MANKO, GOLD, KATCHER & FOX, LLP Forecast 2010

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

Air

Federal Climate Change Update: While Legislation Stalls in Congress, Federal Agencies Move Forward With Programs Affecting U.S. Businesses

Also under SUSTAINABILITY

by TODD KANTORCZYK

As 2009 drew to a close, some thought that the United Nations Climate Change Conference in Copenhagen would result in an international agreement that might spur Congress to pass comprehensive climate change legislation. The conference participants, however, could only agree to "take note" of an eleventh hour agreement dubbed the "Copenhagen Accord" that failed to set binding greenhouse gas ("GHG") emission reduction targets, and the Copenhagen Conference was largely viewed as a failure. While there has been some recent news about support for a simple "cap and dividend" bill, the absence of a meaningful international agreement, the Obama administration's focus on healthcare, jobs and financial reform legislation, and the upcoming 2010 election make it increasingly unlikely that the 111th Congress will produce any comprehensive climate change legislation.

But despite the dim prospects of federal climate change legislation, for many companies it will become increasingly difficult to avoid addressing climate change legal issues as part of any strategic calls that will be made during 2010. In particular, several federal agencies, including the U.S. Environmental Protection Agency ("EPA"), the Securities and Exchange Commission ("SEC") and the Council on Environmental Quality ("CEQ") are moving forward with climate change regulations, guidance and programs that could affect operations at many U.S. businesses in 2010 and beyond.

First, towards the end of 2009, EPA finalized its mandatory GHG reporting rule that became effective as of January 1, 2010. The rule requires, among other things, that facilities with stationary sources that emit 25,000 metric tons of GHGs (measured as CO_2 equivalents or "CO_2e") per year monitor and report these GHG emissions and other operational information to

EPA annually. The over 700 page rule includes detailed requirements, and in some cases options, as to how facilities must measure and report their annual GHG emissions. Recognizing that subject facilities may not have been able to put procedures and equipment in place by January 1, 2010, the rule allows for facilities to employ "best available monitoring methods" through March 31, 2010. Starting April 1, however, affected facilities must follow the monitoring requirements set forth in the rule, which include implementing a GHG monitoring plan, unless granted a waiver by EPA (which had to have been requested by January 28, 2010). Moreover, even facilities that believe they will be under the 25,000 metric ton threshold at the end of 2010 will need to consider what efforts in 2010 may be necessary to prove that annual reporting will not be required under the rule. The decisions made on issues associated with the GHG reporting rule carry added strategic significance because these initial annual GHG emission reports have the potential to "lock in" sources for purposes of a number of GHG programs going forward.

One of these potential GHG programs that may be finalized in 2010 is EPA's effort to regulate, at least initially, large emitters of GHGs through the Clean Air Act's Prevention of Significant Deterioration ("PSD") and Title V operating permit programs. EPA proposed this regulation in the fall of 2009 in anticipation of finalizing rules that limit emissions of GHGs from light duty motor vehicles by increasing fuel economy standards. Once the motor vehicle rules become final, GHGs would become a "regulated pollutant" under the Clean Air Act, triggering the applicability of the PSD and Title V programs to GHG emissions. The difficulty is that the PSD and Title V programs are applicable to "major" sources that (in most circumstances) emit 250 or 100 tons of a "regulated pollutant." Applying this major source threshold to CO_2 emissions would subject a vast number of new sources to these complex programs, overwhelming already over-stretched state and federal permitting resources. In an effort to work around these threshold issues, EPA's proposed rule "tailors" the major source threshold to 25,000 tons per year for at least five years (thus this rule is often referred to as the "Tailoring Rule"). Both the motor vehicle rule and the Tailoring Rule are expected to be finalized in March 2010.

Finalizing the Tailoring Rule in its current form will not be the end of the discussion, however. In particular, it is unclear that EPA's work-around can withstand a legal challenge attempting to enforce the lower thresholds. Furthermore, even if the Tailoring Rule holds up, a number of significant issues remain, most importantly what constitutes "Best Achievable Control Technology" or "BACT" for GHG emissions, which is the standard that must be applied to all PSD permits. EPA convened a Climate Change Advisory Workgroup to study this BACT issue, and this group released an interim "Phase I" report of its findings at the beginning of February 2010. In addition, sources that emit less that 25,000 tons of GHGs annually are not untouched by the Tailoring Rule, as the rule provides for EPA to study streamlined permitting methods, including the use of general permits or presumptive BACT determinations, and thus allow the 250/100 ton thresholds to return after the initial five year period.

Another offshoot of EPA's efforts to regulate GHG emissions from mobile sources in 2010 is EPA's "endangerment finding" for GHGs under Section 202(a) of the Clean Air Act. Strictly speaking, EPA's endangerment finding is EPA's response to the Supreme Court's 2007 decision in *Massachusetts v. EPA*, and is a necessary prerequisite to EPA finalizing the aforementioned motor vehicle rule. Under the "endangerment finding," which was proposed in April 2009 and finalized just before the Copenhagen conference, EPA determined that the well-mixed group of the six major GHGs are reasonably anticipated to threaten public health and welfare, by virtue

of their effect on the earth's climate, and that motor vehicle sources cause or contribute to this threat. In addition to the direct effects of this finding with respect to the motor vehicle rule, many are concerned that EPA's endangerment finding will have broader ancillary effects, such as how GHGs are handled by other Clean Air Act regulatory programs with "endangerment" standards, including the National Ambient Air Quality Standards ("NAAQS") program, or by the courts where plaintiffs have had recent successes alleging that GHG emissions support public nuisance tort suits.

Against this backdrop, state permitting authorities delegated by EPA to carry out Clean Air Act permitting programs have come under increasing pressure to issue permits with GHG emission limits. At the end of 2009, a coal gasification power plant in Idaho accepted GHG emission limits, and in February 2010, California regulatory authorities issued a PSD permit with GHG emission limits to a natural gas fired power plant. 2010 will likely bring more instances of Clean Air Act permits that attempt to incorporate GHG emission limits, especially for power plants.

The EPA is not the only federal agency that has pressed forward with climate change programs that promise to affect U.S. businesses in 2010. For example, recently the SEC approved an "interpretive guidance" concerning existing disclosure requirements with respect to "business or legal developments related to climate change." While the SEC did not create new rules through this guidance, it did for the first time provide express direction to the regulated community on when existing disclosure requirements may obligate companies to disclose business or legal developments related to climate change. Notable issues touched on in the guidance include voluntary GHG reporting, reputational damage, how to address pending legislation or regulations, insurance, and potential new opportunities in a GHG regulated environment. Along the same lines, the Council on Environmental Quality recently issued draft guidance on how federal agencies should assess GHG emissions and climate change issues in conjunction with discharging their duties under the National Environmental Policy Act, which requires federal agencies to evaluate the environmental impact of various projects. The types of projects that could be affected are not limited to purely "public" projects, but could also include private projects that require federal approval or use public funding.

While there may not be much activity in Congress to advance economy-wide climate change legislation, early activity in 2010 indicates that Congress will not sit idly by while EPA and other federal agencies move forward with climate change programs. There is currently legislation pending in both houses that would force EPA to reverse its "endangerment finding" and strip EPA of its authority to regulate GHGs emissions. Along these lines, there will likely be debates in Congress over the Obama administration's 2011 budget increases intended to support EPA "regulatory initiatives to control [GHG] emissions under existing Clean Air Act authorities" and additional funds to aid states in "[GHG] permitting activities under the New Source Review and Title V operating permits programs." Similarly, certain members of Congress have officially voiced objections to the SEC's guidance on climate change disclosures. And some members of Congress have joined and/or support administrative and legal actions that have been initiated challenging the monitoring rule and EPA's endangerment finding.

In sum, despite the relatively low prospects for federal climate change legislation being passed in 2010, climate change regulatory programs will continue to be pushed in 2010. While the ultimate outcome of these regulatory programs may not be certain, many companies will need to track these developments closely and take a hard look at whether there are strategic needs

or opportunities to adjust operations in 2010 in light of these potential new regulatory programs.

Following Several Years of Legal Challenges, 2010 Will Likely See Many Federal and State Air Quality Regulation Developments

by KATE VACCARO

We anticipate meaningful regulatory developments in 2010 in the air quality context at the federal level, as the U.S. Environmental Protection Agency ("EPA") continues to rework certain regulatory programs in response to a number of significant court cases from the last several years. EPA will continue to promulgate new regulations and pursue certain enforcement initiatives consistent with the priorities of the Obama administration. Finally, we expect to see additional air quality regulatory developments in 2010 at the state level.

In 2008, the D.C. Circuit Court of Appeals ("D.C. Circuit") determined that the federal Clean Air Interstate Rule ("CAIR") was inconsistent with the Clean Air Act ("CAA") and remanded the rule to EPA. Because the Court stayed its mandate vacating CAIR, however, beginning in 2009 states were required to either move forward with implementing their own state-specific CAIR programs or allow implementation of the CAIR Federal Implementation Plan ("FIP"). In the meantime, EPA has been focusing on developing a new regulation to replace CAIR and is expected to issue a proposed rule in March 2010. EPA has stated that it is attempting to develop a CAIR replacement rule that works in concert with other federal regulatory programs affecting the power generation sector. Furthermore, EPA appears to be evaluating a wide variety of regulatory approaches for developing a CAIR replacement rule. For these reasons, EPA may not be able to issue a proposed rule by March 2010.

Also in 2008, the D.C. Circuit vacated the federal Clean Air Mercury Rule ("CAMR"), which regulated mercury emissions from electric generating units. EPA is currently working on a new regulation to replace CAMR and is expected to issue a proposed rule in the near term – possibly in 2010. In particular, EPA has explained that, unlike CAMR, the new regulation will be promulgated pursuant to Section 112(d) of the CAA, which requires EPA to establish standards for emissions of hazardous air pollutants ("HAPs") from specific source categories. It is still unclear, however, how (if at all) EPA's CAIR and CAMR replacement rules will overlap, including, in particular, what compliance options will be available under the respective rules.

