



2020 Environmental and Energy Law Forecast

PENNSYLVANIA FORECAST

Pennsylvania's Climate Change Initiatives Entering 2020

Thomas M. Duncan, Esq.

On October 3, 2019, Governor Wolf issued an Executive Order directing the Pennsylvania Department of Environmental Protection (PADEP) to propose a rulemaking to the Environmental Quality Board (EQB) by no later than July 31, 2020 to join the Regional Greenhouse Gas Initiative (RGGI). RGGI is a collection of northeastern states that have instituted a cap and trade program to reduce CO₂ emissions from fossil fuel-fired electric power generators with at least 25 megawatts of capacity. The Executive Order is intended to further Gov. Wolf's goal of reducing statewide greenhouse (GHG) emissions by 26 percent by 2025 and by 80 percent by 2050, based on 2005 levels. If PADEP in fact proposes a rulemaking to the EQB by July 31, 2020, the EQB would likely provide a public comment period in the fall of 2020. PADEP currently expects that the RGGI rule would take effect in the first quarter of 2022.

For now, a rulemaking petition submitted by a group of individuals and organizations in 2018 that requests that the EQB establish a cap-and-trade program to reduce statewide GHG emissions will be held in abeyance while PADEP and the EQB work on the RGGI rule. For a more detailed explanation of this pending rulemaking petition, please refer to our [article](#) from late 2018.

On December 17, 2019, the EQB voted to approve proposed regulations to reduce methane emissions by setting volatile organic compound emissions standards for existing oil and gas operations. A 60-day public comment period is forthcoming.

More recently, on December 19, 2019, a group of northeastern states, including Pennsylvania, which together have formed the Transportation and Climate Initiative, issued a draft Memorandum of Understanding ([MOU](#)) with a goal of creating a cap-and-invest program to reduce CO₂ emissions from the transportation sector. The program would specifically target fuel suppliers. A final MOU is expected in the spring of 2020, at which time states could decide whether to participate in the program.

PADEP Issues New Management of Fill Policy

Michael M. Meloy, Esq. and Will Hitchcock, Technical Consultant

Sweeping changes to Pennsylvania's Management of Fill Policy went into effect on January 1, 2020. The Policy is critically important because it defines when and under what circumstances fill material can be moved and used without being regulated as a waste under the Pennsylvania Solid Waste Management Act. Work involving earth disturbance, excavation, and demolition activities, as well as Brownfields, development, infrastructure, and utility projects fall within the scope of the Policy. The changes to the

Policy will have broad impacts within the regulated community, affecting, among others, real estate developers, land owners, railroads, port operators, public utilities, municipalities, excavation contractors, and environmental consultants who regularly support such entities.

One of the most notable changes to the Policy is the elimination of the numeric standards defining “clean fill” that were found in the prior version of the Policy. Instead, the new Policy incorporates by reference certain of the numeric values established under the Land Recycling and Environmental Remediation Standards Act (Act 2) to implement the statewide health cleanup standards for residential properties. This means that each time the cleanup standards under Act 2 change, the clean fill standards will change at the same time. The immediate impact of incorporating by reference the numeric standards under Act 2 has been dramatic. The clean fill standards for various regulated substances are now significantly lower under the new Policy than they were under the prior version of the Policy including the standards for substances such as various semi-volatile organic compounds and metals that are ubiquitous in urban and suburban environments. The changes in the clean fill standards for benzo[a]pyrene and vanadium are particularly significant. The clean fill standard for benzo[a]pyrene has decreased from 2.5 mg/kg to 0.58 mg/kg which is below the background level of benzo[a]pyrene typically found in many developed areas in Pennsylvania. The clean fill standard for vanadium has decreased from 1,500 mg/kg to 15 mg/kg which is substantially less than typical naturally occurring background levels.

Other important changes to the Policy include changes to the list of materials that can qualify as “clean fill,” new procedures for identifying and sampling “historic fill,” new requirements for performing due diligence at donor sites, increased reporting requirements, new definitions that determine whether the Policy applies to movement of material within a right-of-way or “project area,” alternative analytical methods, and grandfathering provisions to address fill that had already been determined to qualify as clean fill under the existing Policy but not yet placed. The new Policy is the subject of a pending appeal before the Environmental Hearing Board based on the theory that the new Policy is effectively a regulation that should have gone through a formal rulemaking process, and that the new Policy imposes other unreasonable conditions. In the meantime, PADEP is implementing the new Policy and attempting to address numerous questions that are arising as the regulated community moves ahead with steps to comply with the new Policy.

