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AN ENVIRONMENTAL AND ENERGY LAW PRACTICE

2022 Environmental and Energy Law Forecast

FEDERAL

Forecast of the Federal Environmental Policy in 2022

Michael Dillon, Esq. and Zachary J. Koslap, Esq.

With the Biden administration's first year in office coming to a close, the President's environmental policy pledges made at the start of his administration are beginning to take shape. Many of these pledges can be characterized as either responding to or changing course from the previous administration's goals or expanding the federal government's focus on policy areas of importance to the President, including climate change and environmental justice in particular. This federal forecast provides an overview of significant activities that have occurred in 2021 that are bound to shape to the direction of the administration's environmental policy goals for 2022. Looking forward, we can expect the Biden administration to build on the regulatory and policy efforts already underway.

On the topic of climate change, the Biden administration has taken a number of steps, with additional actions anticipated in the coming year. The United States' participation in the United Nation's Glasgow Climate Change Conference made major headlines toward the end of 2021, where the country rejoined the collective efforts to limit global temperature rise. Domestically, the administration began a multifaceted approach in reducing greenhouse gas (GHG) emissions from mobile and stationary sources, including through the phase down on the production and import of hydrofluorocarbons and the final rulemaking that establishes more robust GHG standards in cars and light trucks. Recently, the administration has announced that the federal government will transition to renewable energy by 2050, which includes transitioning to the use of zero-emission vehicles by 2035 and modernizing federal buildings to reach net-zero emissions by 2045.

The first year of the Biden presidency has also shown that the administration intends to increase the focus on environmental justice through federal agency action. The administration's government-wide Justice40 Initiative, for example, has a goal of directing 40 percent of the overall benefits of applicable federal spending to overburdened communities. The EPA in particular has taken steps in developing strategies that prioritize community engagement in overburdened communities, such as coordinating with state enforcement counterparts and encouraging enforcement personnel to participate in community engagement efforts At the same time, EPA plans to take a more active role in state permitting actions involving overburdened communities. We expect that the Biden administration and the EPA specifically will continue to advance environmental justice considerations simultaneous with their development of other policy goals and enforcement objectives.

For example, EPA has made clear that going into 2022 it intends to increase its enforcement actions in overburdened communities. In addition to a broader increase in Superfund enforcement bolstered by the Infrastructure Investment and Jobs Act's revival of an excise tax, we anticipate EPA will more heavily scrutinize Superfund sites in overburdened communities and expedite remedial design/remedial action negotiations. Further, EPA has indicated that it will continue to work closely with state and local air agencies to improve compliance in areas not meeting the National Ambient Air Quality Standards (NAAQS), many of which are overburdened communities.

More broadly, we anticipate EPA to continue the rulemaking efforts it began in 2021. EPA and the U.S. Army Corps of Engineers, for example, are likely to propose a new definition of Waters of the United States in 2022, with the Navigable Waters Protection Rule vacated by the U.S. District Court for the District of Arizona in 2021. We also anticipate EPA to continue its rulemaking efforts to regulate PFAS through drinking water, wastewater, and emissions standards, and potentially to designate certain PFAS as hazardous substances. EPA also will reconsider its decision in December 2020 to retain the PM NAAQS, which EPA believes may not be adequate to protect public health and welfare as required by the Clean Air Act.

The federal section of this forecast provides additional details on many of the Biden administration's environmental policy objectives.

ENVIRONMENTAL JUSTICE

USEPA Promises Continued Focus on Environmental Justice in 2022

Todd D. Kantorczyk, Esq.

At the start of 2021, the Biden administration issued two executive orders that included directives for the federal government to advance environmental justice (EJ) goals.[1] The balance of 2021 saw USEPA take a number of actions consistent with those directives with respect to enforcement, federal funding and permitting. And in the fall, USEPA released its draft 2022-2026 Strategic Plan, which sets forth strategies, goals and objectives that confirm that EJ concerns will continue to be a top priority for USEPA in 2022 and beyond. To this end, we expect EJ to be reflected in USEPA enforcement, funding, permitting, and planning activities over the next year as set forth below,

Environmental Enforcement

In April, June and July, USEPA's Office of Enforcement issued three memoranda that highlighted these actions"

- Increasing the number of inspections in overburdened communities
- Resolving environmental compliance through remedies with tangible benefits for the community
- Community engagement through additional information and improved EJ screening tools
- Early cleanups and expedited negotiations with responsible parties; and
- Additional oversight and review of compliance with existing enforcement instruments

[1] Executive Order 13985: Advancing Racial Equity and Support for Underserved Communities Through Federal Government (January 20, 2021); Executive Order 14008: Tackling the Climate Crisis at Home and Abroad (January 27, 2021).

Examples of this enforcement emphasis cited by USEPA in its annual December press release on 2021 accomplishments, included an emergency order issued under Section 303 of the Clean Air Act that suspended operations at a refinery "located in a community that is disproportionately affected by environmental burdens" and a September 2021 Memorandum of Understanding between USEPA and California EPA to "enhance collaboration on enforcement and compliance assurance in overburdened communities."

Federal Funding

In July, USEPA awarded $100 million for enhanced air pollution monitoring and other initiatives targeted in "environmentally overburdened, economically underserved" communities using funds from the American Rescue Plan. In addition, USEPA recently announced that it will use $1 billion from the new infrastructure law to accelerate cleanups at 49 priority Superfund sites, 60 percent of which are located in what USEPA considers historically under-served communities. These fund awards were made consistent with the Biden administration's Justice40 Initiative which directs that 40 percent of the benefits from clean energy, climate and other funding be allocated to EJ communities.

Permitting

Typically, USEPA plays a limited oversight role in environmental permitting actions where federal permitting authority has been delegated to individual states. A recent minor source air permitting action for a hot mix asphalt plant in Michigan, however, illustrates how USEPA may take a more active role based upon EJ concerns. In September, the Region 5 Acting Regional Administrator issued a comment letter on the application to the state agency noting that the neighborhood around the proposed plant had some of the highest levels in the state for pollution indicators used by USEPA's EJSCREEN tool. The letter included a number of comments and recommendations, including a cumulative analysis of emissions from all emission units at the facility and nearby industrial facilities, alternative continuous compliance measures, such as opacity cameras, and increased public engagement. The letter also noted that the siting of the facility may raise civil rights concerns and "encouraged" the company and state to consider alternative locations, implying the possibility of pursuing enforcement under Title VI of the Civil Rights Act.

Draft 2022-2026 Strategic Plan

In October, USEPA released for public comment its draft 2022-2026 Strategic Plan, which included a number of strategies, goals and objectives that relate to USEPA's renewed focus on EJ. The draft plan includes, for the first time, "advance justice and equity" as a foundational principle. Consistent with that principle, EJ concerns are infused throughout the document. For example, under the enforcement goal, USEPA states that it will continue to rely on EJSCREEN to identify overburdened communities to be targeted for enforcement and reiterates the use of enforcement tools set out in the three memoranda issued earlier in 2021. In addition, the draft plan sets a goal of conducting 55 percent of inspections annually at facilities in EJ communities (an increase from 27 percent between 2017-2019).

In addition, the draft plan includes a specific goal to "Take Decisive Action to Advance Environmental Justice and Civil Rights." This goal makes explicit USEPA's responsibility to enforce civil rights laws, such as Title VI of the Civil Rights Act of 1964, to prohibit discrimination by applicants and recipients of federal assistance from USEPA, which would include state environmental agencies. Under this goal, the plan highlights the role USEPA program and regional offices have during the permit review process to address civil rights issues (like the minor source permit in Michigan noted above), and the need to work with state partner agencies to address these issues. Importantly, the goal includes an objective to strengthen USEPA's External Civil Rights Office, directing an office that previously responded to complaints to engage

in proactive investigations in overburdened communities, and setting a long-term performance goal of completing 100 audits by September 2026.

Looking at 2022
We expect USEPA to continue its focus on EJ concerns in 2022. Notable items to watch for include:

- Finalizing the 2022-2026 Strategic Plan (currently expected February 2022).
- USEPA offices developing EJ action plans. For example, the Office of Land and Emergency Management released a draft action plan on January 5, 2022 that includes such items as revisions to the Risk Management Program, increasing the SPCC facility inspection rate in EJ communities, and the use of aerial surveillance to collect data in EJ communities.
- The appointment of additional EJ leads at USEPA.
- The refinement and use of EJSCREEN for enforcement efforts and the release of a new screening tool, called the Climate and Environmental Justice Screening Tool, to assist with the Justice40 initiative.
- High profile enforcement actions in EJ communities and additional Memoranda of Understanding with state agencies to coordinate enforcement in those communities.
- A more active role from USEPA regional and program offices in state permitting actions, resulting in additional permit conditions and compliance demonstrations, for activities in communities with high scores using the EJSCREEN tool.
- Possible civil rights audits and actions brought in instances where USEPA believes that states or other recipients of federal funding are not adequately addressing EJ concerns.

AIR

Federal Climate Change Update 2022

Katherine L. Vaccaro, Esq.

The Biden Administration kicked off 2021 with big plans for tackling the climate crisis, pledging to cut greenhouse gas emissions in half by 2030. Biden later doubled down on his promise in November at the Glasgow Climate Change Conference, where he tried to convince other world leaders that the United States is not only doing its part to fight climate change but hopes to lead by example. Already a tough sell after Trump's prior withdrawal from the Paris Climate Accord, for which Biden actually apologized, Biden's message to the conference attendees was largely undercut by West Virginia Senator Joe Manchin III's announcement earlier the same day that he would not support Biden's Build Back Better bill.

As originally drafted, the bill earmarked more than $500 billion for clean energy spending, including tax credits and other financial incentives for businesses that install clean energy technologies and individuals who purchase electric vehicles. The Administration hoped incentivizing greenhouse gas (GHG) reductions through tax breaks would provide a workaround to the judicial challenges that generally befall regulatory actions seeking to restrict emissions. The GHG reductions expected from these clean energy initiatives were thought to be necessary to get the Administration in the ballpark of its 2030 goal, and yet, the spending package had already been docked by the time it landed on Manchin's desk. Without Manchin's vote, the bill stalled out in the Senate before the December holidays, and its future remains uncertain.

Naturally, Biden and other key Democrats have already signaled their desire to get the bill through the Senate in one form or another when Congress returns to work in January.

The Administration suffered another significant setback in late 2021, when the Supreme Court surprisingly agreed to review the D.C. Circuit Court's 2020 decision vacating Trump's Affordable Clean Energy (ACE) rule. The ACE rule would have allowed existing power plants to achieve GHG at the individual facility level and repealed the ACE rule's Obama-era counterpart, the Clean Power Plan (the "CPP"). The CPP, by contrast, would have imposed emission standards on the electricity generation sector as a whole. After the D.C. Circuit threw out the ACE rule and the related repeal of the CPP (but without reinstating the CPP), four pro-coal petitioners, including Manchin's home state of West Virginia, asked the Supreme Court to effectively break the tie and weigh in on the breadth of EPA's authority under Section 111(d) of the Clean Air Act, the statutory provision pursuant to which both the Ace rule and the CPP were promulgated, to regulate how an entire industry operates. Oral argument before the Supreme Court is scheduled for February 28, 2022, but the Court's involvement will likely delay Biden's climate change efforts, if not cripple them.

Still, the Administration made some progress on the climate change front during 2021 and further action is expected in 2022. Most notably, EPA proposed a comprehensive plan to reduce methane emissions from the oil and natural gas industry, including for the first time from existing sources. If finalized, the rule would impose stringent monitoring requirements, and performance standards and mandate consideration of environmental justice factors. EPA plans to issue a supplemental proposed rule based on public comments later this year and then a final rule in October. Separately, EPA finalized in late 2021 a regulation aimed at capping and phasing down production and consumption of hydrofluorocarbons commonly used in refrigeration, air condition equipment, and foam, among other applications.

Finally, just weeks ago on December 20, 2021, EPA finalized new limits on tailpipe emissions of carbon dioxide from new cars and light trucks, model years 2023 through 2026. Although the new rule has been touted as a linchpin in Biden's climate change strategy, reductions in tailpipe emissions on their own, without a generous assist from the GHG reductions contemplated under the Build Back Better bill, are likely not enough to get the U.S. to its 50 percent reduction goal by 2023. The new rule has also drawn criticism from the auto manufacturing sector, perhaps setting the stage for another legal battle between EPA and one of the many industries it regulates. Similarly, EPA intends to issue in 2022 the first of several rulemakings setting GHG standards for 2027 model-year and later heavy-duty trucks.

We will continue to track these developments closely. If you have any questions, please contact Kate Vaccaro.