EPA has also been concentrating on developing a revised version of the National Emission Standards for Hazardous Air Pollutants for Industrial, Commercial and Institutional Boilers and Process Heaters ("Boiler MACT"). The original Boiler MACT, which was vacated by the D.C. Circuit and remanded to EPA in 2007, established hydrogen chloride, particulate matter, mercury, and carbon monoxide emission limits for various new and existing affected units located at major sources of HAPs. EPA is expected to issue a proposed revised Boiler MACT in April 2010. Because EPA failed to promulgate a revised Boiler MACT in accordance with the deadlines established by the D.C. Circuit, states were required to begin implementation of the "MACT Hammer" for the Boiler MACT in 2009. Indeed, many states, including Pennsylvania, have already collected Part 1 and Part 2 MACT applications to establish specific standards for

Boiler MACT sources, but many of these same states have also indicated that they will not act on these applications to allow EPA to develop a revised Boiler MACT.

In 2009, the D.C. Circuit remanded the 2006 primary annual National Ambient Air Quality Standards ("NAAQS") for fine particulate matter, or "PM2.5" to EPA for reconsideration, finding that EPA failed to explain adequately why an annual level of 15 $\mu g/m^3$ is requisite to protect the public health. The Court also remanded to EPA the 2006 secondary NAAQS for PM2.5, determining that EPA unreasonably concluded that the NAAQS are adequate to protect the public welfare from adverse effects on visibility. In response to the Court's findings, in October 2009, EPA announced an accelerated schedule for issuing new NAAQS for PM2.5. Specifically, EPA intends to propose new NAAQS for PM2.5 by July 2010 and implement a final rule by April 2011. In the meantime, states are continuing to promulgate revisions to their New Source Review ("NSR") programs to implement NSR for PM2.5 and its precursors, in accordance with the May 2008 EPA rule establishing the NSR requirements for PM2.5.

Also at the federal level, EPA is expected to determine whether to strengthen the NAAQS for ground-level ozone by August 2010. If EPA issues revised ozone standards, the new standards would replace the existing ozone NAAQS issued in 2008 and associated implementation requirements, including area source designations. EPA would then be required to initiate a new process to designate attainment and nonattainment areas based on the new standards.

EPA was very active in 2007, 2008, and 2009 in promulgating standards under Section 112 of the CAA for various area (non-major) sources of HAPs. Through these rulemakings, EPA is carrying out its "Urban Air Toxics Strategy" under the CAA, which requires EPA to identify a list of at least 30 air toxics that pose the greatest potential health threat in urban areas, and develop standards for source categories representing 90 percent of the emissions of those toxics. EPA is anticipated to continue its rulemaking activity in 2010, promulgating standards governing toxic emissions from industrial boilers, institutional and commercial boilers, sewage sludge incineration, and brick and structural clay source categories. Most recently, EPA announced on February 17, 2010, its revision of the existing standards (at 40 CFR Part 63 Subpart ZZZZ) governing stationary compression ignition reciprocation internal combustion engines to now cover existing engines at area sources.

On the New Source Review/Prevention of Significant Deterioration ("NSR/PSD") front, EPA may continue in 2010 to scale back some of the flexibility established by the Bush administration. In particular, EPA has granted reconsideration and/or stayed the following actions: (1) EPA's final rule of December 19, 2007, known as the "reasonable possibility" rule, which specified the circumstances under which a major source undergoing a modification that does not trigger NSR/PSD must undertake post-change recordkeeping and reporting regarding emission increases; (2) certain aspects of EPA's May 2008 rule addressing NSR/PSD provisions for PM2.5, including specifically the "grandfathering" provision under which sources which had submitted complete permit applications prior to the rule's July 15, 2008 effective date may continue to rely on the use of PM-10 as a surrogate for PM2.5 for purposes of the pending application; (3) EPA's December, 2008 rule clarifying that fugitive emissions must be included in determining whether a physical or operational change amounts to a major modification only for those sources specifically identified under Section 302(j) of the CAA; and (4) EPA's January, 2009 "aggregation rule" which clarified the circumstances under which multiple projects at a major source may be evaluated separately for purposes of NSR/PSD applicability evaluations. EPA

may act on some or all of these rules this year. As of February 4, 2010, EPA has proposed to repeal the PM2.5 grandfathering provision, and to stay the fugitive emissions rule for an additional 18 months. In addition, the White House is reportedly considering a reconsideration of the "aggregation rule" which is currently stayed until May, 2010.

Consistent with its apparently more stringent interpretations of NSR issues, EPA's air enforcement priorities in 2010 will continue to include NSR/PSD compliance, with a focus on coal-fired power plants, sulfuric and nitric acid manufacturing facilities, cement manufacturing facilities, and glass manufacturing facilities. In 2009, EPA assessed a total of $5.3 million in penalties against these industries, and required pollution control measures valued at $318 million. Air toxics will also continue to be an enforcement focus, including for facilities subject to Maximum Achievable Control Technology ("MACT") standards governing leak detection and repair, operation of industrial flares, and surface coatings. In 2009, EPA assessed a total of $0.34 million in penalties against these industries, and required pollution control measures valued at $0.19 million. EPA's proposed air enforcement priorities for fiscal years 2011 through 2013 are also currently under consideration. EPA's focus on air toxics will continue, including federal leak detection and repair ("LDAR") requirements and industrial flares, and will also include a geographic initiative to focus on compliance of large emitters of hazardous air pollutants in disproportionately affected areas. NSR/PSD enforcement would also continue, with an added focus on the lime manufacturing sector. In addition to its sector-based enforcement priorities, EPA has identified a need to address environmental justice concerns by focusing on compliance and enforcement across all sectors in underserved and disadvantaged communities.

At the state level, on February 6, 2010, the Pennsylvania Department of Environmental Protection ("PADEP") issued proposed regulations that would revise Pennsylvania's Chapter 127 permitting requirements to incorporate nonattainment NSR requirements for PM2.5. The revisions would address federal NSR requirements for fine particulates, including the identification of major source NSR emission thresholds for PM2.5, significance thresholds for modifications, and the identification of sulfur dioxide ("SO2") and nitrogen oxides ("NOx") as precursors to fine particle pollution. DEP's proposal differs from the federal rules in one significant respect, in that it would extend Pennsylvania's unique "de minimis aggregation" provisions to NSR determinations for fine particulates. Specifically, these provisions of PADEP's existing regulations may result in an NSR "trigger" at major sources, even where the proposed change would result in an emission increase below the significant threshold for the pollutant. In these circumstances, sources are required to aggregate emission increases of the relevant pollutant over a ten-year period, including increases associated with the proposed modification. To the extent that this aggregation of emissions exceeds the significance threshold for major modifications, then the source operator must secure emission reduction credits to offset the aggregate emission increases. Since the significant net emission increase level for major modifications of PM2.5 is only ten tons per year, aggregation of de minimis increases over a ten-year period would cause many facilities to trigger NSR for PM2.5. Given an anticipated shortage of PM2.5 credits, and the less stringent federal requirements, this aspect of the proposed rulemaking may create a disadvantage for Pennsylvania facilities considering modifications. The comment period for the proposed rule closes on April 12, 2010.

Additionally, PADEP is expected to propose rules under the Pennsylvania Air Pollution Control Act that would limit NOx emissions from electric generating units and emergency generators

used during non-emergency periods that operate less than 1,200 hours per ozone season and generate electricity during periods of peak electric demand, including high electric demand days ("HEDD"). PADEP believes regulation is necessary because these units produce aggregate emissions of NOx on peak electric demand days that reduce or eliminate the environmental benefit of NOx emission reductions achieved on peak demand days by the larger electric generating units currently regulated under CAIR.

In New Jersey, the Department of Environmental Protection ("NJDEP") Air Quality Permitting program continues to work with industrial stakeholders on various permitting concerns, including the clarification of issues surrounding temporary equipment at Title V facilities, health risk assessments for diesel particulate emissions from internal combustion engines, State-of-the-Art manual updates, and Title V renewals. NJDEP is also anticipated to finalize its presumptive MACT standard for industrial, commercial and institutional boilers, and process applications by affected facilities.

Energy

As Climate Change Legislation Cools, "Climate-Friendly" Legislation Heats Up

Also under SUSTAINABILITY

by BRYAN FRANEY

While the prospects of comprehensive climate change legislation have dimmed over the last several months, many expect a shift in focus towards wide-ranging energy legislation in 2010. In January, Senator Byron Dorgan (D – N.D.), the second-ranking Democrat on the Senate Energy and Natural Resources Committee, predicted that the Senate "likely will not do climate change [in 2010] but will do an energy bill instead, and that the energy bill will be climate friendly for sure."

The starting point for any energy bill will likely be the American Clean Energy Leadership Act ("ACELA") (S. 1462), which was reported out of the Energy and Natural Resources Committee on June 17, 2009. ACELA had bipartisan support at the committee level where it was passed 15-8. Some of the key sections of ACELA that may impact developers as well as commercial and industrial energy consumers are summarized below:

Renewable Electricity Standard ("RES") – ACELA would establish a national RES, which would require all sellers of electricity to obtain a certain percentage of electricity from renewable resources or from energy efficiency improvements. The RES would start at 3 percent for 2011 and ramp up to 15 percent by 2039. "Renewable" resources would be defined to include wind, solar, waves, geothermal, biomass, landfill gas, incremental hydropower, hydrokinetic, and new hydropower at existing dams with no generation. Notable energy sources that are missing from this list include municipal solid waste incineration and new nuclear power. In addition to renewable sources, State Governors may petition to allow up to 26.67 percent of the RES to be met with energy efficiency improvements. Electricity sellers could comply with the RES by producing/purchasing its own renewable electricity (or making

energy efficiency improvements), purchasing renewable energy credits, or by making alternative compliance payments (i.e. penalties).

