the EJ Law located in the same overburdened communities. Among other requirements, the order requires applicants to hold public hearings "consistent with" the EJ Law, establishes 60-day public comment periods for permit applications, encourages applicants to engage directly with community members in advance of

the comment period, and requires NJDEP to apply "special conditions" as may be necessary to avoid or minimize environmental or public health stressors to the overburdened community. Although there have been a number of public hearings under the administrative order, as of this writing no permits have been issued to entities that have gone through this process. Thus, it is difficult to predict what permit conditions NJDEP may impose under the administrative order or, when issued, the finalized EJ regulations.

Once the regulations are finalized, we expect that obtaining permits will require even more advanced planning and interaction with the affected community. Additionally, facilities should prepare for unpredictable timelines for permit issuance, and uncertainty in the conditions that may be imposed on a new or existing facility's permit for any facility covered by the EJ Law. If the final regulations are substantially similar to the proposed regulations, NJDEP will have the discretion to impose conditions that range from on-site conditions pertinent to the subject matter of the permit to off-site conditions that are unrelated to the subject matter of the permit. Given the limited language of the EJ Law versus the expansive nature of the proposed regulation, the final regulations, which are not expected to change much from the proposal, could be legally challenged on the basis that they go beyond what the statute authorizes. For example, it is possible that challenges could be mounted to the definitions of a new facility, expanded facility, what constitutes the appropriate geographic point of comparison and what constitutes a compelling public interest to authorize NJDEP's issuance of a permit for a new facility. If you would like to learn more about the impact of the regulations or how they apply, please reach out to MGKF's Jill Kaplan or Carol McCabe.

## NJDEP Land Resource Protection Program to Focus on Climate Change Rules in 2023

***Bruce S. Katcher, Esq.***

2023 promises to be a very active year for climate change rules under the NJDEP's Land Resource Protection Program under NJDEP's Protecting Against Climate Change (PACT) initiative:

- The Inland Flood Protection Rule, which was issued in proposed form on December 5, 2022, with finalization expected as soon as May 2023. This rule would revise both the Flood Hazard Area rules as applied to inland flooding by non-tidal streams and rivers and the Stormwater Management (SWM) Rules to address more severe rainfall events caused by climate change.

- The Resilient Environments and Landscapes (REAL) Rule, which NJDEP expects to propose in the second quarter of 2023 and finalize by the first or second quarter of 2024. This rule will incorporate climate change considerations, like sea level rise, into a wide variety of regulatory programs including Coastal Zone Management, Freshwater Wetlands, Flood Hazard Area, and SWM rules.

We previously summarized the salient aspects of the Inland Flood Protection Rule here. Major changes would include use of future precipitation estimates in calculating flood and SWM requirements, expanding flood hazard areas, and increasing design flood elevations (DFE) by two feet above current requirements for future construction. Grandfather provisions are included.

The major elements of the REAL Rule were revealed by Vince Mazzei, Assistant Commissioner for Watershed and Land Management, in a late December webinar. Five feet would be added to the current DFE requirements for future shore construction, based on NJDEP's estimate of a five-foot sea level rise by

2100, combined with an estimated life of most new buildings of approximately 75 years. Flood hazard areas would expand, and the rule would add a new regulatory area – an inundation risk zone (IRZ) – including the area between the current shoreline and the projected year 2100 shoreline. Building would not be prohibited in the IRZ (assuming that flood hazard area and other applicable requirements were met), however, a new risk assessment and alternatives analysis would be required together with a deed notice of building risks based on this analysis.

Other changes would correct inconsistencies between the state program and the National Flood Insurance Program, address renewable energy (especially habitat and infrastructure issues raised by wind energy), encourage nature-based solutions for SWM and water quality, remove SWM exemptions for urban redevelopment, impose new riparian zone protections for headwaters and barrier island baysides, and add wetlands, transition area and wildlife habitat protections. Finally, the proposal would modify the land use permitting process for coastal and inland areas, including replacement of permits-by-rule with a new permit-by-registration process, eliminate or combine some permits-by-certification with general permits, require that certifications be completed by a licensed engineer or architect, and add or modify various permit notice requirements. Mazzei offered to meet with interested parties in January to provide pre-proposal comments.