Climate Change Adaptation on Litigation Radar for 2022

Kate Campbell, Esq.

2021 was yet another active year for climate change litigation, with "failure to adapt" cases now clearly on the litigation radar screen, making their way through early motion practice and discovery. As of this writing, four cases are being pursued by the Conservation Law Foundation (CLF), all targeting petroleum terminals along the coast in New England. Key decisions expected this year and next could have broader implications for facility owners and operators as CLF presses the theory that the failure to prepare the

terminals for foreseeable, catastrophic weather events constitutes an imminent endangerment under RCRA and violates the Clean Water Act's NPDES and stormwater requirements.

In July 2021, the U.S. Court of Appeals for the First Circuit lifted a stay on CLF's lawsuit against ExxonMobil related to its terminal along the Mystic River in Everett, Massachusetts. The district court granted ExxonMobil's motion to stay the case under the doctrine of primary jurisdiction until EPA issued a new NPDES permit for the terminal, reasoning that EPA was better suited than the court to determine the scientific and policy issues raised by ExxonMobil's need to consider climate change, and that EPA's renewal of the permit might moot CLF's request for injunctive relief. The First Circuit resoundingly rejected the district court's rationale, paving the way for the case to proceed through discovery.

Seemingly emboldened by the First Circuit's decision, CLF filed two new citizen suits in Connecticut less than a week later, asserting similar claims under RCRA and the Clean Water Act related to two bulk storage and fuel terminals located in New Haven. A partial motion to dismiss is pending in one of the cases; no motion to dismiss was filed in the other. Whether they end up settling or not, these citizen suits will be ones to watch as environmental non-profits continue to find novel ways to try to drive climate change policy and progress through the courts.

New Source Review: What to Expect in 2022

Carol F. McCabe, Esq.

EPA's regulatory actions to implement the Clean Air Act's New Source Review (NSR) permitting program over the last three decades have been high on the radar for major sources of air emissions, and 2022 will be no different. During the Trump administration, EPA undertook a series of regulatory actions intended to clarify and streamline NSR for permittees. Whereas many of EPA's actions addressed longstanding ambiguities in the regulations or policy interpretations arising from prior administrations, several of the actions were met with criticism by state regulatory agencies and environmental advocacy groups who argued that the reforms weakened the NSR program. Our 2021 forecast outlined EPA's actions during the Trump administration and predicted that the Biden administration may consider changes to some of these actions. While 2021 turned out to be relatively quiet in the world of NSR, perhaps given the Biden Administration's focus on other priorities, it appears possible that at least one key NSR action could be expected to move forward in 2022 and beyond.

The Biden administration appears to have the Project Emission Accounting Rule in its sights for review or revision. The rule was finalized in November 2020, allowing permittees to account for increases *and* decreases in emissions (the "sum of the difference") in "Step 1" of the two-step analysis for determining whether a project causes a significant net emission increase triggering NSR requirements. Step 1 of the NSR analysis is important because if a project increase is determined to be not significant (i.e. below certain pollutant-specific thresholds) in Step 1, then the permittee need not proceed to the Step 2 netting analysis to consider all increases and decreases during the contemporaneous period in order to determine whether a significant net emission increase occurred, and NSR is not triggered.

The Project Emission Accounting Rule was strongly criticized by certain states and was the subject of a Petition for Reconsideration submitted by the Environmental Defense Fund, the Natural Resources Defense Council, the Environmental Integrity Project, the Sierra Club, and the Adirondack Council in

January 2021. The Petitioners objected to the Project Emission Accounting Rule on the following bases: 1) the rule failed to ensure that decreases considered in Step 1 are related to the proposed project; 2) the rule would allow a source to avoid NSR by using non-contemporaneous decreases in Step 1; and 3) the rule failed to ensure that emission decreases will occur and be maintained.

In a letter to Petitioners dated October 12, 2021, EPA denied the Petition for Reconsideration, stating that the Petition did not meet the Clean Air Act criteria for mandatory reconsideration under Section 307(d)(7)(B) that it was impracticable to raise the objection during the comment period, or that the grounds for such objection arose after the comment period but within the time specified for judicial review (i.e. within 60 days after publication of the final rule). EPA's letter outlined the various comments and EPA responses to comments that addressed Petitioners' concerns. Notably, despite EPA's denial of Reconsideration, which evidences a strict adherence to the statutory criteria, EPA indicated that it will undertake a rulemaking to review the Project Emission Accounting Rule consistent with President Biden's Executive Order 13990 *Protecting Public Health and the Environment by Restoring Science to Tackle the Climate Crisis,* stating: "The EPA agrees, however, that the petition for reconsideration identified potential concerns that warrant further consideration by the EPA. Therefore the agency plans to initiate, at its own discretion, a rulemaking process to consider revisions to the EPA's New Source Review regulations that would address the issues raised in the submitted petition and comments on the Project Emission Accounting rule." While the timing of this forthcoming rulemaking has yet to be established, it seems likely that the scope of EPA's effort will address concerns expressed in the Petition, along with related concepts affecting the manner in which emission increases are calculated in the NSR context.

EPA Is Quickly Checking Off President Biden's Executive Order Action Items

Michael Dillon, Esq. and Jessica D. Hunt, Esq.

Upon taking office, President Biden ordered executive agencies to perform sweeping reviews of existing regulations promulgated during President Trump's tenure and, for certain regulations, imposed deadlines for the proposal of new regulations. EPA has been making progress implementing President Biden's executive orders, with additional actions expected to continue into 2022. Some of the more notable EPA actions are summarized below.

New NSPS Requirements Proposed on the Oil and Gas Sector

Among EPA's earliest required actions was to address emissions from the Oil and Gas Sector. On November 15, 2021, EPA published notice in the Federal Register of three proposed actions that are collectively intended to significantly reduce emissions of greenhouse gases (GHGs) and other harmful air pollutants from the Crude Oil and Natural Gas source category. First, EPA is proposing to revise the new source performance standards (NSPS) for GHGs and volatile organic compounds a new subpart OOOOb, which will include standards for emission sources constructed after November 15, 2021. Second, EPA is proposing emission guidelines for states to follow in developing, submitting, and implementing state plans to establish performance standards to limit GHGs from existing sources in the Oil and Gas Sector. Third, EPA is proposing amendments to 40 CFR Part 60 Subpart OOOOa to address inconsistencies between the VOC and methane standards, and to make changes to fugitive emission monitoring at low production well sites and gathering and boosting stations. The comment period for the proposed rulemaking is scheduled to close on January 31, 2022.

Reconsideration of Mercury Air Toxic Standards for Coal- and Oil-Fired EGUs
EPA is required to reconsider the National Emission Standards for Hazardous Air Pollutants for Coal- and Oil-Fired Electric Utility Steam Generating Units, commonly known as the Mercury and Air Toxic Standards. In response to the Supreme Court's decision in *Michigan v. EPA*, 135 S. Ct. 2699 (2015), the Trump Administration determined that it was not appropriate and necessary to regulate hazardous air pollutants from coal- and oil-fired electric generating units. On August 3, 2021, EPA submitted a notice of proposed rulemaking to the Office of Management and Budget but did not identify a timeline for the promulgation of a final rule. On reconsideration, Biden's EPA is likely to again find that regulating hazardous air pollutants from coal- and oil-fired electric generating units is appropriate and necessary, while addressing the Supreme Court's concerns raised in *Michigan v. EPA*. While such a finding itself would not change existing regulations or standards, it may serve as a predicate for the eventual strengthening of emission standards.

Rescission of the Benefit-Cost Rule
On May 13, 2021, EPA issued an interim final rule to rescind the Benefit-Cost Rule. The Benefit-Cost Rule required EPA to conduct a benefit-cost analysis for all "significant" regulations issued under the CAA, and, in conducting the analysis, required EPA to disaggregate economic benefits from other co-benefits and constrained EPA's ability to consider human health benefits. The interim final rule reverts back to the pre-existing administrative process in which EPA will publish notice in the Federal Register and allow for public comment regarding the benefits and costs of an action, the policy considerations, and any other concerns regarding the action. This interim final rule became effective on June 14, 2021 and will remain in effect until it is replaced by the final rule that responds to any public comments.

Reversion of Startup, Shutdown, and Malfunction Exemptions
On September 30, 2021, EPA issued a guidance memorandum withdrawing a prior Trump Administration memorandum that allowed states to incorporate provisions in their state implementation plans for startup, shutdown and malfunctions (SSM). The September 30, 2021 memorandum reverts to a prior position under the Obama Administration that state implementation plan provisions that provide exemptions from air emission limits during periods of SSM are inconsistent with the CAA. EPA's reversion in policy could impact facilities relying on SSM exemptions to comply with permitted emission limits.

The Biden Administration has been busy promulgating new regulations and guidance reversing the Trump Administration's environmental decisions and is expected to continue to review and revise actions taken by the prior administration throughout the course of 2022.

HAZARDOUS SUBSTANCES and REMEDIATION

Another Busy Year Planned for Implementation of TSCA Requirements
Todd D. Kantorczyk, Esq. and Michael C. Nines, P.E., LEED AP, Technical Consultant

TSCA Risk Evaluation Process
In our 2021 Forecast, we predicted that the Biden administration would look for opportunities to reopen the Toxic Substances Control Act (TSCA) risk evaluation process required by the 2016 TSCA amendments as implemented by the Trump EPA. The Biden EPA did not disappoint, announcing at the end of June that it would revisit the risk evaluations for the "first ten" high priority substances completed by the Trump EPA. According to EPA's announcement, these risk assessments incorrectly excluded certain exposure

pathways, in particular for susceptible subpopulations and—consistent with EPA's renewed focus on environmental justice— "fenceline communities" located near industrial facilities. Subsequently, in December 2021, EPA released for public comment a draft TSCA Systematic Review Protocol, ostensibly designed to address a review by the National Academies of Sciences, Engineering and Medicine of the protocol the Trump EPA put in place in 2018. Notably, in its press release EPA said the draft protocol was used instead of the 2018 protocol to evaluate the "next 20" risk evaluations underway pursuant to the 2016 amendments. Comments on the protocol are due February 18, 2022.

TSCA Fee Rule

In addition, EPA has indicated that based on public comment, in early 2022 it will issue a supplemental proposal to the changes to the TSCA fee rule first proposed in January 2021. Ultimately this rule will govern the fees manufacturers, importers, and certain processors are required to pay to fund EPA's costs to implement TSCA. The January 2021 proposed rule included new exemptions for certain manufacturers and importers that are analogous to the current Chemical Data Rule (CDR) exemptions. EPA has indicated that in April 2022 it intends to issue a notice of proposed rulemaking for rules on submitting and supporting confidential business information claims.

New Section 6(a) Rulemakings

The EPA also plans roll out a series of proposed Section 6(a) Rulemakings addressing chemicals which require EPA to address unreasonable risks of injury to health or the environment that the Administrator has determined are presented by a chemical substance under the conditions of use. The proposed Rulemakings, as identified in the EPA's Fall 2021 *Unified Agenda of Regulatory and Deregulatory Actions,* include pending actions on the following chemicals: Cyclic Aliphatic Bromide Cluster (HBCD), 1-Bromopropane; Carbon Tetrachloride, Trichloroethylene (TCE), and asbestos (chrysotile).

PFAS Petition

Finally, the EPA announced in late December 2021 that it would be granting the TSCA Section 21 petition submitted by several North Carolina NGO's compelling a manufacturer to conduct testing of a group of per- and polyfluoroalkyl substances (PFAS). The first phase of testing, authorized under Section 4 of TSCA, will include up to 24 PFAS substances. The EPA plans to then extrapolate this information to 2,950 PFAS that belong to the same categories as the 24 individual substances being tested. This testing and other PFAS testing proposed as part of the Section 21 petition are expected to have wide reaching implications for potential future regulation of PFAS exposures in air, water, and soils.

Federal Regulation and Legislation of PFAS Will Continue to Accelerate in 2022

John F. Gullace, Esq. and Jessica D. Hunt, Esq.

Planned Regulatory Activity at EPA

On October 18, 2021, EPA released its PFAS Strategic Roadmap which sets forth EPA's plans to regulate per- and polyfluoroalkyl substances (PFAS) through 2024. In 2022, EPA is planning a number of significant actions to address PFAS contamination across environmental media. First, EPA is seeking to gain new data and information pertaining to the risks associated with individual PFAS and PFAS mixtures, and intends to complete draft Integrated Risk Information System (IRIS) assessments for public comment and peer review for perfluorohexanesulphonic acid (PFHxS), perfluorohexanoic acid (PFHxA), perfluorononanoic acid (PFNA), and perfluorodecanoic acid (PFDA) in 2022, and publish a final

perfluorobutyrate (PFBA) IRIS assessment by the fall of 2022. In addition, EPA plans to increase its efforts to develop and validate "total PFAS" analytical methods, which includes developing a draft analytical method for measuring additional PFAS in air emissions, and draft methods and approaches for evaluating PFAS leaching from solid materials by the fall of 2022.

