



Air Quality Committee Newsletter

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MESSAGE FROM THE COMMITTEE CHAIR

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Warm greetings to members of the Air Quality Committee, especially to those who have recently joined. Air quality law continues to be a topic of significant attention in the courts, and in U.S. Environmental Protection Agency (EPA) and state rulemakings, and the ABA Section of Environment, Energy, and Resources is providing tools to keep up with the pace. In January, the Air Quality Committee hosted a teleconference featuring EPA's Director of Air Enforcement Phillip Brooks, discussing EPA's current air enforcement priorities. Thanks to Air Quality Committee Vice Chair Shannon Broome, of Katten Muchin Rosenman LLP, who recently returned to the committee leadership team, for hosting this successful event.

The Section's 41st Annual Conference on Environmental Law, at the Grand America Hotel in Salt Lake City, March 22–24, is being hosted by Roger Martella, another member of the committee's leadership, and will feature panels addressing air regulation of the energy sector and developments in greenhouse gas regulation under the Clean Air Act. We look forward to seeing committee members in SLC. Stay tuned for additional committee teleconferences this spring including a discussion of constitutional law considerations in state GHG regulation and other current issues. In addition, the Section's Annual *Year in Review* was released in March and as always, Vice Chair Jonathan Martel ably directed a team of attorneys to cover the relevant air quality legal developments in 2011. Many thanks to all who contributed.

In addition to Shannon Broome, the committee welcomes three new vice chairs: Gale Lea Rubrecht of Jackson Kelly PLLC, Steve Kohl of Warner Norcross & Judd, and Joshua Byrd of North Carolina Central Law School. Josh is taking on the new role of law student liaison for the committee. Lastly, we are grateful for the efforts of Phil Karmel, the editor of this newsletter. In addition to our newsletter, Phil is also a contributing author in the recently released third edition of the *Clean Air Act Handbook*. The handbook thoroughly covers all major sections of the Clean Air Act and implementation by EPA. As many of you know, it is a frequently used and valuable addition to the legal library. If you have an interest in getting more involved in our activities, please let me or any of the committee's vice chairs know or send us your thoughts and ideas. The committee webpage lists all of our vice chairs and any of us would welcome your input. As always, we appreciate the efforts of all of our members and vice chairs to improve the services provided to committee members. If you have any ideas for or would like to contribute to future newsletters, please let us know.

MESSAGE FROM THE EDITOR

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The committee newsletter would not be possible without the dedicated support of our colleagues who have once again done a magnificent job of summarizing developments at EPA headquarters and in the regions. If you are interested in writing an article or regional report for future issues, please contact me.

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SUPPORT THE ONE MILLION TREES PROJECT FOR EARTH DAY 2012

Phillip R. Bower
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In honor of Earth Day 2012, SEER is calling on ABA members to contribute to the “One Million Trees Project—the Right Tree for the Right Place at the Right Time” by planting trees themselves and by contributing to partner tree organizations. Through public outreach and partnering efforts, SEER also hopes to raise the nation’s awareness of the multiple benefits of trees, including cleaner air. Last year, lawyers planted over 3,000 trees for Earth Day!

The Air Quality Committee has supported the One Million Trees Project from the beginning and is encouraging its members to get involved in one or more simple ways:

- (1) Organize or participate in a tree planting project in your community. Project locations will be posted to the One Million Trees Web site as they are scheduled. If you do not see your community listed, consider organizing your own planting.
- (2) Raise funds to support plantings by SEER’s Tree Partners. To donate, visit the One Million Trees Web site, scroll down to Tree Partners, read about the Tree Partners, and donate through the Tree Partner Web site. Make sure you indicate that the donation is through the ABA.
- (3) Plant your own trees and report the plantings through the One Million Trees Web site. Click on “Tree Planting Submission Form” on the project’s Web site and fill out the form.

If you have a question about One Million Trees or how to organize a tree planting, donate, or report a planting, please contact Phillip Bower, the AQC vice chair for Public Service, at pbower@whdlaw.com or visit www.ambar.org/EnvironTrees.

Thank you for your support of the environment and of this worthy cause!

EPA HEADQUARTERS

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I. Air Toxics—Boiler Area Sources

On December 23, 2011, EPA published a proposed reconsideration of the March 21, 2011, final air toxics standards for industrial, commercial, and institutional area source boilers. *See* National Emission Standards for Hazardous Air Pollutants for Area Sources: Industrial, Commercial, and Institutional Boilers; Proposed Rule and Reconsideration of Final Rule, 76 Fed. Reg. 80,532. EPA is proposing a new subcategory for seasonally operated boilers. After an initial tune-up by March 21, 2014, seasonally operated boilers would be required to complete a tune-up every five years instead of biennially as is required of other boilers. EPA is also proposing to add temporary boilers to the list of boilers not subject to subpart JJJJJ. Additionally, EPA is proposing that all existing boilers subject to the tune-up requirement would have two years or until March 21, 2013, in which to demonstrate compliance, instead of one year. EPA states that if it has not taken final action on the initial compliance date for tune-ups before March 21, 2012, for initial compliance, the agency is considering staying the effectiveness of the rule for 90 days to allow EPA to complete reconsideration. In addition, EPA is proposing to amend the definition of natural gas curtailment. EPA is also proposing to allow sources subject to the carbon monoxide (CO) emission limit the option to install, operate, and maintain a CO and oxygen continuous emission monitoring system. Further, EPA has determined that the 30-day rolling average for parameter monitoring and compliance with operating limits is appropriate. For small oil-fired boilers, EPA is proposing to require an initial tune-up by March 21, 2014, and to require subsequent tune-ups to occur only once every five years thereafter. EPA clarifies that for existing sources, tune-ups must be

completed by the compliance date and that new units would not be required to have an initial tune-up. Additionally, EPA is proposing to amend the CO emission limit for new and existing coal-fired boilers. Regarding the energy assessment, EPA clarifies that it does not include electricity purchased from an off-site source or energy use systems located off-site; rather, the assessment is focused on energy generated on-site whose reduced use would reduce on-site air pollution. EPA also clarifies that the due date for energy assessments is March 21, 2014. In addition to the proposed changes, EPA requests comment on whether the initial compliance period for the tune-up requirement should be extended to three years, on the affirmative defense provisions in the final rule, on establishing generally available control technology (GACT) emission limits for biomass and oil-fired boilers, on the final particulate matter (PM) limits for new oil-fired area source boilers, and the title V permitting requirements. Comments were due February 21, 2012.

