

# Air Quality Committee Newsletter

Vol. 18, No. 1

January 2015

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## MESSAGE FROM THE CHAIR

Phillip Bower

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As the new chair for the Air Quality Committee (AQC), I am honored to follow in the footsteps of some amazing past chairs and I believe that we have assembled an outstanding team of vice chairs to help implement the AQC's mission in 2014–2015. At least I hope we have, because the AQC continues to set a high bar for itself. It was announced at the 22nd Fall Conference in Miami that, for the second year in the row, the AQC tied with the Pesticides, Chemical Regulation, and Right-to-Know Committee for “Best Environmental Committee.” Please join me in congratulating the past chair, Gale Lea Rubrecht, as well as the AQC vice chairs, committee members, and contributors to our publications and programs for helping achieve this recognition.

As anyone who practices in the area of air quality knows, significant federal Clean Air Act and related federal and state regulatory developments continue to occur at breakneck speed, and it can be challenging to stay abreast of the latest developments. The AQC is here to help. We act as a forum for information exchange among air quality practitioners and other Section committees. I outline below some of the ways that you can participate in this exchange. I also recap the Section's recent 22nd Fall Conference in Miami, introduce the AQC's vice chairs, and provide some information on upcoming conferences. Always feel

free to contact me or any of the vice chairs if you have questions or suggestions for the AQC.

## 22nd SEER Fall Conference Recap

The 22nd Fall Conference was held in Miami and was a very successful event. The conference opened with a public service project Wednesday morning. The Section partnered with the Tropical Audubon Society, the local chapter of National Audubon Society, to help plant and maintain historic native uplands habitats of pine rockland and rockland hammock located in the historic pioneer home and property of Doc Thomas and the Steinberg Nature Center. The public service projects are a great way to meet other Section members and learn more about the communities we are visiting, so I encourage you to participate.

The CLE sessions started on Thursday morning and included several air-related sessions:

- “Environmental Accidents: Nuts and Bolts for Counsel in Times of Crisis”
- “The Supreme Court and Greenhouse Gases—What It All Means for Your Clients and Practice”
- “Next Generation of Environmental Enforcement: 2014 and Beyond”
- “Train Wreck or Long Overdue Controls?”

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Jacob Santini, Editors

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**AMERICAN BAR ASSOCIATION  
SECTION OF ENVIRONMENT,  
ENERGY, AND RESOURCES**

**CALENDAR OF SECTION EVENTS**

**January 23-25, 2015**  
**Winter Council Meeting**  
Dana Point, CA

**March 3, 2015**  
**Key Environmental Issues in U.S.**  
**Environmental Protection Agency Region 4**  
Georgia State Bar Conference Center  
Atlanta, GA

**March 26-28, 2015**  
**44th Spring Conference: The ABA Super**  
**Conference on Environmental Law**  
San Francisco, CA

**April 15-17, 2015**  
**Section of Litigation's Annual Conference**  
New Orleans, LA  
Primary Sponsor: Section of Litigation

**April 16-17, 2015**  
**ABA Petroleum Marketing Attorneys' Meeting**  
Washington, DC

**April 24-25, 2015**  
**Spring Council Meeting**  
Lenox, MA

**June 3-5, 2015**  
**33rd Annual Water Law Conference**  
Denver, CO

**October 28-31, 2015**  
**23rd Fall Conference**  
Chicago, IL

**For full details, please visit**  
**[www.ambar.org/EnvironCalendar](http://www.ambar.org/EnvironCalendar)**

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- Will the Electric Power Sector Find a Way to Thrive in the Face of EPA's Multi-Media Regulatory Push?"
- "Your Client Wants to Site a New Energy Project or Expand Its Manufacturing Plant: What the Environmental Lawyer Needs to Know to Spot All the Issues"

On Friday night, the Section hosted "Taste of SEER" dinners at local restaurants. AQC at-large vice chair Elizabeth Hurst hosted a group at Wolfgang's around the theme of "Breathing and Talking Air Quality." The conference also included a number of networking opportunities and wrapped up on Saturday with meetings and working groups for committee chairs and vice chairs, as well as a Section Council meeting.

### **AQC 2014–2015 Leadership**

The AQC has an amazing leadership team this year. Vice chairs work hard, often behind the scenes, to plan programs, confirm high quality speakers, solicit and write quality articles for publications, keep the AQC website and social media updated and active, and otherwise help the AQC provide benefits to its membership.

**Membership:** Our committee is one of the larger SEER committees with more than 500 members and growing. Membership vice chair is Heidi Knight. Heidi makes phone calls and sends welcome e-mails to any new committee members. The e-mail contains information on AQC benefits and ways to get involved. Should you have questions about the benefits of joining the AQC, contact Heidi or me.

**Programs:** Vice chairs for Programs are Shannon Broome, Scott Turner, Luran Sturm, and Gary Pasheilich, as well as at-large vice chair Elizabeth Hurst. This team helps develop air quality-themed sessions for the Section conferences, as well as webinars and teleconferences on timely subjects

during the rest of the year. We need your help to identify hot topics and preferred speakers on the subject matters of interest to you, and we welcome your suggestions and ideas. We are especially looking for program proposals that are of interest to more than one committee. For example, a program on the proposed Clean Power Plan carbon standards might be of interest to the AQC and the Climate Change, Sustainable Development, and Ecosystems Committee. A program on air permitting in Indian country might also be of interest to the Native American Resources Committee and the Oil and Gas Committee.

The Section is also encouraging cosponsorships and has preapproved a number of non-ABA entities for programs cosponsored with the ABA. The Air & Waste Management Association is one of the preapproved non-ABA entities, and we are actively seeking to partner with the A&WMA on cosponsoring opportunities. If you would like to help coordinate presentations and discussion on programs for conferences, webinars, and committee conference calls, please contact us.

**Writing and Publications:** Writing opportunities abound and are an excellent way to become involved in the AQC and the Section. We circulate announcements related to writing opportunities via our listserv and on social media and advocate for the inclusion of air quality articles in Section publications, such as *Trends* and *NR&E*.

Jonathan Martel and Zachary Fayne are vice chairs for *Year in Review*. This process is under way for 2014, so if you are interested in volunteering to help write summaries of significant cases and rules, please feel free to contact Jonathan or Zachary.

Randy Dann, Jacob Santini, and Gary Steinbauer are vice chairs for the AQC Newsletter. We publish four issues each year. Our newsletters for 2014–2015 will include regional reports for all ten EPA Regions plus the U.S. EPA Headquarters report. We are also actively soliciting guest columns from AQC members. Articles should have an air quality-related theme, but do not need to be heavily

cited. They can range from a few paragraphs in length to a few thousand words. They can relate to federal, state, or even local issues. I encourage all members, including young lawyers and law students, interested in writing for the newsletter or other publications to contact me or the appropriate vice chair.

**Social Media:** Cheri Budzynski is Social Media vice chair and is managing an AQC subgroup on LinkedIn that I encourage each of you to join. I also encourage each of you to send me substantive materials, such as EPA letters or policy memos, guidance documents, new court decisions, or rulemakings, for distribution to the committee listserv and posting on our committee website by our vice chair for Electronic Communications, Michael Balster, or on LinkedIn, Twitter, or Facebook by Cheri.