Manufacturing Energy Efficiency – ACELA would authorize the Department of Energy ("DOE") to provide grants of up to $100 million to support state-level revolving loan programs for both small and large manufacturers. To be eligible for loan funds, the project must accelerate the implementation of energy efficient technologies and processes and enhance the industrial competitiveness of the U.S. In addition, ACELA would increase funding for research and development of energy efficiency technologies and industrial processes, and would allow manufacturers to request onsite technical assistance from the DOE to help identify more sustainable technologies/processes.

Increase Energy Efficiency of Building Codes – ACELA would require DOE to support improvements to national model building energy codes The revised building codes would set an initial target of 30 percent energy savings in model codes released during or after 2010 as compared to the 2006 International Energy Conservation Code and ASHRAE Standard 90.1-2004 energy efficient building codes. The target would increase to 50 percent savings for model codes released during or after 2016.

Within a defined time period after promulgation of the new energy efficient codes, states would be required to certify that they have updated their codes and that their codes meet or exceed the model energy savings. While the requirements are not mandatory, states would be provided with incentive funding to help implement the building efficiency codes and verify compliance. In states that do not comply with the energy efficient building codes, local governments would be able to adopt the model codes and would be eligible for the financial incentives.

Clean Energy Deployment Administration – ACELA would establish the Clean Energy Deployment Administration ("CEDA"), a new independent administration within the DOE. CEDA would provide loans, guarantees, bonds, and other financial incentives and credit enhancements to encourage the deployment of clean energy technologies. CEDA would support technologies that have the potential to address climate and energy security, but are perceived as too risky for commercial lenders.

Energy Efficiency Incentive Programs – ACELA would authorize DOE to award grants to states to carry out energy efficiency retrofit programs for residential and commercial buildings. Under the home energy efficiency retrofit program, homeowners could receive rebates for implementation of specific measures (i.e. compact fluorescent light bulbs) or customized measures that reduce whole home energy consumption by 10 or 20 percent. Under the commercial buildings program, states would be authorized to provide building owners with financial incentives for retrofits that improve energy performance by at least 20 percent as compared to consumption in the previous year.

Building Energy Performance Information – ACELA would encourage voluntary implementation of building energy performance labeling. The labeling would provide information to consumers and allow building owners to compare and identify efficiency improvements.

Development of the Marcellus Shale Reserves Continues

by MARC GOLD and MICHAEL GROSS

The effort to extract natural gas from the Marcellus Shale geologic formation is expected to continue to generate controversy in the Commonwealth of Pennsylvania and neighboring states. The Pennsylvania Department of Environmental Protection ("PADEP") and the Basin Commissions are trying to establish workable regulatory programs building on the basic legal requirements that have been in place for decades. Applying the traditional compliment of environmental laws and regulations, including the relevant permit programs, has spawned a new set of regulatory norms. The expansive nature of the overall gas extraction effort has led to the creation of federal and state "tip" lines that enable the public to police the activities of the industry. Meanwhile, the industry presses on, looking for meaningful dialogue on regulatory standards that are both protective of the environment and compatible with the urgency to tap into a natural resource that is viewed as an important part of the nation's efforts to achieve energy independence.

PADEP recently promulgated a draft regulatory package that would substantially impact natural gas drilling operations in the Commonwealth. PADEP proposes to amend its regulations for the construction of oil and gas wells (25 Pa Code Section 78) by imposing new casing and cementing requirements in an effort to increase protection of both public and private water supplies. Specifically, the new regulations would bolster well construction specifications and hold drillers responsible for restoring or replacing water sources contaminated by drilling operations to the standards set forth by the Pennsylvania Safe Drinking Water Act. In addition, new notification requirements would require drillers to promptly inform PADEP if wells are over-pressurized, if casings are defective or if gas has migrated into drinking water sources. New inspection requirements would mandate quarterly checks on the integrity of existing wells in operation to ensure that there is no evidence of gas escaping from wells and to determine whether there is evidence of progressive corrosion or other signs of deterioration. Operators will be required to submit annual reports to PADEP identifying compliance status associated with these inspections.

Pennsylvania is also moving to expand oversight of Marcellus Shale drilling operations by increasing the number of employees in the Bureau of Oil and Gas Management. PADEP recently announced it was adding 68 new employees to oversee drilling operations. By way of comparison, in 2008, Pennsylvania had just 35 employees to oversee 74,774 wells. By 2009, enforcement staff increased to 76. This fourfold increase in the number of inspectors over a two year period represents a significant commitment by PADEP to carefully monitor drilling operations in Pennsylvania and underscores the need for drillers to proactively implement and carefully document environmental compliance measures.

In addition to the foregoing, we expect considerable regulatory activity under the air, water (both supply and discharge) and waste programs; enforcement by the agencies and citizen groups; and litigation among private parties on a myriad of potential claims. We also expect the state legislature to renew its effort to enact a tax in some form on gas extraction leases and/or proceeds. The Marcellus Shale play is likely to be one of the most important economic initiatives in the Commonwealth and will continue to draw attention this year and in the years to come.

Climate Change Litigation Likely To Continue To Heat Up in 2010

Also under AIR and SUSTAINABILITY

by MICHAEL CARTER

In the latter half of 2009, two federal appeals courts issued decisions that could signal a new openness in the federal courts to common law tort claims related to climate change. These decisions, issued by the Courts of Appeals for the Second and Fifth Circuits, focused primarily on the threshold issues of standing and justiciability. In the Second Circuit case, *Connecticut v. American Electric Power Company Inc.* ("*AEP*"), eight states, New York City and three private not-for-profit land trusts asserted federal common law nuisance claims against five electric power producers, seeking an injunction to cap the defendants' greenhouse gas emissions. The district court dismissed the case, finding that it raised political questions not suitable for judicial resolution; but the Second Circuit reversed, holding that the political question doctrine did not bar the case and that the plaintiffs had standing to assert federal common law nuisance claims. The Fifth Circuit case, *Comer v. Murphy Oil*, involved a class of private Gulf Coast landowners who sought damages under state common law from a number of energy and petrochemical companies, alleging that the defendants contributed to global warming, which in turn increased the severity of Hurricane Katrina and thereby caused plaintiffs to suffer property damage. As in *AEP*, the district court dismissed the case, but a unanimous panel of the Fifth Circuit reversed in part, concluding that the plaintiffs had standing to assert state common law nuisance, trespass and negligence claims and that such claims did not raise non-justiciable political questions.

Together, these decisions – which involved both governmental and private plaintiffs seeking both injunction relief and monetary damages – suggest that the federal courts may permit a wide variety of plaintiffs to bring climate change related claims. However, divisions remain within the federal courts regarding the application of the standing and political question doctrines to such claims, and they may ultimately be settled only by intervention of the Supreme Court. In fact, despite the unanimous panel decision permitting the plaintiffs' claims, the Fifth Circuit recently granted a motion by the defendants in *Comer* for rehearing *en banc*, and oral argument before the entire Court is scheduled for May 2010. Moreover, shortly after the decision in *AEP*, the District Court for the Northern District of California – like every other district court presented with climate change related tort claims – dismissed a case filed by a coastal Alaskan Native American community against twenty-four energy companies, in which the plaintiffs sought damages for coastal erosion allegedly caused by global warming. The District Court's opinion in that case, *Native Village of Kivalina v. ExxonMobil Corp.*, sharply disagreed with the reasoning of the Second Circuit in *AEP*. The District Court concluded that the plaintiffs' claims raised a non-justiciable political question because there exist no manageable standards to guide resolution of the case, which would require the court to make a policy determination about the benefits and costs of the defendants' conduct that should be left to Congress and the President. The District Court also concluded that the plaintiffs lacked standing, finding that the highly attenuated chain of events between the defendants' greenhouse gas emissions and the plaintiffs' alleged injuries was an insufficient basis to support the suit.

Beyond this continuing disagreement among the federal courts on the threshold issues of standing and justiciability, climate change tort claims face a number of other barriers. Although it did not reach the merits of the case, the Fifth Circuit's panel opinion in *Comer* expressed skepticism that the plaintiffs would be able to prove that the greenhouse gas emissions of the defendants caused their alleged injuries. On the other hand, in *AEP*, the Second Circuit concluded that the plaintiffs could survive a motion to dismiss because they had stated a federal common law public nuisance claim in light of their allegations that the defendants had "unreasonably interfered" with public rights. Accordingly, even if plaintiffs in climate change tort cases face an uphill battle in proving their claims on the merits, they may be able to survive initial motion practice and enter into discovery.

Additionally, federal legislation or regulation of greenhouse gas emissions may eventually displace or preempt climate change related tort claims. Indeed, the Second Circuit decision in *AEP* concluded that federal common law nuisance claims were currently not displaced by federal statutory or regulatory law, but it also expressly left open the possibility that new statutory or regulatory initiatives could bar federal common law claims in the future. On the other hand, it is less clear that state common law claims, like those at issue in *Comer*, would be preempted by future federal climate-change-related statutes or regulations. For example, the Clean Air Act preempts only limited aspects of state law, and the cap-and-trade legislation passed by the House of Representatives in 2009 similarly limits preemption of state law to certain state-administered cap-and-trade programs.

In sum, the past year saw a possible sea-change in the receptivity of the federal courts to common law tort claims related to global warming. Although the plaintiffs in these cases still face multiple obstacles, especially proving that any specific defendant's greenhouse gas emissions caused their injuries, these types of claims will probably only increase in light of the decisions in *AEP* and *Comer*. Indeed, climate-change-related tort claims, particularly those brought pursuant to state law, may survive any future federal regulation of greenhouse gas emissions, and they therefore may remain an important part of the legal landscape for quite some time.