## New Jersey to Remain Focused on PFAS in 2023

***Nicole R. Moshang, Esq., Thomas M. Duncan, Esq., and Brandon P. Matsnev, Esq.***

In 2022, New Jersey advanced significant regulatory, litigation and legislative initiatives applicable to per- and polyfluoroalkyl substances (PFAS) that will carry into 2023 (and beyond). The main initiatives are addressed below.

### PFAS Sampling Requirements for NJPDES Permits

Last year we reported that the New Jersey Department of Environmental Protection (NJDEP) sent PFAS Source Evaluation and Reduction Requirements Surveys to certain NJPDES permittees. Specifically, these surveys asked Category B and L NJPDES permittees to identify their use of Class B firefighting foam and of certain materials that are known to contain PFAS. NJDEP then sent follow-up Requests for Information to a group of NJPDES permittees based on responses to the initial survey, requiring the permittees to collect two effluent samples for 12 PFAS compounds at least 30 days apart and submit the data to NJDEP.

NJDEP's investigation of PFAS compounds in the state remains in full swing. On March 23, 2022, NJDEP sent additional Requests for Information, adding two compounds to the original 12, to a second group of permittees based on responses to the initial survey, with data submission due by August 5, 2022. On October 5, 2022, NJDEP sent Requests for Information to a third group of permittees, adding the GenX compounds to the 14-compound list, with data due to be submitted by February 3, 2023. Monitoring results are available on the Division of Water Quality's webpage, under the new "PFAS" tab, along with an FAQ document concerning the three Requests for Information. According to NJDEP's PFAS webpage, "in the near future, it will also be necessary to investigate to probable sources, reduce/eliminate the sources found (such as product substitution, operational controls, or treatment), and take other actions to protect surface water and sludge quality."

**NJDEP Interim Soil Remediation Standards for PFNA, PFOA, PFOS, and GenX**

On October 17, 2022, NJDEP issued a public notice in the New Jersey Register establishing interim soil remediation standards (SRSs) for the ingestion-dermal exposure pathway for perfluorononanoic acid (PFNA), perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS), and hexafluoropropylene oxide dimer acid and its ammonium salt (GenX). NJDEP also established interim soil leachate remediation standards for the migration to groundwater exposure pathway for PFNA, PFOA, and PFOS. These standards are summarized in the table below. These new interim standards, set forth below, were effective upon publication with no phase-in period.

| Compound | CAS No. | Soil Remediation Standard Ingestion-Dermal Residential (mg/kg) | Soil Remediation Standard Ingestion-Dermal Nonresidential (mg/kg) | Soil Remediation Standard Migration to Groundwater (mg/kg) | Soil Leachate Remediation Standard Migration to Groundwater (µg/L) |
|---|---|---|---|---|---|
| **PFNA** | 375-95-1 | 0.047 | 0.67 | AOC/Site-Specific | 0.26 |
| **PFOA** | 335-67-1 | 0.13 | 1.8 | AOC/Site-Specific | 0.28 |
| **PFOS** | 1763-23-1 | 0.11 | 1.6 | AOC/Site-Specific | 0.26 |
| **GenX** | 13252-13-6, 62037-80-3 | 0.23 | 3.9 | N/A | N/A |

Further evaluation of the interim SRSs can be found in our Special Alert here. NJDEP held a training session on the new interim SRSs on November 10, 2022. The presentation materials can be found here, under "PFAS Interim Soil Standards."

These new standards are likely to impact many remediation projects in 2023.

