



Air Quality Committee Newsletter

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MESSAGE FROM THE COMMITTEE CHAIR

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The Air Quality Committee is pleased to present our May 2011 newsletter. As the U.S. Environmental Protection Agency (EPA) continues its ambitious Clean Air Act rulemaking agenda, with unprecedented attention from Congress, air quality is among the most active and important areas of environmental law. For good reason, the Clean Air Act was a major topic during the 40th Annual Conference on Environmental Law in March. We heard from representatives of states, industry, and EPA in panels discussing greenhouse gas permitting and the state-federal relationship under the Clean Air Act's framework of cooperative federalism. On behalf of this committee, we express our thanks and appreciation to all who took the time to present at and attend these dynamic programs, particularly to Avi Garbow and Anna Marie Wood of EPA for their openness and willingness to engage different perspectives.

Many in the committee work hard to stay abreast of air quality legal developments and provide current and beneficial content to our members. We are planning Quick Teleconferences (QT) this spring on EPA's proposed deferral of greenhouse gas permitting for biogenic emissions (e.g., biomass burning) and the proposed utility-sector hazardous air pollutant regulations. In addition, a QT is being developed for the oil and gas production and processing standards, after they are proposed. We are working with ABA to

make the "Hot News" section of our committee page more user-friendly and accessible for updates, so that it can remain more current. Look for new content by this summer. Lastly, air quality developments will be reviewed in the section's *The Year in Review*, to be published in May, due to the hard work of many volunteers led by Jonathan Martel.

Thanks to all who have recently joined our committee and the vice chairs who make it function. Please feel free to send me an e-mail if you have any thoughts or comments. Finally, a shout-out to Phil Karmel, who works so diligently to publish our committee newsletter. Please contact him at pekarmel@bryancave.com if you wish to contribute to the newsletter.



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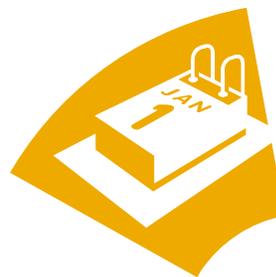
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Section
Programs—**

For full details, please visit the “Events & CLE” link on our Section Web site:

http://www.americanbar.org/groups/environment_energy_resources.html

May 26-27, 2011

15th Institute for Natural Resources Law Teachers

Primary Sponsor: Rocky Mountain Mineral Law Foundation
Stevenson, WA

June 7, 2011

State Incentives to Promote Renewable Power: Assessing Challenges to Federal Authority

Quick Teleconference

June 28, 2011

An Update on North American Climate Change Law and Policy Development

Quick Teleconference

August 4-9, 2011

ABA Annual Meeting
Toronto

October 12-15, 2011

19th Section Fall Meeting
Indianapolis

February 22-24, 2012

30th Annual Water Law Conference
San Diego

March 22-24, 2012

41st Annual Conference on Environmental Law
Salt Lake City

EPA REGIONAL REPORTS

EPA HEADQUARTERS

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I. Air Toxics—Reciprocating Internal Combustion Engines

On December 7, 2010, the U.S. Environmental Protection Agency (EPA) published a notice of reconsideration and requested public comment on the agency's decision to amend the limitations on the operation of emergency stationary reciprocating internal combustion engines (RICEs) to allow them to operate for up to 15 hours per year as part of a demand response program. 75 Fed. Reg. 75,937. The provision allowing emergency stationary engines to participate in a demand response program for up to 15 hours per year was included in the March 3, 2010, final rule establishing standards limiting emissions of air toxics from existing stationary diesel engines located at major and area sources. Comments on the reconsideration were due February 7, 2011.

On March 9, 2011, EPA published a proposed rule and a direct rule amending the air toxics rule for RICEs. 76 Fed. Reg. 12,863, 12,923. The direct final rule and parallel proposal clarify compliance requirements related to continuous parameter monitoring systems (CPMS). Operation and maintenance requirements for CPMS were included in the August 2010 final rule to limit emissions of air toxics from existing stationary engines located at major and area sources. In response to a request for an administrative stay, EPA granted a 90-day stay of CPMS provisions in the final rule on January 19, 2011. In the direct final rule and parallel proposal, EPA is providing an additional 180 days for sources to comply with the CPMS operation and maintenance requirements, revising the frequency of the temperature measurement device performance check from quarterly to annually, and correcting an inadvertent error in the averaging time for the continuous parameter data. The

final rule takes effect May 9, 2011, unless adverse comments are received by April 8, 2011, or a public hearing is requested by March 16, 2011.

II. Air Toxics—Wood Furniture Manufacturing and Shipbuilding and Repair

On December 21, 2010, EPA published a proposed rule proposing changes to the air toxics standards for wood furniture manufacturing operations and shipbuilding and ship repair (surface coating). 75 Fed. Reg. 80,219. For wood furniture manufacturing operations, EPA is proposing an emissions limit of 0.2 tons per year for formaldehyde. This emission limit would require some facilities to choose lower formaldehyde-containing coating. EPA is also proposing to prohibit the use of conventional (low efficiency) spray guns. Under the proposal, those facilities that still use conventional spray guns would be required to replace those guns with more efficient air-assisted airless spray equipment when the conventional guns wear out. For shipbuilding and ship repair (coating operations), EPA did not identify any cost-effective controls, practices, or processes to lower the risks. For both source categories, the proposed amendments would eliminate provisions related to emissions during periods of start-up, shutdown, and malfunction consistent with the D.C. Circuit's vacatur of similar provisions in other source category rules. Comments were due February 22, 2011.

III. Air Toxics—Gold Mining

EPA has added the gold mine ore processing and production area source category to the list of source categories to be regulated under section 112(c)(6) of the Clean Air Act due to its mercury emissions, and on February 27, 2011, promulgated the first National Emissions Standard for Hazardous Air Pollutants (NESHAP) for this source category to reduce mercury emissions. 76 Fed. Reg. 9450. The final rule establishes mercury emission limits for four types of processes found at gold production facilities: (1) ore-pretreatment processes (primarily heating processes used to prepare ore for gold extraction); (2) carbon processes with mercury retorts; (3) carbon processes without mercury retorts; and (4) non-carbon

concentrate processes. The latter three processes separate gold from ore. For existing sources, the emission limits are 127 lb/million tons of ore during ore pretreatment processes; 2.2 lb/ton of concentrate during carbon processes with mercury retorts; 0.17 lb/ton of concentrate during carbon processes without mercury retorts; and 0.2 lb/ton of concentrate during non-carbon concentrate processes. The emission limits for new sources are more stringent than the emission limits for existing sources. The final rule also establishes requirements for monitoring, including a requirement that each facility conduct an annual mercury emissions test at all emissions stacks. EPA estimates that the emission limits will reduce mercury emissions by 0.73 tons per year from current emissions levels. The final rule took effect February 17, 2011. The more than twenty facilities that extract gold from ore will need to meet the requirements of the rule within three years.

IV. Air Toxics—Primary Lead Smelting

On February 17, 2011, EPA published a proposed rule to change the air toxics standard for primary lead smelting. 76 Fed. Reg. 9410. EPA is proposing a reduced facility-wide lead emission limit of 0.22 pounds of lead per ton of lead produced in response to the technology review conducted under requirements of the Clean Air Act. Because the residual risk assessment indicated excessive noncancer risk based on exceedances of the lead National Air Ambient Quality Standards (NAAQS) by a factor of 50, EPA is proposing to establish an ambient lead concentration limit of 0.15 $\mu\text{g}/\text{m}^3$ and a combined lead emissions cap of 0.91 tons per year from refining and furnace area operations. The proposed rule would also correct applicability language from the 1999 standard, and like other similar proposed rules for other source categories, the proposed rule would eliminate provisions related to emissions during periods of start-up, shutdown, and malfunction. According to EPA, the proposed standards would affect only one facility in Missouri and most of the actions necessary for the facility to meet these new standards are being required by a consent decree. Comments on the proposed rule are due April 4, 2011.

V. Air Toxics—Mercury Cell Chlor-Alkali Plants

On March 14, 2011, EPA published a supplemental proposal to the maximum achievable control technology standards for facilities known as mercury cell chlor-alkali plants that produce chlorine and other chemicals. 76 Fed. Reg. 13,852. In the supplemental proposal, EPA is seeking public comment on a new proposed option to prohibit mercury emissions from mercury cell chlor-alkali plants. To comply, facilities could either convert to non-mercury technology or cease their chlorine production operations. According to EPA, there are only two remaining mercury cell chlor-alkali facilities in the United States that would be affected by the rule. One is in New Martinsville, West Virginia, and the other is in Ashtabula, Ohio. Comments are due May 13, 2011.