EPA also plans to take the following actions under each of the following statutes by the end of 2022.

Clean Air Act

- Evaluating options to regulate PFAS under the Clean Air Act, including listing certain PFAS as hazardous air pollutants, by the fall of 2022.

Toxic Substances Control Act (TSCA)

- Proposing a rulemaking to categorize the PFAS on the Toxic Release Inventory (TRI) as "Chemicals of Special Concern" and remove the de minimis eligibility from supplier notification requirements for all "Chemicals of Special Concern."
- Continuing to update the list of PFAS subject to TRI.
- Finalizing its data-gathering rule which would collect certain information on PFAS compounds manufactured since 2011, including information on uses, production volumes, disposal, exposures, and hazards.
- Evaluating its authority under TSCA to regulate abandoned uses of PFAS as well as future uses of PFAS on the inactive portion of the TSCA TRI, by the summer of 2022.

Safe Drinking Water Act and Clean Water Act

- Developing proposed National Primary Drinking Water regulations for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), with a proposed regulation to be published in the fall of 2022, and a final regulation promulgated in the fall of 2023.
- Publishing health advisories for perfluorobutane sulfonate (PFBS) and GenX chemicals based on final toxicity assessments by the spring of 2022.
- Launching detailed studies on facilities where EPA has preliminary data on PFAS discharges, which will include data from electrical and electronic components manufacturers, textile mills, and landfills.
- Proposing monitoring requirements in federally issued NPDES permits at facilities where PFAS are expected or suspected to be present in wastewater and stormwater discharges, using EPA Method 1633. Specifically, EPA will propose that NPDES permits (1) contain conditions based on product elimination and substitution when a reasonable alternative to PFAS is available in the industrial process; (2) require best management practices to address PFAS-containing firefighting foams for stormwater permits; (3) require enhanced public notification and engagement with downstream communities and public water systems; and (4) require pretreatment programs to include source control and best management practices to protect wastewater treatment plant discharges and biosolid applications.
- Issuing new guidance recommending that state-issued permits that do not already include monitoring requirements for PFAS use EPA Method 1633 to sample for PFAS at facilities where PFAS is expected or suspected to be present in wastewater and stormwater discharges.
- Publishing a multi-lab validated analytical method to detect PFAS in environmental media, including wastewater, surface water, and biosolids.
- Issuing national recommended ambient water quality criteria for PFAS to protect aquatic life.

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

- Developing a Notice of Proposed Rulemaking to designate PFOA and PFOS as CERCLA hazardous substances by the spring of 2022. The designation of PFOA and PFOS as hazardous substances would require facilities to report PFOA and PFOS releases that meet or exceed a reportable quantity, would trigger remediation obligations, and would enable EPA and private parties to recover costs incurred in cleaning up contamination of these substances.
- Developing an Advance Notice of Proposed Rulemaking to seek input on whether to designate other PFAS as CERCLA hazardous substances.

Pending Federal Legislation on PFAS

There are currently more than 45 pending bills before Congress addressing PFAS, and more can be expected. Largely, the pending legislation addresses prohibiting the use of PFAS in food packaging, cosmetics, and other products, and requiring EPA to undertake various actions under the environmental statutes. In addition, the National Defense Authorization Act for Fiscal Year 2022, signed by President Biden on December 27, 2021, imposes certain obligations on the Department of Defense regarding its handling and remediation of PFAS, and increases public access to information.

It remains unclear whether any of the pending legislation will gain enough traction to become law. Despite the uncertainty of federal legislation, one thing is certain, 2022 will be a very busy year for EPA on the regulatory front.

EPA Proposes Rulemaking to Expand Available PCB Analytical Methods and Amend PCB Cleanup and Disposal Program Requirements

Brenda Hustis Gotanda, Esq., LEED AP

EPA is considering a potpourri of changes to its Toxic Substances Control Act (TSCA) regulations governing the cleanup and disposal of polychlorinated biphenyls (PCBs). A proposed rulemaking to amend the PCB regulations in 40 C.F.R. Part 761 was published in the Federal Register on October 22, 2021. The proposal is largely focused on expanding the available options for analytical methods (extraction and determinative) used to characterize and verify the cleanup of PCB waste under TSCA and which are summarized below. However, the proposal also includes a number of other substantive amendments to the PCB program, also summarized below. EPA Comments are due by January 20, 2022 under a one-month extension granted by EPA in December.

Expanded Analytical Methods

Some of the proposed changes to the analytical methods include the following:

- Expansion of the available options for extracting PCBs from environmental media. EPA proposes to add the following extraction methods from SW-846 for use on solid matrices: Method 3541 (Automated Soxhlet Extraction), Method 3545A (Pressurized Fluid Extraction) and Method 3546 (Microwave Extraction). EPA proposes to add the following methods for extraction of PCBs from aqueous matrices: Method 3510C (Separatory Funnel Liquid-Liquid Extraction), Method 3520C (Continuous Liquid-Liquid Extraction), and Method 3535A (Solid-Phase Extraction). EPA proposes to incorporate these methods by reference into 40 C.F.R. §761.19.

- Removal of the ultrasonic extraction method (SW-846 Method 3550B) from the PCB regulations on the basis that it does not consistently produce reliable results and has a higher potential than other methods to be conducted improperly.

- Addition of the following three determinative methods to the PCB regulations: SW-846 Method 8082A, SW-846 Method 8275A, and Method 1668C. The latter is a controversial method developed – but never approved - for use in determining compliance under EPA's Clean Water Act (CWA) wastewater discharge permitting program. EPA states in the proposal that, currently, Method 8082 is the only determinative method for PCB samples listed in the regulations and that any other determinative method would require EPA approval. It notes that it has not received any significant concerns from the regulated community regarding the availability of determinative methods, but has investigated additional methods to include in the regulations so as to provide a greater number of options for the regulated community, which could reduce administrative burden on the agency by reducing the number of approvals processed for alternative methods. As to Method 1668C, it had been proposed by EPA for approval for use in determining compliance under the CWA in 2010, however, in response to numerous comments submitted by the regulated community identifying significant technical issues and shortcomings with the Method, it was not approved . Significant concerns are likely to be raised regarding EPA's proposal to include this method in the TSCA rulemaking.

Substantive Amendments to PCB Remediation Requirements

Proposed substantive amendments to the PCB remediation requirements include the following:

- Amendment of the performance-based disposal option for PCB remediation waste under Part 761.61(b) to include provisions addressing applicability, excluded sites, cleanup levels, verification sampling, recordkeeping, notification, and disposal options. EPA notes that the performance-based disposal option does not explicitly require or refer to cleanup requirements or cleanup levels and this could make it challenging for site owners to know when EPA would agree that on-site cleanup is complete. As such, EPA is proposing to add specific provisions regarding cleanup requirements under this option.

- Removal of the option to dispose of PCB bulk product waste under asphalt as part of a roadbed. EPA had allowed this option in its 1998 rulemaking on the basis that PCBs do not migrate from bulk product waste, but it notes in the current proposal that this has been proven incorrect in studies performed since that time. As such, EPA states that it can no longer conclude that this practice presents no unreasonable risk of injury to health or the environment.

- Addition of provisions to the PCB Spill Cleanup Policy that would (1) allow for more flexible requirements for cleanup of spills caused by and managed in emergency situations, such as hurricanes or floods and (2) allow individuals to request a waiver from certain requirements in emergency situations. EPA's proposed definition of "emergency situation" includes a requirement for an official governmental declaration of the emergency such as a natural disaster or emergency declaration by a Governor or the President or an incident funded under the Federal Emergency Management Agency (FEMA) via a Stafford Act disaster declaration or emergency declaration.

- Removal of certain text from the PCB remediation waste disposal requirements in §761.50(b)(3)(ii), which EPA states is erroneous and inconsistent with the definition of PCB remediation waste and could incorrectly imply that waste with <50 ppm PCB that meets the definition of PCB remediation waste is not regulated for disposal. EPA maintains that all materials that fit the definition of PCB remediation waste in §761.3 – including materials at any current concentration where the original source was ≥500 ppm PCBs beginning on April 18, 1978, or ≥50 ppm PCBs beginning on July 2, 1979 – are regulated for cleanup and disposal under §761.61.

- Inclusion of other changes intended by EPA to improve implementation of existing regulatory requirements, clarify regulatory ambiguity and correct technical errors in the regulations. These changes include, among others, adding a definition of "as-found concentration" since this serves as a basis for several regulatory requirements.

WATER

USEPA Plans to Clarify Federal Clean Water Act Jurisdiction in 2022

Todd D. Kantorczyk, Esq.

In our 2021 Forecast article regarding the ongoing saga associated with defining the extent of Waters of the United States (WOTUS) subject to federal Clean Water Act jurisdiction, we predicted that 2021 would see steps to undo the Trump administration's "Navigable Waters Protection Rule", which had previously narrowed the set of waters considered to be WOTUS. That prediction played out in the second half of 2021, with promises for more activity in 2022.

First, in June, the two federal agencies responsible for implementing any WOTUS rule (the USEPA and the US Army Corps of Engineers) announced that efforts were underway to issue two rulemakings intended to revise the definition of WOTUS. The first rule would put back in place a 1986 definition as used following the Supreme Court's 2006 *Rapanos* decision. The second rule would "further refine and build upon that regulatory foundation." Then, at the end of August, a federal district court in Arizona vacated the Navigable Waters Protection Rule. USEPA and the Corps subsequently announced that based upon the court's order the agencies would interpret WOTUS to be consistent with the 1986 definition and post-*Rapanos* guidance.

On November 18, 2021, the agencies announced the proposed first rule, reiterating the intent to use the 1986 definition as implemented following the *Rapanos* decision. In essence, the agencies have attempted to codify the approach that was set out in guidance and used until the Obama administration promulgated its more expansive 2015 rule. Most significantly, the proposed 2021 WOTUS rule states that wetlands, tributaries (and wetlands adjacent to those tributaries) and "other waters" that are "relatively permanent" or have a "significant nexus" to other WOTUS identified in the rule, qualify as WOTUS. Relatively permanent waters are "waters that are relatively permanent, standing or continuously flowing bodies of water with a continuous connection" to such WOTUS. Waters with a significant nexus are described as waters "either alone or in combination with similarly situated waters in the region, significantly affect the chemical, physical, or biological integrity" of such WOTUS. Unlike the Trump rule, the proposed rule does not include categorical exclusions for groundwater, ditches and ephemeral streams, instead requiring such waters to

be evaluated under the relatively permanent and significant nexus standards. The proposed rule was published on December 7, 2021, and the public comment period remains open until February 7, 2022. As noted previously, the proposed rule is supposed to be the first of two rules intended to define WOTUS. Knowing that a new WOTUS rule will likely be subject to extensive litigation, it remains to be seen how much effort in the near term the Biden administration will put into any proposal that expands upon the current attempt to codify the *Rapanos* approach.

EPA's Final Unregulated Contaminant Monitoring Rule 5 (UCMR 5) to Include an Expanded List of PFAS Constituents and Additional Public Water Systems

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

The Safe Drinking Water Act (SDWA), as amended in 1996, requires that EPA establish a program to monitor specified unregulated contaminants every five years from Public Water Systems (PWS). The monitoring effort historically consisted of data collection from large PWS systems (serving > 10,000 people) and representative small PWS serving less than or equal to 10,000 people. EPA published the first Unregulated Contaminant Monitoring Rule (UCMR) in 1999. More than two decades later, EPA has now finalized its 5th cycle of unregulated contaminant monitoring under the now final UCMR 5. EPA published its final Rulemaking on December 27, 2021 with an effective date of January 26, 2022.

The data collected through UCMR 5 will be stored in the National Contaminant Occurrence Database and will be used to support the EPA Administrator's determination as to whether regulation of previously unregulated contaminants is warranted. The selection of contaminants in the final UCMR 5 cycle is based on a review of the Contaminant Candidate List (CCL), which is a list of contaminants that are not currently regulated by EPA under the national drinking water regulations.

As part of the final UCMR 5 rulemaking, EPA will now require monitoring for 29 different types of Per- and Polyfluoroalkyl Substances (PFAS) as well as lithium. The final UCMR 5 preparation and monitoring period will cover the years 2022- 2026. The inclusion of an expanded list of PFAS in the UCMR 5 fulfills a key commitment in EPA's 2021 PFAS Strategic Roadmap by requiring the collection of more drinking water occurrence data for a broader group of PFAS, utilizing analytical methods at lower minimum reporting levels than previously possible (e.g., EPA Method 533 and EPA Method 537.1).