**NJ PFAS Litigation**

We also expect that PFAS related litigation will continue to expand in 2023. A recent opinion issued by Judge Becker on December 14, 2022, in the matter of *NJDEP et al., v. Solvay Specialty Polymers USA, LLC*, No. G-L-1239-20, Superior Court of Gloucester County, highlights the potentially significant geographic reach and scope of future PFAS litigation in New Jersey.

In November 2020, NJDEP filed a complaint against defendants Solvay Specialty Polymers USA, LLC (Solvay) and Arkema Inc. (Arkema) (collectively defendants) seeking natural resource damages for discharges of PFAS from defendants' manufacturing facility located in West Deptford, New Jersey. NJDEP alleged that defendants discharged PFAS from their facility through air emissions, spills to soil and groundwater and direct discharges to the Delaware River, which NJDEP claimed resulted in damages to New Jersey's natural resources. *Id* at 2. NJDEP alleged in its complaint that defendants' contamination to the Delaware River flowed from the river through its pathways inland and thus gave rise to claims for damages to both the river itself and inland resources, however, NJDEP filed a motion to reserve adjudication of the in-river claims for another day (having filed those claims mainly to avoid running afoul of New Jersey's Entire Controversy Doctrine under R. 4:30A, which requires parties to assert all known claims as between the parties in one action) . In support of its motion, NJDEP argued that carving out and reserving the in-river claims for a subsequent action was necessary to prevent delay in the adjudication of the remediation and

restoration of New Jersey's natural resources that NJDEP is obligated to protect for the benefit of state residents.

In opposition to NJDEP's motion to sever, defendants principally argued that severance of the in-river claims would be inefficient for both defendants and the judicial system. The defendants reasoned that they are entitled to seek discovery from, and to join as parties to the current case, a large number of other potentially responsible third parties, and that reserving in-river claims for later litigation will create an unnecessary duplication of effort.

The Court agreed with NJDEP and found that reserving the in-river claims for future litigation would promote judicial efficiency, fairness, and avoid the confusion and complexity that would result if the in-river claims were included in the current litigation. *Id*. at 2, 4-5. The Court reasoned that the geographic area in question covered three states that would likely implicate other trustees' claims, present numerous complex questions of law and fact and expand to multiple third parties in various states with alleged discharges to the Delaware River. *Id*. at 4.

Although the Court granted NJDEP's motion to sever, the Court noted that the parties could seek discovery regarding potential third parties and substances and indicated that defendants could seek leave to bring third parties into the current litigation if discovery revealed a connection between the third party and inland natural resource damages. *Id*. at 6.

While it is yet to be seen if the door has been left open to expand the litigation beyond the current parties and claims, given the large geographic area at issue, multiple pathways, and numerous potential sources of PFAS impacts, it seems almost certain that complex, multi-party PFAS litigation is on the horizon both in this case and others NJDEP may bring to address PFAS contamination in New Jersey

**NJ PFAS Legislation**

Concerning legislation, at this time there are six proposed bills related to PFAS. One of these, S-2712, introduced in May 2022, would ban the sale of class B firefighting foam containing intentionally added PFAS. A violation would be considered an unlawful practice under the state's Consumer Fraud Act and would subject the violator to monetary penalties, including punitive damages and treble costs. On December 15, 2022, the bill was approved by and reported out of the Senate Environment and Energy (Senate EE) Committee. It could become law in 2023, although, as currently written, it would only become effective two years after passage.

The other five proposed bills, S-3176-80 (and related Assembly bills), were part of a comprehensive PFAS legislative package introduced in October 2022 as addressed here. Only one has thus far received Senate EE Committee approval: S-3176, which would direct NJDEP to conduct a study to determine the feasibility of a uniform MCL for the entire class of PFAS compounds. It would further direct NJDEP to investigate and potentially recommend treatment technologies for PFAS. The bill was referred to the Budget and Appropriations Committee on November 3, 2022.