VI. Air Toxics—Chemical Manufacturing Area Sources

On March 14, 2011, EPA issued a final rule to stay the requirement for certain affected sources to comply with the Title V permit program during the pendency of the reconsideration process of certain provisions in the NESHAP for chemical manufacturing area sources. Among the provisions EPA is reconsidering is a requirement that certain affected sources obtain a permit. Included in the final rule was a new provision that stated that “[a]ny source that was a major source and installed a control device on a CMPU [Chemical Manufacturing Process Unit] after November 15, 1990, and, as a result, became an area source under 40 CFR part 63 is required to obtain a permit under 40 CFR part 70 or 40 CFR part 71.” 40 C.F.R. 63.11494(e). EPA previously issued a 90-day stay of the requirement for these affected sources to comply with the Title V permit program on December 14, 2010, but because EPA believes that the reconsideration process will not be completed within 90 days, EPA is promulgating the stay of compliance.

VII. Air Toxics—Boilers, CISWIs, and SSIs

On March 21, 2011, EPA published final rules promulgating emissions standards for major and area

source industrial boilers (76 Fed. Reg. 15,608; 76 Fed. Reg. 15,554), commercial and solid waste incinerators (CISWIs) (76 Fed. Reg. 15,704) and sewage sludge incinerators (SSIs) (76 Fed. Reg. 15,372) in response to a D.C. Circuit order denying the agency's request for additional time to finalize the standards. The final rules take effect May 20, 2011. The standards for boilers will reduce emissions of mercury, organic air toxics, and dioxins. The standards for CISWIs will reduce emissions of mercury, lead, cadmium, nitrogen dioxide, and particulate matter. The standards for SSIs will reduce emissions of mercury, lead, cadmium, and hydrogen chloride. According to EPA, the final rules will cost 50 percent less to implement than the proposed rules.

Facilities with boilers are required to meet the new standards by 2014. The updated standards apply to boilers at large sources of air toxics emissions (e.g., refineries, chemical plants, and other industrial facilities) and boilers located at small sources of air toxics emissions (e.g., universities, hospitals, hotels, and commercial buildings). For boilers at major source facilities, the final rule establishes a work practice standard, instead of a numeric emission limit, for: all new and existing natural gas- and refinery gas-fired units; all new and existing units with a heat input less than 10 mmBtu/hr; and "limited use" boilers that operate less than 10 percent of the year as emergency and backup boilers to supplement process power needs. All other existing and new boilers and process heaters located at major sources have numeric emission limits. Operators of new and existing natural gas- and refinery gas-fired units are required to perform an annual tune-up for each unit, while operators of small and limited use boilers are required to perform a tune-up every other year. The final rule for boilers at major sources requires monitoring, including continuous monitoring of PM emissions by the largest major source boilers and monitoring of oxygen by all units larger than 10 mmBtu/hr. The final rule also requires existing major source facilities to conduct a one-time energy assessment. EPA estimates the benefits associated with reduced exposure to PM_{2.5} and ozone to range from \$22 billion to \$54 billion in 2014 and estimates the cost of installing and

maintaining controls for the final standards for boilers at major sources to be \$1.4 billion per year.

The standards for boilers located at small sources were "dramatically refined" and for some sources the standards were revised from maximum achievable control technology to generally available control technology. Under the final area source rule, existing coal-fired boilers with heat input equal or greater than 10 mmBtu/hr are required to meet numeric emission limits for mercury and CO and biomass. Oil-fired boilers and small coal-fired boilers (<10 mmBtu/hr) are required to meet a work practice standard or a management practice by performing a boiler tune-up every other year. All area source facilities with large boilers are required to conduct an energy assessment. EPA estimates the benefits associated with reduced exposure to PM_{2.5} to range from \$210 million to \$520 million in 2014 and estimates the cost of installing and maintaining controls for the boilers at area sources to be \$487 million per year.

The final CISWI rule revises the December 2000 new source performance standards and emission guidelines for new and existing CISWI units. The final rule covers the following four CISWI subcategories: incinerators; energy recovery units; waste burning kilns; and small incinerators in very remote locations. In the final rule, EPA establishes emission limits for the following nine pollutants regulated under section 129 of the Clean Air Act: mercury; lead; cadmium; HCl; PM; carbon monoxide; dioxins/furans; NO_x; and SO_x. The final rule also requires stack testing, monitoring, additional monitoring for new sources, annual inspections of emission control devices, annual visible emissions test of ash-handling operations, and specified procedures for test data submittal. The standards will result in CISWI units installing add-on controls to capture emissions or using alternative waste disposal methods such as diverting waste to a landfill. Compliance is required no later than three years after EPA approves a state plan for implementing the final rule or February 21, 2016, whichever is earlier. EPA estimates the monetized benefit of the final rule to range from a low of \$360 million to a high of \$870 million in 2016 and estimates the cost of installing and maintaining controls for the CISWI rule to be \$232 million per year.

The final SSI rule represents the first time EPA has regulated SSI units under section 129 of the Clean Air Act. The final rule covers two SSI subcategories: multiple hearth and fluidized bed. It establishes new source performance standards and emission guidelines for new and existing SSI units. Such units burn dewatered sewage sludge and are typically located at wastewater treatment facilities. SSI units are typically found at wastewater treatment facilities. The final rule reflects the agency's final definition of non-hazardous waste which provides that sewage sludge is solid waste and regulates sewage sludge incineration under section 129 and not section 112 of the Clean Air Act. Accordingly, the final rule establishes emission limits for the following nine pollutants regulated under section 129 of the Clean Air Act: mercury; lead; cadmium; HCl; PM; carbon monoxide; dioxins/furans; NO_x; and SO_x. While the majority of SSI units currently meet the emission limits in the final rule, those that do not will need to install one or more air pollution control devices. EPA estimates the benefits associated with reduced exposure to PM_{2.5} to be in the \$21 million to \$25 million range in 2015 and estimates the costs of installing and maintaining controls to be \$18 million per year.

Because the final boiler and CISWI standards "significantly differ" from the proposals, EPA also published notice on March 21, 2011, that it was initiating a reconsideration process to consider a number of what it termed "difficult technical issues" that were raised during the comment period on the proposed rule for boilers and CISWIs. 76 Fed. Reg. 15,266. The SSI rule is not part of the reconsideration. Some of the technical issues identified for reconsideration include: revisions to the major subcategories in the major source boilers rule; establishment of a fuel specification in the major source boilers rule through which gas-fired boilers that use a fuel other than natural gas may be considered Gas 1 units; establishing work practice standards for limited use major source boilers; establishment of standards for biomass and oil-fired area source boilers based on generally available control technology; revision of the proposed subcategory for energy recovery units for CISWI units; establishment of fuel switching provisions for CISWI units; revision of the proposed definition of

CISWI to exclude cyclonic burn barrels; and providing an affirmative defense for malfunction events for area and major source boilers and for CISWI units. *Id.* at 15,267/2–3. In addition, EPA identified the following "issues of central relevance that arose after the period for public comment or [that] may have been impracticable to comment upon": revisions to the proposed monitoring requirements for carbon monoxide for major source boilers and for CISWI units; revisions to the proposed dioxin emission limit and testing requirement for major source boilers; establishing a full-load stack test requirement for carbon monoxide coupled with continuous oxygen monitoring for major source boilers and CISWI units; establishing a definition of "homogenous waste" in the CISWI rule; setting PM standards under generally available control technology for oil-fired area source boilers; and certain findings regarding the applicability of Title V permitting requirements for area source boilers. *Id.* at 15,267/3. EPA states the "Agency is in the process of developing a proposed reconsideration notice that identifies the specific elements of the rules for which [EPA] believe[s] further public comment is appropriate and any provisions that [EPA] propose[s] to modify after more fully evaluating the data and comments already received." EPA advises it "may also seek public comment on other aspects of the portions of the rules [the Agency] decide[s] to reconsider in addition to other provisions in these rules." EPA promises to "evaluate any petitions submitted to the Agency by members of the public requesting that the Agency reconsider any aspects of these rules" and to "consider for inclusion in any forthcoming proposed reconsideration notice all additional issues for which [EPA] determine[s] that reconsideration is appropriate." *Id.*