Also of importance to the UCMR 5 rulemaking efforts, the SDWA amendments under P.L. 115–270, known as America's Water Infrastructure Act of 2018 (AWIA), expanded unregulated contaminant monitoring requirements to include all smaller PWS serving 3,300-10,000 individuals. The final Rule includes these smaller PWS systems in the data collection effort, however, provisions in the final Rule enable the EPA to adjust the number of these smaller systems which must monitor based on available Congressional appropriations. As of now, Congress has not appropriated additional funding to support the UCMR monitoring at these smaller PWS. EPA anticipates that over 9,000 large and smaller PWS will ultimately participate in the PFAS-focused data collection effort.

NPDES Permits for Indirect Discharges Anticipated to Multiply in 2022

Brenda Hustis Gotanda, Esq., LEED AP

Facilities that discharge wastewater with pollutants that have the potential to reach navigable waters via groundwater or other indirect pathways may see increased pressure in the year ahead from environmental organizations and regulatory agencies to obtain a federal Clean Water Act (CWA) NPDES permit for the discharge. Likewise, some facilities may proactively seek to obtain permitting to reduce the risk of potential citizen suits in light of the developing case law following the landmark U.S. Supreme Court decision in *County of Maui, Hawaii v. Hawaii Wildlife Fund*, 140 S. Ct. 1462 (2020). Together, these factors are likely to lead to an increase in the permitting of indirect discharges in 2022.

Last year, following remand in the *County of Maui* case, the U.S. District Court for the District of Hawaii ruled that the County was required to obtain an NPDES permit for the discharge of treated wastewater from the Lahaina Wastewater Reclamation Facility (LWRF) into groundwater via injection wells because the discharge of pollutants was the "functional equivalent" of a direct discharge to navigable waters. In granting summary judgment to the plaintiff environmental organizations, the Court analyzed the evidence against each of the functional-equivalent factors identified by the U.S. Supreme Court in its *County of Maui* decision as well as other factors.

The District Court ruled that the time and distance factors, said to be the most important, as well as the relative-amount-of-pollution-entering-the-water and the specific-identity factors weighed in favor of applying the NPDES permit requirement. It concluded that the undisputed evidence demonstrated that millions of gallons of wastewater are discharged annually into the Pacific Ocean, a navigable water, from groundwater seeps located approximately a half mile from the LWRF. The Court found no genuine issue of fact with respect to whether the discharge was the functional equivalent of a direct discharge to navigable waters. The County's motion for reconsideration was denied by the District Court and the County does not intend to pursue further appeals.

The District Court's analysis and application of the Supreme Court's new functional equivalency test will likely be used in support of other claims advanced by environmental organizations that NPDES permits are required for indirect discharges elsewhere. Likewise, it may also serve as a key guide for permitting agencies.

Currently, there is no federal guidance on how to apply the Supreme Court test. Although EPA had published an initial guidance document in January 2021 under the Trump Administration, it was rescinded by EPA under the Biden Administration in September 2021. The recission memo noted that, consistent with past practice, and informed by the factors specified by the U.S. Supreme Court, EPA will apply site-specific, science-based evaluations to determine whether a discharge is the functional equivalent of a direct discharge.

Facilities with an existing discharge to groundwater or other pathway that may reach navigable waters, who do not currently have an NPDES permit, should consider evaluating available technical information concerning their discharge against these decisions and the functional-equivalent factors. This evaluation may assist in assessing the potential risk that a permit may now be required.

Biden Administration Developing Multi-Billion-Dollar Plan to Reduce Lead in Public Water Systems

Diana A. Silva, Esq.

On January 15, 2021, EPA published proposed revisions to the "National Primary Drinking Water Regulations: Lead and Copper Rule," which was aimed at reducing the risk of lead in public drinking water systems. After assuming office, President Biden announced a series of environmental policy objectives that included replacement of 100 percent of the United States' lead water service lines, which present the most significant source of lead introduced into public drinking water systems. Consistent with this initiative, EPA announced a delay of the effective and compliance dates for the Lead and Copper Rule to allow the agency to complete further stakeholder engagement and evaluate the impact of Executive Order 13390 on the Rule on June 16, 2021. Following the conclusion of the stakeholder process, the Lead and Copper Rule became effective on December 16, 2021, imposing several significant new requirements – including most notably for public water providers to complete inventories of all lead service lines in their respective service territories no later than October 16, 2024.

In addition to the recent changes to the Lead and Copper Rule, EPA announced as part of the December 16, 2021 rulemaking that it intends to enact additional significant revisions to the rule through the development of a new set of regulations, referred to as the "National Primary Drinking Water Regulation: Lead and Copper Rule Improvements." With this new regulatory initiative, EPA intends to address and respond to the issues identified during the stakeholder process. EPA also has announced that it will evaluate the policies set forth in President Biden's Executive Order 13390 ("Protecting Public Health and the Environment and Restoring Science to Tackle the Climate Crisis") to ensure that any changes are consistent with the order. EPA stated that it will issue the proposed version of the Lead and Copper Rule Improvements regulations well in advance of the October 2024 compliance deadline of the currently effective rule, signaling that EPA's new rulemaking efforts are likely to begin this year. It is anticipated that this new rulemaking effort will result in more stringent requirements for public water providers related to lead abatement efforts.

EPA's continued evolution of its regulatory efforts to address lead in drinking water is in concert with newly available funding streams for public water improvement projects provided by the Biden Administration's Bipartisan Infrastructure Law (Public Law 117-58). The infrastructure package allocates billons of dollars for public water improvement efforts over the next five years, including:

- $11.713 billion for below-market interest rate loans and grants through the Drinking Water State Revolving Fund;
- $15 billion for lead service line replacement projects;
- $500 million in grants for Water Infrastructure Improvement for the Nation Reduction in Lead Program;
- $200 million for lead testing and remediation in school and childcare drinking water; and,
- $10 million for a new grant program for lead service line replacement where a community has already completed an inventory.

The renewed federal focus on reducing and eliminating lead in public water systems is also joined by state-led efforts, including legislation recently enacted in Michigan, Illinois, and New Jersey (three of the states with the most lead service lines in the nation) that requires all public water systems to proactively replace all lead water service lines.

OTHER FEDERAL DEVELOPMENTS

Infrastructure Investment and Jobs Act of 2021

Danielle N. Bagwell, Esq., Spencer A. Hill, Jr., Esq. and Jessica D. Hunt, Esq.

On November 15, 2021, President Biden signed into law the Infrastructure Investment and Jobs Act (the "Act"). The Act allocates $1.2 trillion for the development of roads, railways, bridges, broadband, the power grid, and environmental initiatives. Environmental justice is a core objective of the Act, the largest investment in addressing legacy pollution in American history.

Cleanup

The Act directs $21 billion to address Superfund and Brownfield sites and abandoned mines and old oil and gas wells, which are disproportionately located in low-income and minority communities. To that end, the Act reinstates and modifies the expired Hazardous Substance Superfund Trust Fund excise taxes on the production or import of certain chemicals through December 31, 2031, effective after June 30, 2022. The tax will be imposed on businesses that manufacture or produce in the U.S. or import for consumption, use, or warehousing in the U.S. 42 listed chemicals at rates between $0.44 per ton to $9.74 per ton.

Water Infrastructure

The Act allocates $55 billion for upgrading water infrastructure with the goal of delivering clean drinking water to over 10 million Americans and 400,000 schools by eliminating lead service lines and pipes over the next five years. The largest portion will go towards the Drinking Water State Revolving Fund ($11.7 billion) and the Clean Water State Revolving Fund ($11.7 billion), under which federal grants are deposited for states to provide loans to support water infrastructure projects. While eligibility for these grants varies by state, typically both publicly and privately-owned water facilities and systems are eligible. Eligible projects typically include but are not limited to the acquisition, construction, improvement, and repair of all or part of any facility or system for the collection, treatment or disposal of wastewater and for the supply, treatment, storage or distribution of drinking water.

The Act allocates another $15 billion for addressing lead in drinking water, primarily by lead service line replacement. An additional $10 billion is allocated to address emerging contaminants in drinking water with a focus on PFAS. Half of the $10 billion will support a fund which specifically supports underserved, small, and disadvantaged communities in need of funding to comply with the Safe Drinking Water Act and address emerging contaminants. The remainder of the $10 billion will be distributed to address emerging contaminants through the Clean Water ($1 billion) and Drinking Water ($4 billion) State Revolving Funds. The Act also designates funding for development of resilience technology to address extreme weather events and hazards resulting from climate change.

Greenhouse Gases

The Act allocates more than $28 million towards infrastructure that reduces greenhouse gases, focusing on mobile sources, methane reduction from orphaned well sites and abandoned mine reclamation, and the

development of renewable technologies. More than $2 billion is allocated through grants to states, local governments, authorities, and metropolitan planning organizations to increase the accessibility of electric vehicle charging infrastructure, and hydrogen, propane, and natural gas fueling infrastructure. In addition, the Act allocates more than $5 billion in grants and prize competitions that reduce carbon through capture, removal and storage, and more than $54 billion to develop a clean hydrogen program and nuclear energy infrastructure.

PA/NJ Allocations

Pennsylvania and New Jersey are expected to receive approximately $17.8 and $13.51 billion respectively from the Act. While it remains to be seen how states, including Pennsylvania and New Jersey, will use this money, grants should be available to assist in achieving the goals set forth in the Act.

Infrastructure Bill May Inject New Life into Superfund Program

Garrett D. Trego, Esq.

In recent years, EPA's administration of the federal Superfund program has remained largely consistent across both Republican and Democratic administrations. With the passage of the infrastructure bill in November 2021, however, the "Superfund tax" on the production of certain industrial chemicals was reinstated. This change in law may drive more significant changes to the federal Superfund program than policy shifts that followed changes in administrations.

For example, in December EPA announced that it would use the first $1 billion from this new revenue source to help fund remediation at 49 previously unfunded Superfund sites as well as to "accelerate" cleanup at other priority sites across the country. Under the Biden Administration, EPA separately has made clear, including in its July 1, 2021 memorandum to all regional offices, that environmental justice will be a major driver in determining its CERCLA and RCRA enforcement priorities. As funds from the new bill continue to flow to EPA, expect legal and technical activity at new and existing sites to increase, with a particular focus on those sites in or around communities where environmental justice may be a factor.

OSHA Begins Rulemaking Process for Federal Hazardous Heat Standard

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

This year OSHA is likely to formalize regulations addressing heat conditions for indoor and outdoor workers. On October 27, 2021, OSHA initiated the rulemaking process by publishing an Advanced Notice of Proposed Rulemaking (ANPRM), which describes the problem of hazardous heat in the workplace, identifies key issues and considerations, and solicits questions to help formulate standards.

Historically OSHA has relied on the General Duty Clause (GDC) to cite employers for heat-related issues. Under the GDC employers have a broad duty to provide safe workspaces that are free from recognized hazards that can cause death or serious physical harm to employees. 29 U.S.C. § 654(a)(1). But in the ANPRM, OSHA explains that reliance solely on the GDC to address hazardous heat has been challenging. For one, it does not provide specific thresholds concerning heat, and thus OSHA cannot always prove the existence of a recognized hazard. OSHA has tried to rely on scientific literature to establish proof, but courts have largely rejected this effort, as such literature often supplies vague standards, which in any

event do not have the force of law. OSHA has used other tools to prevent heat injury, including an enforcement initiative directing that regional offices increase inspections on hot days, but absent clear standards, OSHA contends it has fallen short.

The ANPRM discusses recognized strategies to reduce occupational heat-related injury and illness. These include engineering controls, such as air conditioning and increased ventilation, and administrative controls, such as reduced workloads or flexible work schedules. OSHA also emphasizes the importance of acclimatization—or gradual rather than sudden exposure to promote a more robust physiological response—as well as employee monitoring, emergency planning, and worker training and engagement. OSHA will likely incorporate some (or all) of these strategies into the final regulations.

California, Minnesota, Oregon, and Washington have already promulgated hazardous heat standards. Though there are similarities among the programs, such as the requirement to provide heat training to employees, they differ in significant ways. For example, California covers only outdoor worksites, whereas Minnesota covers only indoor worksites. Oregon's program applies when the temperature is 80°F, while Washington's applies at 89°F. When regulating a new area of worker safety, federal OSHA often considers successes and failures at the state regulatory level—it has shown particular deference to California OSHA. Indeed, the ANPRM solicits input specifically on the effectiveness of preexisting state heat standards.