II. Air Toxics—Major Source Boiler MACT

On December 23, 2011, EPA published a proposed reconsideration of the final March 21, 2011, air toxics standards for industrial, commercial, and institutional boilers and process heaters at major sources. *See* National Emission Standards for Hazardous Air Pollutants for Major Sources: Industrial, Commercial, and Institutional Boilers and Process Heaters; Proposed Rule and Reconsideration of Final Rule, 76 Fed. Reg. 80,598. This rule is generally known as the “Boiler MACT” rule because it requires maximum available control technology (MACT) emission limits for regulated boilers and process heaters at major sources. EPA is reconsidering and requesting comment on several provisions of the rule and is proposing amendments and technical corrections to the final rule. The proposed rule includes 17 subcategories, which are based on unit design. EPA added subcategories for hybrid suspensions/grate biomass units, limited-use units, solid fuel units, and non-continental liquid units. New and existing units that combust only natural gas, refinery gas, or equivalent fuel would be subject to work practice standards that require an annual tune-up instead of numeric emission limits. EPA also added a

fuel specification to the final rule that would allow units combusting gases not defined as “Gas 1” gases to qualify as Gas 1 units by demonstrating that the fuels combusted meet a fuel specification. EPA is proposing numeric emission limits for new and existing units in each of the 14 subcategories. EPA is proposing a work practice standard for dioxin/furan emissions for all subcategories and revised work practice standards for start-up and shutdown. EPA is proposing that boiler owners and operators conduct initial and annual performance tests and a one-time energy assessment. Records of the performance tests would be submitted electronically to EPA’s WebFIRE database. The energy assessment is to be performed by a qualified energy assessor and completed by the compliance date. Cost-effective energy efficiency measures identified by the energy assessment are to be documented. EPA is proposing to clarify that the energy assessment is limited to only those energy use systems located on-site. For a subset of small units, EPA is proposing to change the tune-up requirement from biennial to once every five years, with the initial tune-up due by the compliance date. For units combusting coal or residual oil with heat input capacities of 250 mmBtu/hr or greater, EPA is requiring PM Continuous Emissions Monitoring System (CEMS), but is proposing to remove the PM CEMS requirement for biomass units. Rather than requiring monitoring of oxygen levels in the stack, EPA is seeking comment on requiring the installation, calibration, monitoring, and use of oxygen trim systems to optimize air-to-fuel ratio and combustion efficiency. In addition, EPA is proposing CO CEMS as an alternative to CO stack testing and oxygen monitoring. EPA has also included options in the proposed rule for mercury CEMS. Each owner or operator is required to submit a notification of compliance. EPA is proposing to reset the compliance dates. For existing sources, it is proposed that the compliance date be three years after the date of publication of the final reconsideration rule. For new sources, it is proposed that the compliance date be 60 days after the date of publication of the final reconsideration. EPA is also proposing technical corrections and clarifications. Comments were due February 21, 2012.

III. Air Toxics—Chemical Manufacturing Area Sources

On January 30, 2012, EPA published a proposed rule (77 Fed. Reg. 4522) announcing reconsideration of its final rule that was published October 29, 2010, establishing national emission standards for the control of hazardous air pollutants for nine area source categories in the chemical manufacturing sector. *See* National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources; Proposed Rule and Reconsideration of Final Rule, 77 Fed. Reg. 4522. The nine area sources are Agricultural Chemicals and Pesticides Manufacturing; Cyclic Crude and Intermediate Production; Industrial Inorganic Chemical Manufacturing; Industrial Organic Chemical Manufacturing; Inorganic Pigments Manufacturing; Miscellaneous Organic Chemical Manufacturing; Plastic Materials and Resins Manufacturing; Pharmaceutical Production; and Synthetic Rubber Manufacturing. EPA is reconsidering and requesting comment on several provisions of the final rule. EPA is proposing to revise the requirement that synthetic area sources that installed a control device after November 15, 1990, obtain a title V permit. Instead, EPA is proposing that the title V requirement apply only when the control device is installed on an affected chemical manufacturing process unit (CMPU). EPA is also proposing that inspections of all equipment in a CMPU may use detection methods incorporating sight, sound, or smell. Additionally, EPA is proposing that opening of vessels be allowed if manual cleaning is necessary and that a cleaned vessel would represent the end of an “inorganic HAP[hazardous air pollutant] service” period. EPA is also proposing to revise the definition of “family of materials” and provides examples of applicability determinations involving a family of materials. EPA is also proposing to clarify that emissions during start-up, shutdown, and malfunction are not exempt. Additionally, EPA is proposing amendments and technical corrections to the final rule to clarify applicability and compliance issues raised by stakeholders. Comments are due March 30, 2012.

IV. Air Toxics—Chromium Electroplating and Steel Pickling Facilities

On February 8, 2012, EPA proposed supplemental amendments to the air toxics standards for the chromium electroplating and steel pickling source

categories. *See* National Emission Standards for Hazardous Air Pollutant Emissions: Hard and Decorative Chromium Electroplating and Chromium Anodizing Tanks; and Steel Pickling-HCl Process Facilities and Hydrochloric Acid Regeneration Plants; Supplemental notice of proposed rulemaking, 77 Fed. Reg. 6628. EPA is proposing to tighten limits for hexavalent chromium emissions from hard and decorative chromium electroplating and chromium anodizing tanks. According to EPA, emissions from chromium electroplating can be controlled by using add-on controls such as packed bed scrubbers, composite mesh pad scrubbers, or high efficiency particulate air (HEPA) filters or by lowering surface tension by adding fume suppressants. EPA is also proposing language in the Steel Pickling MACT standards that would allow an acid regeneration facility to establish its own site-specific emission standard. Comments are due on March 26, 2012.

V. Air Toxics—Group IV Polymers and Resins; Pesticide Active Ingredient Production; and Polyether Polyols Production

On January 9, 2012, EPA published a proposal to amend three national emission standards for hazardous air pollutants. *See* National Emission Standards for Hazardous Air Pollutant Emissions: Group IV Polymers and Resins; Pesticide Active Ingredient Production; and Polyether Polyols Production; Proposed Rule, 77 Fed. Reg. 1268. These standards cover nine industrial source categories in the chemical manufacturing industry. The amendments do not arise from technology or residual risk reviews. EPA is proposing to eliminate the exemptions to emission limits and standards during start-up, shutdown, and malfunction. With respect to Group IV Polymers and Resins, EPA is proposing to establish standards for emission from unregulated emission points by adding standards limiting emissions from equipment leaks used in a subcategory of the Polyethylene Terephthalate Resin (PET) source category. EPA is also proposing a revised concentration limit for ethylene glycol in the cooling water of process contact cooling towers used in one subcategory of the PET source category. Under the proposal, facilities generally would be required to

comply immediately with the proposed revisions, but facilities would have up to three years to comply with the pressure relief device. Comments were due March 9, 2012. EPA states it intends to finalize the rule by November 30, 2012.

VI. Air Toxics—Petroleum Refineries

On January 6, 2012, EPA published a proposed rule to amend the heat exchange system requirements of the air toxics standards for petroleum refineries. *See* National Emission Standards for Hazardous Air Pollutants from Petroleum Refineries; National Uniform Emission Standards for Heat Exchange Systems; Proposed Rule, 77 Fed. Reg. 960. The proposed rule responds to a petition for reconsideration filed by the American Petroleum Institute on the MACT standards EPA promulgated on October 28, 2009. EPA also proposed to create national uniform standards for heat exchange systems that could be applied to refineries and other similar industries such as the chemical industry. EPA is proposing to revise the existing petroleum refinery air toxics standards to cross-reference the uniform standard to allow an alternative option for complying with the standards for heat exchange systems. The proposed uniform standards would allow refiners to reduce monitoring frequency and burden by meeting a lower leak definition. If finalized, these national uniform standards would also be referenced, as appropriate, as EPA revises future air toxics or new source performance standards for individual source categories that have heat exchange systems. Comments were due March 6, 2012.

