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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

# 2017 Environmental and Energy Law Forecast

On January 20, 2017, we inaugurated Donald J. Trump as the 45th President of the United States. President Trump has promised to shake up the federal government, and if his nominee for Administrator of the United States Environmental Protection Agency (EPA), Scott Pruitt, is confirmed by the Senate, a shakeup at EPA is likely. Mr. Pruitt has been the Attorney General of Oklahoma since 2011 and in that time has reportedly sued EPA 14 times on behalf of the state. We will also see changes at the regional levels of EPA with new Regional Administrators appointed to each of EPA's 10 regions, including new Regional Administrators in Region 2, which includes New Jersey and New York, and Region 3, which includes Pennsylvania. Although we do not know who the front-runners might be to fill these critically important positions in Region 2 and Region 3, historically the Region 2 Administrator has alternated between a New York and a New Jersey appointee, so next up would be a New Jersey appointee. But like so many other things with the new Administration, it's difficult to say whether the old practices and customs will be followed.

While things are being shaken up in the Executive Branch, Congress is also already moving in ways that may dramatically affect the environmental landscape. Earlier this month, House Judiciary Committee Chairman Bob Goodlatte reintroduced legislation in the House to change the processes by which Federal agencies, including EPA, formulate new regulations and guidance. The bill, titled the Regulatory Accountability Act of 2017 (H.R.5), is also intended to fundamentally change the judicial review of agency regulations and guidance so as to eliminate the "deference" afforded agencies by the courts. The bill, which has already passed the House, is intended to repeal "Chevron Deference," the U.S. Supreme Court doctrine articulated in a series of decisions including *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984), whereby federal agencies are afforded deference by the courts when interpreting legislation they are required to implement and promulgating regulations pursuant to that legislation. Whether or not the Regulatory Accountability Act ultimately passes in its current form, the legislation is emblematic of the constraints and restraints we expect to see imposed upon EPA from both the Executive Branch and Congress. These changes may push more environmental regulation and enforcement to the state level and we may expect an uptick in activity, including litigation, by non-governmental organizations as interested parties try to fill the void that may be created by a pullback in federal environmental regulation and enforcement.

Against this backdrop of potentially broad changes on the horizon in the environmental and energy arena, the attorneys and technical consultants of Manko, Gold, Katcher & Fox have prepared the following forecast of regulatory, legislative, and litigation developments in specific environmental and energy areas that will bear watching in 2017.

## FEDERAL FORECAST

### Controversial Rule Defining Reach of Wetlands Permitting Jurisdiction Could Learn Its Fate in 2017

***Jonathan E. Rinde, Esq.***

The Clean Water Rule, as it is known, represents a regulatory change to the definition of "waters of the United States" as that term is used in the federal Clean Water Act ("CWA"). In changing the definition of this term, the Clean Water Rule redefined the limits of federal wetlands permitting jurisdiction on private property pursuant to the CWA Section 404 wetlands permitting program administered by the U.S. Army Corps of Engineers. The Clean Water Rule is the result of a multi-year effort by the U.S. Environmental Protection Agency ("EPA") and the Corps, and is the federal government's response to several U.S. Supreme Court decisions that called into question the Corps' expansive view of its Section 404 permitting jurisdiction.

Once promulgated in 2015, the Clean Water Rule was immediately challenged by a host of states as well as private parties in a number of federal courts, alleging, among other things, that the scope of the Clean Water Rule exceeded the authority of the CWA. Finding that the petitioners had a high likelihood of success, the U.S. Court of Appeals for the Sixth Circuit stayed the Clean Water Rule nationwide pending further action of the court. Among those states challenging the Clean Water Rule was Oklahoma, whose Attorney General, Scott Pruitt, is President Trump's nominee for EPA Administrator. Given the Sixth Circuit's suspension of the Clean Water Rule, and the nomination of Mr. Pruitt for the top job at EPA, it seems unlikely that the Clean Water Rule will survive in its current form. Moreover, on January 13, the U.S. Supreme Court agreed to hear argument on the issue of whether jurisdiction over challenges to the Clean Water Rule should sit with federal appellate or district courts. The Court's grant of review on this jurisdictional issue may allow the Trump Administration and Congress to focus on eliminating or replacing the rule while the contentious legal challenges await the Supreme Court's jurisdictional decision.