Employers with higher temperature working conditions should continue to monitor these developments. The comment period for the proposed hazardous heat regulations closes on January 26. If it determines a rule is necessary, OSHA will then publish a Notice of Proposed Rulemaking, for which there will be an additional comment period. Finally, after the close of that comment period, OSHA can publish a final rule.

A Look Ahead at FIFRA in 2022

Garrett D. Trego, Esq.

Enforcement

In the wake of the Covid-19 pandemic, EPA and some environmental state agencies have targeted products claiming to have antimicrobial qualities as unregistered pesticides under the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) and state pesticide laws. FIFRA broadly defines a "pesticide," not based on its ingredients, but as any product that *claims* an ability to "prevent, destroy, repel, or mitigate" a "pest," with "pest" defined to include microbial organisms like viruses, bacteria, mold, and fungi. While EPA's enforcement has centered on products claiming without clear evidentiary support the ability to eradicate the Covid-19 virus, it has also looped in other products generally claiming antimicrobial properties that had previously avoided scrutiny.

Importers and retailers of international products from nations with more lax or different pesticide laws will continue to be surprised when certain products which would not meet a vernacular definition of "pesticide" are flagged for FIFRA enforcement. With the steep penalties available under FIFRA, compliance officers should continue to be wary of any product that appears to make an antimicrobial claim and is not accompanied by EPA and state pesticide registrations.

Judicial

The U.S. Supreme Court is likely to hear in 2022 an argument that FIFRA preempts state law failure to warn pesticide tort claims. In *Monsanto Company v. Hardeman*, No. 21-241, Monsanto will argue that the

EPA's declination to require or accept a cancer warning on Monsanto's Roundup® glyphosate pesticide products, effectively precludes its ability to provide the warning that the tort plaintiffs allege is necessary. The Ninth Circuit held in the underlying case that FIFRA does not preempt state law failure to warn tort claims. A decision in this case may come late in 2022 and may impact thousands of Roundup®-related tort actions proceeding through courts around the country, as well as serve as precedent for FIFRA pre-emption of state tort law claims in general.

Legislative

Democratic federal lawmakers have proposed several ambitious bills that would amend FIFRA by banning entire classes of pesticide products, creating a private right of action against the EPA, and changing the way in which emergency, conditional, and cancelled pesticide registrations are treated. Despite the Democratically controlled government, the bills do not appear to be gaining traction. Extensive amendment of FIFRA is therefore unlikely in 2022.

Cert Granted in Greenhouse Gas Cases

Shoshana (Suzanne Ilene) Schiller, Esq.

In late October of last year, the Supreme Court agreed to hear appeals in four cases regarding the Environmental Protection Agency's authority to regulate greenhouse gases. In 2015, under Section 111(d) of the Clean Air Act, the EPA issued a final Rule, known at the Clean Power Plan (the "CPP"), which provided guidelines for states to regulate carbon dioxide emissions from certain sources. The Rule was immediately challenged, but before those challenges were decided, and following Trump's election, the EPA repealed the CPP and replaced it with the Affordable Clean Energy Rule (the "ACE Rule"). Like its predecessor, the ACE Rule was immediately challenged in the D.C. Circuit Court, which vacated both the repeal of the CPP and the ACE Rule. The CPP was not immediately reinstated however, as the Biden Administration is developing its own plan for tackling greenhouse gasses. Nevertheless, the Petitions for Certiorari that the Supreme Court granted, filed by West Virginia, North Dakota, the North American Coal Corporation, and Westmoreland Mining Holdings LLC, argue that Section 111(d) of the Clean Air Act does not give EPA the authority to pass a Rule as extensive as the CPP. A ruling from the Supreme Court is expected in the summer of 2022.

Pending Petitions

There are still a few Cert Petitions dealing with environmental matters that the Court has yet to act on but should be addressed before the end of the current term.

- Discussed elsewhere in this Forecast, the Court has requested the view of the Solicitor General in connection with a Petition filed by Bayer arguing that state-law failure-to-warn claims based upon injuries alleged caused by pesticides are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act.
- In September, a Petition was filed in the long-running action by the Sacketts asking the Supreme Court to hold that the Clean Water Act only regulates wetlands that have a continuous surface water connection to regulated waters. Given that the Biden administration has recently proposed a new Rule with respect to defining Waters of the U.S., discussed elsewhere in this Forecast, it is unlikely that the Court will grant the Sackett's petition.

- In November, in an action against the owners and operators of a landfill in Missouri, a Petition was filed seeking a decision on the application of the "local controversy" exception to the Class Action Fairness Act where only one of several defendants is a local entity.

PENNSYLVANIA

Pennsylvania's Climate Change Initiatives Entering 2022

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

In 2021, Pennsylvania advanced significant regulatory and executive initiatives that will carry through 2022. Some of these actions focus on greenhouse gases (GHGs) generally, while others are more specific to particular GHGs, such as CO_2 or methane.

Regional Greenhouse Gas Initiative (RGGI)

On July 13, 2021, the Environmental Quality Board (EQB) voted to approve a final rulemaking titled "CO_2 Budget Trading Program," which would allow Pennsylvania to join as the newest member of the Regional Greenhouse Gas Initiative (RGGI). The final rulemaking is now making its way through the regulatory review process outlined in the Regulatory Review Act.

RGGI is an intergovernmental organization consisting of ten member-states (CT, DE, ME, MD, MA, NH, NJ, NY, RI, VT) that has established a market-based cap-and-trade program for CO_2 emissions from fossil fuel-fired power plants that have 25 megawatts or more of nameplate capacity and send at least 10 percent of their gross generation to the grid. In October 2019, Governor Tom Wolf signed Executive Order No. 2019-07 which directed the Pennsylvania Department of Environmental Protection (PADEP) to develop and present to the EQB a proposed rulemaking that would enable Pennsylvania to join RGGI.

The rulemaking would aim to reduce CO_2 emissions from RGGI sources by 25.5 percent between 2022 and 2030. Based on an analysis conducted by a consultant retained by PADEP, most emission reductions are expected to come from reductions in coal use, while a smaller percentage would come from natural gas. While Pennsylvania would expect to see a total statewide emissions reduction of 183 million tons of CO_2 by 2030, approximately 96 million of that 183 million tons of CO_2 emissions would be shifted (i.e., leaked) to other states within PJM territory. PJM is a regional transmission organization that coordinates the movement of electricity in Pennsylvania, all or parts of 12 other states, and the District of Columbia. In fact, nearly all the anticipated reductions in natural gas emissions and generation in Pennsylvania are expected to be leaked to other PJM states.

PADEP expects the auctions of RGGI credits to yield annual revenues of between approximately $131-$187 million through 2030, which is considerably less than what PADEP expected earlier in the rulemaking process. The Air Pollution Control Act requires that all auction proceeds be directed to the Clean Air Fund "for the use in the elimination of air pollution." PADEP is in the process of developing a reinvestment plan for the auction revenues which is expected to include reinvestment in energy efficiency, renewable energy, and greenhouse gas abatement. Although PADEP has taken the position that the allowances amount to

fees that are authorized under the Air Pollution Control Act, opponents of the final rulemaking argue that the anticipated revenue from the auctions exceeds an authorized fee and instead amounts to an unauthorized tax.

Relatedly, still pending before PADEP and the EQB is a rulemaking petition that was submitted by a group of individuals and organizations in 2018 that asked the EQB to establish a cap-and-trade program that would encompass a much broader set of sources than RGGI. For a more detailed explanation of this pending rulemaking petition, please refer to our prior article here. On November 17, 2020, PADEP informed the EQB that PADEP intended to present a report analyzing the costs and benefits of the rulemaking petition by early 2021. On October 19, 2021, PADEP revised that anticipated deadline to early 2022.

Methane Emissions

On May 23, 2020, the EQB initiated a public comment period on a proposed rulemaking to reduce methane emissions by setting emissions standards for volatile organic compounds and other pollutants (along with co-benefits of methane reductions) from existing oil and natural gas production facilities, compressor stations, processing plants, and transmission stations. PADEP received extensive comments during the public comment period, which closed on July 27, 2020. PADEP is planning to submit the final-draft rulemaking to the EQB in first quarter 2022 and finalize the rulemaking by second quarter 2022.

Mobile Sources

On December 21, 2020, a group of three northeastern states, including MA, CT, RI, and the District of Columbia, formed the Transportation and Climate Initiative (TCI) by signing on to a Memorandum of Understanding (MOU) with a goal of creating a cap-and-invest program to reduce CO_2 emissions from the transportation sector. The program would specifically target fuel suppliers. Pennsylvania and seven other states have opted not to sign on to the MOU at this time and instead intend to continue to work with the TCI states to develop the details of the program while pursuing their own state-specific initiatives. TCI issued a draft model rule in March 2021 and a final Model Rule in 2021. Updates on efforts to implement the Model Rule can be found here.

Relatedly, PADEP has developed a draft proposed rulemaking that would amend PADEP's Clean Vehicles Program at 25 Pa. Code Chapter 126, Subchapter D, by establishing a requirement for automakers to offer for sale a percentage of Zero Emission Vehicle (ZEV) Program-eligible light duty vehicles as part of their model offerings. The draft proposed rulemaking, which can be found here, was presented to PADEP's Air Quality Technical Advisory Committee on October 14, 2021.

Hydrofluorocarbons (HFCs)

PADEP has halted development of a proposed rulemaking that would amend 25 Pa. Code Chapters 121, 129, and 130 to impose additional requirements for the control of hydrofluorocarbons (HFCs) by preventing the future use of HFCs in sources such as air conditioning and refrigeration. PADEP intends to wait for U.S. EPA to develop a national rule to address HFCs.

PADEP is Finalizing its Reasonably Available Control Technology Requirements

Jessica D. Hunt, Esq. and Michael C. Nines, P.E., LEED AP, Technical Consultant

PADEP has developed three separate pending regulatory packages to meet EPA's Reasonably Available Control Technology (RACT) requirements. First, PADEP is finalizing additional RACT requirements for major sources of nitrogen oxides (NOx) and volatile organic compounds (VOCs) to meet the RACT requirements for the 2015 8-hour ozone NAAQS (RACT III). The RACT III rulemaking will amend Chapter 129 of PADEP's air quality regulations to establish additional presumptive RACT requirements and emission limitations for certain major stationary sources that were in existence on or before August 3, 2018, and that emit or have the potential to emit 100 tons per year of NOx or 50 tons per year of VOC. The RACT III rule establishes presumptive RACT requirements and emission limits for combustion units, municipal solid waste landfills, municipal waste combustors, process heaters, turbines, stationary internal combustion engines, cement kilns, glass melting furnaces, lime kilns, and direct-fired heaters, furnaces or ovens. For all other sources, PADEP will require the submittal of case-by-case RACT determinations. The proposed rulemaking would require facilities to submit their RACT proposals within six months and demonstrate compliance no later than January 1, 2023. The comment period for the proposed rule closed on October 12, 2021. Three public hearings were held on September 7, 8, and 9, and no public commentators participated. The Department anticipates presenting the draft final-form rulemaking in the second quarter of 2022. Additional information regarding PADEP's RACT III proposal can be found here.

PADEP is separately proposing presumptive RACT requirements and emission limits for the following control technique guideline (CTG) sources: shipbuilding and ship repair surface coating; synthetic organic chemical manufacturing industry (SOCMI) air oxidation distillation, and reactor processes; and dry cleaners that consume 32,493 gallons or more of petroleum solvent annually. PADEP is proposing to amend its regulations applying to surface coatings, 25 Pa. Code § 129.52, to add an additional category for shipbuilding and ship repair surface coating. The proposed rule will apply to owners and operators of shipbuilding and repair coatings who use or apply more than 264 gallons of coatings annually and will impose specific recordkeeping requirements and VOC-content limits. The proposed rule will incorporate EPA's New Source Performance Standards and CTG requirements for SOCMI facilities, and the CTG requirements for large petroleum dry cleaners. The EQB adopted the proposed rule on September 21, 2021. The EQB is expected to publish the proposed rule in the Pennsylvania Bulletin in early 2022, which will be subject to a 60-day public comment period.

PADEP is also proposing emission limitations and other requirements consistent with the RACT recommendations in the CTG for the Oil and Gas Industry that were finalized by EPA on October 27, 2016. The proposed rulemaking would establish RACT requirements for VOCs and other pollutants (along with co-benefits of methane reductions) from existing oil and natural gas production facilities, compressor stations, processing plants, and transmission stations. The proposed rule, approved by the EQB on December 17, 2019, received extensive public comments. PADEP has made certain revisions to the proposed rule based on public comments, which were presented to the Air Quality Technical Advisory Council on December 9, 2021. Notable revisions include applying a 95 percent VOC control requirements for all storage vessels, regardless of location, with the potential to emit more than 2.7 tons per year, and amending its LDAR requirements to require quarterly or annual LDAR inspections depending upon the average barrels of oil equivalent produced per day. PADEP is planning to submit the final-draft rulemaking to the EQB in first quarter 2022 and finalize the rulemaking by second quarter 2022.