**Website/Listserv:** Michael Balster is Electronic Communications vice chair. Our committee website is one of the most viewed Section committee websites. It contains current and archived Hot News alerts, contact information for committee leadership, a membership roster, programs and podcasts, law firm blog articles on air quality issues, committee public service project updates, and other resources on air quality. Let our website help your practice—if you pen a “client alert,” blog post, or other update on air issues, send a link to Michael, and he will post it to our website where it will show up under “Committee Alerts” on the front page.

We use the listserv regularly to keep you informed of air quality developments, Section and AQC activities, and opportunities in which to become involved. We encourage you to share substantive materials, such as new guidance documents, agency letters, court decisions, rulemakings, or other air quality developments, for distribution to the committee listserv and posting on our committee website, Air Quality subgroup on LinkedIn, or Twitter.

## **Upcoming Programs and Events**

The sad news is that the 44th Spring Conference: The ABA Super Conference in Environmental Law will not be held in Salt Lake City. The good news is that it will move to another fabulous location—the Palace Hotel in San Francisco from March 26 to 28, 2015. In addition to the location change, this “Super Conference” promises to provide increased CLE opportunities, covering an expanded range of topics from litigation to transactions, that have been planned with the active involvement of the environmental committees of several ABA sections. The conference will include several sessions related to air quality: A plenary session, “The Future of Energy in a Carbon-Constrained World”; and the panels, “Climate Change and Roles for Existing Power Plants” and “Clean Air Act Hot Topics” are planned.

For those interested in water issues, the 33rd Annual Water Law Conference will be held at the Four Seasons Hotel in Denver on June 3–5, 2015.

Finally, the 24th Fall Conference will be held at the Swissotel in Chicago, a little bit later in the year than usual, from Oct. 28 to 31, 2015. Planning for this conference is getting under way so if you have connections in Chicago that might provide unique opportunities for public service projects, tours, events or excursions for conference attendees, please let me know. You might also need to bring a Halloween costume!

On behalf of the AQC leadership team, thank you for your membership. We look forward to 2014–2015!

Regards,  
Phillip Bower  
Chair, Air Quality Committee

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## GUEST ARTICLE: PENNSYLVANIA GREENHOUSE GAS REGULATION IMPLEMENTATION ACT; BRINGING THE LEGISLATURE INTO THE SIP PROCESS

Sarah L. Clark

*Environmental Resources & Energy Committee, Pennsylvania House of Representatives*

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Earlier this year, Governor Tom Corbett signed into law the Pennsylvania Greenhouse Gas Regulation Implementation Act, which grants the state legislature oversight of the Commonwealth's plan to implement the proposed federal 111(d) regulations to address carbon emissions. Under the act, the Pennsylvania Department of Environmental Protection is required to transmit the state implementation plan to the General Assembly for approval prior to submitting the plan to the Environmental Protection Agency (EPA).

The underlying bill, HB 2354, was subject to heated debate throughout the legislative process. The prime sponsor of the bill, Rep. Pam Snyder, represents parts of the so-called Pennsylvania coal-belt in Fayette, Washington, and Greene Counties, where two coal-fired power plants were deactivated last year, resulting in the loss of over 350 jobs. In her cosponsorship memo, Snyder raised concerns

about the proposed regulations' impact on the local economy and concluded that representatives elected by their constituents, not the regulatory agency, should make the final determination on how the regulations will be implemented. Critics of the legislation argued that the bill was premature because the 111(d) regulations will not be finalized by EPA until June 2015. They also contended that the legislature isn't equipped to properly assess the plan and that its involvement will unnecessarily politicize an otherwise scientific process.

However, the bill was amended prior to final passage to address the main concern that lawmakers would hold up the plan indefinitely, which would result in a federal implementation plan. Under the amended act, if no vote is taken by either chamber by 15 days before the deadline to submit the plan to EPA or if either chamber rejects the plan and fails to approve an amended and resubmitted plan within 60 days of an EPA extension, the plan is deemed approved.

Since the federal regulations have yet to be finalized and the EPA could conceivably still change its approach entirely, it remains to be seen whether the act will be an impediment to Pennsylvania's compliance with President Obama's Clean Power Plan, as its critics claim, or much ado about nothing.



### Registration Now Open!

For four decades, the leading environmental, energy, and resource lawyers, government officials, and academics gather to address the key topics of the day for practicing lawyers. The Spring Conference is an unparalleled forum designed to keep you up-to-date on the most recent developments affecting your practice so you can more effectively serve your clients.

Hear the latest about environmental cases before the U.S. Supreme Court at the opening plenary. Learn about the most recent developments in air, water, waste, and enforcement issues at the hot topics panels. Listen to specialists in their fields, including officials from EPA Region 9, speak about such topics as risk allocation and presenting complex environmental evidence at trial. The Spring Conference is an opportunity for you to network with the nation's top environmental, energy, and resource lawyers.

[www.shopABA.org/EnvironSpring](http://www.shopABA.org/EnvironSpring)

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## EPA HEADQUARTERS

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### **Start-up, Shutdown, and Malfunction (SSM):**

On September 17, 2014, the Environmental Protection Agency (EPA) published a proposed rule (79 Fed. Reg. 55,920) supplementing and revising its February 2013 proposal (78 Fed. Reg. 12,459) to ensure states have state implementation plans (SIPs) in place that require industrial facilities across the country to meet emission limitations when the facility is starting up or shutting down, or when a malfunction occurs. The September 2014 proposal would reverse EPA's interpretation in the February 2013 proposal that would allow affirmative defense provisions during malfunctions in SIPs, would find SIPs containing such provisions substantially inadequate, and would call for the removal of such provisions in SIPs even if the excess emissions resulted during malfunctions.

On June 30, 2011, Sierra Club submitted to EPA a petition for rulemaking, requesting that EPA act on specific alleged SIP deficiencies concerning SIP provisions related to excess emissions during periods of start-up, shutdown, or malfunction at sources. After Sierra Club filed its petition, the U.S. Court of Appeals for the Fifth Circuit in *Luminant Generation Co. v. EPA*, 714 F.3d 814 (5th Cir. 2012), cert. denied, 134 S. Ct. 387 (2013), upheld EPA's action on Texas's SIP, approving an affirmative defense during malfunctions and disapproving affirmative defense provisions during start-up, shutdown, and maintenance. Relying on the Fifth Circuit's decision, EPA responded to the petition in February 2013 and proposed to grant the petition with respect to SIP provisions related to excess emissions during planned start-ups and shutdowns but proposed to deny the petition with respect to excess emissions during malfunctions.

Then in April 2014 the U.S. Court of Appeals for the District of Columbia Circuit held in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014), that

affirmative defense provisions in EPA's regulations for Portland cement manufacturers cannot apply to violations of Clean Air Act (CAA) requirements. The September 2014 proposal would extend the D.C. Circuit's holding to such provisions created by states in SIPs. EPA explains that the D.C. Circuit's decision was based upon the statutory requirements for enforcement of violations and further states that "there is no need to demonstrate that the use of the affirmative defense would be causally connected to any particular impact (*e.g.*, a specific violation of a NAAQS at a particular monitor on a particular day, or the undermining of effective enforcement for a particular violation by a particular source)." 79 Fed. Reg. at 55,935.

In the supplemental proposal, EPA is proposing to grant the petition to make clear that affirmative defense provisions are not permissible in SIPs and is proposing to issue SIP calls for affirmative defense provisions that Sierra Club identified in its petition and that EPA identified independently. EPA is proposing findings that the SSM provisions in the SIPs of 16 states and the District of Columbia do not meet CAA requirements concerning affirmative defense provisions. These are: Alaska; Arizona; Arkansas; California; Colorado; Georgia; District of Columbia; Illinois; Indiana; Michigan; Mississippi; New Mexico; South Carolina; Texas; Virginia; Washington; and West Virginia.