The remaining four bills remain under the EE Committee's consideration. S-3177 would, among other things, ban PFAS-containing cosmetics, carpet treatment products, and food packaging, and would require PFAS-containing cookware to be appropriately labeled. S-3178 would require NJDEP to assess current MCLs in place to ensure they adequately protect children, and to consider whether MCLs should be implemented for presently unregulated PFAS compounds. S-3179 would require that public water systems

promptly notify residents of PFAS exceedances. Finally, S-3180 would mandate that water suppliers or purveyors proactively designate alternate water sources in the event they discover PFAS exceedances in current sources. These bills, if enacted, would create an extensive new and complex regulatory program for NJDEP to administer at substantial cost to the agency and industry.

## New Jersey Site Remediation - Key Issues for 2023

***Bruce S. Katcher, Esq.***

What was formerly known as the Site Remediation and Waste Management Program underwent a rebranding and reorganization in 2022. It is now reorganized and known as the Contaminated Site Remediation and Redevelopment Program (CSRRP), emphasizing both the site remediation and brownfields redevelopment aspects of the program. Responsibility for the solid waste program has been transferred to the Air Quality, Energy and Materials Sustainability Program. CSRRP is headed by recently appointed Acting Assistant Commissioner, David Haymes.

### Contaminants of Emerging Concern

The new year promises to see continued attention to contaminants of emerging concern, especially per- and poly-fluoralkyl substances (PFAS) and 1,4 dioxane (as previously reported here and further addressed below.) NJDEP established interim soil remediation standards for various PFAS in October 2022 and attention to these standards will be important in 2023. Soil and groundwater remediation standards for 1,4 dioxane already existed.

### Proposed Rules – SRRA 2.0 and RAPs

Assistant Commissioner Haymes has also announced that his program is planning to issue a new proposed rule in 2023 to incorporate the requirements of the 2019 amendments to the Site Remediation Reform Act (a.k.a. SRRA and summarized here) into the Administrative Requirements for the Remediation of Contaminated Sites and the Technical Regulations.

That rule proposal is also expected to contain changes to the remedial action permit (RAP) program designed to reduce delays in the issuance of RAPs (a longstanding problem). This may include the possibility of a new general permit program applicable to a variety of RAPs that are relatively straightforward and routine (e.g., for deed notices) and the use of a single permit, instead of dual permits, for projects where both soil and groundwater permits are needed. Other process changes mentioned by Haymes that may be implemented without a rule change would include improvements in permit reviews to identify administrative deficiencies early in the process, including application submission through an electronic portal designed to automatically reject certain administratively deficient applications, a new FAQ web section to provide more guidance on common deficiencies, and cross training of permit reviewers so that one person could handle both soil and groundwater issues instead of the current split responsibility.

### Possible Changes to Groundwater Quality Criteria

While not, strictly speaking, a planned revision to CSRRP regulations, Kimberly Cenno, Bureau Chief of the Bureau of Environmental Analysis, Restoration and Standards indicated at a recent conference that the Division of Water Monitoring and Standards was considering various revisions to the groundwater quality criteria and the assumptions on which they are based. She indicated that there could be updates to 65 standards including 50 that would be more stringent with seven of those changing by an order of magnitude or more. These criteria serve as the basis for the groundwater remediation standards in the CSRRP.

## New Jersey Solid Waste Program Focus Shifts to Sustainability in 2023

***Bruce S. Katcher, Esq.***

The NJDEP solid waste program underwent a subtle but meaningful rebranding in 2022. Formerly known as the Division of Solid and Hazardous Waste Management, it is now known as the Division of Sustainable Waste Management (DSWM) and is housed under the Assistant Commissioner for Air, Energy and Material Sustainability. A noticeable focus on sustainability will characterize the DSWMs 2023 priorities. Moreover, there is some synergy in the reorganization, given that the Air and Solid Waste programs are likely to be the most involved in the new Environmental Justice permitting process.