Significant Changes Coming to Act 2 Cleanup Standards and Management of Fill Policy

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

The Pennsylvania Department of Environmental Protection (PADEP) and the Cleanup Standards Scientific Advisory Board (CSSAB) are working on several significant changes to the Act 2 Cleanup Standards, which are expected to be finalized and take effect sometime in 2022. Because the numeric values on which the residential cleanup standards for soils under Act 2 are incorporated by reference in PADEP's Management of Fill Policy, these changes will also have significant impacts on construction and redevelopment projects outside of the Act 2 program.

The first significant change is a modification to the toxicological model and risk thresholds that are used to quantify exposures to lead in soils. Lead is a unique contaminant in that specific models have been developed by EPA to quantify health risks in adults and children from exposure to lead from a variety of sources. PADEP is proposing to use the updated IEUBK model with a CDC-recommended target blood lead level to calculate a new cleanup standard for lead in soils at residential sites (in the range of 200 mg/kg, which is a significant decrease from the current standard of 450 mg/kg). Use of the IEUBK model will likely necessitate changes to the characterization and attainment sampling procedures required by the Act 2 regulations because the input concentrations for the model are based on average concentrations of lead. Because of the critical importance of these issues, PADEP published in the Pennsylvania Bulletin an advance notice of proposed rulemaking on October 30, 2021, seeking information regarding appropriate models to use, target blood lead levels to use and appropriate attainment methods to implement. The comment period closes on January 28, 2022.

The second significant change is an update to the toxicological values used to calculate cleanup standards for polycyclic aromatic hydrocarbons (PAHs). The cancer potency of many PAHs has been assessed relative to the toxicity of benzo[a]pyrene, a PAH reference compound that has been studied extensively. EPA updated the consensus toxicity values for benzo[a]pyrene in 2017, and PADEP incorporated this change into the updated regulations under Act 2 that were published on November 20, 2021, resulting in significantly less stringent cleanup standards for benzo[a]pyrene. However, the cancer potencies of other PAH compounds have not been adjusted relative to the new benzo[a]pyrene values. Therefore, it is expected that several other PAH toxicity values will undergo similar adjustments, potentially resulting in less stringent cleanup standards and clean fill concentration limits for these ubiquitous contaminants.

The final and perhaps most significant change is an expected increase to the cleanup standards for vanadium. The toxicity values previously used by PADEP have resulted in cleanup standards that are often below naturally-occurring background concentrations of vanadium in soils in Pennsylvania, resulting in costly site cleanup and fill management decisions to address vanadium concentrations that are not the result of a spill or release. However, PADEP and CSSAB have identified alternative toxicity values that are currently in use by EPA and other states. A rulemaking effort is underway to incorporate an alternative toxicity value recommended by CSSAB, which will relieve these issues in the Act 2 program once the new standards are approved and published. The changes that are proposed are expected to be considered by the Environmental Quality Board in the form of a proposed rule in the near future.

Separately, PADEP is considering policies that will address the exceedingly low clean fill standards for vanadium under the Management of Fill Policy. These policies may provide relief on an interim basis while the rulemaking process under Act 2 to amend cleanup standards for vanadium is completed.

Pennsylvania Is Moving Ahead with Regulating PFAS

Michael M. Meloy, Esq. and Jessica D. Hunt, Esq.

Pennsylvania is taking steps to regulate PFAS. As recently discussed in a Special Alert, on November 20, 2021, amendments to regulations implementing the Pennsylvania Land Recycling and Environmental Remediation Standards Act (Act 2) went into effect, which add for the first time groundwater and soil medium-specific concentrations (MSCs) for perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS) and perfluorobutane sulfonate (PFBS). 51 Pa. Bulletin 7173 (Nov. 20, 2021). These new standards have broad implications for projects, both within and outside of those arising under Act 2. Any property participating in the Act 2 program and using the statewide health standard will now be able to demonstrate attainment with these MSCs to be afforded liability relief for releases of these types of compounds. In addition, through the incorporation of the numeric values under Act 2 into PADEP's Management of Fill Policy, PFOA, PFOS and PFBS will now need to be evaluated as part of a clean fill demonstration if there is a reason based on due diligence to believe that a release of these compounds may have occurred.

In addition, on November 16, 2021, the Environmental Quality Board approved a proposed rule to set Pennsylvania-specific maximum contaminant levels (MCLs) for PFOA and PFOS in drinking water. The proposed MCL for PFOA is 14 parts per trillion (ppt) and 18 ppt for PFOS. These proposed MCLs are slightly higher than New Jersey's MCL of 13 ppt and 14 ppt for PFOA and PFOS, respectively. The proposed rule will be published in the Pennsylvania Bulletin in early 2022, which will trigger a 60-day public comment period. Once finalized, the rule will apply to all community, nontransient, noncommunity, and bottled, vended retail, and bulk water systems. It is also likely that the state MCLs will also become cleanup standards for groundwater under Act 2 and may have influence on other state regulatory programs. Because federal MCLs for PFAS are in the works, it is unclear how conflicts between state and federal MCLs, to the extent that they exist, will be resolved.

Amendments to Pennsylvania Stream and Wetlands Permitting Program Expected in 2022

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

The Pennsylvania Environmental Quality Board (EQB) is expected to finalize a proposed rulemaking in 2022 to amend the Pennsylvania Department of Environmental Protection's (PADEP) Chapter 105 regulations, which are the Commonwealth's wetland and aquatic resource permitting regulations. The proposed amendments amount to the first substantive revisions to the Chapter 105 regulations in nearly 30 years.

In the preamble of the notice for the Chapter 105 rulemaking, the EQB positioned the proposed amendments as simply an update to improve the clarity, consistency, and efficiency of the implementation of Chapter 105 by reflecting guidance and practices already adopted by PADEP in administering the Chapter 105 program. Nevertheless, many of the proposed changes have the potential to place additional requirements on obtaining necessary approvals or create uncertainty as to what projects are permittable. Notable changes include:

- A new definition for the term "project," which includes not just the area of the proposed activity, but also reasonably foreseeable areas planned to contain future development that would require 105 permits.

While the Chapter 105 program has always required PADEP to consider reasonably foreseeable development within the affected watershed in evaluating an application, changing the scope of an applicant's project to include this future development could have unintended consequences.

- A new definition of the term "water dependent," a key concept that PADEP is required to evaluate for every 105 permit application.

- Additional details on what is required to be submitted as part of a 105 application to better reflect the details that PADEP has been requesting to date through published instructions associated with permit application forms, with a focus on alternatives analysis, which requires the applicant to examine whether other locations or designs could avoid or minimize environmental impacts without affecting the basic purpose of the project.

- An update to provisions concerning compensatory mitigation for aquatic resource impacts that cannot be avoided to be consistent with PADEP guidance and 2008 federal regulations, focuses on aquatic resource functions, and now references direct, indirect and secondary impacts. The new regulation explicitly provides for the in-lieu fee program and the use of approved mitigation banking sites as options for compensatory mitigation and replaces the 1:1 wetland area replacement ratio with a "no net loss" standard that was previously articulated as a PADEP strategy and as a goal in the 2008 federal rule.

- New types of projects that are eligible for permit waivers including geotechnical or environmental site investigations, recreational trails, and temporary pads at wetland crossings. The new waiver provision also includes some additional restrictions, however, that exclude waivers for projects in certain areas, including threatened and endangered species habitats and identified historic, cultural or archaeological sites.

Pennsylvania Environmental Justice Update

Jill Hyman Kaplan, Esq. and Zachary J. Koslap, Esq.

On October 28, 2021, Governor Wolf issued an Executive Order that prescribes a process to revise the existing Environmental Justice Public Participation Policy, and permanently establishes the Office of Environmental Justice within PADEP. The Order directs the Office of Environmental Justice to take certain actions and allows it to take others. Among those actions that are mandated are:

- making recommendations to PADEP on the integration of Environmental Justice (EJ) considerations throughout PADEP's programs;
- working with PADEP to identify economic development and funding opportunities and consider EJ in the grant awarding process;
- developing and publishing an EJ strategic plan every five years;
- along with other stakeholders, revising the existing Environmental Justice Policy to define and establish criteria for EJ Areas, and to develop an enhanced public participation plan for EJ Areas potentially affected by development projects and industrial operations.

The Office of EJ is also directed to develop standardized mitigation and/or restoration practices for consideration by applicants and permit application reviewers in the permitting or cleanup context. The Order allows the Office to establish an EJ mapping tool to examine environmental and health impacts on vulnerable Pennsylvania communities and an online repository of EJ information and data. The Order also permanently establishes the Environmental Justice Advisory Board and the Environmental Justice Interagency Council.

The current draft of the EJ Public Participation Policy is posted on PADEP's website. PADEP held two discussion sessions in 2021 and has solicited public comments. PADEP is expecting to finalize and start implementing the EJ Public Participation Policy in the summer of 2022.

NEW JERSEY

Governor Murphy's Second Term Environmental Priorities

Bruce S. Katcher, Esq.

With the beginning of his second term this year, it seems probable that Governor Murphy's environmental priorities will focus largely on the continued implementation priorities he identified at the outset of his administration as opposed to new ones. To that end, climate change and environmental justice (and more broadly - community-based environmental concerns) will continue to occupy center stage; however, each of those issues encompass a myriad of ancillary issues that present their own challenges. Notably, very little mention of these issues was made in the Governor's State of the State Address delivered on January 11, 2022.

Climate Change

With respect to climate change, the first wave of Protecting Against Climate Threats (PACT) rules will be finalized by the NJDEP over the course of the year, including those aimed at reducing greenhouse gas emissions at electric generating facilities and those aimed at resiliency and land use regulatory changes designed to tackle the challenges presented by sea level rise, stormwater and flooding.

Along with those regulatory developments, continued (and expanded) programmatic emphasis on promoting the use of electric vehicles (EVs), EV charging infrastructure and port electrification is expected. The longstanding initiative to promote solar energy development will continue alongside the new initiative to promote wind energy development. The administration is promoting both the environmental and economic benefits of wind energy, with heavy emphasis on the development of the huge Wind Port in Salem County. This hub-style marshalling port project will manufacture parts for and serve as a parts marshaling location for offshore wind projects in New Jersey and all along the east coast. Full scale construction is anticipated to occur in 2022 into 2023.

The administration will also face increasing pressure coming from some public sectors for a fossil fuel power plant construction moratorium and a ban on additional natural gas pipeline construction.

Environmental Justice

Environmental Justice (EJ) will also see the roll out a major regulatory package to implement the New Jersey EJ Law, which is likely to come under heavy scrutiny by both business and environmental justice

advocates during the coming year. While the applicability of the EJ law is limited to certain designated permits and facilities, EJ is also likely to be promoted across multiple agencies under existing programs based on the mandates of the Governor's Executive Order #23 which requires that "all Executive branch departments and agencies shall consider the issue of Environmental Justice" in their decision-making. These initiatives will be monitored closely by the Governor's EJ Interagency Council.

With the Governor having made it clear that much new state investment will be targeted to EJ communities, the administration will also participate in defining the range of projects, priorities and investments for the newly available federal funding under the 2020 federal infrastructure legislation a significant portion of which will be directed to address pressing environmental and public health issues in these communities. This will include replacing aging lead water pipes, cleaning up Superfund sites, acquiring new electric school buses, upgrading public transit systems and the electric grid, as well as a variety of other funding programs.

Other
As if the above were not enough, we expect the administration, through the NJDEP, to continue to focus on implementation of the new Dirty Dirt Law, response to the public concern over the perceived threat to public health presented by per- and polyfluoroalkyl substances (PFAS), the ongoing initiative to secure redress for damage to natural resources at contaminated sites, and enhanced recycling efforts.

New Jersey Site Remediation Program Faces Key Issues in 2022

Bruce S. Katcher, Esq.

A variety of issues promise to receive heightened attention under the New Jersey Site Remediation Program (SRP) in 2022.

PFAS and other Emerging Contaminants
There is likely to be a continuing emphasis on addressing per- and polyfluoroalkyl substances and other contaminants of emerging concern (CECs), in dealing with the remediation of contaminated sites. This applies to ongoing cases where the SRP has emphasized that each site must be evaluated for the presence of CECs to the same extent as other contaminants during the investigatory phases of remediation. With respect to "closed" cases where biennial certifications of engineering and/or institutional control remedy effectiveness are required, that process must also include an evaluation of CECs where that may not have been considered during earlier phases of the case. The NJDEP has published guidance addressing this issue and a list of categories of sites at which such an evaluation is presumptively required.