Major Wind Energy Project Delayed by Failure to Obtain Required Permit

Also under ENERGY, SITE DEVELOPMENT and SUSTAINABILITY

by LYNN ROSNER RAUCH

Although there is wide support for projects that implement cost effective renewable sources of energy, such projects are still subject to limitations when it comes to endangered species. In *Animal Welfare Institute v. Beech Ridge Energy*, plaintiffs initiated a citizen suit claim under the federal Endangered Species Act ("ESA"), seeking to protect the interests of the Indiana Bat, which they claim was threatened by the Beech Ridge Energy wind project. The Beech Ridge Energy wind project is an industrial wind energy facility in Greenbrier County, West Virginia, that will cost $300 million to build but would produce electricity "equivalent to the amount of electricity consumed by approximately 50,000 West Virginia households in a typical year." "As noted at the outset [of the opinion], this is a case about bats, wind turbines, and two federal

policies, one favoring the protection of endangered species, and the other encouraging development of renewable energy resources..."

Based on a range of surveys, studies and expert opinions concerning the sensitivities, habitat and behavioral patterns of the Indiana Bat, the Court found that continuing with the project as planned would create a "take" of the Indiana Bat -- meaning this endangered species would with virtual certainty be imminently harmed, wounded or killed during construction and operation of 122 wind turbines stretching along more than twenty miles of the Appalachian Ridge. "Section 9 of the ESA, the cornerstone of the Act, makes it unlawful for any person to 'take any [endangered] species within the United States...'. The ESA defines the term 'take' as 'to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.'" Taking of an endangered species can result in civil and criminal penalties. As the Court explained, "to provide a safe harbor from these penalties" the ESA includes "an incidental take permit ("ITP") process that allows a person or other entity to obtain a permit to lawfully take an endangered species, without fear of incurring civil and criminal penalties, 'if such taking is incidental to, and not the purpose of, the carrying out of an otherwise lawful activity.'" This process "reduce[s] the conflicts between species threatened with extinction and economic development activities" and "encourage[s] 'creative partnerships' between public and private sectors."

Although the Court lauded and encouraged efforts to develop wind energy projects and noted that "some wind energy companies have obtained or are in the process of pursing ITPs," it found that Beech Ridge Energy had violated the ESA by failing to first obtain an ITP. Therefore, the Court reasoned, the wind power project must be put on hold until the developer obtains an ITP to protect the Indiana Bat. This would "allow their project to proceed in harmony with the goal of avoidance of harm to endangered species," because the U.S. Fish and Wildlife Service can attach enforceable conditions intended to lessen the impact on the threatened species through the permitting process. In this way, "the two vital federal policies at issue in this case are not necessarily in conflict."

After the ruling, the parties reached a settlement which set forth additional conditions for project construction and operation thereby allowing the project to proceed while Beech Ridge's application for an ITP undergoes consideration. This matter, however, highlights the need to balance the environmental need and economic motivation to pursue alternative, renewal energy projects with the requirement of doing so in a manner that will protect wildlife, particularly threatened and endangered species. The ramifications of this ruling will likely be felt throughout the alternative and renewable energy industry by heightening the sensitivity of developers to conduct the appropriate studies and analysis of impacts on all manner of wildlife, and to obtain the required permits before commencing construction to avoid mid-project set-backs and frustrations.

Amendments to Federal Rules on Expert Discovery Expected in 2010

by KATE CAMPBELL

Initially proposed in 2008, new amendments to Rule 26 of the Federal Rules of Civil Procedure were transmitted to the U.S. Supreme Court in December with a recommendation that they be

approved and transmitted to Congress. Unless rejected, the amendments are schedule to take effect on December 1, 2010.

Under the amendments, work product protection will be extended to drafts of expert reports and, with three exceptions, to the discovery of communications between testifying expert witnesses and counsel. The exceptions are: (1) communications regarding compensation; (2) communications identifying the facts or data counsel provided to the expert and that the expert considered in forming the opinions to be expressed; and (3) communications identifying any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. Discovery regarding attorney-expert communications on subjects outside of these three exceptions, or regarding draft expert reports, will be permitted only in very limited circumstances and by court order.

According to the Committee on Rules of Practice and Procedure, the amendments are intended to address the "artificial and wasteful discovery-avoidance practices" brought about as a result of the 1993 amendments to Rule 26, which a number of courts interpreted to permit discovery of all communications between counsel and expert witnesses and all draft expert reports. Those discovery avoidance practices include counsel retaining two sets of experts – one to consult and one to provide testimony – and attorneys taking "tortuous steps" to avoid having the expert generate anything other than a single, final report.

The amendments also address witnesses such as treating physicians, who will provide expert testimony but who are not required to provide an expert report because they are not retained or specially employed to provide such testimony, or they are not employees who regularly give expert testimony. Under the amended rule, the attorney relying on such a witness will need to disclose the subject matter of the witness's testimony and summarize the facts and opinions that the witness is expected to offer.

E-Discovery: Judicial Clarity on Obligations and Consequences of Non-Compliance

by ANGELA PAPPAS

The law surrounding electronic discovery ("e-discovery") and the preservation of electronically stored information ("ESI") is one of the more rapidly developing areas of law. In these technology-driven times, the massive amounts of information created and stored by companies presents new challenges to both litigants and to the courts and demands that the duties in handling e-discovery be clarified and the consequences for failing to meet such obligations be defined. In 2003 and 2004, five opinions were issued in the seminal e-discovery case of *Zubulake v. UBS Barburg*. From the *Zubulake* opinions, the basic parameters relating to the scope of a party's duty to preserve ESI during litigation took form.

In January, 2010, the legal framework relating to e-discovery was further refined by another seminal case: *Pension Committee of University of Montreal Pension Plan v. Banc of American Securities*. Authored by Judge Scheindlin, the author of the *Zubulake* opinions, the *Pension Committee* opinion was aptly titled Zubulake Revisited: Six Years Later. This opinion provides further guidance on the obligations of litigants and counsel in the area of preserving ESI, and the consequences of a parties' failure to meet those obligations. In *Pension Committee*, Judge

Scheindlin sanctioned thirteen plaintiffs for failing to "timely institute written litigation holds and engag[ing] in careless and indifferent collection efforts after the duty to preserve arose." The case describes three general yet fluid categories of e-discovery misconduct – negligence, gross negligence and willfulness – and identifies the sanctions that may be appropriate for each category. The plaintiffs found to be negligent in *Pension Committee* had failed to obtain records from all employees and had otherwise failed to take appropriate measures to preserve ESI. In contrast, the plaintiffs found to be grossly negligent were guilty of failing to obtain documents from *key* employees, destroying backup data, failing to provide appropriate supervision to the custodians' ESI preservation efforts, describing their e-discovery process inaccurately in court papers, or deleting or failing to preserve certain electronically stored documents.

Judge Scheindlin imposed monetary penalties on the negligent plaintiffs, requiring them to pay the defendant's fees and costs incurred in litigating the discovery dispute. The grossly negligent plaintiffs were penalized with an adverse inference instruction, whereby, the Judge issued an instruction to the Jury that they were entitled to presume that any lost evidence caused by the grossly negligent plaintiffs' conduct was relevant and thus should be weighed in favor of the defendants. Although none of plaintiffs' conduct rose to the level of willfulness, the Judge mentioned in dicta that an appropriate sanction for willful and egregious conduct would be the termination of plaintiffs' case.

As illustrated by *Pension Committee*, the imposition and appropriate scope of sanctions continues to be a dominant theme among e-discovery opinions. According to Kroll Ontrak®, an e-discovery consultant that tracks all state and federal e-discovery opinions, among the e-discovery opinions issued last year, 39 percent addressed the issue of sanctions, an increase from 25 percent in 2008.

Pension Committee serves as a caution to all litigants and counsel: failure to take the proper steps to effectively manage the preservation, collection and production of ESI through litigation can result in serious consequences. Companies can avoid substantial potential penalties as well as other possible sanctions by simply understanding the legal framework and executing a well-organized e-discovery plan.

Impacts of Chinese Drywall Likely to Continue in 2010

by JOHN GULLACE

"Chinese Drywall" typically refers to drywall manufactured with a high sulfur content that is believed to have been primarily imported from China and used in construction projects generally between 2004 and 2007. Chinese Drywall is believed to emit hydrogen sulfide gas which can have a corrosive effect on metal building components. In addition, the U.S. Consumer Product Safety Commission ("CPSC") issued a report in November of 2009 concluding that the hydrogen sulfide being emitted from Chinese Drywall also appears to have health effects. Although the current multi-district litigation focuses on the use of Chinese Drywall in the South, the CPSC has received reports from 32 states and Chinese Drywall was sold in much of the Mid-Atlantic Region. The federal government's Interagency Drywall Task Force is continuing to investigate. Meanwhile, in mid-January a federal district court in Louisiana ruled in favor of plaintiffs in multi-district litigation and refused to limit their damages under the economic loss rule.

Commentators expect to see financial institutions begin requiring the testing of properties as a condition of financing and various legislative initiatives are being presented in Congress and the state legislatures. If Chinese Drywall is determined to be a defective product, is recalled or prevents a bank from financing a real estate transaction, we may see Chinese Drywall becoming a bigger issue even where it is not emitting hydrogen sulfide.

