



## **Pennsylvania Aggregates & Concrete Association, Monthly Report**

**June 11, 2024 – July 8, 2024**

### **I. Key New Developments for This Period**

#### **U.S. Supreme Court Charts New Path for Federal Administrative Law**

From June 27, 2024, to July 1, 2024, the U.S. Supreme Court issued three decisions with the potential to significantly change federal administrative law, *Loper Bright Enterprises v. Raimondo*, [No. 22-451](#) (2024), *Securities and Exchange Commission v. Jarkesy*, [No. 22-859](#) (2024), and *Corner Post, Inc. v. Board of Governors of the Federal Reserve System*, [No. 22-1008](#) (2024). In *Loper Bright*, the Supreme Court overruled *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Supreme Court decision that granted federal administrative agencies deference when interpreting ambiguous statutory provisions. The Court held that *Chevron* ran counter to the Congressional mandate in the Administrative Procedure Act for courts to “decide all relevant questions of law” and to Constitutional separation-of-powers principles. The Court’s decision does not upset earlier cases that relied on *Chevron*. In *Jarkesy*, the Court held that the Seventh Amendment requires agencies to prosecute common-law forms of action in federal courts, where juries are available, instead of in administrative tribunals (such as before Administrative Law Judges), where juries are not available. In *Corner Post*, the Court held that an Administrative Procedure Act claim accrues when the injury occurs, meaning the applicable six-year statute of limitations to challenge a final agency regulation does not begin to run when the regulation is issued, but when a party is injured by the final agency action. For more information, see Babst Calland’s July 1, 2024, [article](#).

#### **Draft PADEP Guidelines for Industrial Mineral Benching Plans**

On May 7, 2024, William Hudak of the Bureau of Mine Safety presented on the [draft Guidelines for Submitting of Benching Plans](#) at the Aggregate Advisory Board Meeting. The purpose of the guidance is to “reduce the risk of roof and pillar failure during benching and thereafter in underground industrial mineral mines.” It is applicable to all Mine Safety staff and all underground industrial mine operators and personnel. TGDs, including this draft guidance, are flexible and policy only, they do not impose definitive obligation on applicants or prevent PADEP from exercising its discretion. The draft Benching TGD lays out the “assessment process” for benching which includes (1) identifying the proposed benching area, (2) evaluating the likelihood of collapse based on the likelihood matrix included in the draft TGD, (3) and evaluating consequences of a potential collapse. The draft Benching TGD also describes the bench plan submittal procedures and includes an example benching plan at Appendix B. PACA is convening a work group to develop comments on the policy.

**New Chapter 105 General Permit Instructions and Aquatic Resource Impact Table**

In June 2024, PADEP revised the [Chapter 105 Water Obstructions and Encroachment General Permit Instructions](#) and the [Aquatic Resource Impact Table](#). Changes to the Chapter 105 General Permit instructions are substantive, and include the following: (1) concurrent review of threatened and endangered species is no longer allowed for GPs; (2) mitigation methods are aligned with the 2008 migration rule hierarchy of mitigation banks first, in-lieu fee second, and permittee responsible mitigation third; (3) the Pennsylvania Wetland Replacement Fund which included “*de minimis*” has been replaced with the PA In-Lieu Fee Program which does not have a *de minimis* threshold; (4) instructions are included to submit county/municipal notifications for GPs submitted via ePermit; and (5) reporting GPs may now require Federal authorization prior to GP submission. New Chapter 105 General Permit registration form and registration e-permit certification are available [here](#).

**II. Upcoming Deadline Reminder**

1. MSHA’s [Final Rule](#): Safety Program for Surface Mobile Equipment became effective January 19, 2024, with a compliance date of July 17, 2024.