VII. Air Toxics—Secondary Aluminum Production

On February 14, 2012, EPA proposed revisions to the air toxics standard for the secondary aluminum production source category. *See* National Emissions Standards for Hazardous Air Pollutants: Secondary Aluminum Production; Proposed Rule, 77 Fed. Reg. 8576. EPA issued air toxics standards for this industry in 2000. In the new rulemaking, EPA did not identify any new developments in practices, processes, or control technologies that are applicable to this source category. EPA also found that the level of risk from this

source category was acceptable and that public health is protected with an adequate margin of safety. Nevertheless, EPA found that amendments were needed to address compliance requirements. Consequently, the agency is proposing to add testing requirements for hydrogen fluoride, requiring facilities to capture hazardous air pollutant (HAP) emissions during compliance testing, and setting specific criteria that facilities are required to follow when choosing to change furnace classifications from one type to another. EPA is also proposing to eliminate the exemption to emission limits and standards during periods of start-up, shutdown, and malfunction. Comments are due March 30, 2012.

VIII. Air Toxics—Secondary Lead Smelting

On January 5, 2012, EPA published a final rule amending the air toxics standard for secondary lead smelters. *See* National Emissions Standards for Hazardous Air Pollutants from Secondary Lead Smelting; Final Rule, 77 Fed. Reg. 556. These amendments lowered the emission limit for lead, set emission limits for dioxins based on maximum achievable control technology, require pollution prevention by minimizing plastics entering furnaces, establish a work practice standard to limit mercury emissions, and eliminate the exemption for emissions during periods of start-up, shutdown, and malfunction. The final rule took effect January 5, 2012. EPA states that the amendments will cut lead and arsenic emissions by 68 percent from their current levels for a total reduction of more than 90 percent over the last fifteen years.

IX. Air Toxics and New Source Performance Standards—Utility MACT

On December 21, 2011, EPA announced its final rule requiring power plants to reduce emissions of mercury and other air toxics. The final rule was published on February 16, 2012. *See* National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating

Units; Final Rule, 77 Fed. Reg. 9304. EPA is calling this new rule the Mercury and Air Toxics Standards (MATS). It replaces the Clean Air Mercury Rule that was promulgated by the Bush administration using a cap-and-trade system predicted to reduce mercury emissions by 70 percent over thirteen years. *See New Jersey v. EPA*, 517 F.3d 574, 583 (D.C. Cir. 2008) (vacating Clean Air Mercury Rule). MATS will require coal-fired power plants to reduce mercury emissions by 90 percent in four years. The coal industry, many owners of coal-fired power plants and coal-reliant states like West Virginia dispute EPA's claims that the presumed health and economic benefits of MATS outweigh its costs and have raised concerns over the impact of MATS on the reliability and cost of the supply of electricity. Unless successfully challenged, MATS will be the first national regulation of power plant mercury emissions.

MATS applies to coal- and oil-fired electric generating units (EGUs) with a capacity of 25 megawatts (MW) or greater. EPA estimates that MATS will apply to approximately 1,100 existing coal-fired units and 300 existing oil-fired units (for a total of 1,400 affected units) at about 600 power plants. According to EPA, about 60 percent of coal-fired units already comply with the final standards while 40 percent lack state-of-the-art controls. The 40 percent are older plants and many will likely be shut down resulting in a loss of utility worker jobs and tax revenue. EPA projects retirements of 4.7 gigawatts (GW) out of more than 1,000 GW that make up the nation's electric generating capacity, or less than one half of one percent of the nation's generating capacity.

The final rule sets standards for all hazardous air pollutants (HAPs) emitted by coal- and oil-fired EGUs with a capacity of 25 megawatts or greater. Under the final rule, affected power plants must reduce emissions of mercury and other heavy metals, including arsenic, chromium and nickel, and acid gases, including hydrochloric acid and hydrofluoric acid. In addition to reducing emissions of mercury and other air toxics, the final rule will reduce emissions of sulfur dioxide 41 percent and direct emissions of PM_{2.5} 19 percent beyond the reductions expected from the Cross-State Air Pollution Rule (CSAPR).

The final rule will take effect on April 16, 2012. Existing sources will then generally have up to four years or until early 2016, if they need it, to comply with MATS. This includes the standard three years provided to all sources by the Clean Air Act, and an additional fourth year that EPA is “encouraging permitting authorities to make . . . broadly available for technology installations.” If more time is needed, EPA has issued an enforcement policy document that provides a pathway for reliability-critical units to obtain, on a case-by-case basis, a schedule with up to an additional fifth year to achieve compliance. Further, EPA states that if there are still “other situations where sources cannot come into compliance on a timely basis, . . . EPA will address individual noncompliance circumstances (if there are any) on a case-by-case basis, at the appropriate time, to determine the appropriate response and resolution.” *See* EPA Fact Sheet: Benefits and Costs of Cleaning Up Toxic Air Pollution from Power Plants and EPA Fact Sheet: Mercury and Air Toxics Standards for Power Plants (links to both Fact Sheets available, www.epa.gov/airquality/powerplanttoxics/actions.html).

For coal-fired EGUs, both new and existing, the rule establishes numerical emission limits for mercury, PM (a surrogate for toxic non-mercury metals), and hydrochloric acid (HCl) (a surrogate for all toxic acid gases). MATS also sets numerical emission limits for oil-fired EGUs. The standards set work practices, instead of numerical limits, to limit emissions of organic air toxics, including dioxins/furans, from existing and new coal- and oil-fired power plants. The work practice standards require an annual performance test program for each unit that includes inspection, adjustment, and/or maintenance and repairs to ensure optimal combustion. When fully implemented, EPA projects MATS will reduce emissions of mercury from coal-fired power plants by 90 percent and emissions of acid gases from power plants by 88 percent.

EPA expects power plants will comply with MATS through a range of strategies including the use of existing emission controls, upgrades to existing emission controls, installation of new pollution controls, and fuel switching. EPA emphasizes that the final standards are based on “existing, commercially proven

technologies” that are “widely available” and “frequently used” in the electric utility industry, including electrostatic precipitators, fabric filters (baghouses), flue gas desulfurization (scrubbers), or dry sorbent injection. To install and maintain these controls, EPA estimates that MATS will create 46,000 short-term construction jobs and 8,000 long-term utility jobs. According to EPA, the total national annual cost of the final rule will be \$9.6 billion, which is about a billion dollars less than the proposed standards.

EPA estimates that when fully implemented in 2016, MATS will prevent 4,200 to 11,000 premature deaths, 2,800 cases of chronic bronchitis, 4,700 heart attacks, 130,000 asthma attacks, 5,700 hospital and emergency room visits, 6,300 cases of acute bronchitis, 140,000 cases of respiratory symptoms, 3.2 million restricted activity days, and 540,000 missed work or “sick” days per year. EPA estimates the health benefits associated with meeting the standards for air toxics will be \$37 billion to \$90 billion in 2016 (2007\$).

As for electricity rates, EPA projects that they stay within normal historical fluctuations. EPA states its modeling indicates that MATS will result in relatively small changes in the average retail price of electricity (approximately 3 percent). EPA concludes that the increased demand for natural gas will keep electricity prices below 1990 levels.

Some of the changes from the proposal to the final rule include elimination of total PM as a surrogate for non-mercury metal HAPs in favor of a filterable PM limit, a work practice standard for “cold” start-ups, and numerous revisions to the monitoring and reporting provisions.