Lawsuit Highlights Need to Consider Prior Medicare Payments in Settlements

by CHRISTOPHER BALL

In *United States v. James J. Stricker et al.*, the federal government is seeking to recover certain medical costs paid to several Medicare beneficiaries who were parties to a class action lawsuit alleging injuries from exposure to PCBs. The underlying lawsuit was settled in 2003 for approximately $300 million - $129 million of which was paid to plaintiffs' counsel. The government now alleges that 907 of the underlying settling plaintiffs are Medicare beneficiaries, and therefore, Medicare is entitled to reimbursement for conditional payments made to those beneficiaries for injuries released in the 2003 settlement. Because the parties to the settlement failed to notify or reimburse the Medicare program in connection with the underlying class action settlement, the government seeks to recover double the amount of the Medicare payments made plus interest and declaratory relief from several law firms representing the Medicare beneficiaries in the underlying lawsuit, as well as the settling corporate defendants and their insurers.

As way of background, federal law requires available private insurance plans, including self-insurers, to make primary payment for medical services provided, leaving Medicare to pay only secondary "conditional" benefits where primary payment does not transpire "promptly." In cases where Medicare has made these conditional payments, the "Medicare Secondary Payer" provision of the federal Medicare statute generally authorizes the Medicare program to seek reimbursement of its costs once a private parties' responsibility for the payment of the medical care at issue is established. Judgments and settlement agreements addressing beneficiaries' claims can establish a private parties' payment responsibility regardless of whether there is a determination of liability, and can accordingly act as a trigger for Medicare reimbursement actions.

To provide the Medicare program with notice of potentially relevant settlements and facilitate the government's recoupment of funds, the Medicare statute requires that parties providing funds through settlement: (1) determine whether any recipients of settlement funds are Medicare beneficiaries; (2) notify Medicare of payments being made to any Medicare beneficiary through settlement; and (3) reimburse the government for Medicare payments previously made on behalf of the Medicare beneficiaries where the beneficiaries themselves fail to provide the reimbursement. Violations of these requirements may subject parties to enforcement actions seeking potential penalties of $1,000 per day, plus interest and double damages.

The scope of the settlement reporting obligations under Medicare was recently expanded through the Medicare, Medicaid and SCHIP Extension Act of 2007 ("MMSEA"). The MMSEA imposes onerous reporting requirements on parties to a payment of a settlement or judgment with a Medicare beneficiary. These requirements apply where (1) the settling party assumes

some ongoing responsibility for medicals of the beneficiary as of January 1, 2010, or (2) settlements include payments to beneficiaries after October 1, 2010 intended to resolve/partially resolve their claims. Under the new requirements, the reporting parties are required to submit detailed information to Medicare about the settlement including: the total settlement amount; the name, date of birth, gender, social security number and Medicare Health Insurance Claim Number for any Medicare beneficiary involved in the settlement; and information regarding the incident that led to the claim. Reporting parties must begin electronic submission of the required information by January 1, 2011.

Hence, while the *Stricker* litigation may have significant implications on how courts address violations of the Medicare statute, regardless of the outcome, the new MMSEA reporting obligations will present new obligations that must be addressed in future settlements.

Site Development & Brownfield Redevelopment

Construction Sites to be Impacted by New EPA Effluent Limits

Also under WATER

by MICHAEL GROSS
On December 1, 2009, the U.S. Environmental Protection Agency ("EPA") published its final Construction & Development Effluent Limit Guidelines (the "Guidelines"). The Guidelines which went into effect on February 1, 2010, represent the first time that EPA has established nationwide performance standards and enforceable numeric limits on the turbidity of stormwater discharges from construction sites. Specifically, the Guidelines impact all construction sites disturbing more than one acre by imposing non-numeric effluent limitations on stormwater discharges from these sites. For construction sites disturbing more than ten acres, the Guidelines require compliance with specific numeric effluent limits within approximately four years, which will require certain construction site owners and operators to sample stormwater discharges. All construction projects covered by the Guidelines must install best practicable control technologies. In addition, the Guidelines require the implementation of various pollution prevention measures to minimize runoff from certain activities such as dewatering and concrete washout, and impose stringent requirements for soil stabilization.

EPA states that "the final rule is intended to work in concert with existing state and local programs, adding a technology-based floor that establishes minimum requirements that apply nationally." Accordingly, state and local permitting authorities must revise requirements in National Pollutant Discharge Elimination System ("NPDES") permits to ensure compliance with the new effluent limitations and monitoring requirements in the Guidelines. EPA estimates that the Guidelines will impact approximately 82,000 businesses within the construction and development sector, including residential and commercial construction companies and engineering firms, at an annual cost of $953 million. Due to the broad scope of the Guidelines and the enforceable numeric limitations set forth therein, the Guidelines will increase the time and cost of managing and monitoring stormwater runoff at construction sites.

Proposed Amendments to Pennsylvania's Stormwater Management and Erosion and Sediment Control Regulations

Also under WATER

by MICHAEL MELOY

During 2010, the Pennsylvania Department of Environmental Protection ("PADEP") is expected to press forward with efforts to finalize highly controversial and significant changes to Pennsylvania's regulations governing erosion and sedimentation control measures set forth in 25 Pa. Code Chapter 102. The proposed regulations not only revise existing requirements pertaining to erosion and sedimentation controls, but add, among other things, an array of new provisions (1) governing the management of stormwater discharges during construction activities, (2) imposing long term obligations to manage stormwater discharges following the completion of construction activities, and (3) requiring the creation and maintenance of forested riparian buffers in certain instances as a condition to receiving permits to proceed with activities that will result in earth disturbances. It appears that PADEP is focused on attempting to ensure that the proposed regulations are finalized and in effect prior to the gubernatorial election later this year.

The Pennsylvania Environmental Quality Board ("EQB") published the proposed regulations in the Pennsylvania Bulletin in late August 2009 triggering a 90-day public comment period. The EQB received more than 1,300 comments concerning the proposed regulations from a broad array of entities that will be directly affected by the proposed changes and from various watershed associations and private citizens generally supporting the proposed changes. In addition, many state legislators submitted comments regarding the proposed regulations. A number of other governmental entities such as the Pennsylvania Department of Transportation and the Pennsylvania Department of Conservation and Natural Resources likewise submitted comments. These comments highlight the far reaching impacts that the proposed regulations will have in Pennsylvania, encompassing almost any activity that involves earth disturbances including agricultural operations, construction projects, infrastructure projects, and maintenance activities.

On December 30, 2009, the Pennsylvania Independent Regulatory Review Commission ("IRRC") issued to the EQB detailed comments going to the very core of the proposed regulations. For example, IRRC raised significant questions as to whether the proposed regulations are in the public interest, challenged the cost-benefit analysis that PADEP proffered in support of the proposed regulations and questioned the basic need for regulatory changes. In addition, IRRC highlighted many elements of the proposed regulations that are poorly drafted, impose unreasonable burdens on the regulated community and/or appear to be unwarranted. The comments prepared by IRRC will help to frame many of the battles that are likely to take place during the coming weeks.

Three elements of the proposed regulations in particular appear to be engendering tremendous controversy – (1) the inclusion of a permit-by-rule ("PBR") for earth disturbance activities and associated stormwater discharges, (2) the imposition of post-construction stormwater management requirements that apply in perpetuity, and (3) the requirement that earth

disturbance activities requiring permits in areas along certain special protection waterways be predicated on the creation and maintenance in perpetuity of riparian forest buffers at least 150 feet wide. The policy considerations underlying these elements of the proposed regulations reflect a marked shift in emphasis. The current regulations impose requirements that apply during earth disturbance activities to protect water quality. The proposed regulations are dramatically broader in scope, containing requirements for managing stormwater and protecting water quality that apply in perpetuity after the earth disturbance activities have been completed. As such, the proposed regulations may create tremendous stumbling blocks for projects that even PADEP would desire to encourage. Moreover, the long-term consequences of imposing obligations that survive in perpetuity have not been adequately evaluated by PADEP and the EQB.

Given the depth and breadth of the concerns surrounding the proposed regulations, IRRC has strongly recommended that after carefully addressing the multitude of issues that have been raised, the EQB publish an advanced notice of final rulemaking providing an opportunity for additional public comment regarding the revised form of the proposed regulations before attempting to finalize the regulations. PADEP appears to have decided to ignore this recommendation, however. Based on a presentation prepared by PADEP for a meeting with the Water Resources Advisory Committee ("WRAC") on February 19, 2010, PADEP appears to be planning to rapidly move ahead with finalizing the proposed regulations with the objective of discussing final form regulations at a special meeting with WRAC on March 17, 2010, and presenting the final regulations to the EQB for approval at the EQB's meeting on June 15, 2010.

Unless major changes are made to the proposed regulations, PADEP's approach may trigger a major show-down with IRRC and the environmental legislative committees later this year. Preliminary indications suggest that while PADEP intends to make some changes to the proposed regulations (such as abandoning the proposed PBR option), it intends to retain and even expand other highly controversial components of the proposed regulations (such as the requirements to create and maintain riparian buffers).

Site Remediation

UECA Implementing Regulations Proposed

by MATTHEW SULLIVAN

Pennsylvania's Uniform Environmental Covenants Act ("UECA") requires a party relying on engineering or institutional controls to demonstrate compliance with the Land Recycling and Environmental Remediation Standards Act ("Act 2") or Storage Tank and Spill Prevention Act ("Tank Act") to document those controls in a UECA covenant. UECA also applies retrospectively, such that any existing instrument that imposes engineering or institutional controls to demonstrate compliance with Act 2 or the Tank Act must be converted to a UECA covenant by February 2013. Now entering its third year of existence, UECA continues to generate questions and concern from the regulated community. On March 6, 2010, the Pennsylvania Department of Environmental Protection ("PADEP") published proposed

regulations to implement UECA. A 30-day public comment period on the proposed regulations will close on April 5, 2010.