Changes Coming to Act 2 Requirements and Cleanup Standards

Michael M. Meloy, Esq. and Will Hitchcock, Technical Consultant

On November 19, 2019, the Pennsylvania Environmental Quality Board (EQB) adopted in proposed form changes to the regulations that implement the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2). The changes include revisions to the medium-specific concentrations (MSCs) that the Pennsylvania Department of Environmental Protection (PADEP) has developed to implement the statewide health standard under Act 2, as well as various changes to the administrative requirements of the Act 2 program. By regulation, updates to the MSCs are to occur approximately every three years. The last set of updates to the MSCs were finalized and became effective in August 2016.

Proposed changes to the MSCs include new values for emerging contaminants known as per- and polyfluoroalkyl substances (PFAS), optional soil numeric values for total concentrations of polychlorinated biphenyls (PCBs) in addition to the existing arochlor-specific values for PCBs, a broad reduction to all of the ingestion-based groundwater MSCs based on increased groundwater ingestion estimates, and other changes based on the availability of updated chemical toxicity information. Contrary to the

recommendation of the Cleanup Standards Scientific Advisory Board, PADEP chose not to revise the MSCs for vanadium. The MSCs for vanadium in soils were reduced by two orders of magnitude in 2016 to levels that are below typical naturally-occurring background levels in Pennsylvania. The MSCs for vanadium have created extensive issues for remediators since 2016. These issues recently have become even more acute with the new Management of Fill Policy taking effect on January 1, 2020 and incorporating by reference the very low numeric values for vanadium under the Act 2 program as “clean fill” concentration limits.

Proposed changes to the administrative requirements include a new definition of a “volatile compound” which matches the definition used by U.S. Environmental Protection Agency, updates to the procedures for determining the practical quantitation limit for a chemical analysis, increased public involvement in certain stages of the Act 2 process, clarifications regarding the appropriate sequence of reports and handling of combined reports, and other clarifying changes.

Following publication of the proposed changes to the regulations in the Pennsylvania Bulletin and consideration of public comments that are submitted, PADEP will likely make any final adjustments to the regulations and submit them to the EQB for approval in final form. We anticipate that the changes are likely to take effect in late 2020 or early 2021.

PFAS Picking Up Steam in Pennsylvania

John F. Gullace, Esq. and Shelby L. Hancock, Esq.

In 2019 Pennsylvania DEP continued to address PFAS contamination in the State through Governor Wolf’s PFAS Action Team. In April, PADEP’s Bureau of Safe Drinking Water announced its PFAS Sampling Plan, which proposes sampling at more than 300 public water supplies across the State. In December, the Governor released an initial report and recommendation from the PFAS Action Team, along with the results from the first round of water system sampling. Only one of the 96 sampled sites tested above EPA’s health advisory level of 70 ppt for PFOA and PFOS. PADEP expects to complete sampling in June 2020 and will continue to periodically release sampling results. In addition to that sampling, PADEP’s Bureau of Waste Management is expected to initiate its own sampling plan in 2020, mapping landfills across Pennsylvania and proposing a strategy for sampling PFAS in landfill leachate.

As for proposed regulations, throughout 2019 PADEP worked with the State’s Cleanup Standards Scientific Advisory Board to draft proposed cleanup standards for PFOA, PFOS, and PFBS. On November 19, 2019, those standards were considered and adopted by the Environmental Quality Board as part of a broader amendment to PADEP’s Land Recycling Program. The Department is expected to open public comment on the proposed regulations in the coming months, with an estimated implementation of winter 2020-2021. As we move into 2020, we expect Pennsylvania’s regulation of PFAS to pick up steam.

Applying the Environmental Rights Amendment in 2020

Thomas M. Duncan, Esq.

After two years of rapidly developing case law involving the Pennsylvania Environmental Rights Amendment, Pennsylvania courts, and particularly the Pennsylvania Supreme Court, pulled back in 2019.