### TSCA Amendments Promise New Chemical Regulation in 2017

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

In 2016, President Obama signed the Frank R. Lautenberg Chemical Safety for the 21st Century Act (the "Act"), which fundamentally changes certain aspects of the Toxic Substances Control Act ("TSCA"), a statute that gives the U.S. Environmental Protection Agency ("EPA") broad authority to impose restrictions on the manufacture, processing, distribution, use or disposal of ***any*** chemical substance currently or proposed to be placed in commerce. In accordance with the Act, EPA recently proposed the following three rules, which are designed to promote more frequent, timely and systematic review and regulation of new and existing chemical substances and must be finalized by June 22, 2017:

- The Risk Evaluation Rule: this rule will establish the process by which EPA will determine whether an existing chemical substance "presents an unreasonable risk of injury to health or the environment;"
- The Prioritization Rule: this rule will allow EPA to divide the universe of existing chemicals into "high priority" substances that must undergo a risk evaluation to determine whether the substance ***may*** pose unreasonable risks, and "low priority" substances for which a risk evaluation is currently unwarranted; and

- The Inventory Reset Rule: this will require manufacturers and importers to confirm by December 17, 2017, which chemicals currently on the TSCA chemical inventory remain active in commerce, even if they previously fulfilled their TSCA data reporting obligations.

In addition, at the end of 2016, EPA published a list of ten chemical substances that will undergo the first risk evaluations under the Act. EPA is required to publish the scopes of the risk evaluations for these substances in March 2017. Finally, EPA will continue in 2017 to pursue TSCA rules for existing chemicals that were already in progress at the time the Act was enacted. For example, in December 2016 and January 2017 EPA proposed to ban the use of trichloroethylene ("TCE") in aerosol degreasing, vapor degreasing and spot cleaning at dry cleaning facilities. In sum, it appears that EPA will be very active in 2017 with respect to chemical regulation under TSCA.

## New Requirements to Impact Hazardous Waste Generators in 2017

***Rodd W. Bender, Esq.***

The rules of the road applicable to facilities generating hazardous waste will change significantly in 2017 due to promulgation by the U.S. Environmental Protection Agency ("EPA") of the final Hazardous Waste Generator Improvements Rule, which was published in the Federal Register on November 28, 2016 (81 *Fed. Reg.* 85372). The rule represents the first major overhaul of the generator regulatory program, which has evolved piecemeal since the 1980s. EPA has reorganized the regulations to make them easier to navigate. Substantively, the final rule contains several important changes. Generator facilities will likely embrace some of these, such as new flexibility for "very small quantity generators" (formerly known as conditionally exempt small quantity generators) to consolidate their hazardous waste at an affiliated large quantity generator facility rather than having to send it directly for disposal. The rule will also allow VSQGs and small quantity generators to maintain their existing generator category subject to certain conditions despite an unusual "episodic" event that would otherwise bump the facility to a higher category.

EPA has also strengthened many of the obligations imposed on hazardous waste generators, which may require increased efforts to ensure compliance. These changes impact areas such as making hazardous waste determinations, managing waste in satellite and central accumulation areas, labeling containers and tanks, and developing emergency planning and preparedness procedures. Further, in the enforcement context, the rule distinguishes between violations of "independent requirements" applicable to facilities simply by virtue of being generators, and failures to satisfy "conditions for exemption" that allow a facility to avoid obtaining a hazardous waste permit. Facilities found to have neglected exemption conditions – many of which (like labeling a drum) appear relatively minor on their face – could experience significant consequences if deemed to be operating without a permit.

The rule becomes effective on May 30, 2017. States authorized to implement the hazardous waste program will be required to adopt changes in the rule that are more stringent than the current federal program, and will have the option of adopting less stringent changes. Facilities should take time over the next few months to become familiar with the rule and be prepared to make any necessary adjustments before regulatory agencies begin enforcing the new requirements.

## Trump Administration's Infrastructure Agenda Could Also Push Permitting Reforms

***Jonathan E. Rinde, Esq.***

As a builder and property developer, President Trump focused on the rebuilding of America's infrastructure as one of his campaign platforms. Whether it be the nation's roads and bridges, public water systems, airports, railways, ports, telecommunication systems or pipelines, the condition of the country's infrastructure has been a source of concern for many. And according to President Trump's campaign website, "[i]nfrastructure projects across the U.S. are routinely delayed for years and years due to endless studies, layer-upon-layer of red-tape, bureaucracy, and lawsuits—with virtually no end in sight. This increases costs on taxpayers and blocks Americans from obtaining the kind of infrastructure that is needed for them to compete economically."