According to the preamble to the proposed regulations, PADEP has attempted to tailor parts of the regulations to clarify certain ambiguities in UECA. The proposed regulations do clarify which instruments will need to be converted to a UECA covenant and who must perform that conversion, and the regulations also provide a means to defer that conversion until the property is subsequently transferred. The regulations also specify that PADEP will not impose additional obligations on the property as part of the conversion.

However, the proposed regulations also appear to create a host of new issues by: (1) requiring that the UECA covenant generally be submitted at least 30 days before the submission of the final report documenting the remedial activities, even though the content of the UECA covenant is typically dependent upon what is in that final report and cannot be finalized in advance; (2) requiring the use of PADEP's model UECA covenant, even though the current model covenant includes content that is not required under UECA; and, (3) requiring the submission of a list of the occupants of, and those with a recorded interest in, the property - a requirement that is not established by UECA. In addition, other important issues have not been addressed in the proposed regulations. For example, because PADEP can require each current owner of the property to execute the covenant, the need to enact a UECA-compliant covenant has been problematic for sites that have been remediated and subsequently subdivided and conveyed to multiple new owners.

NJ Site Remediation - LSRP Program Underway – What to Expect in 2010

by BRUCE KATCHER

New Jersey's new Licensed Site Remediation Professional ("LSRP") program under the Site Remediation Reform Act ("SRRA") will be the focus of much attention in 2010. Under this ambitious and, for New Jersey, ground-breaking new program, the large majority of new site remediation cases must be overseen by an LSRP, as opposed to a New Jersey Department of Environmental Protection ("NJDEP") case manager, must proceed through the remediation process without awaiting NJDEP pre-approval and, upon completion, a response action outcome ("RAO") will be issued by an LSRP, as opposed to a no further action letter issued by NJDEP. Sites that are remediated using engineering or institutional controls will be subject to a new remedial action permitting requirement, which must be issued by the NJDEP before the LSRP may issue the RAO. In addition, pre-existing cases that are now under NJDEP case manager oversight may opt-in to the LSRP program with NJDEP approval.

Given these new innovations, here's a brief list of key issues to track in 2010:

Potential for NJDEP review of reports to bog down the process - While LSRPs must still submit reports to NDJEP, the NJDEP review of such reports is supposed to be limited to a checklist "inspection" of an accompanying form in most instances and partial or full report review will take place only in limited circumstances. As submissions are made to NJDEP by LSRPs, the LSRPs and the regulated community will begin to gain experience with the circumstances in which NDJEP will choose (or may be required) to review a report (or portions

thereof) and the level of detail that NJDEP will apply to its review. This will be critical to judging the likely success of the LSRP program, which is intended to greatly speed up the process of completing remediation of contaminated sites by avoiding backlogs attributed to agency review.

Likelihood and circumstances of NJDEP audit of RAOs – NJDEP has authority to audit a RAO for up to three years following its issuance. Concerns have been raised about the possibility that such audits may be delayed until the end of that period, thereby leaving a cloud over a RAO for a considerable period of time following its issuance. The coming year should provide an indication of how quickly NJDEP will perform these audits or decide that an audit is not needed.

NJDEP discretion to subject a case to direct oversight – While most cases will be subject to LSRP oversight, some cases will remain subject to direct oversight by NJDEP on either a mandatory or discretionary basis (based on criteria in SRRA). While these cases must still use a LSRP, they will require full NJDEP review and approval of all reports, NJDEP will select the remedy and financial assurance in the form of a trust fund will be required. During this year, we should begin to get a feel for when NJDEP will exercise its discretion to place a case under direct oversight and how it will exercise its remedy selection authority.

Establishment of LSRP Board and regulations for full licensing program – Under SRRA, NJDEP was given the authority to issue temporary LSRP licenses with terms of no longer than three years to get the program quickly up and running. Over 300 such licenses have already been issued. A new LSRP Board is required to be established to develop and implement regulations for the issuance of licenses, to issue the final (versus temporary) licenses and to oversee compliance with the LSRP code of conduct. The LSRP Board has not yet been appointed nor have the regulations been proposed. Hopefully the establishment of the LSRP Board will take place soon so that the full-fledged licensing program can begin to take shape.

Final administrative regulations – Under SRRA, NJDEP was required to issue interim regulations to implement the SRRA administrative reforms without notice and comment by November 4, 2009, and to issue final regulations with notice and comment by May 2011. The interim regulations were issued in a timely fashion, however, in order to meet the notice and comment requirements for the final regulations, a rule proposal will have to be issued during 2010. The form of this final rulemaking should take shape over the next several months and may, because of time constraints, look very similar to the interim rules.

Revision of the technical regulations – The NJDEP has promised to begin the process of generating extensive revisions to the regulations that have governed the technical details of site remediations in New Jersey ("Tech Regs") during the coming year. These regulations have long been criticized for their overly prescriptive and inflexible nature. A stakeholder process is being established to afford the opportunity for extensive public input and NJDEP has promised to focus on a performance-based approach rather than detailed prescriptive requirements. The regulated community is also hoping that risked-based decision-making will be given wider latitude under the new regulations.

Guidance document development – Under SRRA, the decisions of LSRPs are supposed to be based on professional judgment. To guide that judgment, NJDEP has started the process of

developing a wide range of guidance documents covering many different technical topics (two of the more controversial guidance documents deal with immediate environmental concerns and free product, however, many more are in the works). According to NJDEP, their intent is to use the Tech Regs to identify the remedial phase objectives and to utilize guidance documents to describe the actions, tactics, and technical issues "to be considered" in meeting those objectives. Concerns have been expressed over the degree to which compliance with guidance will be considered mandatory and it will be crucial to the program's success to avoid simply shifting the old prescriptive approach from the Tech Regs to the guidance documents.

Will LSRPs be overly conservative? – Concern has been expressed that LSRPs will be unnecessarily conservative in exercising their professional judgment, thereby increasing the cost of completing site remediation projects. This coming year should afford the regulated community experience with whether or not this will be the case.

In addition to the above, a variety of other issues remain to be fleshed out during the coming year including how the new presumptive remedy process will work for residential properties, to what extent the new remedial action permit process for engineering and institutional controls will complicate or simplify the site remediation process, how readily existing cases opt-in to the process, how readily extensions of the new mandatory time frames will be granted, and what contracting issues are presented by the new requirements. The LSRP reforms ushered in by SRRA have been hailed as having the potential to transform the site remediation process in New Jersey. The jury is still out, however, as to whether that transformation will be for the better or for the worse.

Changes to Act 2 Statewide Health Standards on the Horizon

by RODD BENDER

This year may bring important revisions to the numeric cleanup standards established for many regulated substances under Pennsylvania's Land Recycling Program. The Pennsylvania Environmental Quality Board recently published a proposed rulemaking that would amend the regulations implementing the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2") administered by the Pennsylvania Department of Environmental Protection ("PADEP"). The proposal was published in the March 6, 2010 *Pennsylvania Bulletin*, initiating a 30-day comment period ending on April 5.

The rulemaking's primary purpose is to update the medium-specific concentrations ("MSCs"), which are numeric standards developed by PADEP to implement the statewide health cleanup standards under Act 2 that remediators may attain at contaminated sites across the Commonwealth. The update incorporates current science into the numeric standards, which were first promulgated in 1997 and last formally revised in 2001. For example, as new toxicological data and information becomes available, that data and information can affect previously calculated MSCs. In addition, because some of the MSCs reflect maximum contaminant levels ("MCLs") promulgated by the U.S. Environmental Protection Agency ("EPA"), the proposed regulations include new MSCs that are already in use by virtue of previously finalized changes in the MCLs.

The proposed revisions to the MSCs, as currently drafted, will have a mixed impact on cleanups. In total, the MSCs will increase in 215 instances, including for various regulated substances with respect to the groundwater, soil direct contact, and/or soil-to-groundwater exposure pathways. Conversely, MSCs across these same pathways will decrease in 170 cases. Among commonly encountered regulated substances, the proposed revisions will impact soil and/or groundwater MSCs for benzene, benzo(a)pyrene and other polycyclic aromatic hydrocarbons, methyl ethyl ketone, various PCB aroclors, tetrachloroethylene ("PCE"), trimethylbenzene compounds, trichloroethylene ("TCE"), xylenes, arsenic and chromium VI. In addition, MSCs will be issued for 26 new regulated substances.

Notably, PADEP decided not to revise the used aquifer groundwater MSC for methyl tertiary butyl ether ("MTBE"), a prevalent gasoline-related contaminant. This standard was originally established using very conservative assumptions regarding toxicity. However, additional toxicity information has become available in recent years that would have resulted in a more lenient cleanup standard for MTBE using the scientific approaches prescribed in Act 2. Notwithstanding the availability of this information, PADEP decided not to alter the current MSCs for MTBE citing concerns over potential groundwater taste and odor impacts. The Cleanup Standards Scientific Advisory Board, an advisory committee that consults with PADEP on the Land Recycling Program, opposed PADEP's decision pertaining to the MSC for MTBE because it is based on aesthetic rather than health-based criteria.

Besides revising MSCs for specific substances, the proposed rulemaking will, among other things: set a three-year review cycle for future MSC table revisions; incorporate changes to MSC equations based on the current version of EPA's *Risk Assessment Guidance for Superfund*; clarify that MCLs and health advisory levels ("HALs") automatically become Act 2 MSCs upon promulgation; and clarify that remediators must address vapor intrusion when attaining the statewide health standard under Act 2.

The proposed changes to the MSCs could have a significant impact on parties remediating contaminated sites in Pennsylvania. Depending on the substances involved and whether the MSCs will increase or decrease, remediators may find it easier or more difficult to attain the statewide health standard. Parties currently in the midst of a cleanup should also review the proposal carefully to determine how it may affect an existing cleanup strategy.