Speaking at the 21st Annual NJDEP-AWMA Regulatory Update Conference in November, the new Division Director, Janine MacGregor, noted the increased emphasis on sustainability as a consequence of new and pending legislation over the last few years and identified a variety of Division priorities in 2023, including:

- Recycled Content Law – Enacted at the beginning of 2022, this law imposed minimum recycled content requirements on certain manufacturers of containers and packaging products in an effort to create or expand the market for recyclables. The DSWM is currently developing regulations to implement this program.

- Food Waste Reduction and Recycling - There are two primary laws that the DSWM is charged with implementing:

    1. The Food Waste Reduction Law (enacted in 2017) which requires NJDEP to develop a plan to reduce food waste in New Jersey by 50 percent by 2030;
    2. The Large Generator Food Waste Recycling Law (enacted in 2020), which requires certain large generators of food waste to separate and recycle it.

DSWM is currently finalizing its Food Waste Reduction Plan and is planning to issue the Plan and proposed regulations on food waste recycling and food waste energy production and composting in early 2023.

- Get Past Plastic Initiative – This is the program that implements the law passed in 2020 that, among other things, bans single use plastic carryout bags and polystyrene foam food serve products and containers in New Jersey. The law is currently being implemented without regulations and the DSWM expects to propose those in the second half of 2023.

- Extended Producer Responsibility (EPR) requirements – EPR, which is a concept that is intended to reduce waste by making product manufacturers and distributors responsible for their products and packaging at the end of life, is a concept currently under consideration in New Jersey. S-426, pending in the NJ Senate, would require manufacturers of certain containers to develop and implement a product stewardship plan. DSWM is advising Senator Smith on the bill and researching how similar laws work elsewhere.

- Advanced Recycling – This is an emerging technology that turns used solid plastic into its gas or liquid raw materials to be remanufactured into new plastic for use in plastic products or packaging. DSWM is

currently researching these technologies and how other states are regulating them, including whether the entities should be regulated as manufacturers, recycling or solid waste facilities.

Other programs on which the DSWM is currently working, as reported by Director MacGregor, are the following (all of which have elements of waste reduction/reuse/recycling):

- Electronic -Waste – DSWM is working on regulations to strengthen and streamline the manufacturer reporting program with a rule proposal expected in early 2023.

- Recycling Rules – DSWM is working on revising the exemptions from the recycling regulations with an eye toward evening the playing field between those recyclers that are and are not exempted. A rule proposal is expected in early 2023.

- Dirty Dirt Law – This is the law that requires certain entities in the business of providing fill and soil recycling services to be licensed under the A-901 program. Regulations are expected to be proposed in the summer of 2023.

## New Utility Benchmarking and Reporting Requirements for Commercial Buildings

***Technical Consultant Will Hitchcock and Bruce S. Katcher, Esq.***

For the first time, certain owners of commercial buildings over 25,000 square feet will be required to report the building's energy and water usage to the New Jersey Board of Public Utilities (BPU). These benchmarking reports will be due annually with the first report due by October 1, 2023, covering utility usage from the 2022 calendar year. This program is being developed by the BPU as required by New Jersey's Clean Energy Act of 2018 and is substantially similar to energy benchmarking programs already in place in other states and municipalities, including Philadelphia.

The list of covered buildings will be constructed from the state's Tax Assessment Database and therefore buildings owned by tax exempt entities will not be covered. Owners of covered buildings should receive a notification from the BPU by July 1, 2023. Utility usage would be reported using EPA's ENERGY STAR Portfolio Manager online application, and a number of exemptions may be available upon application, including exemptions for new buildings (through the first year of operations), buildings to be demolished, unoccupied buildings, and others. The BPU will be establishing procedures to obtain data from the water and energy utilities and, where needed, to obtain tenant consent. The data will eventually be reported out to the public in a format to be determined, although, according to the BPU, the public reports will not be available for five years.