VIII. Air Toxics—Utility MACT

On March 16, 2011, EPA proposed the first national mercury and air toxics standards for new and existing coal- and oil-fired power plants (utility maximum achievable control technology [MACT]). The proposed rule would set technology-based emissions limitation standards for mercury, hydrogen chloride (HCl) as a surrogate for acid gases, and particulate matter (PM) with an option for measuring total metals

as a surrogate for non-mercury metals. If finalized, these standards will result in the upgrading of existing controls, such as PM controls like electrostatic precipitators, and the installation of new controls, such as fabric filters, scrubbers, dry sorbent injection systems, and activated carbon injection systems. To limit emissions of organic air toxics, including dioxins and furans, the proposed rule would establish work practice standards instead of numerical emission limits and would require an annual performance test to ensure optimal combustion. To provide flexibility in achieving the standards, EPA is proposing to allow facility-wide averaging for all hazardous air pollutant emissions from existing units within the same subcategory. Based on the design of the various types of boilers at different power plants, EPA has identified two different subcategories of coal-fired electric generating units (EGUs), two different subcategories of oil-fired EGUs, and a subcategory for units that combust gasified coal or solid oil (integrated gasification and combined cycle (IGCC) units). For certain subcategories of power plants the proposal would establish alternative standards, including SO₂ instead of HCl, individual non-mercury metal air toxics instead of PM, and total non-mercury metal air toxics instead of PM. EPA is proposing to subcategorize coal-fired boilers located at mine mouths that are generally designed to burn lignite coal. For this subcategory, EPA is proposing a mercury limit based on “beyond the floor” emission reductions. EPA is also proposing to subcategorize solid and liquid oil units because petroleum coke is a solid fuel and cannot be burned in a liquid oil-fired boiler. Under the proposed rule, existing power plants must comply in three years, but individual sources can obtain an additional year if technology cannot otherwise be installed in time. EPA states it expects that plants totaling less than 10 gigawatts of the nation’s coal-fired capacity are expected to retire by 2015 rather than invest in control technologies. EPA states that this represents a decrease in coal-fired generation of approximately 2 percent and that these plants are the smaller, less efficient and higher polluting units that are not used much. According to EPA, each year these proposed standards would reduce 91 percent of mercury emissions from coal-fired power plants, 91 percent of acid gases from power plants, and 55 percent of sulfur

dioxide emissions from power plants. In addition to reducing air toxics, EPA states that the proposed utility MACT would reduce emission of fine PM (PM_{2.5}) and SO₂. EPA estimates that the health benefits of the proposed standards range from a low of \$59 billion to a high of \$140 billion in 2016 and that the costs will be \$10.9 billion in 2016. EPA states that these standards will provide regulatory certainty and a “level playing field” for cleaner energy sources. EPA promises “to take into account the combined effects of . . . upcoming rulemakings” on power plants, including the transport rule, ozone and PM National Ambient Air Quality Standards, coal combustion wastes, cooling water control requirements, and greenhouse gas emissions. EPA is also proposing to revise the new source performance standards (NSPS) for fossil fuel-fired EGUs. This NSPS would revise the standards that new coal- and oil-fired power plants must meet for PM, SO₂, and nitrogen oxides (NO_x). EPA will hold three public hearings on the proposal in Atlanta, Georgia, Chicago, Illinois, and Philadelphia, and will take public comment on the proposal for sixty days following publication in the *Federal Register*. EPA is obligated under a consent decree to promulgate the final utility MACT by November 2011.

IX. Climate Change—GHG Reporting Program

On December 27, 2010, EPA published three actions related to data elements reported under EPA’s Greenhouse Gas (GHG) Reporting Program: (1) an interim final rule deferring until August 31, 2011, reporting of data elements that are inputs to emissions equations (e.g., heat input and fuel use) (75 Fed. Reg. 81,350); (2) a proposed rule to defer for calendar years 2010, 2011, and 2012 those data elements that are inputs to emission equations until March 31, 2014, to allow EPA to evaluate the issues associated with public availability of the information (75 Fed. Reg. 81,338); and (3) a request for information on inputs to emission equations to allow EPA to evaluate the issues related to making such data public (75 Fed. Reg. 81,366). In July 2010, EPA proposed to determine that information included in emissions equations are “emissions data” and cannot be protected as confidential business information under the Clean Air

Act. The interim final rule took effect December 27, 2010, and comments on the proposal were due January 26, 2011, or by February 10, 2011, if a hearing was requested. Information in response to the call for information was due February 25, 2011. The new information and reporting deferral are intended to allow EPA to assess the issue and make final decisions on how to treat the data elements in question. The proposed updates to the Greenhouse Gas Reporting Program do not change the requirement that facilities retain these data so that EPA may follow up with facilities through on-site audits.

On March 18, 2011, EPA published a final rule deferring the original deadline for reporting year 2010 GHG emissions from March 31, 2011, to September 30, 2011. 76 Fed. Reg. 14,812. The final rule took effect upon publication and changes only the deadline for reporting for 2011. It does not change the reporting deadline for future years and does not change what data must be reported. EPA states that its intent to publish nonconfidential 2010 data by December 2011 remains unchanged. EPA also states in its press release that it plans to have the final uploading tool, called the Electronic Greenhouse Gas Reporting Tool (e-GGRT), available this summer. Because the regulatory deadline for reporters of 2010 GHG data to register in e-GGRT is at least 60 days before the reporting deadline (40 C.F.R. 98.4(d)), this reporting deadline extension also has the effect of extending the registration deadline to at least 60 days before September 30, 2011. Registration involves submittal of a certificate of representation.

X. Climate Change—PSD and Title V Permitting

On December 13, 2010, EPA published its final prevention of significant deterioration (PSD) SIP call rule for GHGs, finding that the PSD provisions in EPA-approved state implementation plans (SIPs) for all or part of 13 states are “substantially inadequate” to meet Clean Air Act requirements because they do not authorize application of PSD requirements to GHGs emitted from stationary sources. 75 Fed. Reg. 77,698. The 13 states issued a determination that their SIPs were deficient include Arizona, Arkansas, California,

Connecticut, Florida, Idaho, Kansas, Kentucky, Nebraska, Nevada, Oregon, Texas, and Wyoming. The final rule establishes the deadline for each state’s submittal of SIP revisions to incorporate GHGs into the state’s PSD program. Seven of the states (Arizona, Arkansas, Florida, Idaho, Kansas, Oregon, and Wyoming) chose to accept the earliest SIP submittal deadline of December 22, 2010. Five of the states selected SIP submittal dates after December 22, 2010, because these states do not expect to act on PSD permits between January 2, 2011, and their chosen SIP submittal dates. Because Texas did not select a SIP submittal date, it became subject to the rule’s “default” date of December 1, 2011. Litigation challenging the final PSD SIP call is pending in the D.C. Circuit.

On December 29, 2010, EPA published a final finding of failure to submit SIP revisions to add authority to regulate GHG emissions under PSD programs for the states that had agreed to a SIP submittal deadline of December 22, 2010. 75 Fed. Reg. 81,874. On December 30, 2011, EPA published a final FIP for GHG PSD requirements in the seven states that had agreed to a SIP submittal deadline of December 22, 2010, which they did not meet. 75 Fed. Reg. 82,246. Litigation challenging the final finding of failure to submit and final FIP is pending.

Because Texas refused to cooperate with EPA, the agency published an interim final rule on December 30, 2010, partially disapproving Texas’s PSD SIP effective January 2, 2011. 75 Fed. Reg. 82,430. EPA states in this rule that it made an error when it previously approved Texas’s PSD SIP because Texas did not address how its program will apply to pollutants newly subject to regulation and did not provide assurances that the program has adequate legal authority to apply to such pollutants. Because EPA, in this interim final rule, disapproves Texas’s PSD SIP in this respect, EPA also issued a FIP to take over PSD permitting of large sources of GHGs in Texas effective immediately through April 30, 2011. EPA also published a parallel proposed rule to partially disapprove Texas’s PSD SIP under EPA’s interpretation of the Clean Air Act’s “error correction” provisions. 75 Fed. Reg. 82,365. The proposed rule tracks the interim final rule. If finalized,

the proposed rule would replace the interim final rule beginning May 1, 2011. EPA held a public hearing on the proposed rule in Dallas on January 14, 2011, and comments were due February 12, 2011. Litigation challenging the interim final rule is currently pending in the D.C. Circuit. If the rule survives Texas's legal challenge, major new and modified sources in Texas will be required to obtain a dual permit, with EPA imposing conditions on GHG emissions and Texas doing so for emissions of all other regulated pollutants.

On December 30, 2010, EPA published its so-called narrowing rule to ensure that 24 states will not have to issue, as a matter of federal law, PSD permits for sources that emit GHGs below the emission threshold levels specified in EPA's tailoring rule even if those states have not adopted the tailoring rule levels into their PSD SIPs. 75 Fed. Reg. 82,536. This final rule withdraws EPA's approval of those states' PSD SIPs (i.e., "narrows" EPA's previous PSD SIP approvals) in the 24 states that have PSD SIPs that, according to EPA, would have required PSD permits to be issued at levels below those specified in the tailoring rule. The 24 states are Alabama, California, Colorado, Georgia, Indiana, Iowa, Louisiana, Maine, Maryland, Mississippi, Missouri, New Hampshire, New Mexico, North Carolina, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virginia, and Wisconsin.

Also on December 30, 2010, EPA published its so-called narrowing rule to ensure that 33 states and other jurisdictions will not have to issue Clean Air Act Title V permits for sources that emit GHGs below the emission threshold level specified in EPA's tailoring rule even if those states and jurisdictions have not adopted the tailoring rule level into their Title V operating permit programs. 75 Fed. Reg. 82,254. This final rule withdraws EPA's approval of those states' and jurisdictions' Title V programs (i.e., "narrows" EPA's previous Title V program approvals) in the 33 states and other jurisdictions that have Title V programs that, according to EPA, would have required Title V permits to be issued at levels below those specified in the tailoring rule. The 33 states and jurisdictions are Alabama, California, Colorado, District of Columbia, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana,

Maine, Maryland, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, New York, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Utah, Vermont, Virgin Islands, Virginia, Washington, West Virginia, and Wisconsin.