X. Climate Change—GHG Reporting Rule

On November 29, 2011, EPA published a rule finalizing the August 4, 2011, proposed revisions to the General Provisions in the Mandatory Reporting of Greenhouse Gases Rules and to multiple subparts promulgated in 2010. *See* Mandatory Reporting of Greenhouse Gases; Final Rule, 76 Fed. Reg. 73,886. Among the revisions is a one-time extension of the

deadline for submission of the annual GHG report for any facility reporting under one of the subparts for which data collection began in 2011 (including subpart DD—Use of Electric Transmission and Distribution Equipment; subpart II—Industrial Wastewater Treatment; and subpart TT—Industrial Waste Landfills). The purpose of the extension is to allow EPA additional time to develop and allow stakeholder testing of the Electronic Greenhouse Gas Reporting Tool (e-GGRT) modules for those new subparts. EPA extended the deadline for the entire facility that reports under any of those subparts in order to prevent a single facility from being subject to two separate reporting deadlines. Facilities eligible for the extension must notify EPA by March 31, 2012, that they are not required to submit their report until September 28, 2012. Facilities that do not report under any of the new subparts must submit the annual report by March 31, 2012. EPA also revised the three-year record-keeping requirement to run from the date of submission of the annual GHG report, and revised section 98.9 to require that all “requests, notifications, and communications to the Administrator” be submitted electronically and “in a format as specified by the Administrator.” The new rule would thus require use of e-GGRT to submit any communication for which e-GGRT provides a format. The language requiring use of a specified format was not included in the proposal. These revisions took effect December 29, 2011.

On January 10, 2012, EPA published a proposed rule re-proposing confidentiality determinations for the data elements under the Mandatory Greenhouse Gas Reporting Rule. *See Proposed Confidentiality Determinations for Data Elements Under the Mandatory Reporting of Greenhouse Gases Rule; Proposed Rule, 77 Fed. Reg. 1434.* On July 7, 2010, EPA proposed confidentiality determinations for data elements; the agency issued the re-proposal to propose significant changes to certain data elements. In addition, EPA is proposing confidentiality determinations for seven new data elements that are not inputs to equations. EPA is also proposing to categorize three data elements as inputs to emission equations and to defer their reporting deadline to March 31, 2013. Comments were due March 12, 2012.

XI. Climate Change—Mobile Sources

On December 1, 2011, EPA and the National Highway Traffic Safety Administration (NHTSA) published a proposed rule proposing greenhouse gas emissions and corporate average fuel economy standards for 2017 and later model year light-duty vehicles. *See 2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards; Proposed Rule, 76 Fed. Reg. 74,854.* The proposed rule responds to a presidential memorandum issued by President Obama on May 21, 2010, requesting that EPA and NHTSA develop through notice and comment rulemaking a coordinated national program to reduce greenhouse gas emissions and fuel consumption of light-duty vehicles for model years 2017–2025. On January 13, 2012, EPA and NHTSA announced a 14-day extension of the public comment period, extending the period for submission of comments to February 13, 2012. *77 Fed. Reg. 2028.*

XII. Renewable Fuel Standard (RFS) Program

The Renewable Fuel Standard program, as updated to reflect the requirements of the Energy Independence and Security Act of 2007, is now called “RFS2.” On January 5, 2012, EPA published a proposed rule (*77 Fed. Reg. 462*) and direct final rule (*77 Fed. Reg. 700*) identifying additional fuel pathways that EPA has determined meet the biomass-based diesel, advanced biofuel, or cellulosic biofuel life-cycle greenhouse gas (GHG) reduction requirements for RFS2, as specified in section 211(o) of the Clean Air Act. The proposal describes EPA’s evaluation of biofuels produced from camelina oil, energy cane, giant reed, and napier grass; it also includes an evaluation of renewable gasoline and renewable gasoline blendstocks, as well as biodiesel from esterification, and clarifies the definition of renewable diesel. EPA is also finalizing two changes to regulations that were proposed on July 1, 2011 (*76 Fed. Reg. 38,844*). The first change adds ID letters to pathways to facilitate references to specific pathways. The second change adds “rapeseed” to the existing pathway for renewable fuel made from canola oil. The proposal would add these pathways as pathways that

have been determined to meet one or more of the GHG reduction thresholds specified in section 211(o), and assigns each pathway a corresponding D-Code. It allows producers or importers of fuel produced pursuant to these pathways to generate Renewable Identification Numbers, providing that the fuel meets the other requirements specified in the RFS2 regulations to qualify it as renewable fuel. EPA withdrew the direct final rule due to adverse comment (77 Fed. Reg. 13,009), and is expected to proceed with the rulemaking process based on the parallel proposed rule, after consideration of public comment.

On January 9, 2012, EPA published a final rule establishing 2012 renewable fuel standards. 77 Fed. Reg. 1320. Under section 211(o) of the Clean Air Act, EPA is required to set the renewable fuel standards each November for the following year. In general the standards are designed to ensure that the applicable volumes of renewable fuel specified in the statute are used. However, the statute specifies that EPA is to project the volume of cellulosic biofuel production for the upcoming year and to base the cellulosic biofuel standard on that projected volume if it is less than the applicable volume set forth in the act. In the final rule, EPA finalizes a projected cellulosic biofuel volume for 2012 and annual percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuels that will apply to all gasoline and diesel produced or imported for domestic use in year 2012. In the notice of proposed rulemaking (NPRM), EPA also proposed an applicable volume of 1.28 billion gallons for biomass-based diesel for 2013. The statute specifies that the minimum volume of biomass-based diesel for years 2013 and beyond must be at least 1.0 billion gallons. EPA is continuing to evaluate the many comments on the NPRM from stakeholders, and will issue a final rule setting the applicable biomass-based diesel volume for calendar year 2013 as expeditiously as practicable. EPA's action also made changes to the RFS2 regulations designed to clarify existing provisions and to address several unique circumstances that have come to light since the RFS2 program became effective on July 1, 2010. Finally, EPA's rule makes a minor amendment to the gasoline benzene regulations regarding inclusion of transferred blendstocks in a

refinery's early benzene credit generation calculations. The final rule took effect on January 9, 2012.

On December 27, 2011, EPA announced that it has finalized the RFS2 program's requirements to reduce 2012 greenhouse gas emissions by increasing the use of renewable fuels, blending more than 1.25 billion gallons of renewable fuels over the amount mandated for 2011. According to EPA, this will help reduce petroleum imports and encourage the development and expansion of the nation's renewable fuels sector. For more information on the standards and regulations, *see* www.epa.gov/otaq/fuels/renewablefuels/regulations.htm.

XIII. Renewable Fuels—Palm Oil

On January 27, 2012, EPA published a notice of data availability concerning renewable fuels produced from palm oil. 77 Fed. Reg. 4300. This notice provides an opportunity to comment on EPA's analyses of palm oil used as a feedstock to produce biodiesel and renewable diesel under the RFS2 program. EPA's analysis of the two types of biofuel shows that biodiesel and renewable diesel produced from palm oil have estimated life-cycle greenhouse gas (GHG) emission reductions of 17 percent and 11 percent, respectively, for these biofuels compared to the statutory baseline petroleum-based diesel fuel used in the RFS2 program. This analysis indicates that both palm oil-based biofuels would fail to qualify as meeting the minimum 20 percent GHG performance threshold for renewable fuel under the RFS2 program. Comments were due February 27, 2012.