The BPU is currently holding stakeholder meetings and accepting public comments on the proposed program until January 30, 2023. We have assisted several of our clients with exemption applications and the preparation and submittal of ENERGY STAR benchmarking reports under Philadelphia's existing benchmarking program.

## NEW YORK

### New York Lower Courts Give Green Light to Green Amendment Lawsuits, for Now

***Stephen D. Daly, Esq.***

As reported in last year's forecast, as of January 1, 2022, New York became one of the few states to have incorporated an environmental rights amendment into its Bill of Rights. The New York Amendment, proverbially known as the "Green Amendment," provides that, "Each person shall have a right to clean air and water, and a healthful environment."

Judicial decisions interpreting the new Amendment have now started trickling in, offering a glimpse into how the rights protected by the Amendment might be enforced. In *Fresh Air for the Eastside, Inc. v. State of New York*, Index No. E2022000699 (Monroe Cnty. Dec. 7, 2022), a Monroe County Supreme Court held that the Amendment affords a cause of action by a private party against the government for violations of the Amendment, but not against another private party. The lawsuit concerned a landfill located outside of Rochester, New York. The plaintiffs, a group of neighboring residents, sued the landfill's operator, a private entity, along with the State of New York and other government entities, seeking declaratory and injunctive relief on the basis that the operation of the landfill violated the plaintiffs' constitutional rights to a healthful environment.

In a ruling on motions to dismiss, the court dismissed the claim against the landfill operator but allowed the claim against the State to proceed. The court held that the Amendment "makes no reference to private entities" and therefore imposes a restriction only on the government. As for the State, the court rejected the argument that the plaintiffs' claims had to be pursued as an administrative challenge to final agency action under CPLR Article 78. The court held that it was well within its authority "to compel the State to comply with the Constitution" in a declaratory judgment action, seeking injunctive relief, when the harm from the landfill was allegedly ongoing and unabated. The court also rejected the State's argument that the lawsuit called into question the Department of Environmental Conservation's enforcement discretion, which is not typically subject to judicial review. While the State may exercise its discretion under various environmental statutes as to when and how it implements its enforcement authority, the court reasoned, "the State lacks the discretion to violate the Constitution." Thus, assuming the allegations in the complaint were true, the court held that it was apparent that "more needs to be done to protect [plaintiffs'] constitutional rights to clean air and a healthful environment." The court therefore denied the State's motion to dismiss.

A related lawsuit involving many of the same parties, *Fresh Air for the Eastside, Inc. v. Town of Perinton*, Index No. E2021008617, was an Article 78 proceeding challenging various local approvals issued the landfill. The court denied the defendants' motions to dismiss the plaintiffs' constitutional challenge based on the Amendment, allowing the claim to move forward. There, the court noted that "constitutional inquiries of government action are more rigorous" than the usual "arbitrary and capricious" standard and suggested that it was improper for the court to afford the same deference to the agency as was usually afforded in Article 78 proceedings. The court ultimately denied the motions to dismiss the constitutional claim based

on the Amendment, allowing it to proceed as a basis for overturning the Town's and the Zoning Board of Appeals' decisions.

If the first judicial decisions are any indication, both private and public parties will want to closely track developments concerning the Amendment in these and similar cases. While private parties like the landfill operator may not be subject to direct lawsuits for violations of the law, they will undoubtedly feel the force of the Amendment if the government is obligated to do "more" – possibly above and beyond their statutory prerogatives – to ensure New Yorkers' rights to a healthful environment are not infringed, as the Monroe County Supreme Court's decisions suggest. Suffice it to say that these decisions are just the opening salvo in this developing area of the law.