**III. Federal and Other Rulemakings, Policies and Reports**

<b><u>Selected Dates and Deadlines</u></b>		
	<b>Regulation/Policy Proposal/Meeting</b>	<b>Comment Deadline or Meeting Date</b>
<b>Mining</b>	MSHA <a href="#">Final Rule</a> : Safety Program for Surface Mobile Equipment	<u>Effective Date:</u> January 19, 2024  <u>Compliance Date:</u> July 17, 2024
	MSHA is <a href="#">Requesting Comments</a> on Information Collection Related to Respirator Program Records	<u>Comments Due:</u> August 26, 2024
<b>Air</b>	USEPA <a href="#">Final Rule</a> : New Source Performance Standards for Greenhouse Gas Emissions from New, Modified, and Reconstructed Fossil Fuel-Fired Electric Generating Units; Emission Guidelines for Greenhouse Gas Emissions from Existing Fossil Fuel-Fired Electric Generating Units; and Repeal of the Affordable Clean Energy Rule.	<u>Effective Date:</u> July 8, 2024

<b>Water</b>	SRBC Public Hearing and Business Meeting. Links and meeting materials are posted <a href="#">here</a> .	<u>Public Hearing:</u> August 1, 2024  <u>Business Meeting:</u> September 5, 2024
	DRBC Public Hearing and Business Meeting. Links and meeting materials are <a href="#">here</a> .	<u>Public Hearing:</u> August 7, 2024  <u>Business Meeting:</u> September 5, 2024
	USEPA <a href="#">Final Rule</a> : Designation of Perfluorooctanoic Acid (PFOA) and Perfluorooctanesulfonic Acid (PFOS) as CERCLA Hazardous Substances	<u>Effective Date:</u> July 8, 2024
<b>OSHA</b>	OSHA is <a href="#">Requesting Comments</a> on Information Collection Related to Concrete and Masonry Standard	<u>Comments Due:</u> July 12, 2024
<b>Miscellaneous</b>	CEQ <a href="#">Final Rule</a> : National Environmental Policy Act Implementing Regulations Phase 2	<u>Effective Date:</u> July 1, 2024
<i>* Deadlines and meeting dates may be subject to change.</i>		

### *Summary of New Federal Developments*

#### **A. Mining**

1. **Corrections to MSHA’s Final Rule on Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection** – On June 24, 2024, MSHA [published](#) typographical corrections to the “Lowering Miners’ Exposure to Respirable Crystalline Silica and Improving Respiratory Protection” final rule that was published on April 18, 2024. These corrections were effective June 24, 2024, and applicable beginning June 17, 2024, the rule’s effective date. No substantive changes were made in this correction.
  
2. **MSHA is Requesting Comments on Information Collection Regarding Respirator Program Records** – On June 26, 2024, MSHA published a [request for comments](#) by [August 26, 2024](#), concerning the information collection for Respirator Program Records. MSHA’s final rule on Respirable Crystalline Silica amends 30 CFR 56.5005 and 57.5005 to incorporate by reference ASTM F3387-19, entitled “Standard Practice for Respiratory Protection,” as it is the most recent consensus standard developed by experts in government and professional associations on the selection, use, and maintenance of respiratory equipment. The final rule requires that approved respirators be selected, fitted, used, and maintained in accordance with the provision of a written respiratory protection

program consistent with the requirements of ASTM F3387-19. MSHA is requesting four types of information in connection with respirators in metal and nonmetal mines— revised written SOPs governing the selection and use of respirators; medical evaluation/fit testing results; emergency respirators inspection records; and records relating to the respiratory programs, which are all consistent with ASTM F3387-19 requirements.

- 3. Department of Labor Completed Impact Inspections at 15 Mines in 12 States in May 2024** – On June 26, 2024, the U.S. Department of Labor [announced](#) that MSHA completed impact inspections at 15 mines in 12 states (Arizona, Idaho, Illinois, Kentucky, Mississippi, Missouri, Ohio, Pennsylvania, South Dakota, Texas, Utah, and West Virginia) in May 2024, which resulted in 300 issued violations, including 62 significant and substantial and five unwarrantable failure findings.