XIV. Nonconformance Penalties for Manufacturers of Heavy-Duty Diesel Engines

On January 31, 2012, EPA published a proposed rule (77 Fed. Reg. 4736) and an interim final rule (77 Fed. Reg. 4678) concerning nonconformance penalties (NCPs) for on-highway heavy-duty diesel engines. EPA is proposing to make NCPs available to manufacturers of heavy-duty diesel engines in model years 2012 and later for emissions of nitrogen oxides (NO_x). In addition, EPA is taking final action to make

NCPs available to manufacturers of heavy-duty diesel engines in model years 2012 and 2013 for emissions of NO_x. In general, the availability of NCPs allows a manufacturer of heavy-duty engines whose engines fail to conform to specified applicable emission standards, but do not exceed a designated upper limit, to be issued a certificate of conformity upon payment of a monetary penalty to the U.S. government. The proposed upper limit associated with these NCPs is 0.50 grams of NO_x per horsepower-hour. Comments on the proposal and interim final rule are due April 4, 2012.

XV. NAAQS—Lead Designations

On November 22, 2011, EPA published the final designations for the 2008 National Ambient Air Quality Standard (NAAQS) for lead. 76 Fed. Reg. 72,097. EPA previously designated 16 areas as nonattainment for the lead NAAQS based on data from the pre-2010 monitoring work, but deferred designations for all other areas so that data from newly deployed monitors could be considered. In the November 2011 final designations, EPA has determined that 39 states are meeting the lead standards. EPA has also determined, based on 2008–2010 air quality monitoring data, that Illinois, Iowa, Kansas, Michigan, and Puerto Rico each have one area that does not meet the lead NAAQS. EPA is also identifying three areas located in Tennessee, Arizona, and New York as unclassifiable because the information available is insufficient to confirm whether or not the areas are meeting the standards. Areas designated as nonattainment will need to develop state implementation plans within 18 months and implement them within 5 years to reduce pollution to meet the lead standards.

XVI. NAAQS—Ozone Designations

On January 19, 2012, EPA published a proposed rule proposing to extend the public comment period on EPA's responses to state and tribal ozone designation recommendations for the 2008 ozone NAAQS of 75 parts per billion (ppb) from January 19, 2012, to February 3, 2012. 77 Fed. Reg. 2677. In granting the requests for a short extension, EPA notes that the

original 30-day comment period fell across two federal holidays. EPA states in the proposed rule that it intends to promulgate final designations for the 2008 ozone standards in spring 2012.

XVII. Cross-State Air Pollution Rule (CSAPR)

Finalized by EPA on July 6, 2011, the Cross-State Air Pollution Rule (CSPAR) was scheduled to begin on January 1, 2012. But on December 30, 2011, the U.S. Court of Appeals for the District of Columbia Circuit stayed the rule. *See EME Homer City Generation, L.P., v. EPA*, No. 11-1302 (D.C. Cir. Dec. 30, 2011) (per curiam). The stay serves to maintain the status quo pending a ruling on the merits and requires that EPA continue the administration of the Clean Air Interstate Rule (CAIR) until the court's ruling. (CAIR itself was struck down, but not vacated, by the D.C. Circuit in *North Carolina v. EPA*, 550 F.3d 896 (D.C. Cir.), modified on reh'g, 550 F.3d 1176 (D.C. Cir. 2008).) The D.C. Circuit has scheduled argument on the challenge to CSAPR on April 13, 2012.

On December 27, 2011, EPA published a final rule supplementing the Cross-State Air Pollution Rule (CSAPR) by including additional states to be regulated under the rule's ozone-season NO_x program. *See* Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone; Final Rule, 76 Fed. Reg. 80,760. In this rule, EPA finalizes its determination that six states (Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin) contribute significantly to downwind nonattainment, or interference with maintenance, of the 1997 ozone NAAQS in other states. The rule makes final the proposed federal implementation plans (FIPs) for five of the six states (Iowa, Michigan, Missouri, Oklahoma, and Wisconsin), establishing ozone-season NO_x emission budgets, variability limits, and new unit set-asides for each of those states. These five states must inform EPA by March 6, 2012, of their intent to submit a state implementation plan (SIP) allocating 2013 allowances for existing units and must submit any such SIP by October 1, 2012. If such a SIP is approved, EPA will record allowance allocations

pursuant to the SIP for 2013 by April 15, 2013. As with other states regulated under CSAPR, EPA is allowing no opportunity to submit SIPs for 2012. The deadlines for SIP submissions by these five states for 2014 and future years are the same as the deadlines established in CSAPR for other states included in the ozone-season NO_x program. In this final rule, EPA sets separate ozone-season NO_x budgets for Oklahoma in 2012 and 2013. EPA determined that because Oklahoma is not in the CSAPR annual NO_x program and not regulated under the Clean Air Interstate Rule (CAIR), covered sources in that state will have insufficient time to install low-NO_x burners or shift distribution of electricity to cleaner generators to meet local electricity demand that is currently being met by oil/gas units before the 2012 ozone season. With respect to Kansas, EPA did not finalize a CSAPR ozone-season NO_x FIP because it determined it lacked authority to do so. EPA previously approved a SIP for Kansas that did not rely on CAIR. EPA proposed a SIP Call for Kansas on January 6, 2011, and stated in this rule that it intends to take final action on that proposed SIP Call “concurrently with this action or shortly thereafter.” Subject to the D.C. Circuit’s stay, the final rule took effect January 26, 2012.

On February 6, 2012, EPA published a notice of intent setting forth its interpretation of the effect of the D.C. Circuit’s stay on the federal implementation plans finalized by EPA in December 2011. *See* Federal Implementation Plans for Iowa, Michigan, Missouri, Oklahoma, and Wisconsin and Determination for Kansas Regarding Interstate Transport of Ozone: Effect of Stay of Transport Rule; Notice of Intent, 77 Fed. Reg. 5710. (As noted above, those FIPs were based upon EPA’s conclusion that Iowa, Kansas, Michigan, Missouri, Oklahoma, and Wisconsin significantly contribute to nonattainment or interfere with maintenance of the 1997 ozone NAAQS in other states and required sources in those states to comply with CSAPR’s ozone-season NO_x trading program.) EPA’s notice of intent stated that although the D.C. Circuit’s stay does not by its own terms apply to the new FIPs in these states, EPA will deem the new FIPs stayed because they were promulgated in connection with CSAPR, which has been stayed. The notice of intent took effect immediately on February 6, 2012.

XVIII. Regional Haze

On December 30, 2011, EPA published a proposed rule to approve the CSAPR trading program as an alternative to determining best available retrofit technology (BART). *See* Regional Haze: Revisions to Provisions Governing Alternatives to Source-Specific Best Available Retrofit Technology (BART) Determinations, Limited SIP Disapprovals, and Federal Implementation Plans; Proposed Rule, 76 Fed. Reg. 82,219. This rulemaking proposes to find that the CSAPR trading program achieves greater reasonable progress toward the national goal of achieving natural visibility conditions in class I areas than source-specific best available retrofit technology (BART) in the states in which CSAPR applies. EPA also proposes a limited disapproval of the regional haze state implementation plans (SIPs) submitted previously by 14 states that relied on the Clean Air Interstate Rule (CAIR) to satisfy the BART requirement and that are now covered by CSAPR. These 14 states are Alabama, Florida, Georgia, Indiana, Iowa, Louisiana, Michigan, Mississippi, Missouri, North Carolina, Ohio, Pennsylvania, South Carolina, and Texas. EPA proposes federal implementation plans (FIPs) for these 14 states. EPA also proposes FIPs for four states (Kentucky, Tennessee, Virginia, and West Virginia) for which EPA previously proposed disapproval of regional haze SIPs because of reliance on CAIR. The FIPs proposed in this action will take effect immediately upon finalization. EPA states it will withdraw any of the FIPs proposed in this action in the event that any state submits a revised regional haze SIP incorporating the requirements of CSAPR. On January 31, 2012, EPA published a notice extending the public comment period until February 28, 2012. 77 Fed. Reg. 4735.