Environmental Justice
Environmental justice considerations will probably receive a new emphasis. Although New Jersey's Environmental Justice (EJ) Law excludes "any authorization or approval necessary to perform a remediation" from the list of permits required to undergo a statutory EJ review, the Governor's Executive Order #23 requires that "all Executive branch departments and agencies shall consider the issue of Environmental Justice and make evaluations and assessments in accordance with that guidance, to the extent not inconsistent with law." Therefore, parties conducting remediations in areas meeting the definition of overburdened community under the EJ Law would be advised to at least consider the impacts of their remediation on the community, and, where required, develop inclusive public participation plans.

SRRA Reforms
The NJDEP has embarked on a stakeholder process to address a number of issues that were raised as concerns during the process of amending the Site Remediation Reform Act (SRRA) in 2019 but were put aside to be addressed administratively rather than legislatively. Among the objectives of this initiative will be an update to the remedial action permit (RAP) process to expedite the issuance of RAPs where possible through the creation of a general permit process for the issuance certain routine RAPs.

Miscellaneous
Finally, a variety of other issues will take on importance during the coming year. Watch for approaching regulatory or mandatory deadlines in May 2022, the application of the deadline extensions granted during the COVID-19 public health emergency that ended on June 4, 2021, the implementation of the NJDEP's revisions to its Fill Material Guidance issued in late October 2021, and the NJDEP's less forgiving approach to the submission of deficient documents by LSRPs.

New Jersey Environmental Justice: Issues to Watch in 2022

Jill Hyman Kaplan, Esq. and Zachary J. Koslap, Esq.

Environmental Justice Administrative Order
Just over a year after Governor Phil Murphy signed New Jersey's Environmental Justice Law (EJ Law), the New Jersey Department of Environmental Protection (NJDEP) issued an administrative order on September 22, 2021 designed to implement an environmental justice review process until the EJ Law regulations can be adopted and go into effect. The order applies to facilities as defined in the EJ Law located in overburdened communities that seek authorizations covered under the EJ Law. Among other requirements, the order requires applicants to hold public hearings "consistent with" the EJ Law, establishes 60-day public comment periods for permit applications, "strongly encourages" applicants to engage directly with community members in advance of the comment period, and requires NJDEP to apply "special conditions" as may be necessary to avoid or minimize environmental or public health stressors to the overburdened community. The order indicates that NJDEP can only exercise its authority under the order to the extent consistent with existing law and regulations (i.e., not including the EJ Law).

Public Involvement
Issuance of the order came months after NJDEP completed a series of stakeholder meetings designed to provide background on the EJ Law and solicit input on key aspects of the law in anticipation of rulemaking. NJDEP also has launched a Community Engagement Series, which began on November 15 in Burlington City. The series is designed to be a year-long effort to encourage community engagement in environmental justice issues.

EJ Law Regulations
As we reported at the time of its passage, the EJ Law seeks to address cumulative environmental and public health stressors in overburdened communities, which the law defines as communities in which (1) at least 35 percent of the households qualify as low-income households; (2) at least 40 percent of the residents identify as minority or as members of a state recognized tribal community; or (3) at least 40 percent of the households have limited English proficiency. The coming year will see the proposal for public comment of what promises to be an extensive set of regulations aimed at implementing the substantive requirements of the EJ Law in these communities. The substantive requirements will reflect the

information developed at the stakeholder meetings referenced above and the internal deliberations at NJDEP. The key EJ Law requirements that will be the subject of those regulations are briefly summarized below.

Under the EJ Law, certain types of facilities seeking covered permits for new or expanded facilities from NJDEP in an overburdened community must develop an environmental justice impact statement (EJIS) as part of any permit application. The purpose of the impact statement is to assess the potential environmental and public health stressors associated with the proposed new or expanded facility. The applicant must then hold an environmental justice public hearing to accept comments from members of the overburdened community on the impact statement and the proposed new or expanded facility.

For the issuance of new permits, if NJDEP finds that issuance of the permit would "together with other stressors cause or contribute to adverse cumulative environmental or public health impacts" in the community "that are higher than those borne by other" comparative geographic units, then NJDEP ***must*** deny the permit. If NJDEP makes the same finding in the context of existing facility expansions or permit renewals, then NJDEP may only apply permit conditions on the construction and operation of the facility to protect public health.

All the various aspects of the EJIS process, the stressor evaluation, what types of facilities and permits are covered and which are excluded, the public hearing process, the geographic unit comparison, the nature of permissible permit conditions and much more will need to be addressed in the regulations.

Although NJDEP has not officially announced when it expects to issued the proposed regulations, the agency's informal statements indicate that the proposal should be expected in the New Jersey Register sometime during the first quarter of 2022, followed by a public comment period and the agency's subsequent review and response to those comments.

New Jersey Remains Focused on PFAS

John F. Gullace, Esq. and Jessica D. Hunt, Esq.

New Jersey was among the first in the nation to promulgate standards to regulate per- and polyfluoroalkyl substances (PFAS) and has some of the most stringent standards in the nation. In the coming year, it is likely to bring particular attention to PFAS in wastewater discharges, the remediation of contaminated sites and water supply systems.

PFAS Source Evaluation and Reduction Requirements Survey

Over the past year, New Jersey has been attempting to understand the sources of PFAS in New Jersey, especially including wastewater discharges. On March 17, 2021, the New Jersey Department of Environmental Protection (NJDEP) sent a PFAS Source Evaluation and Reduction Requirements Survey to Category B NJPDES Discharge to Surface Water Permittees (industrial/commercial dischargers) and Category L NJPDES Significant Indirect User Permittees (dischargers to sanitary sewers) to evaluate potential sources of PFAS. Certain wastewater utilities in the state have also sent out surveys.

Permittees that received the survey were asked to identify their use of Class B firefighting foam, their handling, storage, use, application or manufacture of certain materials that are known to contain PFAS, and

whether the permittee was using materials containing PFAS. Based on the responses to the initial PFAS survey, on August 18, 2021, the NJDEP sent a request for information to select Category B NJPDES Discharge to Surface Water Permittees and select Category L NJPDES Significant Indirect User Permittees, to require the collection of two samples for 12 PFAS at least 30 days apart and to submit the monitoring data to the NJDEP by December 15, 2021. The information requests appear to be the first step in New Jersey's effort to quantify the use of PFAS in the state, and additional investigation by the NJDEP is likely.

PFAS As a Contaminant of Emerging Concern in the Site Remediation Program
New Jersey has also been focused on remediating PFAS contamination. On August 5, 2021, the NJDEP published guidance for the remediation of contaminants of emerging concern (including PFAS) if they are identified at a site undergoing remediation. Under the guidance, licensed site remediation professionals should evaluate every site currently undergoing remediation to determine if PFAS is a contaminant of concern and if further investigation or clean up is required. The NJDEP's biennial certification form for sites undergoing monitoring and maintenance has also been revised to require an evaluation of contaminants of emerging concern at sites subject to a post-RAO remedial action permit. While the guidance does not necessarily require sampling, multiple lines of evidence must be used to determine if sampling and subsequent remediation is required, and the results of this evaluation must be included in the next remedial phase report (or biennial certification) for the Department's review.

Water Supply Systems
Finally, New Jersey's requirement that public water supply systems sample for PFAS has resulted in many public supply systems detecting PFAS in their drinking water. Addressing PFAS in drinking water can be expensive and litigation brought by the owners of these systems against parties allegedly responsible for the discharge of PFAS is on the rise – a trend that will continue in the coming year.

Significant NJDEP Organizational Changes
Bruce S. Katcher, Esq.

Several significant changes in the administration of the New Jersey Department of Environmental Protection (NJDEP) promise to play out during 2022.

New Leadership
As of mid-2021, the NJDEP has a new Commissioner, Shawn LaTourette. Commissioner La Tourette previously served as legal and regulatory policy adviser to former Commissioner Catherine R. McCabe, Chief of Staff, Deputy Commissioner, and he became acting Commissioner in January 2020 when Commissioner McCabe left the agency. Given this background, he promises to bring much needed stability and experience with the inner workings of the agency to the Commissioner position during Governor Murphy's second term.

Compliance and Enforcement Reorganization
At the end of 2021, the Commissioner began to make significant changes in the NJDEP's approach to compliance and enforcement. These changes focus on realigning the air, water, solid waste and land resource protection (formerly land use) enforcement staffs to their respective media areas under the Assistant Commissioners for Air, Water Resources, Site Remediation/Solid Waste, and Land Resource

Protection, respectively. The agency feels that the integration of planning, permitting, compliance and enforcement under their respective media areas will facilitate compliance and enforcement while promoting a unified policy vision.

In addition, a new Office of Enforcement Policy will be created to ensure consistency of enforcement among the media programs. A new Chief Enforcement Officer will head that office and develop an agency-wide enforcement agenda aimed at achieving the NJDEP' s major priorities, including environmental justice, air quality, resource protection, and implementation of the Dirty Dirt Law and the legislature's past revisions to waterfront public access requirements.

New Office of Community and Economic Development
The agency is establishing a new Office of Community and Economic Development, to be headed by Elizabeth Dragon, formerly the Assistant Commissioner of Compliance and Enforcement. The Office is intended to improve the NJDEP's services to communities and play an important role on the Governor's Council on the Green Economy. To this end, it will aim to direct those funds controlled by the NJDEP toward investments in communities in accordance with the agency's overall programmatic priorities.

Resiliency Planning in New Jersey

John F. Gullace, Esq.

On October 29, 2019, Governor Murphy issued Executive Order 89 (EO 89) in response to the anticipated severe impacts of climate change on New Jersey. Among the work set in motion by EO 89 was the development of a Statewide Climate Change Resilience Strategy (EO 89 at ¶ 4) and an update to the State Development and Redevelopment Plan (EO 89 at ¶ 7). In 2021, legislation and action under EO 89 resulted in (a) modification of the Municipal Land Use Law to require local master plans to include climate change-related hazard vulnerability assessments; (b) the development of an NJDEP web-based resource titled "Resilient New Jersey: Local Planning for Climate Change Toolkit" which is a resource for integrating climate change into local land use decisions and planning efforts to ensure "investments made today withstand the conditions of tomorrow and make it easier to adapt as the climate continues to change;" and (c) the issuance of the "New Jersey Climate Change Resiliency Strategy" on October 12, 2021 with its six priorities for the state. Separately, on December 13, 2021, NJDEP issued a natural and working lands strategy scoping document to begin gathering input on how best to manage natural lands and farmland to fight climate change.

Finally, throughout 2021, NJDEP has been working on extensive revisions to its Land Resource Protection (aka "Land Use") regulations to implement changes consistent with the NJDEP's broad based Protection Against Climate Threats (PACT) initiative. These changes will be proposed during the first quarter of 2022 and will affect future development in the coastal area, waterfront development, flood hazard area, and requirements relating to wetlands and stormwater, all of which will have a significant bearing on resiliency planning.

In response to the threats posed by climate change, New Jersey has embarked upon an ambitious, forward looking program to educate, coordinate, and manage future development and land use to prepare for rising sea levels, heavier rainfall, more severe storms and extreme weather, and generally more frequent and significant flooding. These steps are anticipated to spawn greater regulation of local land use by the state as we head into 2022 and beyond.

NJDEP Proposes Rules for the Reduction of CO_2 Emissions

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

On December 6, 2021, the New Jersey Department of Environmental Protection ("NJDEP" or "Department") published proposed new rules and amendments to the Department's Air Pollution Control Regulations at N.J.A.C. Chapter 7:27 for the control and prohibition of carbon dioxide (CO_2) emissions (the "Proposed Rule"). The Proposed Rule would reduce CO_2 emissions from: (1) certain fossil fuel-fired electric generating units (EGUs) through the application of output-based emission limits, (2) certain commercial and industrial fossil fuel-fired boilers based upon an additional permit requirement, and (3) No. 4 and No. 6 fuel oil by banning its sale and use. The Proposed Rule also would amend certain general provisions of the Department's Air Pollution Control Regulations that could have far-reaching implications for all facilities that emit CO_2, as further discussed below.

The Department developed the Proposed Rule as part of its implementation of relevant provisions of the Global Warming Response Act (GWRA), N.J.S.A. 26:2C-37 et seq., which requires New Jersey to reduce greenhouse gas (GHG) emissions to 80 percent of 2006 levels by 2050, the so-called "80x50 goal." The Department, however, has cautioned that the Proposed Rule not be viewed as the definitive step for reducing GHG emissions in accordance with the GWRA and has noted that NJDEP will be proposing additional rulemakings aimed at other stationary and mobile sources of GHG emissions.