## **B. Air**

- 1. U.S. Supreme Court Stays Implementation of USEPA “Good Neighbor” Rule** – On June 27, 2024, the U.S. Supreme Court, in a 5-4 [decision](#), granted emergency applications to stay implementation of USEPA’s Good Neighbor rule, pending resolution of a petition for review by multiple states and industry groups in the D.C. Circuit. The Good Neighbor Provision requires states to prohibit emissions “in amounts which will . . . contribute significantly to nonattainment in, or interfere with maintenance by, any other State” of the relevant air-quality standard. The petitioners challenged USEPA’s rule that disapproved of about a dozen state programs developed under this program. The Supreme Court found that the Applicants were likely to prevail on their arbitrary and capricious claim because USEPA did not fully explain changes to the plan and ignored objections to it. The cases are *Ohio v. U.S. Env. Prot. Agency*, No. 23A349, *Kinder Morgan, Inc. v. U.S. Env. Prot. Agency*, No. 23A350, *American Forest & Paper Ass’n v. U.S. Env. Prot. Agency*, No. 23A351, and *United States Steel Corp. v. U.S. Env. Prot. Agency*, No. 23A384. In the days preceding the Supreme Court decision multiple parties submitted *amicus* briefs to the D.C. Circuit in support of the rule. Multiple cases are consolidated under *Utah v. U.S. Env. Prot. Agency*, No. 23-1157 (D.C. Cir.).

## **C. Water**

- 1. Federal District Court Denies Motion to Enjoin Implementation of WOTUS Rule** – On June 17, 2024, the U.S. District Court for the Eastern District of North Carolina held that USEPA’s amended WOTUS rule conforms to the interpretation of “waters of the United States,” as defined in the U.S. Supreme Court opinion *Sackett v. U.S. Env’t Protection Agency*, and denied the plaintiff’s motion for a preliminary injunction that would have suspended implementation of the WOTUS rule nationwide. The plaintiff claimed that the rule does not conform with *Sackett* and continues to exert “broad Clean Water Act authority over private land,” including isolated wetlands. The plaintiff also claimed that the revised rule omits the “indistinguishability” requirement for wetlands to

be subject to federal regulations, i.e., that the wetlands are indistinguishable from WOTUS. The case is *White v. U.S. Env't'l Prot. Agency*, No. 2:24-cv-00013 (E.D.N.C. June 17, 2024). Case documents are available upon request.

#### D. OSHA

1. **OSHA is Requesting Comments on Information Collection Related to Concrete and Masonry Construction Standard** – On June 12, 2024, OSHA published a [request for comments](#) on or by July 12, 2024, concerning the Concrete and Masonry Construction Standard. Construction firms engaged in the erection of concrete formwork are required to post warning signs/barriers in accordance with 29 CFR 1926.701(c)(2) to reduce exposure of non-essential employees to the hazards of post-tensioning operations. Paragraphs 29 CFR 1926.702(a)(2), (j)(1), and (j)(2) are general lockout/tagout measures to protect workers from injury associated with equipment and machinery. Paragraph 29 CFR 1926.703(a)(2) requires employers make available drawings or plans for jack layout, formwork, working decks and scaffolds. Paragraph 1926.705(b) requires employers to mark the rated capacity of jacks and lifting units. OSHA is interested in comments regarding (1) whether the collection of information is necessary for the proper performance of the functions of the Department, including whether the information will have practical utility; (2) the accuracy of the agency's estimates of the burden and cost of the collection of information, including the validity of the methodology and assumptions used; (3) ways to enhance the quality, utility and clarity of the information collection; and (4) ways to minimize the burden of the collection of information on those who are to respond, including the use of automated collection techniques or other forms of information technology.