EPA REGION 1

**Dixon Pike, Brian Rayback, and
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I. Regional Greenhouse Gas Initiative

The 14th Regional Greenhouse Gas Initiative (RGGI) auction took place on December 7, 2011, and resulted in total proceeds of \$51,583,770 for the participating states of Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Rhode Island, and Vermont. At the auction, 27,293,000 CO₂ allowances for 2009–2011 sold to 38 bidders, representing 63 percent of the allowances offered for sale. The market clearing price was \$1.89 per ton. While allowances for a future control period (2014 vintage year) were offered at the auction, no bids were submitted for these allowances. The next RGGI auction is scheduled for March 14, 2012. This will be the first auction in which New Jersey, which withdrew from the program as of January 1, 2012, does not participate.

On November 15, 2011, the analysis group released a study titled “The Economic Impacts of the Regional Greenhouse Initiative on Ten Northeast and Mid-Atlantic States.” The report reflects one attempt to evaluate and quantify the impacts of RGGI, estimating that RGGI produced \$1.6 billion in economic value added to the ten-state region.

II. Connecticut Releases BACT Database

The Connecticut Department of Energy and Environmental Protection (DEEP) recently improved online accessibility to information in order to assist the regulated community. In October 2011, to aid in the preparation of best available control technology (BACT) determinations, the agency unveiled the CT BACT database, which contains all minor and major source BACT determinations for at least the past five years. Additionally, DEEP has created an online, interactive questionnaire, the Air Permit Wizard, which it hopes will help owners and operators of air pollution emissions sources determine permit applicability.

III. Maine SO₂ Modeling Initiative

In January 2012, the Maine Department of Environmental Protection (MDEP) mailed letters to sources of 100 or more tons per year of SO₂ asking these sources either to model, or submit sufficient information to MDEP to allow it to model, compliance with the new, 1-hour SO₂ NAAQS. MDEP enclosed modeling protocol guidance with the letter and requested modeling results by January 15, 2013. The purpose of the request is to gather information in support of the state’s anticipated June 2013 submission to EPA of a maintenance state implementation plan (SIP) with modeling demonstrating attainment of the 1-hour SO₂ standard, as expeditiously as practicable, but not later than January 1, 2018. MDEP anticipates that this maintenance SIP will support Maine’s request that the entire state be designated “unclassifiable” with regard to the 1-hour SO₂ standard.

IV. Massachusetts Recommends Retirement of RGGI Allowances

In a December 22, 2011, memorandum to the Massachusetts RGGI Auction Advisory Committee, the Massachusetts Department of Energy Resources (DOER) and Department of Environmental Protection (MassDEP) staff recommended the retirement of 16,831,266 unsold RGGI allowances for the first compliance period (2009 through 2011) held by Massachusetts, provided other states do the same with their unsold allowances. Across all RGGI states there are approximately 109 million allowances that were offered but not sold at auction during the first compliance period. Staff stated retirement of these allowances “will allow a clean slate for the participating states to undertake program review in 2012 and consider a potential redesign of the RGGI program, to better achieve the long-term goals set forth in the RGGI MOU.”

V. Massachusetts Proposes Conforming Change to VOC Definition

MassDEP is proposing to amend the definition of volatile organic compound (VOC) in 310 CMR 7.00 to make it consistent with EPA’s definition by adding

dimethyl carbonate and propylene carbonate to the list of compounds exempt from the definition of VOC.

VI. New Hampshire Releases Draft Redesignation Request for O₃ Nonattainment Area

On December 23, 2011, the New Hampshire Department of Environmental Services (NHDES) released for public comment its draft request for redesignation of the Boston-Manchester-Portsmouth, New Hampshire, ozone nonattainment area as being in attainment with the 1997 8-hour (0.08 ppm) ozone standard. The area for which NHDES proposes to seek redesignation encompasses portions of four counties and 52 cities and towns in southeast New Hampshire. The largest municipalities in this area are Manchester and Nashua.

VII. New Hampshire Releases Estimate of Hg Emissions from Coal-Fired Power Plants

On November 29, 2011, NHDES released its Preliminary Determination on Baseline Mercury Emissions. The document estimates that the baseline mercury emissions from the coal-burning power plants in the state are 309 pounds of mercury per year.

VIII. Rhode Island Air Initiatives

On October 26, 2011, the Rhode Island Department of Environmental Management (DEM) submitted a letter to EPA certifying that Rhode Island's existing SIP is consistent with the primary and secondary NAAQS, as amended in 2008, for lead.

DEM also recently adopted a new regulation, Air Pollution Control Regulation No. 49—Transportation Conformity. The regulation, which went into effect on October 20, 2011, outlines the procedures to be used to determine the conformity of transportation plans, programs, and projects to the SIP.

Effective February 2, 2012, amendments to Air Pollution Control Regulation No. 43—General Permits for Smaller-Scale Electric Generation Facilities will go into effect.

In either the first or second quarter of 2012, DEM expects to initiate rulemaking to amend the following Air Pollution Control Regulations: No. 9 (Air Pollution Control Permits), No. 22 (Air Toxics), and No. 37 (Low Emissions Vehicle Program).

Finally, DEM plans to begin the rulemaking process to repeal Air Pollution Control Regulation No. 41—NO_x Budget Trading Program.

IX. Vermont Requires Lower Sulfur Fuel

On September 28, 2011, the Vermont Department of Environmental Conservation (DEC) adopted amendments to the state's Air Pollution Control Regulations, specifically Section 5-221(1), to require lower sulfur limits for fuels used for heat or power generation. DEC indicated the amendments are part of a regional strategy intended to reduce regional haze and benefit public health. The amendments became effective on October 14, 2011.



**Upcoming Section Programs—
For full details, please visit:**

www.ambar.org/EnvironCalendar

March 22-24, 2012
41st Annual Conference on Environmental Law
Salt Lake City

April 19-20, 2012
2012 ABA Petroleum Marketing Attorneys' Meeting
Washington, DC

May 3, 2012
Wetlands Law and Regulation
Primary Sponsor: ALI-ABA
Washington, DC

May 4, 2012
Species Protection: Critical Legal Issues
Primary Sponsor: ALI-ABA
Washington, DC

May 23, 2012
U.S. Environmental Protection Agency Region 2
Conference
Primary Sponsor: U.S. Environmental Protection
Agency, Region 2
New York, NY

EPA REGION 2

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I. NYSDEC Proposes Article 10 Regulations Addressing CO₂ and EJ

As reported in the last issue of this newsletter, on August 4, 2011, New York enacted the Power NY Act, which renewed authorization of article 10 of the Public Service Law, reestablishing article 10 as the process for permitting new power plants (of at least 25 MW) in the state. The New York State Department of Environmental Conservation (NYSDEC) has now issued proposed regulations to limit carbon dioxide emissions from the new facilities to be certificated under article 10, as the Power NY Act requires. NYS Register, Jan. 18, 2012, pp. 13–23. According to NYSDEC’s rulemaking notice, the numerical emission limits effectively prohibit all new coal-fired or oil-fired generation in New York at any facility that does not use carbon capture and sequestration.