Article I, Section 27 of the Pennsylvania Constitution, known as the Environmental Rights Amendment (ERA), states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

In 2017, the Pennsylvania Supreme Court, in *Pa. Env'tl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017) (*PEDF II*), overturned a decades old balancing test and instead focused on the text of the ERA, splitting it into two parts – the individual right embodied in the first sentence, and the Commonwealth's trustee obligations embodied in the second and third sentences. The Court applied private trust principles that existed at the time the ERA was enacted in 1971 and struck down as unconstitutional statutory enactments that directed oil and gas royalties to the Commonwealth's general fund rather than a fund used exclusively for conservation purposes. The Court found that "royalties – monthly payments based on the gross production of oil and gas at each well – are unequivocally proceeds from the sale of oil and gas resources," and must therefore remain in the trust. The Court remanded to the Commonwealth Court the issue of whether rental payments and up-front bonuses received under those oil and gas leases constituted trust assets that must also be used exclusively for conservation purposes.

On July 29, 2019, as we [reported](#), the Commonwealth Court, in *Pa. Env'tl. Defense Found. v. Commonwealth*, 214 A.3d 748 (Pa. Cmwlth. 2018) (*PEDF III*), held that two-thirds of rental payments and up-front bonuses received by the Commonwealth as proceeds from oil and gas leases on state forest and park lands must be reserved for conservation purposes under the ERA. The Pennsylvania Environmental Defense Foundation has sought an appeal, which could give the Pennsylvania Supreme Court an opportunity to weigh in on this issue in 2020.

One question left open by the Supreme Court's decision in *PEDF II* is the extent to which the ERA imposes obligations on municipalities and state agencies other than the Pennsylvania Department of Environment Protection (DEP). On May 14, 2019, as we [reported](#), the Supreme Court issued an order refusing to hear an appeal of the Commonwealth Court's decision in *Frederick v. Allegheny Twp. Zoning Hearing Bd.*, 196 A.3d 677 (Pa. Cmwlth. 2018), in which the Commonwealth Court held that municipalities lack the authority to regulate in the areas of environmental protection reserved to DEP. The Commonwealth Court, in *Frederick*, upheld a zoning ordinance that renders oil and gas development a permitted use by right in all zoning districts, including residential and agricultural districts, finding that the zoning ordinance did not violate the ERA. The Court had held that, "as a creature of statute, the Township can exercise only those powers that have been expressly conferred upon it by the General Assembly." To that end, the Court stated that zoning necessarily requires municipalities to account for the natural, scenic, historic and esthetic values of the environment. But, as to the remaining environmental issues covered by the ERA – i.e., clean air and pure water – the Court found that "[m]unicipalities lack the power to replicate the environmental oversight that the General Assembly has conferred upon DEP and other state agencies."

The Commonwealth Court later reiterated this holding in *Delaware Riverkeeper Network v. Middlesex Township Zoning Hearing Board*, No. 2609 C.D. 2015 (Pa. Cmwlth. June 26, 2019), in *In re Andover Homeowners' Ass'n, Inc.*, 217 A.3d 906 (Pa. Cmwlth. 2019), and again in *Protect PT v. Penn Township*

Zoning Hearing Board, No. 1632 C.D. 2018 (Pa. Cmwlth. Nov. 14, 2019). The Supreme Court's refusal to hear an appeal of the Commonwealth Court's decision in *Frederick* leaves that decision in place as the primary guidance by which municipalities will continue to assess their duties and authority under the ERA.

Looking into 2020, the relative decreasing trend in ERA case law may continue, but still expect additional challenges to local land use decisions and General Assembly budgetary measures. There are also still a number of unanswered questions in the aftermath of the Supreme Court's decision in *PEDF II*, such as better defining the terms "Commonwealth" and "public natural resources," and determining the extent to which the ERA imposes independent obligations on DEP and other state agencies.

Please feel free to forward this information to your colleagues and encourage them to subscribe to our mailing list.

This alert is intended as information for clients and other interested parties. It is not intended as legal advice. Readers should not act upon the information contained herein without individual legal counsel.

Portions of this email may contain attorney advertising under the rules of some states.

Copyright © 2020. Manko, Gold, Katcher & Fox, LLP www.mankogold.com