Since President Trump knows all too well the hurdles faced by real estate developers in pursuit of a project, it should come as no surprise that while his administration pursues an increased focus on infrastructure, there may be a tendency to reduce or eliminate the "red-tape" which many associate with environmental regulation. In this regard, his campaign website states that the President would "link increases in spending to reforms that streamline permitting and approvals, improve the project delivery system, and cut wasteful spending on boondoggles." Many will be watching as President Trump moves forward with his agenda on infrastructure.

## MATS Litigation Rolls On

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

In 2017, the District of Columbia Circuit Court of Appeals will hear the latest round of challenges to EPA's Mercury and Air Toxics Standards ("MATS"), a regulation that has attracted considerable attention for being one of the most expensive air pollution control regulations in history. MATS, which regulates emissions of hazardous air pollutants ("HAPs") from electric generating units used at power plants ("EGUs"), was initially challenged in 2012 by a host of industry representatives and environmental groups. The DC Circuit determined that regulation of EGUs by the U.S. Environmental Protection Agency ("EPA") under MATS was reasonable and upheld the rule. Opponents of MATS next appealed to the U.S. Supreme Court, which reached the opposite conclusion that EPA had acted unreasonably by failing to consider the costs of compliance in determining that it is appropriate and necessary to regulate HAPs from EGUs. The Supreme Court therefore directed EPA to fulfill its obligation to consider costs in justifying the regulation, but the Court did not vacate MATS during the interim. *Michigan v. EPA*, 135 S. Ct. 2699 (2015). In response to the Supreme Court's decision, EPA issued its "Supplemental Finding" in April 2016, in which EPA affirmed its earlier determination of the appropriateness of the rule. The Supplemental Finding is now the subject of new challenges before the DC Circuit. Final briefs in this case are due in late March 2017, and the Court is expected to hear oral argument shortly thereafter.

Because MATS remained in effect while EPA undertook to respond to the Supreme Court's directive, certain of the rule's key compliance deadlines have already passed. Therefore, a majority of the sources subject to MATS have had to take action to transition toward compliance, including by making material operational changes and installing significant control system upgrades to satisfy MATS's stringent emission standards. Accordingly, for most sources, it may not matter if MATS is ultimately invalidated. Yet, other facilities continue to seek relief from MATS. The DC Circuit's forthcoming ruling will bring us one step closer to determining MATS's ultimate fate.

## EPA Begins New Year by Amending Risk Management Program Rules

***Michael Dillon, Esq.***

On January 13, 2017, the U.S. Environmental Protection Agency published final amendments to its Risk Management Program ("RMP") regulations at 40 C.F.R. Part 68. The final rule comes in response to Executive Order 13650, which ordered federal agencies to take actions to improve chemical facility safety and security. The amendments to the RMP regulations apply to any facility holding more than a threshold quantity of a "regulated substance" identified in 40 C.F.R. Part 68, including facilities in the chemical manufacturing, oil and gas extraction, manufacturing, agricultural, petroleum manufacturing, and food and beverage sectors. EPA estimates that approximately 12,500 facilities may be impacted by the rule.

Changes finalized as part of the amendments include enhancements to the RMP rule's accident prevention, emergency response, and data availability provisions. Some of the significant updates to the rule include obligations for Program 2 and 3 facilities to conduct root cause analyses in response to certain release events and to perform third-party audits after an RMP reportable accident; enhanced coordination between regulated facilities and local emergency response agencies; and mandatory public meetings with local communities impacted by RMP reportable accidents. The amendments to the RMP rule take effect on March 14, 2017.

## States Take Aim at Federal Government's Authority to Designate Critical Habitat for Endangered Species

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

On November 29, 2016, eighteen states filed suit against the U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, the "Services") in federal court in the Southern District of Alabama challenging two controversial rules related to the designation of critical habitat for endangered or threatened species. One of the rules revised the definition of "adverse modification" of critical habitat, and the other rule clarified the criteria used by the Services when designating critical habitat. The two rules had been sharply criticized as a significant expansion of federal power because, as the critics argue, the rule gives the Services authority to designate almost any area as critical habitat and almost any action as an "adverse modification" of that habitat.