On March 21, 2011, EPA published a proposed rule that would defer application of PSD and Title V permitting requirements to carbon dioxide (CO₂) emissions from bio-energy and other biogenic stationary sources for a period of three years to allow EPA time to determine how best to account for biogenic CO₂ emissions. 76 Fed. Reg. 15,249. During the three-year deferral period, EPA states that it plans to "conduct a detailed examination of the science associated with biogenic CO₂ emissions from stationary sources" and will engage with various federal partners and outside technical experts and scientists "to consider technical issues that the Agency must resolve in order to account for biogenic CO₂ emissions in ways that are scientifically sound and also manageable in practice." *Id.* at 15,251/3. In addition to the proposed rule, EPA also issued interim guidance designed "to help permitting authorities establish a basis for concluding that [best available control technology] BACT (which is one of the statutory conditions for receiving a [PSD or Title V] permit) for GHG emissions at [stationary] sources is combustion of biomass fuel by itself." *Id.* at 15,263/3. EPA defines the term "biogenic CO₂ emissions" as "emissions of CO₂ from a stationary source directly resulting from the combustion or decomposition of biologically-based materials other than fossil fuels." *Id.* at 15,251/3. EPA provides the following nonexhaustive list of biogenic CO₂ emissions: (1) CO₂ generated from the biological decomposition of waste in landfills, wastewater treatment, or manure management processes; (2) CO₂ from the combustion of biogas collected from biological decomposition of waste in landfills, wastewater treatment, or manure management processes; (3) CO₂ from fermentation during ethanol production; (4) CO₂ from combustion of the biological fraction of municipal solid waste or biosolids; (5) CO₂ from combustion of the biological fraction of tire-derived fuel; and (6) CO₂ derived from combustion of biological material, including all types of wood and

wood waste, forest residue, and agricultural material. *Id.* at 15,262/3. Comments are due May 5, 2011. EPA plans to finalize the rulemaking deferring requirements for CO₂ emissions from biomass-fired and other biogenic sources for three years by July 2011.

XI. NAAQS—Carbon Monoxide

On February 11, 2011, EPA published a proposed rule proposing to retain the current carbon monoxide (CO) National Ambient Air Quality Standards (NAAQS). 76 Fed. Reg. 8158. In the proposal, EPA is also proposing changes to the ambient air monitoring requirements for CO including those related to network design. Comments are due April 12, 2011.

XII. NAAQS—Lead

On January 26, 2011, EPA published notice of a public teleconference of the EPA Science Advisory Board Lead Review Panel on February 2, 2011. 76 Fed. Reg. 4660. The purpose of the teleconference is to discuss the lead review panel's draft advisory report concerning the following two EPA documents: "Approach for Developing Lead Dust Standards for Residences" (Nov. 2010 Draft) and "Approach for Developing Lead Dust Standards for Public and Commercial Buildings" (Nov. 2010 Draft).

XIII. NAAQS—Ozone

On December 22, 2010, EPA published a proposed rule in response to a petition by the Natural Resources Defense Council (NRDC) for administrative reconsideration of an August 11, 2009, final rule that allows "outside-the-area" emission reduction crediting for compliance with the "reasonable further progress" (RFP) provisions of EPA's phase 2 rule for implementing the 1997 eight-hour ozone NAAQS. 75 Fed. Reg. 80,420. Under the proposed rule, states would be prohibited from taking credit for emission reductions at sources located outside an ozone nonattainment area to meet the RFP obligations applicable to that nonattainment area. EPA also requests comment on whether there are sound policy reasons for allowing states to take credit for such

emission reductions. Comments were due February 7, 2011.

In a motion filed on December 8, 2010, in the ozone NAAQS litigation, *Mississippi v. EPA*, No. 08-1200 (D.C. Cir.), EPA announced that it needs until July 29, 2011, to complete the 2008 Ozone NAAQS Reconsideration Rule. The motion states that the EPA administrator "recently determined that additional advice from [CASAC] may prove useful and important in evaluating the scientific and other information before her." EPA explains it needs an additional seven months because it "intends to submit questions to the [Clean Air Scientific Advisory Committee (CASAC)] panel for the Ozone NAAQS Rule requesting additional advice" and that the CASAC process "includes an opportunity for the public to submit comments." CASAC is the independent scientific review committee established and tasked by Congress with giving EPA advice on air quality standard setting. The motion and the supporting declaration of EPA Assistant Administrator for Air and Radiation Regina McCarthy outline the agency's next steps for completing the ozone NAAQS reconsideration rulemaking by July 29, 2011. First, the agency plans to develop a set of questions for CASAC and provide them for CASAC's review. The questions will request CASAC's additional advice on the scientific evidence and other information before the administrator. According to the motion, EPA heard testimony during three public hearings from 210 interested stakeholders and received "more than 5,000 unique comments" on its proposed rule reconsidering the ozone NAAQS. Step 1 will take place during December 2010 and January 2011. Second, CASAC will hold a public meeting to discuss its response. EPA expects that the public meeting will take place in February 2011. Third, CASAC will provide its additional advice to EPA by letter. EPA expects that it will have CASAC's letter "shortly after" the public meeting that is anticipated in February 2011.

On January 26, 2011, EPA published a notice announcing two public teleconferences on February 18, 2011, and March 3, 2011, of the CASAC Ozone Review Panel for the Reconsideration of the 2008 Ozone NAAQS. 76 Fed. Reg. 4661. On February 28, 2011, EPA published notice that CASAC Ozone

Review Panel for the Reconsideration of the 2008 Ozone NAAQS would continue its discussion of its advice on EPA's reconsideration of the 2008 Ozone NAAQS on March 23, 2011. 76 Fed. Reg. 10,895.

With an eye toward its next ozone NAAQS review, on February 28, 2011, EPA published notice of a 60-day public comment period on the draft "First External Review Draft Integrated Science Assessment for Ozone and Related Photochemical Oxidants." 76 Fed. Reg. 10,893. Comments must be received by April 29, 2011.

XIV. NAAQS—Second Standard for Oxides of Nitrogen and Sulfur

EPA published notice of the availability of the "Policy Assessment for Review of the Secondary National Ambient Air Quality Standards for Oxides of Nitrogen and Sulfur" (Jan. 14, 2011 version). 76 Fed. Reg. 4695. The policy assessment document contains EPA staff analysis of the scientific bases for alternative policy options for consideration by EPA before rulemaking. EPA states it will continue with final document production, including final reference checks and document formatting, and that it expects to release the final policy assessment document around the end of January, but is releasing the January 14, 2011, version of the final policy assessment document to allow sufficient time for review of EPA's final policy assessment document by EPA's Clean Air Science Advisory Committee before its meeting on February 15 and 16, 2011. EPA in fact released the final policy

assessment document on February 4, 2011, and published notice of its availability on February 15, 2011. 76 Fed. Reg. 8735.

XV. NAAQS—Sulfur Dioxide

On January 26, 2011, EPA denied all requests for reconsideration of the one-hour SO₂ NAAQS that was promulgated in June 2010 and also denied all requests for an administrative stay of the rule, finding petitioners' arguments "inadequate and generally irrelevant." 75 Fed. Reg. 4780. In the proposed SO₂ NAAQS that was issued in 2009, EPA indicated it intended to rely on monitoring data for classifying areas as attainment or nonattainment, but in the preamble to the June 2010 SO₂ NAAQS, EPA stated that demonstrations of attainment with and maintenance of the new standards were to be based upon air quality modeling demonstrations, rather than on the use of actual measurements of air quality. Industry and several states submitted petitions for reconsideration requesting that EPA either clarify how it intended to implement the new one-hour standard or reopen the proceeding to allow notice and comment rulemaking on the agency's new modeling approach to implementation. Currently, states must submit to EPA their recommendations for designations of areas as attainment, nonattainment, or unclassifiable by June 2, 2011, and their section 110(a)(2) "infrastructure" state implementation plans by 2013. Litigation challenging the SO₂ NAAQS is pending in the D.C. Circuit, and any petitions for review of the January 26, 2011, denial action are due March 28, 2011.

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EPA REGION 1

**Dixon Pike, Brian Rayback, and
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Pierce Atwood LLP

I. Regional Greenhouse Gas Initiative

The 11th Regional Greenhouse Gas Initiative (RGGI) auction took place on March 9, 2011, and resulted in total proceeds of \$83,425,588 for the participating states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. At the auction, all of the 41,955,813 CO₂ allowances for 2009–2011 sold at a price of \$1.89 per allowance, and all 2,144,710 CO₂ allowances for the future control period of 2012–2014 sold at the same price. A total of 43 entities submitted bids in the auction, the majority of which were electric generators and their corporate affiliates. Cumulative proceeds from all eleven of the RGGI auctions now total more than \$860.9 million. The next RGGI auction is scheduled for June 8, 2011.