In the same issue of the State Register, NYSDEC also proposed regulations to implement the environmental justice provisions of the Power NY Act. The proposed regulations define key terms such as “low-income community” (a census block group, or contiguous area with multiple census block groups, where 23.59 percent or more of the population have an annual income that is less than the poverty threshold); “minority community” (a census block group, or contiguous area with multiple census block groups, where the minority population is equal to or greater than 51.1 percent in an urban area or 33.8 percent in a rural area); “minority population” (Hispanic, black, Asian and Pacific Islander, or American Indian); “impact study area” (which is required to be at least a one-half mile radius around the location of the proposed facility); “adjacent communities” (those within a specified radius of the proposed facility); “EJ area” (a minority or low-income community that may bear a disproportionate share of the negative environmental consequences resulting from industrial, municipal, and commercial operations or the execution

of federal, state, local, and tribal programs and policies); and “comparison area” (a reference area to determine whether the adjacent communities in the impact study area bear a disproportionate environmental burden).

A full EJ analysis is required if (1) a “minority community” or “low-income community” is located within the “impact study area” *or* (2) if the impact study area contains an area (defined by census block group or multiple census block groups) that has a minority or low-income population that is above 85 percent of the stated thresholds for constituting a minority or low-income community *and* available data indicate that the impact study area may bear a disproportionate environmental burden.

If a full EJ analysis is required, it must include (1) a cumulative impact analysis of air quality to include most criteria pollutants and potentially certain toxic air pollutants; and (2) “comprehensive” demographic, economic, and physical descriptions of the impact study and comparison areas, to include information pertaining to population, racial and ethnic characteristics, income levels, public health, air quality (including air toxics data), the number and concentration of specific industrial facilities or sites, open space, historic and cultural resources, community or neighborhood character, visual and aesthetic resources, ambient sound levels, and vehicle and pedestrian traffic. If the analysis determines that the proposed facility would contribute to any significant and adverse disproportionate environmental impacts in the impact study area, the applicant must identify measures that it will take to avoid, offset, or minimize each impact and evaluate the effectiveness of such measures. All disproportionate impacts must be avoided to the maximum extent practicable.

II. RGGI Allowances to Be Retired

On January 17, 2012, in connection with the announcement of the next auction of allowances under the Regional Greenhouse Gas Initiative (RGGI), the states of Connecticut, Delaware, Massachusetts, New York, Rhode Island and Vermont announced their intention to retire first control period allowances

(2009–2011) that were offered, but not sold in the first control period auctions (Auctions 1–14). The retirement of these allowances may be the first step in tightening the regional emissions cap, which in recent years has been much higher than the actual emissions from the power plants subject to the program.

III. New York City Carpet Law

On January 17, 2012, the city of New York enacted a law (Intro. No. 585-A) limiting volatile organic compound emissions from carpets and carpet cushions. The law is intended to combat “sick building syndrome.” Carpet sellers may either test the carpets they sell for compliance with the law’s emission standards or comply by selling carpets certified with a “green label” by the Carpet and Rug Institute, or any other certification program that may be specified in the city’s implementing regulations.

IV. New York City Law Requires Particulate Filters on HVAC Intakes

On December 27, 2011, the city of New York enacted a law (Intro. No. 592-A) requiring that air-handling units of mechanical ventilation systems, any portion of which provides outdoor air ventilation, be equipped with a particulate matter filtration system with a minimum efficiency reporting value of 11 or greater in accordance with ASHRAE 52.2, published by the American Society of Heating, Refrigerating and Air-Conditioning Engineers, Inc. The law contains an exemption for previously installed units and for units with a design capacity of less than 5000 cubic feet per minute. The purpose of the law is to reduce indoor exposure to ambient particulate matter.

EPA REGION 3

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I. EPA Region 3 Radon Initiative

Region 3 declared January 2012 as Radon Action Month alerting residents to test homes and buildings during the winter months because windows and doors are closed tightly and people are spending more time indoors. The surgeon general has warned that radon is the second leading cause of lung cancer in the United States, with an estimated 21,000 deaths a year. Only smoking causes more lung cancer deaths. Radon is a colorless, odorless gas, so testing is the only way to know if it is present indoors. The test kits are available at home improvement centers and hardware stores, and cost approximately \$20, including the analysis. Simple fixes in a home or building can lower exposure.

II. EPA Region 3 Special Agent in Charge of Criminal Investigation Division

On October 24, 2011, EPA announced that David G. McLeod Jr., a 17-year EPA veteran, has been selected as the special agent in charge of its Criminal Investigation Division Area Office in Philadelphia. McLeod will supervise environmental investigations throughout EPA’s mid-Atlantic region. He previously served as the assistant special agent in charge of the New York area office and as the resident agent in charge of the Jackson, Mississippi, office.

III. EPA Improvements to Title V Web Site

EPA Region 3 has posted a webpage listing the pending title V permit actions—including renewals and modifications—and the dates for public comment. Under the title V program, the public may petition EPA to object to a permit issued by a state agency provided that the objection was brought before the state agency during the 30-day public comment period for the draft permit, before the expiration of EPA’s 45-day review period, and EPA has not objected to the issuance of the permit. If these conditions are met, anyone who



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raised objections during the public comment period may petition the EPA administrator within 60 days of the end of EPA's review period. A table lists proposed title V permits submitted to EPA and undergoing EPA's 45-day review, including the start and expiration dates for EPA's 45-day review period, and the start and expiration dates for the public's 60-day period to petition the administrator following EPA's review period. Go to www.epa.gov/reg3artd/permitting/petitions3.htm.

IV. Settlement of Enforcement Action against Merck

On September 28, 2011, EPA and the Department of Justice announced that Merck & Co. agreed to pay a \$1.5 million civil penalty to settle alleged violations of federal environmental laws at its pharmaceutical manufacturing facilities in Riverside and West Point, Pennsylvania. The complaint alleges that Merck did not comply with Clean Air Act emissions reporting and record-keeping requirements. The complaint also asserts Clean Water Act and hazardous waste violations. The company has taken corrective actions to correct the alleged violations, and has implemented best management practices for continuing environmental compliance.

V. Delaware—SIP Revisions

On January 23, 2012, EPA proposed to approve a SIP revision amending Delaware's regulation of NO_x emissions from industrial boilers and process heaters at petroleum refineries, by including a NO_x emission limit for the fluid catalytic cracking unit carbon monoxide boiler at the Delaware City Refinery and providing for a facility-wide NO_x emission cap compliance alternative. 77 Fed. Reg. 3211.

On December 22, 2011, EPA approved Delaware's SIP revision adding section 4.0, under regulation 1141, relating to the control of emissions of VOC from the manufacture, sale, use, or application of adhesives, sealants, primers, and solvents. 76 Fed. Reg. 79,537. EPA is approving this SIP revision to meet the requirements of a reasonably available control technology (RACT) rule for the miscellaneous

industrial adhesives control techniques guideline (CTG) category. The rule became effective on January 23, 2012.

On November 25, 2011, EPA approved a SIP revision amending the control of VOC emissions from offset lithographic printing and letterpress printing. 76 Fed. Reg. 72,626. EPA is approving this SIP revision to meet the requirements of a RACT rule for the offset lithographic printing and letterpress printing CTG category.