Revised SIPs would be due 18 months after the date on which the EPA administrator signs the final rule on the February 2013 proposal and the September 2014 supplemental proposal. EPA has entered into a settlement agreement with the Sierra Club and WildEarth Guardians to take final action by May 22, 2015. If EPA takes final action by May 2015, then the SIP submission deadline for each of the states subject to the final SIP calls would be in November 2016.

The September 2014 supplemental proposal may be of interest to all air agencies. A state may merely remove an impermissible provision or establish alternative emission limits for start-up and shutdown that sources will need to meet. A state

that receives a SIP call to remove an affirmative defense provision would retain its ability to apply discretion in its enforcement program on a case-by-case basis. A state may also choose to include a SIP provision that directs state personnel, but not EPA or other parties pursuant to citizen suit provision, in the exercise of enforcement discretion.

As for the implications for regulated sources, EPA states changes to equipment or practices will depend on the nature and frequency of the source's SSM events and how the state revises its SIP to address excess emissions during SSM events. Sources may need to consider modifying their physical equipment or practices, improving the effectiveness of emission control systems, increasing the durability of components to reduce the frequency of malfunctions, and/or improving monitoring systems to detect and manage malfunctions promptly. EPA states that in the context of judicial enforcement proceedings that sources may continue to make the practical argument that the CAA requirement that emission limitations be "continuous" must be balanced against the practical reality that control technology can fail unavoidably. Further, EPA states that sources retain the ability to seek lower monetary penalties.

EPA states it cannot estimate the number, nature, and overall cost of the changes emission sources may make. Likewise, EPA states it cannot estimate the total emission reduction that will be achieved for any particular pollutant or how those reductions will be distributed across the country, although EPA believes that the February 2013 and September 2014 proposals, if finalized, will reduce aggregate emissions from industrial sources and improve air quality. EPA explains that it cannot provide estimates because of the diversity of the SIP provisions and potentially affected sources, the unknown nature of the states' responses, and the fact that many instances of excess emissions have not been reported as a result of existing automatic exemptions in SIPs. EPA maintains it is "obligated and authorized to issue the proposed SIP calls to remove affirmative defense provisions even though

[it] is unable to estimate the number, nature, cost and resulting emissions reductions that will . . . result from the removal of such provisions from the affected SIPs." *Id.* at 55,927. EPA held a public hearing on October 7, 2014, and comments were due November 6, 2014.

**Climate Change:** On September 25, 2014, EPA published a notice that it was extending the public comment period on its proposed rule, "Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units," also called the Clean Power Plan proposed rule, that was published June 18, 2014 (79 Fed. Reg. 34,830), by 45 days from October 16, 2014, to December 1, 2014. 79 Fed. Reg. 57,492.

On October 30, 2014, EPA published a notice of data availability (NODA) in support of its Clean Power Plan proposed rule that was published June 18, 2014. 79 Fed. Reg. 64,543. In the NODA, EPA provides additional information on three topics that have attracted significant stakeholder input and requests public comment. The three topics are: the emission reduction compliance trajectories created by the interim goal for 2020 to 2029; certain aspects of the building block methodology; and the way state-specific carbon dioxide (CO<sub>2</sub>) goals are calculated. Regarding the glide path for 2020 to 2029, EPA states that stakeholders have suggested two potential approaches for addressing reductions that states would be required to make as early as 2020 when that interim compliance period begins: allowing credit for early reductions and phasing in increased use of efficient natural gas generation over time. Commenters also suggested that the agency take a regional approach to establishing renewable energy targets. EPA invites comment on whether and how book life of the original generation asset, as well as the book life of any major upgrades to the asset, might be either used as part of the basis for the development of an alternative emission glide path or used to evaluate whether other ways of developing an alternative glide path would address stranded investment concerns. Commenters expressed concern regarding EPA's implementation

of building block 2 (using low-emitting power sources more) and building block 3 (using more zero- and low-emitting power sources). Some said building block 2 should be more stringent, while others said it should be less stringent and that it might not be possible for all natural gas combined cycle (NGCC) units to operate at 70 percent capacity. In the NODA, EPA requests comment on whether building block 2 should focus on additional opportunities to use natural gas beyond what EPA included in the Clean Power Plan proposed rule: the construction and/or increased utilization of new NGCC units and additional co-firing of natural gas at existing fossil steam units. EPA also requests comment on whether regional availability of NGCC should be considered, rather than just in-state availability of NGCC generation and on whether to establish some minimum value as a floor for the amount of generation shift. In the NODA, EPA states that stakeholders also noted concerns with the treatment of renewable energy (RE) generation in building block 3, specifically what they describe as a potential misalignment between estimating each state's target based on in-state renewables while allowing use of out-of-state renewables for compliance with state goals. These stakeholders have suggested that state targets could be developed by defining regional RE targets and then assigning shares of those regional targets to individual states within the region. EPA is requesting comment on stakeholders' suggestion for a regionalized approach for RE target setting. Under this approach, each state's RE target would be adjusted based on the RE potential available across a multi-state region in which the state is located. A state's goal would be informed by the opportunity to develop out-of-state RE resources as part of its state plan. Regarding the goal-setting equation, EPA states stakeholders have expressed concerns that the numeric formula is not consistent in its application of the Best System of Emission Reduction (BSER) for building block 2, as compared with building blocks 3 and 4. EPA invites comments on two options suggested by stakeholders: replace all historical fossil generation on a pro rata basis or prioritize replacement of historical fossil steam generation. EPA is also

requesting comment on the use of 2010 and 2011 data in addition to 2012 data in setting state-specific CO<sub>2</sub> goals. Comments are due December 1, 2014.

## **National Ambient Air Quality Standards (NAAQS)**

1. Nitrogen Dioxide (NO<sub>2</sub>) NAAQS: On September 16, 2014, EPA published notice of a proposed consent decree in *WildEarth Guardians v. McCarthy*, No. 1:13-dv-02748-RBJ (D. Colo.), concerning implementation of the January 2010 NO<sub>2</sub> NAAQS. 79 Fed. Reg. 55,477. Under the proposed consent decree, EPA would agree to make findings by November 15, 2014, that certain states had failed to submit SIPs for the 2010 NO<sub>2</sub> NAAQS.

2. Ozone NAAQS: On September 8, 2014, EPA published notice of the availability of three final documents related to the current review of the ozone NAAQS. 79 Fed. Reg. 53,192. The three final documents are titled: *Policy Assessment for the Review of the Ozone National Ambient Air Quality Standards*; *Health Risk and Exposure Assessment for Ozone*; and *Welfare Risk and Exposure Assessment for Ozone* and are available on the Internet at: [http://www.epa.gov/ttn/naaqs/standards/ozone/s\\_o3\\_index.html](http://www.epa.gov/ttn/naaqs/standards/ozone/s_o3_index.html).

3. Particulate Matter (PM<sub>2.5</sub>) NAAQS: On October 3 and 28, 2014, EPA published correcting amendments identifying and correcting errors in the tables of the June 2, 2014, final rule updating regulations for the 1997 and 2006 PM<sub>2.5</sub> NAAQS nonattainment areas for Wisconsin and New York, respectively. The final rules took effect on their respective publication dates. 79 Fed. Reg. 59,674, 64,123.