#### E. Miscellaneous

1. **U.S. Supreme Court Will Hear Case Regarding NEPA Review** – On June 24, 2024, the U.S. Supreme Court granted a [petition](#) by a coalition of seven Utah counties to review a decision by the U.S. Court of Appeals for the District of Columbia revoking the Surface Transportation Board's approval of a rail line that would transport crude oil from Utah. The petitioners argue that the D.C. Circuit misinterpreted *Dep't of Transp. v. Public Citizen*, 541 U.S. 752 (2004) by ruling that the Surface Transportation Board failed to evaluate the project's impact on "distant" effects outside of its regulatory responsibility. The petitioners contend that the D.C. Circuit's decision splits from rulings by other circuit courts that have interpreted "*Public Citizen* as tying the scope of an agency's NEPA review to the limits of that agency's regulatory authority." The U.S. Supreme Court may use this case to clarify the scope of federal agency review under NEPA by deciding whether NEPA requires an agency to study environmental impacts beyond the proximate effects over which the agency has regulatory authority. The case is *Seven County Infrastructure Coalition v. Eagle County, Colorado*, No. 23-975. Court documents are available [here](#).

2. **Texas District Court Enjoins Federal Trade Commission from Enforcing Non-Compete Ban Against Plaintiffs** – On July 3, 2024, the U.S. District Court for the Northern District of Texas entered a preliminary injunction blocking the Federal Trade Commission from implementing or enforcing the non-compete ban against plaintiffs in the matter. The preliminary injunction stays the September 4, 2024, effective date of the ban and will be effective until the court’s final adjudication. Although the injunction does not extend past the plaintiffs in this case, Judge Ada Brown’s opinion indicates that the ban may be struck down because “the Commission has exceeded its statutory authority in promulgating the Non-Compete Rule.” The Non-Compete Ban was promulgated on April 23, 2024, and if upheld, would render most non-compete agreements unenforceable. The case is *Ryan, LLC v. Federal Trade Commission*, No. 3:24-cv-00986-E. Court documents are available upon request.
  
3. **U.S. Supreme Court Denies Certiorari in Case Challenging OSHA’s Power to Write Permanent Safety Standards** – On July 2, 2024, the U.S. Supreme Court [denied](#) Petitioner’s writ of certiorari in *Allstates Refractory Contractors, LLC v. Julie A. Su, Acting Secretary of Labor*, No. 23-819, a case that sought to expand the “nondelegation” doctrine by limiting Congress’ ability to grant agencies (such as EPA and OSHA) rulemaking discretion. The nondelegation doctrine stands for the principle that Congress cannot delegate its legislative powers or lawmaking ability to other entities. In 1928, the U.S. Supreme Court clarified that when Congress does give an agency authority to regulate, Congress must give agencies an “intelligible principle” on which to base their regulations. The Petitioner, *Allstates Refractory Contractors*, argued that Congress unconstitutionally gave OSHA unconstrained freedom to decide when safety standards are “reasonably necessary or appropriate” under the 1970 Occupational Safety and Health Act in allowing OSHA to enact and enforce major occupational safety rules against “practically every business in the United States” with “virtually no instruction on how to use this vast lawmaking authority.” Although certiorari was denied, four Justices, including Justice Thomas, would have granted certiorari to reconsider “the Court’s approach to Congress’s delegations of legislative power.” This case is *Allstates Refractory Contractors, LLC v. Julie A. Su, Acting Secretary of Labor*, No. 23-819. Court documents are available upon request.

## **F. Climate Change**

1. **DRBC Directs Staff to Develop Climate Resilience Plan** – On June 13, 2024, the Delaware River Basin Commission [announced](#) that it had approved a [resolution](#) directing staff to develop a Climate Resilience Plan that would include planning, consultation, outreach, education, and rulemaking elements specific to climate change. The Plan will include prioritized DRBC actions for evaluating the impacts of climate change on the water resources within the Basin, and formulating management approaches, including recommended policies and regulations, for improving resiliency and adaptation to climate change. Such actions include but are not limited to flow and drought management; flood loss; water quality; water use and efficiency; water equity and environmental justice; and

new or revised regulations. The Plan, however, will not include setting or implementing greenhouse gas reduction goals. More information on climate change considerations specific to the DRBC is available [here](#).