The states' primary argument is that the two critical habitat rules unlawfully expand federal regulatory authority over lands and waters beyond the scope of the federal Endangered Species Act. To highlight the expansion of regulatory authority, the states provided the following extreme examples:

> [U]nder the Final Rules, the Services could declare desert land as critical habitat for a fish and then prevent the construction of a highway through those desert lands, under the theory that it would prevent the future formation of a stream that might one day support the species. Or the Services could prevent a landowner from planting loblolly pine trees in a barren field if planting longleaf pine trees might one day be more beneficial to an endangered or threatened species.

The Services have not yet answered the complaint filed by the states. The Services, however, have filed a motion to dismiss on the grounds that the states do not have standing to challenge the two critical habitat rules. Environmental groups and industry groups are expected to intervene in the litigation.

As with many federal issues pending during the current changeover in the White House, it remains unclear how or whether the new Trump Administration will seek to influence the defense of the Services' critical habitat rules.

## PENNSYLVANIA FORECAST

### PA Supreme Court Will Focus on the Natural Gas Industry in 2017

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

There are three cases pending before the Pennsylvania Supreme Court that, when decided, may have broad implications for the development of natural gas infrastructure in the Pennsylvania's Marcellus Shale region. Each of these cases will be closely watched by both the regulated community and environmental advocacy groups, and will likely shape the legal framework for Pennsylvania's natural gas industry for years to come.

The first case – *Marcellus Shale Coalition v. PADEP*, Dkt. Nos. 115-MAP-2016 and 573-MD-2016 – challenges the recent promulgation by the Pennsylvania Department of Environmental Protection ("PADEP") of regulations for hydraulic fracturing operations, known as the Chapter 78(a) rules. The Coalition argued that certain of the new regulations are beyond the scope of PADEP's regulatory authority, and filed a complaint for declaratory and injunctive relief, including a request for a preliminary injunction to stay certain portions of the new regulations from taking effect during the pendency of the appeal. In November 2016, the Pennsylvania Commonwealth Court granted the Coalition's request for a preliminary injunction and barred the immediate applicability of four of the challenged regulatory provisions, including: (1) a requirement that drillers notify local schools, playgrounds, municipalities, and water supplies of the construction of nearby gas wells; (2) a requirement that drillers identify and monitor old wells located near a proposed new-well location, even when the old wells are not under the drillers' ownership or control; (3) requirements for upgrades to previously-constructed freshwater impoundments; and (4) heightened requirements for remediation of drilling sites. As the challenge on the merits of the regulations continues before the Commonwealth Court, PADEP appealed the preliminary injunction to the Pennsylvania Supreme Court. The outcome of both appeals will be important for shaping the law on agency regulatory authority in Pennsylvania.

The second case – *Gorsline v. Bd. of Supervisors of Fairfield Twp.*, Dkt. No. 67-MAP-2016 – challenges whether a local township properly granted a conditional use permit under the township's local zoning code to allow a natural gas company to install a well in a residential zoning district. The local zoning code allows for the construction of "public service" facilities in the residential district, and the township granted the conditional use permit on that basis. A group of local residents who opposed the permit sued to overturn the township's grant of the permit. The trial court in Lycoming County agreed with the local residents, and reversed the township's grant of the conditional use permit. The Commonwealth Court overturned the trial court decision, holding that the natural gas well was "similar" to a public service facility, which was expressly allowed in the residential district. The local residents have appealed to the Supreme Court, and arguments will likely be heard early this year. The ultimate decision in this case will mold the law on whether private natural gas development could be considered a "public" facility for local zoning exemptions throughout the state.

The final case – *Pa. Envtl. Def. Fund v. Commonwealth*, Dkt. No. 10-MAP-2015 – challenges the Commonwealth's leasing of state forest land for natural gas exploration. A citizen group opposing the leasing filed an action for declaratory relief, arguing that the leasing was contrary to the Environmental Rights Amendment contained in Article 1, Section 27 of Pennsylvania's Constitution. In January 2015, an en banc panel of the Commonwealth Court ruled that the Environmental Rights Amendment did not restrict what the state could do with funds generated from leasing public land. In arriving at this holding, the Commonwealth Court reviewed the Pennsylvania Supreme Court's *Robinson Twp.* decision, which was a plurality, rather than a majority decision, declared that it was not binding precedent, and instead applied the so-called *Payne v. Kassab* test to evaluate the constitutional issues in the case. Pennsylvania's Environmental Rights Act Amendment is front and center in the Supreme Court appeal, and the case is expected to generate an opinion that will clarify how the Amendment should be applied.