## New York Poised to Pursue Aggressive Agenda to Curb Greenhouse Gas Emissions

***Stephen D. Daly, Esq.***

New York's 2019 Climate Leadership and Community Protection Act (the "Climate Act") mandates that by 2030, New York must achieve 70 percent renewable energy generation, and by 2040, must achieve 100 percent zero-emission electricity. The Climate Act also created the Climate Action Council (the "Council") and tasked it with developing a scoping plan to serve as the initial framework for how the State will achieve the Climate Act's ambitious goals.

On December 19, 2022, the Council announced the approval and adoption of the New York State Climate Action Council Scoping Plan ("the Plan"). The Plan includes a sweeping list of recommendations that touches upon practically every sector of the economy. Its recommendations include:

- an aggressive transition to renewable energy sources, including new and upgraded transmission and distribution systems so that renewable energy generated upstate can be moved to more populated areas downstate;
- the implementation of an economy-wide cap-and-invest program; improved monitoring, reduction, and capture of methane emissions from solid waste management facilities and water resource recovery facilities;
- the timed phase-out of gasoline vehicles so that by 2030, nearly all light-duty vehicle sales are zero-emission; and
- the timed phase-out of fossil fuel heating and cooking appliances so that when they are retired, they are replaced with electric alternatives.

With the Plan finalized, the next phase for implementing the Climate Act will fall on the New York State Department of Environmental Conservation (DEC). DEC has until January 1, 2024 to draft and promulgate enforceable regulations to ensure the State meets the Climate Act's statewide greenhouse gas emission limits as outlined in the Plan. Given the breadth of the Plan, and a newly elected Governor in place who is committed to fighting Climate Change, these forthcoming regulations will likely propose sweeping changes that may affect virtually every industry in the State. Stakeholders will therefore want to closely monitor any opportunity for public input.

## DEC Set to Renew and Add Climate Change Requirements to the Multi-Sector General Permit for Industrial Stormwater (GP-0-23-001)

***Stephen D. Daly, Esq. and Technical Consultant Michael C. Nines, P.E., LEED AP***

The New York State Department of Environmental Conservation (DEC) is expected to finalize its renewed Multi-Sector General Permit (MSGP) for stormwater associated with industrial activities in early 2023. The existing MSGP is set to expire on February 28, 2023 with the new permit anticipated to go into effect on March 1, 2023 for another 5-year term. Existing MSGP permit holders will need to submit a Notice of Intent (NOI) for coverage under the renewed MSGP within 90-days of the MSGP being renewed (*i.e.,* on or before May 30, 2023), in order to maintain permit coverage and authorization to discharge stormwater associated with industrial activities. Permittees will also need to update their Stormwater Pollution Plan (SWPPP) which contains a regulated facility's best management practices (BMPs) for preventing industrial activities from polluting stormwater.

Facilities that are currently exempted from stormwater permitting through a Conditional Exclusion for No Exposure (NEC) are anticipated to be able to maintain their NEC status as the NEC will remain valid until the expiration date identified on the letter from DEC that approved the NEC.

The renewed MSGP is substantially similar to the existing MSGP, with a few notable changes. For instance, pursuant to the Climate Leadership and Community Protection Act and related guidance, the new MSGP contains a requirement for permittees to implement enhanced stormwater control measures for facilities that have a potential to be impacted by future physical climate risks. Regulated facilities will need to evaluate the potential to be impacted by future physical climate risks due to major storm events, storm surge, seiche, sea-level rise and flood events pursuant to the Community Risk and Resiliency Act (CRRA), 6 NYCRR Part 490, and associated guidance (e.g., "State Flood Risk Management Guidance" (SFRMG) and "Estimating Guideline Elevations"). The new MSGP specifically identifies enhanced BMPs which these permittees must consider, including but not limited to:

- Reinforcing interior and exterior material storage structures to withstand flooding;
- Delaying delivery of raw materials when a major storm event is expected within 48 hours;
- Elevating or securing semi-stationary structures to prevent floating;
- Permanently storing materials and waste above expected flood level;
- Permanently reducing or eliminating exterior storage; and
- Relocating company vehicles to higher ground.