II. Northeast Diesel Collaborative

In December 2010, the Northeast Diesel Collaborative (NEDC), a regional partnership formed to reduce diesel emissions and comprised of public and private entities (including EPA Region 1 and the environmental agencies of all six New England states, plus New York and New Jersey) issued a model contract specification entitled “Diesel Emission Controls in Construction Projects.” The model contract specification is designed to offer guidance to public and private institutions interested in addressing diesel emission reductions through future construction contracts. Among other things, the NEDC recommends, through the model specification, that such institutions undertaking large construction projects in high-risk areas (1) require the highest level of emission control available, (2) include the widest range of diesel on-road vehicles, nonroad equipment, and generators, (3) implement or enforce idle-reduction policies at construction sites, and (4) require the use of ultra-low sulfur diesel fuel. The full text of the model specification can be found at the NEDC’s Web site (www.northeastdiesel.org).

III. Connecticut Adopts Tailoring Rule

Effective January 28, 2011, the Connecticut Department of Environmental Protection (CDEP) amended its air pollution rules to authorize regulation of greenhouse gas (GHG) emissions through its prevention of significant deterioration (PSD) and Title V permitting programs in accordance with the EPA’s prevention of significant deterioration and Title V greenhouse gas tailoring rule, 75 Fed. Reg. 31,514 (June 3, 2010) (GHG tailoring rule). The rule amendments are consistent with the GHG tailoring rule in that they limit GHG permitting requirements to major new sources and major modifications calculated using the thresholds established in the federal regulations. Although the amendments do not include the phase-in approach adopted by EPA in the GHG tailoring rule, CDEP indicated in response to public comment that, in view of the likely timing of EPA approval of the state implementation plan (SIP) revisions submitted by CDEP in conjunction with the amendments, the failure to implement the phase-in approach would have no practical impact.

IV. Connecticut Lawn Equipment Exchange Program

On March 24, 2011, CDEP announced that 76 towns and school districts will receive portions of almost \$500,000 in funding pursuant to its Lawn Equipment Exchange Fund (LEEF) program, which provides reimbursement to eligible recipients for 80 percent of the costs associated with replacing old lawn and grounds maintenance equipment with new, low-polluting machines. CDEP indicated that the funds awarded pursuant to the LEEF program will allow for the replacement of nearly 360 pieces of older equipment and, using an EPA model in conjunction with cost and utilization factors provided in applications submitted by the recipients of the funds, would result in emission reductions estimated at more than 100 tons over the life of the new equipment. The LEEF program is funded through a \$550,000 supplemental environmental project related to violations of federal new source review regulations by a midwestern power company.

V. Maine Adopts Tailoring Rule

Proposed changes by the Maine Department of Environmental Protection (MDEP) to chapter 100 of its air licensing regulations to implement EPA's GHG tailoring rule were adopted by the Board of Environmental Protection (BEP) at its February 3, 2011, meeting. The new rules mirror the federal standards with respect to the definitions of "greenhouse gases" (GHGs) and "carbon dioxide equivalents" (CO₂e) and the regulatory thresholds for major sources (potential emissions of 100,000 tons/year of CO₂e) and major modifications (net emissions increase of 75,000 tons/year of CO₂e). Additionally, the new rules reflect an intent that GHGs will not be subject to licensing for new minor sources and minor modifications and that GHGs will not need to be considered in best available control technology (BACT) for new minor sources or best practical treatment (BPT) analyses for renewals of minor or major source licenses. Also consistent with EPA's GHG tailoring rule, the new rules make no distinction between CO₂ from combustion of fossil fuels versus CO₂ from combustion of renewable or biogenic fuels, although MDEP included in chapter 100 a "Note" regarding its intent to make further regulatory amendments to exclude biomass in the event EPA does so. Furthermore, in response to public comment, MDEP incorporated into its final rules EPA's phase-in approach adopted under the GHG tailoring rule.

VI. Maine Regional Haze SIP

MDEP submitted its state implementation plan for regional haze (regional haze SIP) to EPA for approval in December 2010. Pursuant to rules promulgated in 1999 under the Clean Air Act (CAA), each state is required to submit a regional haze SIP demonstrating that "reasonable progress" is being made toward meeting a goal of achieving natural visibility conditions in certain federally protected parks and wilderness areas designated as "Class I" areas by the year 2064. The state of Maine contains or shares portions of three Class I areas. The regional haze SIP addresses regional haze plans for the ten-year period from 2008 to 2018. Specifically, the regional haze SIP includes, among other things, a determination of best available

retrofit technology for specific sources defined in the CAA, a low-sulfur oil strategy, and an initiative targeting a 90 percent sulfate reduction for certain electric generating unit stacks impacting Class I areas throughout the eastern United States. Maine must submit revisions to the regional haze SIP every five years that further evaluate progress toward meeting the "reasonable progress" goal, and must update its long-term strategy in 2018 and every 10 years thereafter.

VII. Massachusetts Clean Energy and Climate Plan

In December 2010, the Massachusetts Executive Office of Energy and Environmental Affairs (EEA) released the Clean Energy and Climate Plan for 2020 (clean energy plan) that sets the statewide GHG emissions limit for 2020 at 25 percent below 1990 levels. The clean energy plan was required by the Global Warming Solutions Act (GWSA), signed into law in Massachusetts in 2008, which mandates a statewide reduction in GHG emissions to 80 percent below 1990 levels by 2050. The GWSA also required that the EEA set a legally enforceable GHG limit of between 10 and 25 percent for 2020 by January 1, 2011. Pursuant to the clean energy plan, the combination of established state policies and additional contemplated measures, each aimed at reducing GHG emissions while growing the green economy, supported setting the 2020 emissions limit at the statutory maximum. The plan estimates that between 42,000 and 48,000 jobs in Massachusetts would result from full implementation of the plan in 2020.

VIII. Massachusetts LEV Regulations

The Massachusetts Department of Environmental Protection (MassDEP) filed, on an emergency basis, amendments to its low emission vehicle (LEV) program regulations on December 3, 2010. Under Massachusetts law, MassDEP is required to adopt California's vehicle emission standards, as set by the California Air Resources Board (CARB), as long as those standards achieve, in the aggregate, greater emission reductions than federal standards. The LEV amendments incorporate two recent revisions made by the CARB to the California GHG emission standards.

First, the amendments allow auto manufacturers to comply with fleet average GHG emission standards for model year 2009–2011 vehicles by “pooling” vehicle sales in all jurisdictions that have currently adopted the CARB standards, rather than having to comply on a state-by-state basis. Second, the amendments implement the terms of a May 2009 agreement between the Obama administration, the state of California, and auto manufacturers that effectively harmonized EPA and CARB emission standards for model year 2012–2016 vehicles. As emergency regulations, the LEV amendments were effective upon filing, but were subsequently revised in March 2011 pursuant to a public hearing and commentary received by MassDEP in January.

IX. Tailoring Rule Implementation in Massachusetts

EPA administers the PSD permitting program in Massachusetts and has not delegated authority to MassDEP to implement the EPA PSD program there. Accordingly, EPA will implement the GHG tailoring rule requirements for the PSD permitting program in Massachusetts. No regulatory amendments have been proposed by MassDEP with respect to its non-PSD and Title V permitting programs in connection with the GHG tailoring rule, and there is no indication at this time that it intends to do so.

X. New Hampshire VOC Regulations

As reported in our last regional update, the New Hampshire Department of Environmental Services (NHDES) has initiated rulemaking to readopt and update the rules regarding volatile organic compound (VOC) emissions from stationary sources. NHDES published draft rules regarding VOC emissions in February 2011. The proposed amendments, in addition to clarifying existing requirements, incorporate 9 of the 11 control techniques guidelines (CTGs) issued in 2006–2008 by EPA to reduce ozone in nonattainment areas. To incorporate the federal CTGs, the proposed rules include, among other things, newly added emission limits, control technology standards, and work practice standards for new categories of flat wood paneling, fiberglass boat manufacturing materials,

and certain industrial adhesives. Additionally, previously unregulated industrial cleaning solvent activities will be covered under the proposed rules. A public hearing on the proposed rules was held on April 1, and the deadline for public comment is April 11.

XI. New Hampshire Adopts Tailoring Rule

NHDES has recently adopted rule amendments implementing provisions of EPA’s final GHG tailoring rule. The rule changes adopted the federal definitions for both GHGs and CO₂e, and modified the existing definitions of “major source,” “major stationary source,” and “significant” to clarify that the federal GHG thresholds established by the GHG tailoring rule, specifically the major source threshold of 100,000 tons of CO₂e per year and the major modification threshold of a net increase of at least 75,000 tons of CO₂e per year, will apply. The new rules are effective as of December 21, 2010.

XII. Movement Afoot to Pull New Hampshire out of RGGI

On March 30, 2011, the New Hampshire House of Representatives approved HB 519, which if enacted would end the state’s participation in RGGI, by a vote of 251 to 108. The bill also repeals New Hampshire’s Greenhouse Gas Emissions Reduction Fund, which is funded by the sale of RGGI allowances and provides grant money for energy efficiency initiatives for citizens, nonprofits, businesses, and governmental entities throughout the state. HB 519 will next be considered by the New Hampshire Senate, where the bill will need 16 votes to overcome an anticipated veto from Governor John Lynch.