Sustainability

Green Building Forecast

by MEREDITH DuBARRY HUSTON

In 2010, energy efficiency will be a primary driver for green building legislation and legal issues as increased attention to climate change has focused attention on building energy use. Emerging trends include requirements for collection and public reporting of building energy usage data and mandates for improved energy efficiency through revisions to building energy codes.

In 2009, the climate change bill passed by the U.S. House of Representatives included a provision which would have mandated the adoption of a national standard for building energy

efficiency. It remains to be seen whether Congress will ultimately enact legislation implementing a national building energy code or green building code. In the meantime, on January 12, 2010, California passed the first state-level building code mandating "green" standards for energy performance, water usage, and construction practices. As of January 2011, the "CalGreen" regulations will require new buildings in California to recycle 50 percent of their construction waste and to reduce water usage by 20 percent. All commercial buildings over 10,000 square feet will be required to undergo mandatory commissioning of air conditioning, heating, and mechanical equipment. The regulations are intended to help the state achieve its goal of reducing greenhouse gas emissions by 33 percent by 2020.

In December 2009, New York City enacted legislation requiring that new buildings and existing building renovations meet minimum energy conservation standards. The legislation requires large building owners to conduct mandatory energy audits every ten years and to gather and report energy performance and water use data on an annual basis. Benchmarking data will be made publicly available. As of January 1, 2010, Washington D.C. is phasing in a similar benchmarking and disclosure requirement for private buildings. Washington State and Seattle have also recently enacted energy benchmarking legislation. Likewise, in 2009, the United States Green Building Council ("USGBC") introduced a "minimum program requirement" requiring LEED certified projects to commit to providing their project energy and water usage data to USGBC for a period of five years after occupancy. Some parties have expressed concern that the requirements for public reporting of energy usage could lead to legal disputes, including design or construction defect claims or claims by tenants against landlords, where newly available data provides evidence that buildings are failing to perform as promised.

In our region, Philadelphia joined the growing list of municipalities with requirements for green building, enacting legislation in December 2009 requiring contracts for new construction and major renovation of city-funded buildings of over 10,000 square feet to "include requirements intended to insure that the finished project will achieve a silver-level LEED rating." Under the legislation, at least five points towards LEED certification must be earned in the category of Energy and Atmosphere.

Green building and energy efficiency legislation will undoubtedly continue to emerge and evolve at the national, state, and local level in the coming year.

Waste

New Requirements Governing the Beneficial Use of Coal Ash Anticipated This Year

by BRETT SLENSKY

As discussed in our December 2009 Client Alert in late 2009, the Pennsylvania Environmental Quality Board ("EQB") issued extensive proposed changes to Pennsylvania's residual waste regulations governing the beneficial use of coal ash while the U.S. Environmental Protection Agency ("EPA") was considering a new federal regulatory approach, including possibly regulating coal ash as a hazardous waste. This year we expect both of these efforts to continue and anticipate the issuance of EQB's final coal ash regulations, as well as EPA's draft rule, in the near future.

With regard to EQB's proposed regulations, the EQB received a wide array of comments from numerous stakeholders (e.g., trade and industry associations, coal ash generators, environmental interest groups, individuals, and Pennsylvania's Independent Regulatory Review Commission) during the public comment period, which closed on December 22, 2009. These comments, which the EQB is expected to address as part of the final regulatory package, included requests for EQB to further assess the need for the regulations in light of the existing regulatory framework, to further justify the content and placement limitations contained in the new regulations and to address how the transition of previously approved coal ash sites and operations will be handled. When final, Pennsylvania's new expanded requirements are likely to have a significant impact on those that generate coal ash as well as those that beneficially use coal ash for a variety of purposes.

At the federal level, the White House reportedly held more than twenty meetings with EPA and various stakeholders in late 2009 to discuss the potential impact of treating coal ash and other coal byproducts as hazardous waste. In the wake of these meetings, EPA announced on December 17, 2009, that it intended to delay publication of the draft rule for a short period of time due to the "complexity of the analysis" and to allow the agency more time to clarify and refine parts of the proposal. Many of those in the regulated community continue to be strongly opposed to the potential regulation of coal ash as a hazardous waste while other stakeholders favor this approach. Given this tension and other divisions between those on both sides of this issue, a protracted public comment period is expected to follow EPA's issuance of the draft rule.

Water

EPA Proposes Numeric Nutrient Standards for Florida Waters: Is a National Approach to Regulating Impaired Waterbodies Next?

by KATE CAMPBELL

On January 15, 2010, the U.S. Environmental Protection Agency ("EPA") proposed numeric nutrient water quality standards for surface waters in the State of Florida. It is the first time EPA is acting to establish federal numeric water quality standards to control nutrient discharges on a statewide basis.

The driving force behind EPA's action was a federal lawsuit filed by several environmental organizations in 2008, seeking to require EPA to promulgate numeric nutrient standards for Florida waters. After evaluating the environmental groups' claims, EPA essentially agreed, issuing a determination in January 2009 that Florida's existing narrative criteria for nutrients are insufficient to ensure protection of state waterbodies, and that numeric criteria are necessary to meet the requirements of the Clean Water Act.

In addition to the new nutrient standards, which EPA acknowledges will not be immediately attainable for most Florida surface waters, the proposed rules also include a new implementation mechanism for affected point and nonpoint source discharges. Termed a "restoration water quality standard," the proposed regulatory mechanism is premised upon the State's adoption of interim numeric water quality standards that are intended to reflect

achievement of "maximum feasible progress." Under the current proposal, these interim standards would be the basis for calculating enforceable numeric effluent limits in National Pollutant Discharge Elimination System ("NPDES") permits and for other control strategies for nonpoint sources and would be replaced with more stringent numeric effluent standards over time until the numeric standards are achieved.

Although the proposed rules address only Florida waters, EPA's action is expected to set a national precedent, paving the way for EPA or individual states to impose numeric water quality standards and effluent limits for nutrients. The rulemaking may also signal a new point source control strategy that EPA may apply to other pollutants, both conventional and toxic, where numeric water quality standards and the numeric effluent limits derived therefrom are not immediately attainable. This effort would likely cause permit issuing authorities to move away from relying on non-numeric, best management practices that are more readily achieved and typically favored by dischargers. MGKF is presently litigating these same issues in connection with the regulation of PCBs in the Delaware Estuary, advocating for alternative point source implementation mechanisms based upon the use of non-numeric effluent limitations for PCBs.

EPA is currently accepting public comments on the proposed nutrient rules for Florida, final adoption of which is set for October 2010.

Federal Jurisdiction Over Wetlands Will Remain in Flux

Also under SITE DEVELOPMENT

by JONATHAN RINDE

In this upcoming year, the courts, the U.S. Army Corps of Engineers (the "Corps") and the U.S. Environmental Protection Agency will continue to define the extent of permitting jurisdiction allowed by Section 404 of the Clean Water Act. The most recent example of this process is the issuance of Special Public Notice #10-08 by the Baltimore District of the Corps, which announced on February 1, 2010, a one year trial implementation period for a Regional Supplement to the Corps' 1987 Delineation Manual. This Regional Supplement must be used for jurisdictional determinations in the north central and northeast regions of the United States. In its public notice, the Corps also requested that any delineator who believes that the Regional Supplement resulted in a significantly different boundary line than one produced under the 1987 Delineation Manual could submit both delineations to the Corps for review. At the end of the one year trial period, the Corps will assess the effectiveness of the Regional Supplement and determine whether any changes are necessary.

Stormwater Regulations Continue to Evolve

Also under SITE DEVELOPMENT

by BRIDGET DORFMAN

In recent years, we have observed an increased focus at all levels of government on compliance with construction-related stormwater requirements. Developers have had to respond to this increased focus by investing more time and money in obtaining timely National Pollutant

Discharge Elimination System ("NPDES") permits for earth disturbance activity, installing and maintaining state-of-the-art Best Management Practices ("BMPs"), training employees in proper stormwater management practices, and keeping stormwater records (or risk enforcement actions in the form of significant penalties and/or stop work orders). Our firm is tracking a number of recent stormwater-related developments at the federal, state, and local levels that seem poised to make stormwater compliance an even more rigorous and expensive process in 2010 and beyond.

At the federal level, in December 2009, the U.S. Environmental Protection Agency ("EPA") issued Effluent Limitations Guidelines ("ELGs") for the construction and development point source category. The ELGs, to be phased in over a number of years, require all permittees to implement new erosion and sediment controls and pollution prevention measures at construction sites and also imposes numeric limitations on turbidity for sites that disturb ten or more acres of land at one time. The numeric limitation represents a huge shift in construction stormwater regulation, which until now has been measured qualitatively, not quantitatively. EPA has also announced its intention to develop new regulations by 2012 that address post-construction stormwater discharges from rooftops, parking lots, and roads on newly developed and redeveloped sites and into the nation's waters. For a more detailed discussion of the ELGs, click here.

At the state level, the Pennsylvania Environmental Quality Board ("EQB") has proposed new stormwater management rules that would, among other things, create mandatory riparian buffers around Exceptional Value surface waters, require that Post-Construction Stormwater Management Plans be submitted with NPDES applications, and dramatically increase application fees. The EQB has also proposed the rescission of Pennsylvania's NPDES permitting, monitoring and compliance regulations, to be replaced by a new chapter that incorporates current federal NPDES program requirements and imposes a new fee structure intended to recoup all of the Pennsylvania Department of Environmental Protection's costs for running the NPDES program. For a more detailed discussion of the new EQB rules, click here.

At the local level, the Philadelphia Water Department is moving to a new billing scheme for stormwater management services for non-residential property owners, to be based upon a calculation of the property's size and how much of the property is covered by impervious surface. Some property owners in Philadelphia will see their stormwater bills decrease slightly, but others will see their bills increase significantly. The owners facing larger bills may be able to reduce their bills by making physical changes to their property to better manage stormwater.