## Pennsylvania to "Clear the Air" in 2017

***Darryl D. Borrelli, Senior Technical Consultant***

A change to Pennsylvania's program guidance for the Land Recycling Program (a/k/a "Act 2") occurred in early 2017 when the new Vapor Intrusion Guidance document became operable on January 18. The new document provides a vast amount of additional detail and flexibility, as compared to the current vapor intrusion guidance document, on the collection and evaluation of environmental samples containing volatile organic compounds ("VOCs"). Environmental samples will be able to be screened and evaluated using simple look up tables or by conducting a more site-specific evaluation. A much more detailed evaluation of potential preferential pathways for vapor intrusion is also required by the new guidance.

In addition, the Pennsylvania Department of Environmental Protection ("PADEP") is working on a complete update and revision to other sections of the Act 2 Technical Guidance Manual. A revised document is expected to be available later in 2017. One area that is receiving significant focus relates to assessing the presence and potential for recovery of petroleum product releases. PADEP's new guidance on this issue is expected to reflect recent national trends, which provide for a critical evaluation of petroleum mobility and the practicality of performing actions to recover petroleum product. The new document is also expected to address the current disconnect in PADEP's guidance related to the requirement to recover petroleum contamination whose source was a regulated storage tank "to the maximum extent practicable," while product whose source is not a regulated tank may be managed in-place.

## Update on the Management of Fill Policy

***Michael M. Meloy, Esq.***

In terms of ramifications for the regulated community, few if any technical guidance documents issued by the Pennsylvania Department of Environmental Protection ("PADEP") rival in importance the Management of Fill Policy (also referred to as the Clean Fill Policy). The Management of Fill Policy establishes guidelines for delineating between fill material that can be used as unregulated "clean fill" and fill material that instead must be managed as a waste under the Pennsylvania Solid Waste Management Act ("SWMA"), 35 P.S. §§ 6018.101 – 6018.1003. The current version of the Management of Fill Policy was issued in 2004 and was slightly revised in 2010.

On December 20, 2014, PADEP issued significant proposed changes to the Management of Fill Policy for public comment. The proposed changes focused predominantly on modifying the numeric standards that

are used to help determine whether fill material qualifies as "clean fill" or instead is regulated under the SWMA. The proposed changes also included modifications to the sampling and analytical protocols contained in the Management of Fill Policy. The proposed changes sparked significant public comment during the public comment period that closed on February 18, 2015.

The numeric standards in the Management of Fill Policy are generally based on the direct contact numeric values and generic soil-to-groundwater numeric values developed by PADEP to implement the statewide health cleanup standard under the Pennsylvania Land Recycling and Environmental Remediation Standards Act ("Act 2"), 35 P.S. §§ 6026.101 – 6026.908, for soils at residential properties overlying used aquifers. Since these standards were adopted in 2004, the numeric values under Act 2 have been amended on multiple occasions. The most recent amendments took effect on August 27, 2016.

PADEP has indicated that it plans to proceed with revisions to the Management of Fill Policy to take into account the most recent modifications to the cleanup standards under Act 2. If PADEP embraces the approach that it used in 2004, a number of the numeric standards for "clean fill" will decrease significantly. In certain instances, the new "clean fill" standards will drop to below background levels for commonly occurring regulated substances including benzo(a)pyrene and vanadium. As part of public comments regarding the proposed changes to the Management of Fill Policy, Manko, Gold, Katcher & Fox has emphasized the importance of developing options to address default background levels for various regulated substances that might be higher than the new "clean fill" standards to avoid the significant problems that will be created without such a "safety valve."

In addition, PADEP seems to have given little thought to the major legal issues that will be triggered by imposing new and more restrictive numeric standards on fill material. For example, such changes will necessarily place into question the status of fill material that was used in accordance with the current numeric standards but which might not qualify as "clean fill" under the new numeric standards. Likewise, the status of fill material that has been acquired in reliance on the current clean fill standards but may not be used by the time the new standards take effect will need to be resolved.