On October 14, 2014, the district court in *Center for Biological Diversity v. McCarthy*, No. 4:13-cv-5142-SBA (N.D. Cal.), entered a consent decree concerning implementation of the 2006 PM<sub>2.5</sub> NAAQS. EPA published notice of the proposed consent decree on July 31, 2014. 79 Fed. Reg.

44,452. The consent decree establishes deadlines for EPA to make findings that certain states failed to submit nonattainment SIPs for the 2006 PM<sub>2.5</sub> NAAQS and to take final action to approve or disapprove, in whole or in part, certain 2006 PM<sub>2.5</sub> nonattainment SIPs addressing nonattainment new source review. Under the consent decree, EPA agrees to sign a final rule approving, disapproving, or approving in part and denying in part, nonattainment new source review SIPs for the 2006 PM<sub>2.5</sub> NAAQS: Los Angeles-South Coast, California, area by April 15, 2015; San Joaquin Valley, California, area by September 1, 2014; and Fairbanks, Alaska, area by December 31, 2014.

On September 16, 2014, EPA published notice of its action denying the petition for reconsideration and amended rulemaking from North Carolina concerning certain provisions of the final rule, “Prevention of Significant Deterioration (PSD) for Particulate Matter Less than 2.5 Micrometers (PM<sub>2.5</sub>)—Increments, Significant Impact Levels (SILs) and Significant Monitoring Concentration (SMC),” 75 Fed. Reg. 64,864, published on October 20, 2010. 79 Fed. Reg. 55,412. Petitions for judicial review, if any, were due November 17, 2014.

On August 8, 2014, EPA published notice of a proposed consent decree in *Sierra Club v. McCarthy*, No. 3:14-cv-00964-JD (N.D. Cal.), concerning implementation of the prevention of significant deterioration (PSD) program requirements for PM<sub>2.5</sub>. Under the proposed consent decree, EPA would agree to sign a notice or notices by no later than August 15, 2014, finding that Vermont, Wisconsin, and California (as to the North Coast Management District) failed to submit SIP revisions addressing the PM<sub>2.5</sub> PSD increments and implementing regulations required by the October 20, 2010, PSD final rule concerning increments, SILs, and SMC for PM<sub>2.5</sub>. 79 Fed. Reg. 46,439. Comments on the proposed consent decree were due September 8, 2014.

4. Sulfur Dioxide (SO<sub>2</sub>) NAAQS: On October 28, 2014, the district court held a hearing on a

joint motion to enter a proposed consent decree concerning designations for the 2010 primary SO<sub>2</sub> NAAQS in *Sierra Club v. McCarthy*, No. 3:13-cv-3953-SI (N.D. Cal.). EPA published notice of the proposed consent decree on June 2, 2014. 79 Fed. Reg. 31,325. Under the proposed consent decree, EPA would be required to complete designations in three stages. First, on or before the date 16 months from the date of the consent decree, EPA agrees to a notice of promulgation of such designations for remaining undesignated areas which (a) based on air quality monitoring in the three full calendar years preceding such deadline have monitored violations for retirement of the 2010 SO<sub>2</sub> NAAQS; or (b) contain any stationary source that has not been “announced for retirement” and that according to the data in EPA’s Air Markets Database, either (i) emitted more than 16,000 tons of SO<sub>2</sub> in 2012, or (2) emitted more than 2600 tons of SO<sub>2</sub> and had an annual average emission rate of 0.45 lbs SO<sub>2</sub>/mmBtu or higher in 2012. Second, on or before December 31, 2017, EPA will sign a notice of promulgation of such designations for remaining undesignated areas in which, by January 1, 2017, states have not installed and begun operating a new SO<sub>2</sub> monitoring network meeting EPA specifications referenced in EPA’s anticipated “Data Requirements Rule” rulemaking (proposed at 79 Fed. Reg. 27,449 (May 13, 2014)) directing states to collect and analyze additional information regarding SO<sub>2</sub> emissions concentrations. Third, on or before December 31, 2020, EPA will sign a notice of promulgation of such designations for all remaining undesignated areas.

On August 25, 2014, EPA published notice of its action denying petitions for reconsideration of the designations for the 2010 primary SO<sub>2</sub> NAAQS that were published on August 5, 2013 (78 Fed. Reg. 47,191). 79 Fed. Reg. 50,577. EPA also denied a request for a stay of the final designations rule. The reconsideration petitions and stay request concerned the Billings, Montana, SO<sub>2</sub> nonattainment area. Any petitions for review of EPA’s denial of the petitions for reconsideration were due October 24, 2014.

## REGIONAL REPORTS

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### EPA REGION 1

Dixon Pike and Brian M. Rayback *Pierce Atwood LLP Portland, Maine*

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#### New England

EPA announced separate settlements with three industrial laundry companies operating facilities throughout New England. EPA alleged that the companies failed to obtain air permits that were necessary due to volatile organic compounds (VOCs) from laundering. The companies agreed to pay penalties of \$460,000, \$309,980, and \$150,000 to resolve EPA allegations. Visit <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/6c60c0125fe5f5c685257d15004d49e!OpenDocument> to view the News Release.

In 2014, the Regional Greenhouse Gas Initiative (RGGI) states implemented a new cap of 91 million short tons of CO<sub>2</sub>, which will decline by 2.5 percent each year until 2020. The 25th auction of CO<sub>2</sub> allowances held on September 3 resulted in the sale of 17,998,687 allowances at a clearing price of \$4.88/allowance. The next auction is scheduled for December 3, 2014. Visit <http://www.rggi.org/design/overview/cap> for an overview.

On October 1, EPA confirmed that there was a decrease in the number of ozone exceedances in New England this year. In 2014, there were only 9 days of excess ozone, whereas there were 20 such days in 2013, and 29 such days in 2012. Visit <http://yosemite.epa.gov/opa/admpress.nsf/0/3469EB93B2E6584585257D640052E69D> to view the EPA News Release.

#### Connecticut

On September 4, the Connecticut attorney general announced that the state had joined 11 other states in court to support EPA's proposal to set greenhouse gas (GHG) standards for new and existing fossil fuel electric generating power plants. Visit <http://www.ct.gov/deep/cwp/view>.

<http://www.ct.gov/deep/cwp/view.asp?A=4568&Q=552408> to view the Press Release.

The Connecticut Department of Energy and Environmental Protection (DEEP) announced a grant program allowing owners of outdoor wood boilers up to \$7000 to remove and upgrade units. Visit <http://www.ct.gov/deep/cwp/view.asp?A=4568&Q=551284> to view the Connecticut DEEP News Release.

EPA approved state implementation (SIP) revisions to the Connecticut DEEP's visible and particulate matter emissions and record-keeping and monitoring regulations. Visit <http://www.gpo.gov/fdsys/pkg/FR-2014-07-16/pdf/2014-16469.pdf> to view the *Federal Register* notice.

#### Maine

EPA approved a request from Maine for an exemption from nonattainment new source review requirements for NO<sub>x</sub>. Maine's 2012 request for the "NO<sub>x</sub> waiver" under section 182(f) of the Clean Air Act (CAA) was based on a demonstration that NO<sub>x</sub> emissions from Maine sources are not having an adverse impact on the ability of any nonattainment areas in the Ozone Transport Region (OTR) to attain the ozone standards during times when elevated ozone levels are monitored in those areas. Visit <http://www.gpo.gov/fdsys/pkg/FR-2014-07-29/pdf/2014-17583.pdf> to view the *Federal Register* notice.