Other Regulatory Programs

Nanotechnology Regulatory Outlook for 2010

by MICHAEL NINES

Nanotechnology or "intentionally produced nanomaterials" includes objects between 1 and 100 nanometers. Nanotechnology manipulates matter for particular applications, and includes the engineering of particles by certain chemical and/or physical processes to create materials with specific properties not displayed in their larger scale counterparts. To date, nanomaterials can

be found in over 500 consumer products. By 2015, it is estimated that consumer products with nanotechnology applications will value $1 trillion on the world market. Some of the same special properties that make nanomaterials useful are also properties that may pose hazards to humans and the environment under specific conditions. Multiple agencies in the federal, state, and international communities have studied the potential effects from nanomaterials in the environment. Specifically, the U.S. Environmental Protection Agency ("EPA") has played a leading role in funding research and setting research directions to develop environmental applications for, and understand the potential human health and environment implications of nanotechnology. EPA has stated that it will review nanotechnology products and processes as they are introduced under the product review requirements of the Toxic Substances Control Act ("TSCA"), the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), and the Clean Air Act. EPA had previously launched a collaborative process to design a Nanoscale Materials Stewardship Program ("NMSP") under TSCA, to complement and support its efforts on new and existing nanomaterials. The EPA's NMSP ended in December 2009, with the release of the much anticipated interim report, with a final report due in 2010. Although the NMSP provided EPA with useful information regarding a limited number of nanoscale materials in commerce, significant gaps in environmental health and safety information remain. To address these information gaps, EPA is taking action on existing nanoscale materials under TSCA.

On February 19, 2010, EPA announced that it will be developing a Significant New Use Rule ("SNUR") under section 5(a)(2) of TSCA to ensure that nanomaterials receive appropriate regulatory review. The SNUR would require persons who intend to manufacture, import, or process certain nanoscale materials for an activity that is designated as a significant new use to submit a Significant New Use Notice to EPA at least 90 days before commencing that activity. The SNUR would identify existing uses of nanomaterials based on information previously submitted under the agency's voluntary NMSP and other information.

As part of EPA's efforts to ensure a more comprehensive understanding of nanomaterials already in commerce, EPA is also developing proposed rules under TSCA section 8(a) to require the submission of additional information, and under TSCA section 4 to require testing for nanomaterials of particular interest, which are already in commerce. This information would help EPA determine whether additional risk management actions for certain nanoscale materials are needed to protect human health and the environment. EPA anticipates proposing these rules by the end of 2010.

Reauthorization of TSCA and Proposed Regulatory Changes

by MICHAEL MELOY

During 2010, the U.S. Environmental Protection Agency ("EPA") is expected to make a strong push in support of reauthorizing and substantially amending the Toxic Substances Control Act ("TSCA"). Since its adoption in 1976, TSCA has remained largely unchanged. However, EPA has announced that one of its key priorities for this year is to press Congress to modernize and strengthen the tools available under TSCA to enable EPA to regulate more effectively the broad array of chemicals that are used in commerce. In connection with this effort, EPA has issued a series of principles to guide the legislative process. These principles include the following concepts:

- Chemicals need to be reviewed against safety standards that are based on sound science and reflect risk based criteria protective of human health and the environment.

- Manufacturers must be required to provide sufficient hazard exposure and use data for chemicals that they make to support a determination by EPA that the chemicals are safe and do not endanger public health (including relevant subpopulations such as children) or the environment.

- EPA must be vested with authority to obtain information regarding chemical use and exposure from downstream processors and users of chemicals.

- EPA must have clear authority to take risk management actions when chemicals do not meet safety standards, taking into account considerations such as children's health, economic costs, social benefits and equity concerns.

- EPA must be authorized to set priorities for conducting safety reviews on existing chemicals and impose clear, enforceable and practicable deadlines on both itself and industry for completion of such reviews.

- The design of safer and more sustainable chemicals, processes and products must be encouraged with the objective of producing chemicals that pose lower risks, are more energy efficient and are more sustainable.

- Standards for substantiating claims of confidential business information ("CBI") to protect information that is disclosed to EPA must be made stricter, including eliminating CBI protection for information and data relevant to health and safety.

- A sustained source of funding for implementing the TSCA program must be developed.

An overhaul of TSCA is obviously a step that requires Congressional action. While EPA may press for new legislation, EPA cannot control what Congress decides to do and when Congress may take action. Consequently, EPA is simultaneously taking steps on its own through aggressive implementation of the existing TSCA program to advance certain of the objectives that it has articulated for legislative reforms.

For example, in a notice published in the Federal Register on January 21, 2010, EPA announced a new policy for reviewing CBI claims in the context of submissions under Section 8(e) of TSCA. (Section 8(e) of TSCA requires those who manufacture, process or distribute in commerce a chemical substances or mixture to immediately inform EPA if they obtain information which reasonably supports the conclusion that the chemical or mixture presents a substantial risk of injury to health or the environment.) Under EPA's new policy, where a health and safety study submitted under Section 8(e) of TSCA involves a chemical identity that is already listed on the public portion of the TSCA Chemical Substances Inventory, the chemical identity generally cannot be protected as CBI. In general, this policy appears to be designed to eliminate the ability of a regulated entity to claim as CBI information regarding a chemical identity where a health and safety study has been submitted and the chemical identity is already listed in the public portion of the TSCA Chemical Substances Inventory. In EPA's view, the new policy will

make more health and safety information available to the public. EPA has indicated that this new policy is part of a broader effort to increase transparency and provide additional information to the public.

Similarly, on December 30, 2009, EPA issued action plans for phthalates, perfluorinated chemicals, polybrominated diphenyl ethers, and short-chain chlorinated paraffins. These action plans summarize available hazard, exposure, and use information for the chemicals that they cover; describe the risks that each chemical may present; and identify the specific steps that EPA is taking to address those concerns. EPA has indicated that it expects to have issued a total of 12 action plans for various classes of chemicals by the end of 2010.

Along with the action plans described above, EPA is moving forward with risk management actions involving a number of chemicals, including lead, mercury, formaldehyde, polychlorinated biphenyls ("PCBs"), glymes, and certain carbon nanotubes. These actions include strengthening regulations governing lead paint work practices standards for renovation and remodeling, banning the use of lead weights in tires, banning the use of mercury in various types of switches, relays and other devices, reevaluating use authorizations for PCBs (discussed in more detail below), and regulating two types of carbon nanotube chemical structures.

Engineered nanoscale materials pose particular challenges because they may be comprised of chemicals that are included in the TSCA inventory but behave very differently than those chemicals. Accordingly, one of the key issues that EPA expects to address in 2010 under TSCA is when an engineered nanoscale material should be considered to be a new chemical for purposes of TSCA. In addition, EPA is developing regulations to require regulated entities to report data on existing uses, production volumes, specific physical properties, chemical and structural characteristics, methods of manufacture and processing, exposure and release information, and available health and safety information pertaining to nanoscale materials.

Finally, EPA has indicated that it intends to reexamine various use authorizations for PCBs with the aim of narrowing or eliminating such authorizations. Pursuant to TSCA, the manufacture of PCBs was banned as of January 1, 1979. However, because PCBs were widely being used as of that date, EPA promulgated regulations allowing PCBs to continue to be used for certain purposes (such as in dielectric fluid in electrical equipment) provided that certain conditions were satisfied. These regulations have affected a broad spectrum of the regulated community. EPA is now signaling that it intends to terminate such use authorizations. In certain instances, such a step will have significant impacts on those entities that continue to rely on the PCB use authorizations. An advanced notice of proposed rulemaking is expected to be issued in early 2010 presenting EPA's approach for phasing out use authorizations for PCBs.

EPA's Enforcement Priorities for 2010

Also under AIR, WASTE and WATER

by JOHN GULLACE

The U.S. Environmental Protection Agency ("EPA") has indicated that one of its guiding themes will be the protection of those who are most vulnerable: children, environmental justice

communities and tribal areas. Consistent with this theme, EPA Administrator Jackson has been conducting an "Environmental Justice Tour" with members of Congress, and EPA has publically stated that there is a need to protect environmental justice communities from refineries. EPA views the Clean Air Act ("CAA") as the most efficient way to obtain tangible health benefits and has stated that, based upon a recent EPA victory, the government can recover mitigation damages including health costs. According to EPA, a significant area of enforcement under the CAA will be New Source Review violations and Prevention of Significant Deterioration permitting violations. Coal fired utilities will be a focus of enforcement and EPA has publically stated that there are 50 ongoing investigations involving such utilities. In addition to coal fired utilities, CAA enforcement will focus on acid manufacturing, cement plants, and glass manufacturing. Other target industries identified by EPA are carbon black, PVC, oil and gas production, polystyrene foam, landfills, industrial boilers, iron and steel, natural gas, elevated flares, aluminum, municipal waste combustion, ethanol production, wood, paper and pulp. EPA believes that there is "rampant" non-compliance with flare use especially in disproportionately impacted communities.

Clean Water Act enforcement will focus on improving water quality in the Chesapeake Bay and Puget Sound. In furtherance of its goal to cleanup the Chesapeake Bay through enforcement, on December 29, 2009, EPA sent letters to the states in the Chesapeake Bay watershed, including Pennsylvania and Delaware, warning them of consequences if they do not meet pollution reduction targets. With regard to the Chesapeake, the emphasis will be on agricultural runoff, stormwater, and concentrated animal feeding operations.

For hazardous waste enforcement, there is increased interest in financial assurance requirements, coal combustion wastes and surface impoundments, among others. Finally, the Department of Justice Environmental Crimes Division announced a new Worker Endangerment Initiative which will result in prosecutions at the intersection of OSHA and environmental law.

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