PADEP has suggested that it may decide to propose additional changes to the Management of Fill Policy beyond those identified in late 2014 and reissue the updated version of the Management of Fill Policy for further public comment. These developments are likely to unfold in the coming months and will be critically important to anyone involved in excavating, moving, placing, or otherwise handling soils and other types of fill material in Pennsylvania.

## Proposed Changes to Chapter 245 Regulations for Storage Tanks

***William E. Hitchcock, Technical Consultant***

At the December 6, 2016 meeting of the Storage Tank Advisory Committee ("STAC"), the Pennsylvania Department of Environmental Protection ("PADEP") presented draft changes to the Chapter 245 regulations governing administration of the Storage Tank and Spill Prevention Program, and distributed drafts of technical guidance documents describing closure requirements for aboveground and underground storage tank systems. Many of the proposed changes to these programs were prompted by EPA's July 2015 revisions to the federal storage tank regulations, which must be implemented at the state level within three years.

Substantive changes are proposed to the Chapter 245 regulations, including periodic operation and maintenance requirements for Underground Storage Tank ("UST") systems, periodic inspection requirements, changes to the types of acceptable overfill prevention devices, new secondary containment requirements, requirements to ensure system compatibility with alternative and biofuel blends, training requirements for tank operators, a new level of certification for tank inspectors, and additional reporting and recordkeeping requirements for tank inspections. The proposed regulations will also apply to emergency generator USTs, which were previously deferred from regulation under the state and federal programs. Many of the new requirements have a one-year "phase-in" period to allow the regulated community some time to bring existing tank systems into compliance. PADEP intends to begin the public comment period for these proposed changes by the end of 2017. The current draft documents can be accessed using the links below:

- Draft proposed rulemaking to revise Chapter 245 (Administration of the Storage Tank and Spill Prevention Program)
- Draft technical guidance "Closure Requirements for Aboveground Storage Tank Systems"
- Draft technical guidance "Closure Requirements for Underground Storage Tank Systems"

## NEW JERSEY FORECAST

### Changes in Store for the New Jersey Site Remediation Program

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

2017 may see a number of changes to New Jersey's Site Remediation Program – both legislative and regulatory.

First, modification of the Site Remediation Reform Act ("SRRA"), the law that established the licensed site remediation professional ("LSRP") program in 2009, is a distinct possibility. This effort, often referred to as SRRA 2.0, may examine a variety of issues including the following:

- Providing greater flexibility under the direct oversight provisions that place sites that miss certain mandatory deadlines under an extremely restrictive regime of direct New Jersey Department of Environmental Protection ("NJDEP") oversight (versus LSRP oversight);

- Expanding the limited nature of financial assurance mechanisms for engineering controls under remedial action permits and direct oversight;

- Defining the degree of deference afforded by LSRPs to previously issued NJDEP no further action letters when an LSRP is subsequently re-evaluating a site, for example, when the site is sold post-NFA and triggers a new round of compliance with the Industrial Site Recovery Act;

- Developing a flexible mechanism to vary the timing of mandatory and regulatory deadlines to facilitate cleanup and redevelopment of brownfields sites;

- Assessing whether historic fill ought to be regulated differently than other discharges and if so how;

- Determining whether contamination associated with the historic application of pesticides ought to be considered a discharge or subject to special statutory treatment distinct from other types of contamination; and

- Considering whether pre-1993 purchasers of property should be subject to the same liability regime as post-1993 purchasers (as determined by the Appellate Division in *New Jersey Schools Development Authority v. Marcantuone*) and concurrently, whether a bona fide prospective purchaser defense similar to that under CERCLA ought to be afforded under the Spill Act.

Second, it is also possible that some of these issues could be addressed through regulatory mechanisms. For example, NJDEP has been taking a flexible view of its discretion under the direct oversight provisions. In this regard, NJDEP included specific language to this effect in a recently published consent judgment noting that, "[a]t the sole discretion of the Department, the Department may adjust the Direct Oversight requirements pursuant to N.J.A.C. 7:26C-14.4." Such discretion could include relieving "innocent" developers that undertake to remediate a site from compliance with the direct oversight provisions.