EPA proposed to extend the CAA prohibition against the sale of conventional gasoline in reformulated gasoline areas to southern Maine counties. Visit <http://www.gpo.gov/fdsys/pkg/FR-2014-08-28/pdf/2014-20177.pdf> to view the *Federal Register* notice.

#### Massachusetts

The Massachusetts Department of Environmental Protection (MassDEP) announced it entered into a consent order with a hospital, which requires payment of a \$540,000 fine for installing and operating a 3000-kilowatt combined heat and power engine without appropriate air permitting.

Visit <http://www.mass.gov/eea/agencies/massdep/news/releases/lahey-clinic-hospital-inc-penalized-540000-.html> to view the MassDEP News Release.

EPA announced that a consent agreement with a Fall River company requires penalties of \$114,118 to resolve EPA claims that the facility violated Risk Management Plan requirements with respect to chlorine and ammonia. Visit <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/c0d88a96d1225fb785257d770055ada0!OpenDocument> to view the EPA News Release.

MassDEP announced it had entered into a consent order with an auto body repair shop, which required a \$44,000 penalty for conducting fraudulent automobile emissions inspections. Visit <http://www.mass.gov/eea/agencies/massdep/news/releases/western-avenue-auto-body-in-lynn-penalized-44000-.html> to view the MassDEP News Release.

## New Hampshire

The New Hampshire Department of Environmental Services (DES) is proposing to eliminate the requirement to file an annual emissions report for emergency generators and to replace the annual emission-based fee with a once-every-five-years registration fee. Visit <http://des.nh.gov/organization/commissioner/legal/rulemaking/documents/env-a700amd-ip.pdf> to view the draft notice.

DES proposed to change the annual report applicability threshold so that smaller sources (operating under general state permits and permit-by-notifications) are not required to submit an annual report. Visit <http://des.nh.gov/organization/commissioner/legal/rulemaking/documents/env-a907.01-ip.pdf> to view the draft notice.

## Rhode Island

EPA announced a settlement with the Rhode Island Air National Guard that requires the Guard to reduce emissions at its aircraft repair facility

and pay a penalty of \$39,400 to settle alleged air violations resulting from paint-spraying operations. Visit <http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/f70b83b705fe0b2c85257d1f006b1fef!OpenDocument> to view the EPA News Release.

The U.S. District Court in Rhode Island imposed a \$200,000 fine and five years probation against a chemical company that admitted to violating the Clean Air Act by failing to develop a Risk Management Plan addressing flammable ethyl. Visit <http://www.providencejournal.com/news/courts/20141006-ex-pawtucket-chemical-company-fined-200k-for-clean-air-act-violations.ece> to view the news article.

EPA proposed to approve a SIP revision that will allow gasoline-dispensing facilities to decommission their Stage II vapor recovery systems as of December 25, 2013. Visit <http://www.gpo.gov/fdsys/pkg/FR-2014-10-24/pdf/2014-25354.pdf> to view the *Federal Register* notice.

## Vermont

Lake Champlain Transportation Company, which operates ship repair and painting facilities, will take actions to minimize air emissions and protect air quality and pay \$100,000 in penalties to resolve EPA claims that the company violated National Emissions Standards for Hazardous Air Pollutants for shipbuilding and repair. Visit <http://yosemite.epa.gov/opa/admpress.nsf/0/9F72944A419D2D2285257D540064E9E1> to view the EPA News Release.

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### EPA REGION 3

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## Enforcement Actions

### Virginia

On September 12, 2014, EPA announced a settlement with the U.S. Navy over alleged

violations of the CAA and the Resource Conservation and Recovery Act at the Naval Support Activity Hampton Roads in Chesapeake, Va. The Navy will pay a \$49,500 penalty and implement procedures to ensure the proper handling of its hazardous wastes. The CAA violations pertained to regulations designed to reduce discharges of ozone-depleting substances used as coolants in air conditioning units. EPA alleged that the facility did not perform leak rate calculations when it serviced those units, and that the facility did not have a CAA permit to operate a diesel-fired boiler and was thus not subject to emissions limits.

### **West Virginia**

On August 27, 2014, EPA and the Department of Justice announced a settlement with E.I. du Pont de Nemours and Company at its Belle, W.V., facility for eight alleged releases of harmful levels of hazardous substances between May 2006 and January 2010. DuPont will pay a \$1.275 million penalty and will take corrective actions to prevent future releases to resolve the alleged violations of the general duty clause and risk management provisions of the CAA, Compensation Environmental Response, Compensation, and Liability Act, and Emergency Planning and Community Right-to-Know Act. The hazardous substances allegedly released included methyl chloride, oleum, and phosgene. The phosgene release occurred when a hose ruptured, resulting in the fatality of a worker exposed to the toxic gas. DuPont estimates that it will spend approximately \$2.276 million to complete the required improvements to its safety and emergency response processes.

## **SIP Revision Approvals—Final and Proposed**

### **D.C.-Maryland-Virginia**

EPA approved requests from the District of Columbia (D.C.), Maryland, and Virginia to redesignate to attainment their respective portions of the Washington, D.C.-Maryland-Virginia nonattainment area (“Washington Area”) for the 1997 annual PM<sub>2.5</sub> National Ambient Air Quality Standards (NAAQS). EPA also

approved, as a revision to their respective SIPs, the common maintenance plan submitted by D.C., Maryland, and Virginia to show maintenance of the 1997 annual PM<sub>2.5</sub> NAAQS through 2025 for the Washington Area. The Washington Area maintenance plan includes motor vehicle emissions budgets for PM<sub>2.5</sub> and NO<sub>x</sub> for the area for the 1997 annual PM<sub>2.5</sub> standard, which EPA approved for transportation conformity purposes. *See* 79 Fed. Reg. 60,081 (Oct. 6, 2014).

### **Maryland**

EPA is proposing to approve Maryland’s request to redesignate to attainment the Baltimore, Maryland Nonattainment Area (“Baltimore Area”) for the 1997 annual PM<sub>2.5</sub> NAAQS. EPA has determined that the Baltimore Area attained the standard and is proposing to determine that it continues to attain the standard. In addition, EPA is proposing to approve, as a revision to Maryland’s SIP, the Baltimore Area maintenance plan to show maintenance of the 1997 annual PM<sub>2.5</sub> NAAQS through 2025 for the Baltimore Area. The maintenance plan includes the 2017 and 2025 PM<sub>2.5</sub> and NO<sub>x</sub> mobile vehicle emissions budgets for the Baltimore Area for the 1997 annual PM<sub>2.5</sub> NAAQS, which EPA is proposing to approve for transportation conformity purposes. *See* 79 Fed. Reg. 59,703 (Oct. 3, 2014).

EPA approved a SIP revision submitted by Maryland that addresses the infrastructure requirements for the 2008 ozone NAAQS. *See* 79 Fed. Reg. 62,010 (Oct. 16, 2014).

### **Pennsylvania**

EPA approved a SIP revision submitted by Pennsylvania that includes amendments to the Allegheny County Health Department Rules and Regulations, Article XXI, Air Pollution Control, and meets the requirement to adopt reasonably available control technology for sources covered by EPA’s Control Techniques Guidelines standards for the following categories: offset lithographic printing and letterpress printing, flexible package printing, and industrial solvent cleaning operations. *See* 79 Fed. Reg. 60,059 (Oct. 6, 2014).