XIII. Rhode Island Regulates Outdoor Wood Boilers

The state of Rhode Island Department of Environmental Management (DEM) recently promulgated Air Pollution Control Regulation No. 48, limiting emissions of particulate matter from outdoor wood boilers (OWBs) in accordance with phase II standards set by EPA’s voluntary outdoor wood-fired hydronic heater program. Regulation No. 48 prohibits,

as of July 1, 2011, the import, supply, distribution, installation, or sale of any OWB, unless it has been certified by EPA to meet a particulate matter emission limit of 0.32 lbs/mmBtu heat output. In addition, the regulation clarifies that, within each burn rate category established in EPA's Test Method 28 for Measurement of Particulate Emissions and Heating Efficiency of Outdoor Wood-fired Hydronic Heating Appliances, no individual test run shall exceed 18.0 grams per hour. Regulation No. 48 also requires all distributors or sellers of OWBs to provide consumers with a notice regarding compliance with state law and regulations, including Regulation No. 48. Regulation No. 48 becomes effective on April 14, 2011.

XIV. Rhode Island Implements Tailoring Rule

Effective January 31, 2011, the DEM amended its air licensing regulations to implement EPA's GHG tailoring rule.

XV. Vermont Implements Tailoring Rule

The Vermont Department of Environmental Conservation (DEC) filed regulatory amendments to its air permitting rules with the Vermont Secretary of State's Office in January 2011 to implement EPA's GHG tailoring rule. The amendments were consistent with the permitting requirements set forth in the GHG tailoring rule, and do not extend to new minor sources or minor modifications. However, the amendments permit the DEC to expand the definition of "greenhouse gases" beyond the EPA definition to any pollutant that it "may reasonably anticipate to cause or contribute to climate change." In addition, in response to public comment, the DEC did indicate that it may engage in future rulemaking to extend GHG permitting to sources not covered by the GHG tailoring rule. The amendments took effect on February 8, 2011.

XVI. Vermont Regulates Outdoor Wood Boilers

In December 2010, the Vermont Agency of Natural Resources, Air Pollution Control Division (APCD) launched a voluntary OWB change-out program

providing financial incentives to encourage the replacement of old OWBs with cleaner and more efficient heating systems, including new OWBs compliant with Vermont's phase II emission standards; propane or natural gas furnaces or boilers; APCD-approved indoor wood or pellet boilers; and certain sustainable heating systems, such as geothermal heat pumps. Recently enacted legislation in Vermont directed the APCD to implement the change-out program and mandated that certain OWBs, including those within 200 feet of a residence, school, or health care facility not served by the OWB, be retired by December 31, 2012. Under the program, the APCD will issue rebate vouchers ranging from \$1,000 to \$6,000 for eligible replacement OWBs.

XVII. Vermont Revises Testing Guidelines

The APCD revised its source emission testing guidelines, relating to the emission testing of stationary sources in Vermont, in February 2011. Included among numerous technical changes is an update to the list of dioxin/furan equivalency factors to be used to calculate "toxicity equivalent" emissions, in keeping with the most recent EPA guidance. In addition, the revisions incorporate recently promulgated EPA regulations providing that audit samples will be obtained from approved private "accredited audit sample providers," as opposed to EPA itself.

EPA REGION 2

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I. New York State Climate Action Plan

On November 9, 2010, Governor David Paterson released a 600-page Climate Action Plan interim report for public comment. The report evaluates what would need to be done to reduce the state's greenhouse gas (GHG) emissions by 80 percent of 1990 levels by 2050 (in the parlance of the report, "80 by 50"). The report makes recommendations as to the building, industrial, transportation, power-generation, agriculture, forestry, and waste-management sectors of the state's economy. Achieving the 80 by 50 goal (which was referenced in Governor Paterson's Executive Order 24 issued in August 2009) would require far-reaching changes that would extend well beyond the low-hanging fruit of efficiency improvements. The state is expected to issue a final report—which is expected to recommend legislative and regulatory action—some time in 2011.

II. NYSDEC Makes Conforming Revisions to State's NSR Regulations

On March 23, 2011, the New York State Department of Environmental Conservation (NYSDEC) proposed a number of amendments to the state's new source review (NSR) regulations. *See* New York State Register, March 23, 2011. In general the amendments incorporate (1) EPA's NSR rulemakings of May 16, 2008, and October 20, 2010, pertaining to fine particulate matter (PM_{2.5}), and (2) EPA's tailoring rulemakings with respect to the regulation of GHG emissions under the prevention of significant deterioration (PSD) program. NYSDEC later adopted the proposed rule as an emergency rule on April 13, 2011. *See* New York State Register, April 13, 2011. Although the emergency rule will expire on May 26, 2011, it is expected that by that date NYSDEC will have repromulgated the rule as a permanent rulemaking.

III. Cornell University Researchers Publish Report on GHG Footprint of Shale Gas

Robert Howarth from Cornell University and his colleagues published a report addressing the GHG footprint of natural gas extracted from shale formations, concluding that because natural gas is comprised principally of methane (a GHG) and because of leakage that occurs during the extraction process, shale gas has a greater GHG footprint than coal on a total life-cycle basis. The paper was published in *Climate Change Letters* and is posted at www.eeb.cornell.edu/howarth/Marcellus.htm.

IV. Joseph Martens Confirmed as NYSDEC Commissioner

On March 8, 2011, the New York State Senate confirmed Joseph Martens as NYSDEC commissioner. He previously served as president of the Open Space Institute and as deputy secretary for energy under Governor Mario Cuomo.

V. Cruise Ships to Tap the Electric Grid While in Port in NYC

On April 13, 2011, New York City Mayor Michael Bloomberg announced a \$15 million green port infrastructure project to allow large cruise ships docked in slips in New York City to run on the land-based electric grid instead of generating their own electricity. The measure is intended to reduce air pollution.

VI. EPA Settlement with City of Vineland, New Jersey

On March 31, 2011, the United States lodged a proposed settlement with the city of Vineland, New Jersey, which will require the city to retire certain generating units at its electric generating station, spend tens of millions of dollars to upgrade other units and pay a \$850,000 civil penalty. The settlement arose from EPA's allegations that the city operated the facility in excess of the applicable emission limits for opacity, carbon monoxide (CO), and nitrogen oxides (NO_x), and failed to monitor NO_x and sulfur dioxide (SO₂) emissions in compliance with the terms of its Title V

operating permit. The proposed consent decree is posted at www.justice.gov/enrd/ConsentDecrees/r_City_Of_Vineland_Consent_DecreeFinal.pdf.

VII. New York City Enacts Rule Phasing Out Use of Nos. 4 and 6 Fuel Oil

On April 21, 2011, the New York City Department of Environmental Protection published a rule in *The City Record* phasing out the use of No. 4 and No. 6 fuel oil, in order to reduce particulate matter (PM) and NO_x emissions within the city. The new rule requires all new boilers that provide heat or hot water for a building to operate on either natural gas or No. 2 fuel oil. Existing boilers used for these purposes must upgrade to natural gas or No. 2 fuel oil by January 1, 2030. For either new or existing boilers, the building may install pollution control equipment to reduce PM and NO_x emissions to levels equivalent to natural gas or No. 2 fuel oil, instead of fuel switching, but it is expected that the vast majority of buildings will comply by foregoing Nos. 4 and 6 fuel oil. In addition, the city will not renew a certificate of operation for a boiler burning No. 6 fuel oil without the installation of pollution control equipment to reduce emissions at least to the level of No. 4 fuel oil or a compliance agreement with the city with respect to the boiler. According to the city's press release, only one percent of the buildings in the city burn Nos. 4 or 6 fuel oil, but these boilers emit more PM than all the cars and trucks in New York City combined.

EPA REGION 4

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I. Redesignation of the Birmingham PM_{2.5} Nonattainment Area

The Alabama Department of Environmental Management has proposed revisions to the Alabama state implementation plan (SIP) to redesignate the Birmingham nonattainment area for the annual National Ambient Air Quality Standard (NAAQS) for fine particulate matter (PM_{2.5}) to attainment status. Redesignation follows the EPA's determination effective October 20, 2010, that the Birmingham nonattainment area had attained the 2006 24-hour PM_{2.5} NAAQS.

II. TVA Settlement for Widows Creek Generating Station

As of March 15, 2011, EPA and Tennessee Valley Authority (TVA) entered into a consent agreement resolving Clean Air Act violation allegations at TVA's Stevenson, Alabama, Widows Creek Power Plant. TVA will pay a \$450,000 civil penalty and is retiring 931 sulfur dioxide allowances and 13 nitrogen oxide allowances under EPA's nitrogen oxide and acid rain cap and trade programs.

III. Bi-state (Indiana and Kentucky) Louisville PM_{2.5} Nonattainment Area

EPA determined that the bi-state Louisville PM_{2.5} nonattainment area has obtained the 1997 annual average PM_{2.5} NAAQS. 76 Fed. Reg. 12,860.