**IV. Pennsylvania Rulemakings, Policies and Reports**

<b><u>Selected Dates and Deadlines</u></b>		
	<b>Regulation/Policy Proposal/Meetings</b>	<b>Comment Deadline or Meeting Date</b>
<b>Mining</b>	Mining and Reclamation Advisory Board meeting. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> July 25, 2024
	Aggregate Advisory Board meeting. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> August 28, 2024
<b>Air</b>	Air Quality Technical Advisory Committee Meeting. Links and meeting materials will be available <a href="#">here</a> .	<u>Meeting Dates:</u> July 11, 2024 October 10, 2024
<b>Water</b>	Water Resources Advisory Committee meeting. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> July 18, 2024
<b>Miscellaneous</b>	Climate Change Advisory Committee meeting. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> August 20, 2024
	Citizens Advisory Council meeting at 12:30 p.m. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> September 10, 2024
	Environmental Quality Board meeting at 9:00 a.m. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> August 13, 2024
	Conservation and Natural Resources Advisory Committee Meeting. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> July 24, 2024
	Environmental Justice Advisory Board meeting at 9:00 a.m. Links and meeting materials are posted <a href="#">here</a> .	<u>Meeting Date:</u> August 13, 2024
	Storage Tank Advisory Committee meeting. Links and meeting materials will be posted <a href="#">here</a> .	<u>Meeting Date:</u> September 5, 2024
* <i>Deadlines and meeting dates may be subject to change</i>		

### *Summary of New Pennsylvania Developments*

#### **A. Miscellaneous**

- 1. State Representative Schlossberg’s House Bill 782 was Referred to Committee** – On June 26, 2024, State Representative Brennan Schlossberg’s [H.B. 782](#) was referred to Committee. This bill seeks to amend the Pennsylvania Municipalities Planning Code by requiring a person who proposes subdivision or land development to inform the county or regional commission and the governing body of each contiguous municipality in writing, within 10 days of submitting an application for preliminary plat approval, that the application may constitute a “development of regional significance and impact”. The potentially affected municipality may ask the reviewing governing body or planning agency, within 30 days of receiving notification, to require the applicant to submit an impact analysis. Developments of “regional significance and impact” will require mitigation plans that explain the nature and extent of mitigation efforts to address any known or potential harm or negative effect on the host municipality. Applicants will be responsible for all fees to coordinate and expedite review of a proposed development of regional significance and impact.
- 2. State Representative Struzzi Introduces Resolution to Review PADEP Permitting Process** – On June 5, 2024, State Representative Jim Struzzi (R, Indiana County) [announced](#) the introduction of [H.R. 468](#), which will direct the Legislative Budget and Finance Committee to conduct a survey on the Pennsylvania Department of Environmental Protection’s permitting process. Struzzi believes that the list of 800 permits issued by PADEP “begs the question whether there are duplicative or unnecessary permits required by the department.” The directed study will determine (1) a total list of all permits issued by PADEP and the statutory reference, including the initial date of permit issuance; (2) a review of all permits issued by PADEP to identify overlapping, inconsistent, or antiquated permits; (3) a review of which permits are required under federal law or regulation; (4) a review of the utilization and implementation of PADEP permits over a full calendar year to determine the total number of each permit applied for and identifying which permits are filed electronically or by paper in addition to the maximum and minimum wait time for the approval of each permit and the number of permits necessary for the applicant; (5) an analysis and comparison of other state environmental protection permits to determine best practices and provide suggestions; and (6) an analysis and comparison of total and individual resources and workloads for the permitting programs and all offices charged with administration of the programs.

If you have any questions concerning information included in this update, please contact Kevin Garber at (412)-394-5404, [kgarber@babstcalland.com](mailto:kgarber@babstcalland.com), or Jessica L. Deyoe at (202)-853-3489, [jdeyoe@babstcalland.com](mailto:jdeyoe@babstcalland.com) for questions pertaining to the environmental matters.