Third, NJDEP is also planning a variety of regulatory changes during 2017. Most importantly, sometime in the spring of 2017 the agency expects to propose a set of comprehensive amendments to the remediation standards for the first time since they were adopted in June 2008. In preliminary discussions of the changes under consideration, NJDEP has indicated that it is looking at dropping as many as thirteen contaminants from the list, adding at least sixteen contaminants and evaluating three contaminants of interest (dioxins, extractable petroleum hydrocarbons, and 1,4 dioxane). Remediation concentrations for contaminants on the list may change, falling by more than an order of magnitude, which may trigger the need to re-evaluate completed remediations in some cases. In addition, NJDEP is planning to propose a new set of regulations for underground heating oil tanks that are not covered by the N.J.A.C. Chapter 14B regulations (also known as “unregulated heating oil tanks” or UHOTS) in early 2017. Neither the UHOT regulations nor the remediation standard changes are likely to be adopted in final before 2018.

## Changes Coming for Dirty Dirt in New Jersey

***John F. Gullace, Esq.***

New Jersey has made it a priority to encourage the recycling and reuse of dirt, concrete and other building materials, but the New Jersey Department of Environmental Protection (“NJDEP”) has come to the realization that the regulatory framework put in place to encourage such recycling has also encouraged the importation of contaminated building material, the reuse of contaminated soil at remediation sites and the infiltration of unscrupulous dirt brokers. The recycled material coming out of Class B Recycling Facilities is not always in fact clean fill; and the backfill brought to a remediated site via a dirt broker is sometimes more contaminated that the soil that was removed. Accordingly, at a recent symposium, NJDEP management explained that “clean fill” is a misnomer and that NJDEP needs to move to a concept of appropriate fill depending upon the use. Whether by regulation or by statute, this year we expect to see continued focus on this issue and proposals to regulate dirt brokers and to ensure that the material reused at a remediation site is sampled and determined to be suitable for that particular site.

## What's in the Air for 2017 in New Jersey?

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

2017 promises to be an active year for air regulatory developments in New Jersey. In early January, the New Jersey Department of Environmental Protection ("NJDEP") proposed amendments to its air regulations governing Reasonably Available Control Technology obligations for sources of volatile organic compounds ("VOC") and nitrogen oxides ("NOx"). The rules are intended to help the state meet the National Ambient Air Quality Standard for ozone through the regulation of VOC emissions from industrial cleaning solvents; miscellaneous metal and plastic parts coatings; paper, film and foil coatings; and fiberglass boat manufacturing materials. These rules reflect recommendations from federal Control Techniques Guidelines. The proposed rulemaking also targets NOx emissions from existing simple cycle combustion turbines combusting natural gas and compressing gaseous fuel at Major NOx facilities (compressor turbines) and from stationary reciprocating engines combusting natural gas and compressing gaseous fuel at Major NOx facilities (compressor engines). NJDEP will hold a public hearing on the rule on February 13, 2017 and will accept comments submitted by March 4, 2017. A copy of the proposal can be found here.

Separately, NJDEP has announced its consideration of another air regulatory effort called the Resiliency, Air Toxics and Exemptions rulemaking. At a meeting with industrial stakeholders in December, NJDEP indicated that it would be considering revisions to certain aspects of its Chapter 27 air regulations which would: 1) incorporate resiliency measures regarding the use of emergency equipment conducting construction, repair and maintenance; 2) update toxic valuations using current scientifically based values; 3) incorporate new permit exemptions for specified equipment and operations; 4) repeal Subchapters 30 and 31 (pertaining to outdated NOx trading programs); and 5) undertake minor cleanup of existing rules. The Department described the goals for each item, solicited input on the changes from the group of industrial stakeholders, and indicated its intent to begin working on the proposal early this year. Materials from the December stakeholder meeting are available at the Department's website here, under "past meetings."

## PFCs and Other Chemicals to Receive Increased Regulatory Attention in New Jersey in 2017

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

The group of chemicals referred to as perfluorinated chemicals ("PFCs") are likely to receive increased regulatory scrutiny by the New Jersey Department of Environmental Protection ("NJDEP") in 2017. PFCs have been historically used in a wide variety of products to make them resistant to stains, grease and water and have also been used in some firefighting materials (such as foam). They are extremely persistent in the environment and have been showing up in municipal drinking water supplies in New Jersey.