IV. Florida Regulatory Revisions

The Florida Department of Environmental Protection (DEP) is currently revising the state's air quality regulations to (1) revise the state implementation plan for hospital/medical/infectious waste incinerator units; (2) convert certain Title V general permits to non-Title V general permits; (3) update Florida's nonattainment



new source review rules; and (4) remove or revise obsolete provisions related to ambient air quality standards, prevention of significant deterioration increments, and nonattainment area designations.

DEP is not currently proposing any revisions to its state implementation plan to implement the federal tailoring rule for greenhouse gas pollutants. EPA will be using its federal implementation plan authority to implement greenhouse gas permitting in Florida.

V. Settlement for Importation of Non-complaint Nonroad Engines in Mississippi

On February 28, 2011, EPA and the U.S. Justice Department announced that Mississippi-based PowerTrain, Inc., will pay a civil penalty of \$2 million to resolve claims that the company sold approximately 80,000 nonroad engines and equipment imported from China that were not covered by a certificate of conformity required by the Clean Air Act.

VI. North Carolina Implements Tailoring Rule

On January 28, 2010, Governor Bev Perdue issued Executive Order No. 81 bringing North Carolina in line with the federal tailoring rule for greenhouse gas pollutants. Governor Perdue took the step of issuing Executive Order No. 81 to effect immediate implementation of a state tailoring rule after adoption of the rule by the North Carolina Environmental Management Commission was delayed by citizen objections that prevented implementation until the rule could be considered by the general assembly.

VII. Redesignation of the Knoxville, Tennessee, Eight-Hour Ozone Nonattainment

EPA approved the request of the Tennessee Department of Environment and Conservation (TDEC) to redesignate the Knoxville, Tennessee, eight-hour ozone nonattainment area to attainment for the 1997 eight-hour ozone NAAQS. 76 Fed. Reg. 12,587.

VIII. EPA Schools Air Toxics Initiative in Tennessee

As of November 9, 2010, EPA completed analysis of monitoring data targeting diisocyanate emissions at two locations near three schools in Vonroe, Tennessee, and Mosheim, Tennessee, as part of its Schools Air Toxics Initiative. While diisocyanates were not detected in any samples, EPA and TDEC determined additional testing was warranted at the Vonroe, Tennessee, location because the monitoring period may not reflect typical emission source production levels.



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EPA REGION 8

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EPA Region 8 is comprised of the states of Colorado, Montana, North Dakota, South Dakota, Utah, and Wyoming. Although the committee's newsletter has not reported on Region 8 developments in some time, there is plenty going on in the air quality segment, as summarized below.

I. Region 8 Stationary Source Aggregation Issue

EPA Region 8 recently completed first-phase briefing of an appeal of permitting actions by the agency before the Environmental Appeals Board (EAB). The matter is styled *WildEarth Guardians v. EPA*, and is an appeal by WildEarth Guardians (WEG) of a renewal Title V operating permit issued to BP America Production for the continued operation of its Florida River compression facility located within Indian Country near Durango, Colorado. The matter concerns whether EPA Region 8 properly determined the source for purposes of Title V and PSD permitting, and whether the comment period on the permit should have been reopened. WEG asserts on appeal and in comments on the draft permit that the compression facility should be aggregated with numerous wells and other compressor stations located across La Plata County.

EPA Region 8 is also involved in litigation brought by WEG regarding the permitting of another natural gas compressor station by the state of Colorado. *WildEarth Guardians v. Jackson*, C.A. No. 10-cv-01680-MSK-KLM (D. Colo.). That facility is owned by Kerr-McGee Gathering, an affiliate of Anadarko Petroleum Corporation, and is known as the Frederick Compressor Station. The noted litigation was stayed in anticipation of a response by EPA Administrator Lisa Jackson to a petition by WEG seeking to have EPA

object to the state of Colorado's twice-supplemented analysis and rationale for issuing the renewal Title V permit for the Frederick Compressor Station in January of 2007. As in the EAB appeal by WEG noted above, this litigation seeks to have EPA object to such permitting for not aggregating the compression facility in question with other producing wells and compression facilities under common control because WEG asserts they should be deemed "adjacent" under applicable Title V and PSD regulations defining major stationary sources. EPA Administrator Jackson issued an order on February 2, 2011, in response to WEG's last petition (the third of three) requesting that EPA once again object to Colorado's permit and source determination for Frederick, but EPA found the Colorado analysis adequate and denied the petition. The noted litigation is no longer stayed and has not been withdrawn by WEG, so EPA has filed an answer, and briefing is expected in the coming months.

II. Tribal Delegation

EPA Region 8 has been working on authorization of an operating permit program for the Southern Ute Indian Tribe for approximately two years, and is reportedly getting close to formal approval. The program will be based on the 40 C.F.R. part 70 operating permit regulations.

III. EPA Region 8 Enforcement

Region 8 entered a consent agreement with Metal Management Inc., announced February 24, 2011, regarding alleged violation of the CAA involving releases of ozone depleting chemicals from the respondent's scrap metal operation in Salt Lake City, Utah. EPA alleged that the respondent disposed of equipment containing such refrigerant chemicals between 2004 and 2006 without verifying they had been removed first. The agreement includes payment of a \$75,000 penalty by the respondent.

In other enforcement news, EPA Region 8 announced in early January 2011 that Gasco Energy, Inc., will pay a \$350,000 penalty and institute new air pollution controls at its Uinta Basin facilities to resolve multiple alleged violations of the Clean Air Act. Gasco, the former operator of the Riverbend Compressor Station

on the Uintah and Ouray Indian Reservation near Vernal, Utah, will cut air pollution at its Uinta Basin operations by more than 550 tons per year under the terms of the settlement with EPA.

IV. Colorado Implementation of Tailoring Rule

On March 1, 2011, the Colorado Department of Public Health and Environment, Air Pollution Control Division (CDPHE) released guidance to the regulated community on the upcoming implementation of greenhouse gas (GHG) regulation under the Title V operating permits program. This guidance is intended to offer further explanation, and provide examples demonstrating how the GHG tailoring rule now impacts state regulation and sources in Colorado. *See* 75 Fed. Reg. 31,514 (June, 3, 2010) (tailoring rule). In the guidance, CDPHE explains that the tailoring rule resulted in changes to the Colorado State Regulation No. 3.

V. Colorado Regional Haze SIP

On January 15, 2011, CDPHE submitted to the Colorado General Assembly for review the revised state implementation plan (SIP) to comply with the regional haze provisions of the Clean Air Act. The revised SIP will impose emission limits on those sources subject to Best Available Retrofit Technology (BART) requirements of the visibility regulations for regional haze. To comply, sources will have to install and operate BART as expeditiously as practicable, but not later than five years after EPA's approval of the implementation plan revision. This SIP also includes an emissions reduction plan for major utilities operating in the state. The emissions reduction plan was directed by state law under the Colorado HB 1365, known as the Clean Air, Clean Jobs Act, enacted in 2010. The SIP revisions were submitted to EPA pending general assembly review of the revised SIP under state law.

VI. EPA Proposes to Disapprove Montana SIP

On January 6, 2011, the EPA announced that it proposed to disapprove the revisions to the Montana

SIP and new rules. 74 Fed. Reg. 758 (Jan. 6, 2011). These new rules have been effective in Montana since January 1, 2006. EPA has stated that the revisions and new rules pertaining to Montana's air quality permitting requirements of oil and gas well facilities do not meet the requirements of the Clean Air Act (CAA) and EPA's minor new source review (NSR) regulations. *Id.* The rules at issue give oil and gas companies sixty days after drilling a well to register and submit a permit application with the Montana Department of Environmental Quality. According to EPA this precludes the state, EPA, or the public to determine if the source is in compliance with the CAA before construction commences. *Id.* As of January 2011, more than 900 oil and gas facilities have been registered under the rule. The public comment period on EPA's proposal ended on February 28, 2011. No final decision has been issued.

VII. North Dakota Regional Haze SIP

The North Dakota Department of Health adopted a plan for implementing the regional haze program requirements on February 24, 2010. The plan was submitted to EPA Administrator Jackson under cover of a letter dated March 3, 2010, from Governor Hoeven. In the plan, seven steam electric generating units were identified as sources subject to BART. The installation of BART controls on those sources will result in significant emission reductions, and will improve visibility in North Dakota's Class I areas.

VIII. Other North Dakota SIP Issues

In other North Dakota SIP-related developments, EPA published two final rules in 2010 approving SIP revisions. On June 3, 2010, EPA approved revisions to the North Dakota air pollution control rules regarding PSD, and partially approved the SIP revision "Interstate Transport of Air Pollution," addressing requirements for attainment of the 1997 PM_{2.5} and eight-hour ozone NAAQS. EPA did not act on provisions concerning noninterference of North Dakota sources with maintenance of these NAAQS in other states or interference with protecting visibility in other states. These revisions are referred to as the Interstate Transport of Air Pollution SIP. 75 Fed. Reg. 31,290. Also, on November 22, 2010, EPA partially approved

certain additional revisions to the Interstate Transport of Air Pollution SIP not acted upon in its June 3, 2010, final rule noted above. 75 Fed. Reg. 71,023.