EPA is taking direct final action to approve a revision to Pennsylvania's SIP addressing the state board's requirements for all criteria pollutants of the NAAQS. EPA is also approving a related infrastructure element from Pennsylvania's September 24, 2012, SIP submittal for the 2008 Lead NAAQS. *See* 79 Fed. Reg. 62,003 (Final Rule), 79 Fed. Reg. 62,090 (Proposed Rule) (Oct. 16, 2014).

EPA is proposing to approve Pennsylvania's requests to redesignate to attainment the Harrisburg-Lebanon-Carlisle-York nonattainment areas ("the Areas") for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS. This proposed approval is contingent upon the D.C. Circuit Court granting EPA's motion to lift the stay of the Cross State Air Pollution Rule (CSAPR) issued on December 30, 2011. EPA is proposing to find that the attainment of the Areas is in part due to the emissions reductions resulting from the Clean Air Interstate Rule (CAIR) in Pennsylvania and in the states upwind of Pennsylvania. Thus, if the D.C. Circuit Court lifts the stay of CSAPR and grants EPA's motion to begin implementation of CSAPR on January 1, 2015, those emission reductions originally required under CAIR will be made permanent and enforceable through the implementation of CSAPR. In addition to the redesignation requests, EPA is also proposing to determine that the Areas continue to attain the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. Furthermore, EPA is proposing to approve as revisions to Pennsylvania's SIP the associated maintenance plans to show maintenance of the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS through 2025 for the Areas. The maintenance plans include the 2017 and 2025 PM<sub>2.5</sub> and NO<sub>x</sub> mobile vehicle emissions budgets (MVEBs) for the Areas for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS, which EPA is proposing to approve for transportation conformity purposes. EPA is also initiating a process to determine if these budgets are adequate for transportation conformity purposes. In addition, EPA is proposing to approve, as revisions to the Pennsylvania SIP, the 2007 base year emissions inventory for the Areas for the 1997 annual and the 2006 24-hour PM<sub>2.5</sub> NAAQS. EPA's proposed approvals of the maintenance plans

and MVEBs for the Areas are also contingent upon the lifting of the CSAPR stay by the D.C. Circuit Court. *See* 79 Fed. Reg. 62,389 (Oct. 17, 2014).

## **Virginia**

EPA approved a revision to Virginia's SIP that removes the Stage II vapor recovery program from the maintenance plans for the Richmond 1990 1-hour and Richmond-Petersburg 1997 8-hour ozone NAAQS Maintenance Areas ("Richmond Area"). The revision also includes an analysis that addresses the impact of the removal of Stage II from subject gasoline-dispensing facilities in the Richmond Area. EPA concluded that the analysis submitted by Virginia satisfies the requirements of section 110(l) of the CAA. *See* 79 Fed. Reg. 46,711 (Final Rule), 79 Fed. Reg. 46,747 (Proposed Rule) (Aug. 11, 2014).

EPA is taking direct final action to approve revisions to Virginia's SIP removing references to two operating permits and a consent agreement for GenOn Potomac River, LLC's Potomac River Generating Station ("Potomac River"), which was formerly owned by Potomac Electric Power Company. Potomac River has permanently shut down; therefore, the permits and consent agreement are no longer applicable and are being removed from the Virginia SIP. *See* 79 Fed. Reg. 47,004 (Final Rule), 79 Fed. Reg. 47,043 (Proposed Rule) (Aug. 12, 2014).

EPA approved two separate revisions to Virginia's SIP addressing the infrastructure requirements for the 2008 ozone and 2010 NO<sub>2</sub> NAAQS. EPA approved the prevention of significant deterioration (PSD) portions of the infrastructure requirements of the CAA for Virginia's SIP submittals for the 2008 ozone and 2010 NO<sub>2</sub> NAAQS. *See* 79 Fed. Reg. 58,682 (Sept. 30, 2014).

## **West Virginia**

EPA is taking direct final action to approve a revision to West Virginia's SIP pertaining to amendments of West Virginia's Legislative Rule on Ambient Air Quality Standards that change the effective date of the incorporation by reference of the NAAQS as well as their monitoring reference and equivalent methods. *See* 79 Fed. Reg. 56,513

(Final Rule), 79 Fed. Reg. 56,538 (Proposed Rule) (Sept. 22, 2014).

EPA approved a SIP revision submitted by West Virginia addressing the infrastructure requirements for the 2010 SO<sub>2</sub> NAAQS. *See* 79 Fed. Reg. 62,022 (Oct. 16, 2014).

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## EPA REGION 5

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### Illinois

EPA issued a final rule to approve a SIP revision to the state's vehicle inspection and maintenance program in the Chicago and Metro-East St. Louis ozone nonattainment areas to reflect state rule changes. The rule became effective on September 12, 2014. 79 Fed. Reg. 47,377 (Aug. 13, 2014).

EPA issued proposed and direct final rules approving SIP revisions to the state's gasoline volatility standards, including amendments to motor vehicle refinishing regulations and to repeal a registration program that overlaps with federal registration requirements. The direct final rule will become effective December 5, 2014, unless EPA received adverse comments by November 5, 2014. 79 Fed. Reg. 60,065, 60,125 (Oct. 6, 2014).

EPA issued a final rule to approve a SIP revision for the 1997 8-hour ozone maintenance plan for the Illinois portion of the greater Chicago attainment area. The revision establishes new motor vehicle emissions budgets for VOCs and nitrogen oxides (NO<sub>x</sub>) for the year 2025, and approves the allocation of a portion of the safety margin for VOCs and NO<sub>x</sub> in the ozone maintenance plan to the 2025 budgets. The rule became effective on November 5, 2014. 79 Fed. Reg. 60,073 (Oct. 6, 2014).

EPA issued a final rule to partially approve a SIP revision to section 110 infrastructure requirements

for the 2008 ozone, 2010 nitrogen dioxide, and 2010 sulfur dioxide NAAQS. The rule becomes effective on November 17, 2014. 79 Fed. Reg. 62,042 (Oct. 16, 2014).

EPA issued proposed and direct final rules to approve a SIP revision to phase out the Stage II vapor recovery program requirements in the Chicago ozone nonattainment area and amends permitting regulations applicable to storage tanks and fuel dispensing. The direct final rule becomes effective December 16, 2014, unless EPA receives adverse comments by November 17, 2014. 79 Fed. Reg. 62,352, 62,378 (Oct. 17, 2014).

### Indiana

The Indiana Supreme Court issued a decision in *Natural Resources Defense Council v. Poet Biorefining*, 15 N.E.3d 555, 2014 Ind. LEXIS 659 (Sept. 2, 2014), which considered whether an ethanol plant was a "chemical process plant" for purposes of major source PSD permitting. In 2007, EPA issued the ethanol rule that excluded ethanol plants from the definition of "chemical process plant." Indiana published a SIP revision that followed the change, but did not codify the change through EPA's approval process. However, the court found that a formal SIP revision was unnecessary since the existing SIP did not explicitly define ethanol plants as chemical process plants, and the agency is due deference in its "reasonable" interpretation of the term.

EPA issued a final rule to approve a SIP revision to portions of the state's PSD program, including components for making determinations for PM<sub>2.5</sub> increments. The rule became effective on September 10, 2014. 79 Fed. Reg. 46,709 (Aug. 11, 2014).