NJDEP recently initiated procedures to adopt the 2015 recommendation of the New Jersey Drinking Water Quality Institute (DWQI) to set a new drinking water standard for perfluorononanoic acid (PFNA) of 0.013 parts per billion (ppb) which should take 12 to 18 months to complete. The DWQI also made a recommendation in 2016 to set a drinking water standard for another PFC, perfluorooctanoic acid ("PFOA"), at 0.014 ppb, and this chemical is likely to be the next one in the NJDEP regulatory hopper. These standards would be lower than existing U.S. Environmental Protection Agency and NJDEP guidance levels and could ultimately become groundwater remediation standards as well as drinking water standards.

In addition, the legislature is currently considering a bill that would mandate that NJDEP adopt new or increased standards for sixteen chemicals (including PFNA, perchlorate, radon-222 and formaldehyde), for which the DWQI has made recommendations since 1985, but for which NJDEP has failed to promulgate or increase standards. If enacted, this legislation would obligate NJDEP follow a similar procedure for future DWQI recommendations.

## Trends in Resolving Your Environmental Disputes with the State of New Jersey

***John F. Gullace, Esq.***

The New Jersey Department of Environmental Protection ("NJDEP") wants you to know that there are faster ways to resolve your environmental non-compliance, including some that you will like, and some that you will not. For instance, NJDEP is experimenting with the issuance of "tickets" and the agency is very pleased with the results. Currently, "tickets" are being issued primarily for failure to comply with mandatory deadlines under the Site Remediation Reform Act (SRRA), for example, failure to timely retain an LSRP. The benefit to the state of this ticketing process is speed. Instead of plodding through traditional enforcement actions that can take several years, the NJDEP "tickets" are heard in municipal court like speeding tickets and are resolved within a few months. NJDEP is evaluating whether to expand its use of tickets as an enforcement mechanism.

NJDEP's desire to promptly resolve non-compliance is being seen in other ways as well. NJDEP management is encouraging several alternatives to protracted litigation. To promptly resolve non-compliance, NJDEP recommends the early negotiation of Administrative Orders on Consent. NJDEP has also been publicizing its willingness to consider small Special Environmental Projects ("SEPs") to resolve penalties. The change here is NJDEP's willingness to consider SEPs as small as a few thousand dollars and NJDEP's greater flexibility in evaluating the nexus between the harm and the SEP. You might be able to resolve an air violation in a community by performing a stormwater project in the same community. Finally, if you are unable to resolve your dispute with NJDEP's program personnel, NJDEP is encouraging the regulated community to engage the Office of Alternative Dispute Resolution to help untangle and put to rest its disputes with NJDEP. We expect this trend favoring quick, flexible resolutions to continue at NJDEP through at least the end of this year since the message is coming from the highest levels at NJDEP and we would not expect a policy shift before a change in administration a year from now.

## Political Changes to Affect NJDEP in 2017 and Beyond

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As a state that has viewed itself as being a role model for other states when it comes to environmental regulation, New Jersey politicians have begun to position New Jersey as a place that must stand tough in view of the anticipated rollback of federal environmental regulations by the Trump Administration. Former Governors Jim Florio (D) and Christine Todd Whitman (R) have both reportedly taken this position, and called for the election of an new administration at the state level – elections to replace Governor Christie are scheduled to take place in November 2017 – that will press for strong environmental programs at the state level and lobby the federal government to preserve existing protections.

At present, the leading candidate for governor is reported to be a Democrat, Phil Murphy, CEO of the non-profit New Start New Jersey, and former Goldman Sachs executive. If elected, it is possible that some of

the administrative reforms instituted by NJDEP Commissioner Martin to make the NJDEP more "user friendly" and to eliminate duplicative and unnecessarily inflexible regulation where appropriate, might come in for re-examination. In addition, practices such as the use of funds from programs like the Clean Energy Program for purposes of plugging revenue holes in the general budget would likely come to an end, and Christie-disfavored programs like New Jersey's participation in the Regional Greenhouse Gas Initiative (RGGI), are likely to be revived. The current leading Republican contender, Lt. Governor Kim Guadagno, known for her work on the current administration's Red-Tape Commission, could be expected to build on the practices of her predecessor.