IX. Progress on South Dakota Regional Haze SIP

South Dakota held public hearings and rulemaking proceedings in September 2010 to finalize a regional haze SIP revision package to be submitted to EPA by January 15, 2011.

X. Eighth Circuit SOL Decision in NSR Enforcement Case

An air quality development of particular note in South Dakota is the decision of the U.S. Court of Appeals for the Eighth Circuit in *Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. Aug. 12, 2010). The decision addresses the applicable statute of limitations (SOL) in new source review enforcement matters, this one involving the Big Stone Generating Station. A split in federal cases has existed based in part on the federal courts' interpretations of relevant SIP provisions in a number of cases involving statute of limitations defenses to the alleged failure to obtain a federal NSR permit many years prior to such disputes being joined. *Sierra Club* argued that Otter Tail violated the CAA every day it operated without a preconstruction NSR permit, but the court did not agree, holding that the South Dakota SIP's definition of BACT was tied to the construction process, among other things. The court held that challenged modifications were prohibited, but not subsequent operation. As a result, the plaintiff's claims for civil penalties were dismissed as time-barred.

XI. Utah Implements Tailoring Rule

On December 1, 2010, the Utah Air Quality Board adopted revisions to Utah's air quality rules incorporating the GHG tailoring rule, thereby avoiding the possible imposition of a federal implementation plan for permitting of major sources of GHGs in Utah. The board also proposed to amend the rules it adopted to provide for conditioning the rules on the continued validity of the federal GHG tailoring rule and related

rules. Subsequent revisions to those rules were considered at a hearing on February 24, 2011, and adoption of the revisions is expected on or about April 6, 2011.

XII. EPA SIP Call for Utah's Unavoidable Breakdown Rule

On November 19, 2010, EPA issued a proposed SIP call, which would find the Utah SIP substantially inadequate to attain or maintain the NAAQS, with respect to Utah's "unavoidable breakdown" rule, R307-107. EPA states in its notice of the SIP call (75 Fed. Reg. 70,888) that the rule exempts emissions during unavoidable breakdowns from compliance with emission limitations. The Utah Division of Air Quality submitted detailed comments in opposition to the SIP call on December 28, 2010. A number of other states have also commented on EPA's Utah SIP call with respect to the unavoidable breakdown rule, referred to in many states as a malfunction rule. The EPA has stated that the SIP call was issued as a result of claims asserted by nongovernmental organizations regarding the unavoidable breakdown rule and a resulting consent decree entered by EPA.

XIII. Ozone Exceedances in Utah's Uintah Basin

Also of note in Utah with respect to air quality are multiple exceedances of the eight-hour ozone NAAQS in the Uintah Basin of northeast Utah, home to much oil and gas production activity in recent years. EPA and state officials and industry representatives are engaged in more in-depth study of the winter weather conditions and sources of ozone precursor emissions contributing to the high ambient levels of ozone observed in area monitors in 2010 and the first two months of 2011.

XIV. Medicine Bow Permitting Decision in Wyoming

On March 9, 2011, the Supreme Court of Wyoming affirmed the Wyoming Environmental Quality Council's decision to uphold the air permit that the Wyoming Department of Environmental Quality (DEQ) issued to Medicine Bow Fuel and Power LLC (Medicine Bow).

Sierra Club v. Wyoming Department of Environmental Quality, et al., 2011 WY 42 (Mar. 9, 2011). In 2009, DEQ issued Medicine Bow a permit to construct an industrial coal gasification and liquefaction plant for the production of transportation fuels and other products, along with an underground mine that will supply coal. The Sierra Club challenged DEQ's decision to issue the air permit to Medicine Bow on the grounds that DEQ failed to consider the emissions from malfunction and "cold starts" in calculating the source's "potential to emit" (PTE). ("Cold starts" are unplanned and irregular starts.) DEQ did not consider cold starts to be part of the facility's normal operations, and excluded those emissions from the Medicine Bow's PTE. Countering the Sierra Club's position and following *Alabama Power Co. v. Costle*, 636 F.2d 323 (D.C. Cir. 1979), the Wyoming Supreme Court concluded that PTE is not to be calculated to represent the "worst conceivable operation." The court found DEQ's issuance of the permit was consistent with applicable Wyoming statutes and regulations.

XV. Wyoming Challenges EPA's GHG Permitting Rules

Wyoming is the second state to file suit against EPA over the GHG permitting rulemakings, specifically

including the GHG tailoring rule. Following Texas's lead, on February 15, 2011, the Wyoming Attorney General filed suit in the U.S. Court of Appeals for the Tenth Circuit challenging EPA's GHG tailoring rule. In its petition, Wyoming argues that the tailoring rule exceeded EPA's authority and required the states to meet unreasonable deadlines. Under the tailoring rule, states were required to amend their state PSD programs to incorporate GHG permitting. After thirteen states failed to do so by the specified deadline, including Wyoming, EPA issued a subsequent rulemaking finding that the states' SIPs contained "substantial inadequacies" and directing the states to submit corrective SIP revisions to EPA for approval by December 22, 2010. Wyoming did not meet this deadline. EPA then promulgated a FIP for Wyoming on December 23, 2011, and assumed GHG permitting authority on January 2, 2011. According to Wyoming, the lawsuit seeks to guard Wyoming's rights to control permitting of air quality. Wyoming had informed EPA that in order to comply with federal greenhouse gas rules the Wyoming legislature would have to change state law, and it could not do so until the 2011 legislative session that began on January 12, 2011—10 days after the EPA assumed GHG permitting authority for Wyoming through the FIP.



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EPA REGION 9

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I. EPA Proposes Revised BART Plan for Four Corners Power Plant

On February 11, 2011, EPA announced a supplemental Best Available Retrofit Technology (BART) proposal to reduce emissions from the Four Corners Power Plant, which is operated by Arizona Public Service (APS) for a consortium of owners. The new, more stringent proposal will reduce nitrogen oxides (NO_x) emissions from approximately 45,000 tons per year to 5800 tons per year. The revised proposal follows APS's offering of an alternative requiring plant operators to install selective catalytic reduction (SCR) on two of the five coal-fired boilers and shut down the three older ones. The proposal is intended to reduce the Four Corners Power Plant's visibility impact by an average of 72 percent at nearby national parks and wilderness areas.

II. Approval of Gila River Indian Community Tribal Implementation Plan

On January 19, 2011, EPA announced it would approve the Gila River Indian Community's tribal implementation plan (TIP). The plan provides a framework for protecting air quality on the Reservation, including ordinances, a permit program, civil and criminal enforcement, air monitoring, and an emissions inventory. The approval came after the Gila River Indian Community's Department of Environmental Quality spent 12 years developing and implementing the plan to protect air quality on tribal lands. EPA's action makes the plan federally enforceable.

III. Significant Plan Approvals/Disapprovals

EPA Region 9 has proposed to disapprove (1) the San Joaquin Valley PM_{2.5} attainment plan; (2) the South Coast PM_{2.5} attainment plan; and (3) the Phoenix

PM₁₀ attainment plan. Region 9 has also proposed to approve the California regional haze plan.

IV. Settlement for San Joaquin Valley Facilities

Ampersand Chowchilla Biomass, LLC (ACB), and Merced Power, LLC (MP), agreed to settle allegations of Clean Air Act noncompliance in an action brought jointly by EPA and the San Joaquin Valley Unified Air Pollution Control District. The plants, located in the San Joaquin Valley, are required to pay \$328,000 and \$492,000, respectively; EPA and the district will split the penalty equally. ACB is also required to pay an extra \$15,000 to the district for a district-only violation.

ACB and MP refurbished the plants in 2007–2008 and initiated operations in 2008. A joint investigation by EPA and the district found that ACB and MP violated the air permits issued to them by the district by

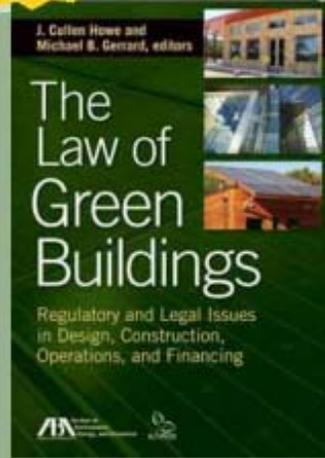
- emitting air pollutants—including nitrogen oxides, sulfur dioxide, and carbon monoxide—in excess of permit limits;
- failing to perform timely source testing to measure emissions of various air pollutants;
- failing to properly install and operate emissions control systems for nitrogen oxides, a precursor to ozone; and
- failing to certify the continuous emissions monitoring systems.

The plants are also alleged to have violated various district rules including requirements for emissions control plans.

The settlements require ACP and MP to install devices to improve monitoring and reporting of air pollutants; enhance nitrogen oxides emissions controls; and prepare more stringent control plans to minimize emissions of air pollutants. As a part of this action, the companies will reduce emissions of nitrogen oxides by up to 180 tons per year and carbon monoxide by up to 365 tons per year.

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