EPA issued proposed and direct final rules to approve a SIP revision to the state's open burning provisions. EPA is proposing to approve the rule for attainment counties and to take no action on the rule for nonattainment or maintenance areas for ozone or particulate matter. The direct final rule becomes effective on November 17, 2014, unless EPA received adverse comments by October 17, 2014. 79 Fed. Reg. 55,641, 55,712 (Sept. 17, 2014).

EPA issued a final rule to approve a SIP revision for infrastructure requirements for the 2008 lead NAAQS. The rule becomes effective on November 17, 2014. 79 Fed. Reg. 62,035 (Oct. 16, 2014).

## Ohio

EPA issued a final rule to approve a SIP revision regarding infrastructure requirements for the 2008 lead and 2010 nitrogen dioxide NAAQS. The rule became effective on November 5, 2014. 79 Fed. Reg. 60,075 (Oct. 6, 2014).

EPA issued a final rule to approve a SIP revision regarding infrastructure requirements for the 2008 ozone NAAQS. The rule becomes effective on November 17, 2014. 79 Fed. Reg. 62,019 (Oct. 16, 2014).

EPA issued proposed and direct final rules to approve SIP revisions to implement regulations establishing definitions, defining increment levels, and setting Class I variances related to fine particulate matter (PM<sub>2.5</sub>). The revisions also incorporate changes that recognize nitrogen oxides as an ozone precursor, as well as several other changes. The direct final rule will be effective December 29, 2014, unless EPA receives adverse comments by November 28, 2014. 79 Fed. Reg. 64,119, 64,161 (Oct. 28, 2014).

## Wisconsin

EPA issued a final rule to approve SIP revisions regarding the PSD and Nonattainment New Source Review (NNSR) programs, including the incorporation of changes to recognize nitrogen oxides as an ozone precursor. The final rule became effective on November 5, 2014. 79 Fed. Reg. 60,064 (Oct. 6, 2014).

EPA issued a final rule to approve a SIP revision modifying the PSD program to identify PM<sub>2.5</sub> precursors. The final rule became effective on November 17, 2014. 79 Fed. Reg. 62,008 (Oct. 16, 2014).

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## EPA REGION 6

John B. King  
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## Arkansas

### **Meeting to Address EPA's Clean Power Plan:**

On June 25, 2014, the Arkansas Department of Environmental Quality (ADEQ) and the Arkansas Public Service Commission (APSC) held a stakeholders meeting on the EPA proposed Clean Power Plan. The primary topics addressed were an assessment of the state's pollution reduction target under EPA's alternate proposals, an economic analysis of the plan, and a grid reliability study. The group plans to develop recommendations for Arkansas's SIP.

**Crittenden County Ozone EI:** The ADEQ held a public hearing at West Memphis November 6, 2014, to receive comments on the proposed emission inventory (EI) revision for Crittenden County. Crittenden County, along with Shelby County, Tenn., and De Soto County, Miss., was designated in 2012 as nonattainment for ozone.

**Additional Go RED! Funding Available:** Using an EPA grant for \$163,000, ADEQ is funding efforts to reduce diesel emissions through a program known as "Go RED!" Eligible projects must reduce diesel emissions by employing measures such as exhaust control, idling reduction technology, engine upgrade, engine replacement, and vehicle/equipment replacement. Applications are due to ADEQ by December 31, 2014; subsequent deadlines will be the last day of each following month until April 30, 2015, or until all funds are awarded. Projects must be completed by Aug. 31, 2015. For more information on this latest round of funding, please visit [http://www.adeq.state.ar.us/air/branch\\_planning/clean\\_diesel.aspx](http://www.adeq.state.ar.us/air/branch_planning/clean_diesel.aspx).

## Louisiana

**Comments on Clean Power Plan:** On September 12, 2014, Secretary Peggy Hatch of the Louisiana

Department of Environmental Quality (LDEQ) provided initial comments to EPA, highlighting data inaccuracies in EPA's proposed rule and the damaging effects the rule would have on Louisiana's economy. Secretary Hatch claimed in the letter that the proposed rule "unequivocally exceeds the authority provided to EPA by Section 111(d) of the Clean Air Act, and risks undermining our state's economic development while providing questionable and unsubstantiated environmental benefit." Secretary Hatch suggested that there were discrepancies in the proposed final emissions goal for Louisiana, which she suggested should be raised to 1078 lb CO<sub>2</sub>/MWh, with an alternate goal of 1239 lb CO<sub>2</sub>/MWh. Visit [http://www.deq.louisiana.gov/portal/portals/0/news/pdf/EPAemissions\\_PR.pdf](http://www.deq.louisiana.gov/portal/portals/0/news/pdf/EPAemissions_PR.pdf) for an LDEQ News Release, which includes a copy of the letter.

**New Assistant Secretary for Permits:** On August 5, 2014, LDEQ Secretary Peggy Hatch named Tegan Treadaway as assistant secretary for the Office of Environmental Services, which is responsible for issuing all air quality permits. Treadaway was administrator of air permits and has worked at LDEQ in air permits for ten years. A Baton Rouge native, Treadaway is an LSU graduate with bachelor's degrees in both biochemistry and chemical engineering. Visit <http://www.deq.louisiana.gov/portal/portals/0/news/pdf/teganpressrelease.pdf> to view the LDEQ News Release announcing the appointment.

## New Mexico

**CAA Settlement:** On October 10, 2014, the New Mexico Environment Department (NMED) announced that it entered into a settlement agreement with Enterprise Field Services to resolve alleged violations, including exceeding permit limits for volatile organic compounds, failure to submit proper notification of excess emissions, and failure to properly assess and record blowdown events. The settlement totals \$340,712, comprising \$36,203 in cash payment with the balance to go toward a supplemental environmental project (SEP) involving the installation of a vapor recovery unit at the facility to reduce the volume of process unit

waste gas. Visit <http://www.nmenv.state.nm.us/OOTS/PR/2014/PR101014%20Environment%20Department%20Reaches%20Settlement%20With%20Enterprise%20Field%20Services.pdf> to view the NMED News Release.

**Regional Haze Settlement:** On October 9, 2014, EPA formally approved a revision to the New Mexico SIP, following a settlement agreement involving EPA, New Mexico, the Public Service Company of New Mexico (PNM), and the Navajo Nation over a regional haze dispute in the Four Corners area. *See* 79 Fed. Reg. 60,985 (Oct. 9, 2014). Under the settlement agreement, PNM will retire units 2 and 3 of the San Juan Generating Station by December 31, 2017; PNM will be required to install emission control technology on units 1 and 4; and PNM will continue to operate these units without setting a retirement date. Visit <http://www.nmenv.state.nm.us/OOTS/documents/092614EPAApprovesRegionalHazeSettlementAgreement.pdf> to view the NMED News Release.

**Natural Gas Fleet Grant:** The city of Santa Fe was awarded \$114,670 in grant funding from the NMED through EPA to help fund an early vehicle replacement on their diesel-fueled solid waste and recycling fleet. The vehicles travel to pick up household and commercial refuse and recycled materials on a daily basis. Using natural gas rather than diesel fuel will reduce harmful emissions from these vehicles.