Permittees must evaluate these measures and then update their SWPPP to identify which enhanced stormwater control measures were selected for implementation and which were not, along with an explanation as to why certain control measures were not selected, where applicable.

The new MSGP will require the electronic submittal of the NOI and related materials, as well as the Annual Certification Report (ACR) and Discharge Monitoring Reports (NetDMR) through DEC's nFORM portal. The new MSGP also clarifies industrial sector requirements for Sectors engaged in dismantling of used motor vehicles for resale of parts (Sector M) and facilities primarily engaged in dismantling of motor vehicles for scrap (Sector N), with separate and specific BMPs and monitoring requirements for each activity. Finally, other changes include overall organizational and formatting changes, as well as duplicative language removal.

Covered facilities should review the new MSGP and discuss the enhanced BMP climate-related requirements to gain a full understanding of the complexities that may be encountered when addressing any climate-related risks for its covered facility.

## DELAWARE

### Delaware Likely to Propose State Drinking Water Standards for PFAS

***Stephen D. Daly, Esq. and Technical Consultant Will Hitchcock***

Last year, Delaware's Division of Public Health (the "Division"), with assistance from the Department of Natural Resources and Environmental Control (DNREC), proposed maximum contaminant levels (MCLs) for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) in drinking water as required by House Bill 8, signed in October 2021 and as previously reported here. The proposed MCLs for PFOA and PFOS were 21 and 14 parts per trillion (ppt), respectively, with a cumulative standard where both are present of 17 ppt. The proposed MCLs appeared in the August 1, 2022 edition of the Delaware Register of Regulations and were originally anticipated to take effect in early 2023. However, the Division is now expected to revise and republish the proposed MCLs as a result of the interim Health Advisory Levels (HALs) published by EPA in June 2022 of 0.004 ppt for PFOA and 0.02 ppt for PFOS. It remains to be seen how the Division will account for EPA's interim HALs. The Division could stick with its original proposal, but it is more likely that the Division either adopts the much more conservative interim HALs proposed by EPA, or some intermediate value between its original proposal and EPA's. No revised proposal has yet been announced, but this is expected to occur sometime in 2023, at which time the public will likely have another opportunity to comment. Stakeholders will want to monitor any opportunity to submit public comment, even if comments were previously submitted regarding the Division's original proposal. Once the new MCLs go into effect, they will presumably be applied as Hazardous Substance Cleanup Act screening levels for groundwater remediations in Delaware.

### DNREC Proposing to Adopt California's Zero-Emission Vehicle Standards

***Stephen D. Daly, Esq.***

Under the Clean Air Act, states are generally preempted from adopting state emission standards for mobile source emissions, except that California is afforded a special exemption due to its unique air quality problems. Other states may elect to adopt the more stringent California vehicle emission standards, rather than rely on the federal standards. If a state adopts California's emissions standards, they must do so identically.

Delaware is one of the states that has adopted the California standards, *see* 7 Del. Admin. C. 1140, but it has not yet adopted California's zero-emission vehicle standards, known as "Advanced Clean Car II," which seek to restrict and later ban the sale of most new vehicles powered by gasoline and diesel. In March 2022, Governor Carney directed DNREC to begin the process of adopting the Advanced Clean Car II standards.

In November and December 2022, DNREC received public input and comment regarding the adoption of these standards, including holding several public workshops. Under these regulations, the sale of traditionally fueled light-duty passenger cars, trucks, and SUVs would be rapidly scaled down in Delaware

starting in late 2025, culminating with a total ban on the sale of new gasoline and diesel-powered vehicles by model year 2035. Once the proposed regulatory language is finalized, DNREC will promulgate the draft proposed regulatory language and hold a public hearing, likely in early 2023. DNREC expects that the Secretary's decision/order regarding the adoption of the new regulations will be issued in mid-2023.