Read the full details in our January 6 Special Alert.

New Jersey Proposes Regulations for Mobile Cargo Handling Equipment at Ports and Intermodal Rail Yards

Carol F. McCabe, Esq.

On January 3, 2022 the New Jersey Department of Environmental Protection (NJDEP) published a significant proposed rulemaking that would affect owners and operators of cargo handling equipment at ports and intermodal rail yards (the CHE Rule).

Part of the NJDEP's continuing Protecting Against Climate Threats (aka PACT) initiative, the proposed CHE Rule would seek to reduce emissions of greenhouse gases and other pollutants from diesel-fueled mobile sources, following similar rules promulgated by the California Air Resources Board in 2006. Under the CHE Rule, non-road equipment designated as "yard trucks" and "non-yard trucks" would be required to meet the most current engine standards, and in-use equipment would be required to be replaced or retrofitted over a phased-in compliance period. Notably, the CHE Rule would apply to both public and private port operators and would require replacement or control of pre-1998 and Tier 0 in-use equipment as soon as two years from the effective date of the rule.

NJDEP is requesting comments on the rule during a 60-day comment period ending on March 4, 2022 and will hold a public hearing on February 9, 2022. A final rule could be adopted by the end of 2022 or early 2023.

NJDEP's Advanced Clean Truck and Fleet Reporting Rules Begin to Take Effect

William Hitchcock, Technical Consultant and Matthew C. Sullivan, Esq.

On December 20, 2021, as part of its Protecting Against Climate Threats initiative, NJDEP announced that it had adopted the new Advanced Clean Truck and Fleet Reporting Rules (the ACT Rules) that were first proposed in April. The newly adopted rules incorporate a portion of California's Advanced Clean Trucks regulation by reference, with a few minor modifications as well as a one-time reporting requirement for fleet owners, operators, brokers, and carriers.

The Advanced Clean Trucks regulations adopted in California in 2020 require manufacturers of on-road vehicles with a Gross Vehicle Weight Rating (GVWR) above 8,500 lbs to meet increasing sales targets for Zero and Near-Zero Emissions Vehicles (ZEVs and NZEVs). When a ZEV or NZEV is produced and sold to the ultimate purchaser, a credit is generated for the manufacturer. The credits may be banked for future use or traded, sold, or transferred between manufacturers. Manufacturers that have not met the annual sales targets for ZEVs and NZEVs may then use these credits to offset their annual sales deficit. This cap and trade program is designed to incentivize the sale of ZEVs and NZEVs, thereby reducing overall emissions from heavy duty trucks, which account for a disproportionate share of emissions from the transportation sector.

In NJDEP's ACT Rules, the ZEV and NZEV sales targets and generation of deficits will apply to manufacturers of on-road vehicles above 8,500 pounds GVWR manufactured in model year 2025 and subsequent years for sale in New Jersey on or after January 1, 2025. However, manufacturers may begin generating, banking, and trading ZEV and NZEV credits beginning with model year 2022 vehicles. In addition, the Act Rules will not apply until California receives a waiver from EPA that would allow it to implement its Advanced Clean Trucks regulations in lieu of less stringent federal requirements pursuant to 43 USC §7543.

As noted above, the ACT Rules also establish a one-time reporting requirement designed to gather information about the operations of entities that own and/or use medium- and heavy-duty vehicles in NJ, so that NJDEP will be better informed if it takes future actions to accelerate the sale and use of ZEVs in the medium- and heavy-duty weight classes. The information to be reported includes general information about the entity as well as vehicle and usage information at the facility level. The rule contains five categories of entities that are required to report this information. Generally, any large entity with more than $50 million in revenue that operates one or more vehicles over 8,500 lbs Gross Vehicle Weight Rating in NJ, or any entity that operates a fleet of 50 or more vehicles over 8,500 lbs Gross Vehicle Weight Rating in NJ, will be required to report using an online portal.

The online reporting system is not yet available, and the report is not due until April 1, 2023. However, the report is designed to capture a "snapshot" of the entity's fleet as it existed at any time in 2022. As such, entities covered by the fleet reporting aspect of the ACT Rules may wish to begin collecting information on their fleets or discussing arrangements with their service providers, subsidiaries, and corporate parents to understand exactly which vehicles are owned by whom and determine responsibility for reporting the required information.

If you have any questions about the application of the ACT Rules or wish to discuss your facility's reporting requirements in more detail, please contact Matt Sullivan or Will Hitchcock.

NEW YORK

New York Environmental Rights Amendment Takes Effect

Stephen D. Daly, Esq.

In November 2021, New Yorkers voted to adopt a new environmental rights amendment (the "Amendment") to the New York Constitution's Bill of Rights. The Amendment was approved by voters in November after it had been approved in two successive legislative sessions in 2019 and 2021. The Amendment takes effect this month.

While several other states have environmental protections incorporated into their respective constitutions, New York joins only Montana and Pennsylvania to add environmental rights to their respective Bills of Rights. In a single sentence, the new Amendment in New York provides that, "Each person shall have a right to clean air and water, and a healthful environment." N.Y. Const., Art. 1, § 19.

There is much uncertainty regarding what this Amendment affords New Yorkers. None of the Amendment's words or phrases are defined, nor does the Amendment set out how it is to be implemented. Does the Amendment, for example, authorize a private cause of action by residents of New York against alleged polluters for infringing their rights? Does it create a private cause of action against the state or local government for failing to protect these new environmental rights? Does the Amendment expand the authority of executive agencies or local governments to regulate activities that might infringe environmental rights, or does the Amendment merely limit governmental action that would infringe on these environmental rights?

Potential answers to these questions may be found in neighboring Pennsylvania. As has been previously reported in our 2021 Forecast, courts there have been actively interpreting Pennsylvania's version of an environmental rights amendment following the Pennsylvania Supreme Court's 2017 decision in *Pa. Envtl. Defense Found. v. Commonwealth*, 161 A.3d 911 (Pa. 2017), which appeared to breathe life into an amendment that had until then been viewed as largely duplicative of state laws that protected the environment. Notably, however, although New York's Amendment invokes similar rights of the people to "clean air and water," New York's version does not incorporate the "public trust" and "common property" principles that are found in the Pennsylvania amendment, which may limit reliance in New York on Pennsylvania decisions for interpretative assistance.

For now, only one thing remains clear: this new addition to the New York Constitution will be fodder for New York litigators and courts for the foreseeable future.

Opposition to Renewable Energy Projects in New York Continues to Present Challenges for Project Developers

Stephen D. Daly, Esq.

In 2019, New York State passed the Climate Leadership and Community Protection Act, committing the State to 100 percent zero-emission electricity by 2040. Since then, proposed solar and wind energy projects have sprung up across the State, particularly in Upstate and Western New York. Despite the

State's ambitious agenda, however, many of these renewable energy projects have been bogged down or even stopped by local opposition.

Opponents of these types of projects have often borrowed from the playbook of environmental organizations and public interest groups that have used environmental and administrative laws, in particular the Federal National Environmental Policy Act (NEPA) and its New York equivalent, the New York State Environmental Quality Review Act (SEQRA), to slow and sometimes stop fossil fuel or other types of development projects. The opposition often takes many forms, including submission of public comments, participation in public hearings, running internet campaigns and petitions, and filing lawsuits against government decisionmakers and developers. Local and municipal governments have also banned, placed moratoria on, or significantly restricted wind and solar energy development in response to renewable energy project proposals.

While local opposition can be challenging to the siting of solar and wind farms, some of the largest fights concern the siting and development of transmission lines that are needed to move renewable energy from upstate to downstate, a crucial component of plans to transform New York's energy economy. Opposition to such major infrastructure projects is often broad and varied depending on the trajectory of the proposed line, and can include environmental groups, local municipalities, and Native American tribes, among others.

Some innovative approaches are being used by lawmakers and others to reduce the delays for renewable projects that have plagued the development of other types of infrastructure. In 2020, New York passed the Accelerated Renewable Energy Growth and Community Benefit Act, Executive Law § 94-c, which created the Office of Renewable Energy Siting to streamline the permitting process for large scale renewable projects. The Office must complete its review of most types of projects within one year of a complete application. Executive Law § 94-c also restricts the ability of local governments to regulate or prevent the siting of these projects. New York courts have so far rejected challenges to Executive Law § 94-c and its implementing regulations, *see Town of Copake v. NY State Office of Renewable Energy Siting*, No. 905502-21 (N.Y. Supr. Ct. Oct. 7, 2021).

Elsewhere, courts have turned to mediation as a tool to resolve litigation disputes regarding the proposed development of renewable energy projects. For example, in Hawaii this past year, a solar farm and neighboring residents reached an agreement through mediation that included a legally enforceable $1.375 million community benefits package for local groups. This type of an agreement could serve as a model for future disputes over renewable energy projects.

If New York State is truly committed to transforming its energy economy by 2040, lawmakers and developers will have to continue to generate innovative ways to reconcile local concerns with large-scale infrastructure development.

DELAWARE

Governor Carney Unveils Climate Action Plan But is it More Plan than Action?

Stephen D. Daly, Esq.

Governor Carney unveiled Delaware's Climate Action Plan on November 4, 2021 (the "Plan"), continuing his administration's expressed focus on climate change. According to the Governor, the Plan will serve as a roadmap for the State as it pursues goals to both reduce greenhouse gas (GHG) emissions and maximize Delaware's resilience to climate change.

With respect to emissions reductions, the Plan sets a path for achieving the Governor's commitment to reducing state GHG emissions by at least 26 percent by 2025 from 2005 levels. The Plan identifies several potential strategies for achieving these reductions including expanding the availability of clean and renewable energy, phasing out reliance on fossil fuels, improving energy efficiency, transitioning the transportation sector to zero-emission vehicles, and focusing on reductions of "high global warming potential" GHGs like methane. As for improving Delaware's resilience to climate change, the Plan proposes strategies including reviewing and updating existing regulations, coordinating with and supporting local communities and stakeholders, and assisting with Delaware-specific research and monitoring.

None of the Plan's proposed strategies or potential solutions are mandated by law. The Plan itself does not change any existing laws, policies, regulations, or funding levels, according to DNREC. Nor does the Plan call for specific legislative solutions. Rather, the Plan makes repeated reference to taking advantage of existing laws and programs to further its ambitious agenda. In this respect, the Plan tracks similar efforts by DNREC to promote environmental justice, another headlines-grabbing issue, where DNREC has so far eschewed the promulgation of formal rulemaking or guidance, choosing instead to informally incorporate environmental justice considerations into its decision-making.

It therefore remains to be seen what the practical consequences for Delaware and its regulated community will be as a result of the Climate Action Plan.

Delaware PFAS Legislation in 2021 Sets Up PFAS Regulation for 2022

Stephen D. Daly, Esq.

Delaware currently follows the EPA's non-enforceable health advisory limit in drinking water of 70 parts per trillion for perfluorooctanoic acid (PFOA) and perfluorooctane sulfonate (PFOS), two prominent types of per- and polyfluoroalkyl substances (PFAS), but that is likely to soon change.
On October 20, 2021, Governor Carney signed into law House Bill No. 8, known as the Drinking Water Protection Act. The Act directs Delaware's Division of Public Health (DPH), in collaboration with DNREC, "to establish state-level maximum contaminant levels (MCLs) for certain contaminants found in public drinking water systems" in the State, specifically PFOA and PFOS. If Delaware adopts stricter MCLs than any EPA limit, the State's standard would control.

The Act sets rigorous deadlines for DPH and DNREC to follow as part of their regulatory processes. The Act gave DNREC and DPH 60 days from the effective date of the Act to begin the regulatory review process, and the Act set a nine-month deadline, now July 2022, for public hearings to be held on proposed

regulations. The Act also required DNREC and DPH to conduct a statewide survey on PFAS in drinking water and both report the results of the survey and provide a proposed plan of action by January 1, 2022.

As of the date of this article, the author has not been able to locate a publicly available copy of any statewide survey results or report that have been presented to the Governor or General Assembly. However, in December 2021, the U.S. Geological Survey, in cooperation with DNREC, released the results of a groundwater-quality investigation from 2018 of 30 public water-supply wells in Delaware describing the occurrence and distribution of PFAS. It is unclear whether DNREC intends to rely on the data from the U.S. Geological Survey as the basis for the state-wide survey mandated by the Act.

The Drinking Water Protection Act set in motion what will likely be a very active 2022 for PFAS regulation in Delaware.