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## EPA REGION 8

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## Colorado

**Proposed Regional Haze Settlement:** On August 14, 2014, EPA issued notice of a proposed settlement agreement between environmental groups, including WildEarth Guardians (collectively, the petitioners), and

EPA, in the course of pending litigation in the Tenth Circuit. *See* 79 Fed. Reg. 47636 (Aug. 14, 2014). The petitioners challenged EPA’s approval of the Colorado Department of Public Health & Environment’s (CDPHE) Regional Haze SIP (published in 77 Fed. Reg. 76,871 (Dec. 31, 2012, effective Jan. 30, 2013)). Petitioners took issue with the regional SIP’s best available retrofit technology (BART) and the reasonable progress determinations for particular sites (including for certain units at the Craig Generating Station, the Comanche Power Station, and Coors Brewery). The settlement, if accepted in this form, would resolve all of the petitioners’ claims relating to the Comanche Power Station, and also requires the CDPHE to revise its regional haze SIP. The CDPHE is required to submit its revised SIP by December 31, 2015, and EPA is required to take action on that revision, according to the proposed settlement agreement.

## North Dakota

**SIP Revisions to SSM Events:** EPA approved revisions to the North Dakota Administrative Code that the state made to comply with new requirements relating to start-up, shutdown, and malfunction (SSM) events. On September 17, 2014, EPA further revised its policy regarding SSM events, issuing a Supplemental Notice of Proposed Rulemaking (SNPR) that, if issued, would remove the availability of an affirmative defense for air emission exceedances resulting from malfunction events. The SNPR supplements EPA’s February 2013 proposal, in which EPA, responding to a 2011 petition for rulemaking filed by the Sierra Club, proposed significant changes to the treatment of excess emissions during start-up and shutdown events. That proposal, which was a “SIP call” under Clean Air Act section 110(k)(5), required revision and resubmission of nonconforming SIP-based affirmative defense provisions, effectively disallowing penalty mitigation through an affirmative defense for start-up and shutdown events. It did not, however, affect similar affirmative defense provisions for malfunction events. After EPA issued the 2013 proposal, the D.C. Circuit in *NRDC v. EPA*, 749 F.3d 1055 (D.C. Cir. 2014) held that the Clean Air Act does

not grant EPA (or the states) authority to create affirmative defense provisions in their air emission regulations because doing so usurps the jurisdiction of the federal courts to determine liability and impose penalties in private civil enforcement cases. Accordingly, EPA proposed a second SIP call to require certain states to revise, and likely remove, existing affirmative defense provisions for excess emissions resulting from malfunction events.

Now EPA has approved North Dakota’s suggested revisions to its SIP. First, EPA approved removal of NDAC section 33-15-03-04.4, which created an affirmative defense that allowed an operator to exceed emissions limitations when, during oil field service and drilling operations, it was not technically feasible to meet emissions specifications. Second, EPA approved removal of NDAC section 33-15-05-01.2.a(1), which created an “implicit exemption” from particulate matter limits for “temporary operational breakdowns or cleaning of air pollution equipment.” *See* 79 Fed. Reg. 41,473 (Oct. 22, 2014). There are two notable potential impacts that may affect the North Dakota oil and gas industry: (1) to properly account for SSM emissions, North Dakota may be forced to promulgate more stringent air emission standards that may tighten permit limits for individual sources; and (2) operators will have less operational flexibility as they must now effectively comply with emission standards *continuously*. This second likely impact could force sources to make mechanical or equipment changes to better control emissions or risk enforcement—even for malfunction events.

## Utah

**Tenth Circuit Rehearing Denial re Section 307(b)(1) Jurisdiction:** On September 3, 2014, the Court of Appeals for the Tenth Circuit issued a decision denying rehearing in *Utah v. EPA*, 765 F.3d 1257 (10th Cir. 2014). This case arose out of EPA’s December 14, 2012, final rule rejecting proposed revisions to Utah’s SIP under the CAA. Under CAA section 307(b)(1), “[a]ny petition for review . . . shall be filed within sixty days from the date notice of [a] promulgation, approval, or action appears in the Federal Register. . . .” 42

U.S.C. § 7607(b)(1). EPA's notice of its partial denial of Utah's SIP did not reference section 307(b)(1)'s 60-day deadline. In an effort to remedy this omission, EPA published a notice on January 22, 2013, which stated that parties would have until March 25, 2013, to file a petition for review. Utah (as well as industry petitioners), relying on EPA's statement, filed petitions for review before March 25, 2013, but more than 60 days after the rule partially denying Utah's SIP was originally published. On May 6, 2014, the Tenth Circuit held that the 60-day deadline ran from December 14, 2012, the date the final rule was published, and dismissed the petitions for lack of jurisdiction. *See Utah v. EPA*, 750 F.3d 1182 (10th Cir. 2014). Utah and the industry petitioners filed a motion for rehearing, contending that the 60-day deadline is not jurisdictional. On September 3, 2014, the Tenth Circuit denied the motion for rehearing and confirmed its ruling that section 307(b)(1)'s 60-day deadline is jurisdictional in nature, which is in line with Tenth Circuit and D.C. Circuit precedent. The Tenth Circuit's September 3 decision highlights a recently created circuit split. In a decision issued just days before, on August 29, 2014, the Seventh Circuit issued a unanimous opinion in which the panel held that the 60-day deadline is not jurisdictional, and therefore the deadline could be waived in certain circumstances. *See Clean Water Action Council of Northeastern Wisconsin, Inc., et al. v. EPA, et al.*, 765 F.3d 749 (7th Cir. 2014). The existence of this circuit split sets up the possibility that the issue will be taken up by the Supreme Court in the future.

## Wyoming

**Upper Green River Basin Nonattainment Area Ozone Strategy:** On October 24, 2014, the Wyoming Department of Environmental Quality (WDEQ) released an update to the ozone strategy for the Upper Green River Basin (UGRB). The UGRB area was designated by EPA as marginal nonattainment for the 8-hour ozone NAAQS of 0.075 ppm on July 20, 2012. The UGRB ozone strategy was initially released in March 2013, and WDEQ issued updates to the strategy in September 2013 and April 2014. The October

24, 2014, ozone strategy update outlines several "activities" and "rulemaking subject areas" that WDEQ intends to focus on through March 2015, at which time another update may be issued. The activities identified include: (1) a produced water tank study, (2) forecasting for the winter ozone season, (3) EPA ozone NAAQS review, (4) ozone action days, (5) UGRB winter ozone study, (6) oil and gas production site emissions inventory study, and (7) produced water ponds study. In addition, WDEQ has identified the following four "rulemaking subject areas": (1) the ongoing rulemaking regarding "a Phase I technology based control strategy and regulatory option to reduce emissions from existing upstream oil and gas sources while preserving the current New Source Review permitting processes," which was initiated in June 2014 and is anticipated to be completed during calendar year 2015; (2) "[e]valuat[ion] [of] a Phase II emission budget based control strategy and regulatory option to reduce emissions from existing upstream and midstream oil and gas sources"; (3) information gathering "on how an incentive program could be coordinated with rulemaking processes to accelerate emission reductions in the UGRB nonattainment area prior to completion of statutory rulemaking processes"; and (4) "stakeholder involvement in the gathering and evaluation of information that may be utilized in [the] Phase II emission budget based control strategy and regulatory option." Lastly, the UGRB ozone strategy update identified 18 other activities, studies, and projects that are "ongoing." The UGRB ozone strategy is available on DEQ's website at <http://deq.state.wy.us/aqd/Technical%20Documents.asp>.