VI. Delaware—DuPont Sponsors Diesel Generator Replacement

On December 9, 2011, the Delaware Department of Natural Resources and Environmental Control (DNREC) and DuPont entered into an agreement, as a condition of DuPont's Delaware Coastal Zone permit, for DuPont to fund a project to replace 20 diesel generators used to power refrigerated storage containers at the Trinity Distribution Services facility in New Castle, Delaware, with electrified outlets, reducing diesel emissions. DuPont is using this project to offset air emissions from two new boilers at its Edge Moor facility in Wilmington. The project will eliminate up to 120 tons of harmful air pollutants annually from the Trinity site and produce health and environmental benefits for the community. Under the agreement, DuPont provided \$225,000 to replace the generators with electrified outlets and an additional \$25,000 to fund technical and administrative oversight of the project by the Clean Air Council through its diesel pollution reduction program. The project complements the state's ongoing efforts to reduce diesel emissions, including projects funded by EPA and grants made available through the Diesel Emissions Reduction Act.

VII. District of Columbia—SIP Revisions

On January 10, 2012, EPA issued a final rule determining that the Metropolitan Washington, District of Columbia-Maryland-Virginia (DC-MD-VA) fine particle (PM_{2.5}) nonattainment area and the Martinsburg-Hagerstown, West Virginia-Maryland (WV-MD) PM_{2.5} nonattainment area have attained the 1997 annual PM_{2.5} NAAQS. 77 Fed. Reg. 1411.

These determinations are based upon certified ambient air monitoring data for the 2007–2009 monitoring period. EPA is finding these areas to be in attainment effective February 9, 2012.

On November 16, 2011, EPA proposed revisions to the regional haze SIP for the first implementation period. 76 Fed. Reg. 70,929. EPA is proposing to determine that the regional haze plan submitted by the District of Columbia satisfies the requirements of the Clean Air Act. EPA is also proposing to approve this revision as meeting the infrastructure requirements relating to visibility protection for the 1997 8-hour ozone NAAQS and the 1997 and 2006 PM_{2.5} NAAQS. Comments were due December 16, 2011.

VIII. Maryland—SIP Revisions

On December 9, 2011, EPA proposed to make several determinations with respect to the Philadelphia-Wilmington-Atlantic City 8-hour ozone moderate nonattainment area. 76 Fed. Reg. 76,929. First, EPA is proposing to determine that the area has attained the 1997 8-hour ozone NAAQS. This proposed determination is based upon complete, quality assured, and certified ambient air monitoring data that show the area has monitored attainment of the 1997 8-hour ozone NAAQS for the 2008–2010 monitoring period. If this proposal is made final, the requirement that certain planning requirements related to attainment be submitted to EPA would be suspended for so long as the area continues to attain the 1997 8-hour ozone NAAQS. Second, EPA is also proposing to determine that the area attained the 1997 8-hour ozone NAAQS by its attainment date of June 15, 2011. Finally, EPA is withdrawing the May 8, 2009, proposed disapprovals of the attainment demonstrations for the area, based on the ambient air quality monitoring data demonstrating attainment. Comments were due January 9, 2012.

On November 25, 2011, EPA approved SIP revisions to basic program elements, including regulatory structure, monitoring, modeling, legal authority, and adequate resources necessary to assure attainment and maintenance of the standards. 76 Fed. Reg. 72,624. These elements are referred to as infrastructure requirements. Maryland has made submittals

addressing the infrastructure requirements for the 1997 8-hour ozone and PM_{2.5} NAAQS and the 2006 PM_{2.5} NAAQS. This action approves portions of those submittals effective December 27, 2011.

On November 23, 2011, EPA proposed to make two determinations regarding the Baltimore PM_{2.5} nonattainment area. 76 Fed. Reg. 72,374. First, EPA proposed to determine that the area has attained the 1997 annual PM_{2.5} NAAQS, based upon certified ambient air monitoring data for the 2008–2010 period showing that the area has monitored attainment of the NAAQS and data available to date for 2011 in EPA's Air Quality System (AQS) database that show the area continues to attain. If EPA finalizes this proposed clean data determination, the requirements for the area to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other planning SIP revisions related to the attainment of the standard would be suspended for so long as the area continues to attain the annual PM_{2.5} NAAQS. EPA is also proposing to determine, based on quality-assured and certified monitoring data for the 2007–2009 monitoring period, that the area attained the 1997 annual PM_{2.5} NAAQS by its applicable attainment date of April 5, 2010. In addition, EPA is withdrawing the July 31, 2009 (74 Fed. Reg. 38,161) proposed clean data determination for the area.

IX. Pennsylvania—SIP Revisions

On January 26, 2012, EPA proposed limited approval of a revision to the Pennsylvania SIP submitted by the Pennsylvania Department of Environmental Protection (PADEP) on December 20, 2010 that addresses regional haze for the first implementation period. 77 Fed. Reg. 3984. This revision addresses the requirements of EPA's regional haze program. EPA is proposing a limited approval of this regional haze SIP revision on the basis that the revisions, as a whole, strengthen the Pennsylvania SIP. EPA is also proposing to approve this revision as meeting the infrastructure requirements relating to visibility protection for the 1997 8-hour ozone NAAQS and the 1997 and 2006 PM_{2.5} NAAQS. On December 30, 2011, EPA proposed a limited disapproval of the Pennsylvania

regional haze SIP because of deficiencies arising from the D.C. Circuit's remand of the Clean Air Interstate Rule (CAIR). 76 Fed. Reg. 82,219.

On January 24, 2012, EPA approved a SIP revision containing Pennsylvania's Clean Vehicle program, which adopts California's second-generation low emission vehicle program for light-duty vehicles (LEV II). 77 Fed. Reg. 3386. Pennsylvania has adopted a Clean Vehicle program that incorporates by reference provisions of California's LEV II rules and specifies a transition mechanism for compliance with these clean vehicle standards in Pennsylvania.

On January 23, 2012, EPA took direct final action to make two determinations regarding the Philadelphia-Wilmington fine particulate (PM_{2.5}) nonattainment area. 77 Fed. Reg. 3147 (final rule), 77 Fed. Reg. 3223 (proposed rule). First, EPA is making a determination that the area has attained the 1997 annual PM_{2.5} NAAQS by its attainment date of April 5, 2010. This determination is based upon certified ambient air monitoring data that show the area has monitored attainment of the 1997 annual PM_{2.5} NAAQS for the 2007–2009 monitoring period. Second, EPA is making a clean data determination, finding that the area has attained the 1997 PM_{2.5} NAAQS, based on certified ambient air monitoring data for the 2007–2009 and 2008–2010 monitoring periods. In accordance with EPA's PM_{2.5} implementation rule, this determination suspends the requirement that an attainment demonstration, RACM, RFP plan, and contingency measures with respect to the annual PM_{2.5} NAAQS be submitted for the area, for so long as the area continues to attain this NAAQS. The direct final rule will be effective on March 23, 2012, unless adverse comments are submitted to EPA within the comment period.

On January 20, 2012, EPA proposed to determine that the Harrisburg-Lebanon-Carlisle-York, Allentown, Johnstown, and Lancaster nonattainment areas for the 2006 24-hour PM_{2.5} NAAQS have clean data for this NAAQS. 77 Fed. Reg. 2941. These proposed determinations are based upon certified ambient air monitoring data showing that these areas have monitored attainment of this NAAQS based on the

2008–2010 data available in EPA's AQS database. If these proposed determinations are made final, the requirements for these areas to submit an attainment demonstration, associated RACM, RFP, contingency measures, and other planning SIPs related to attainment of the standard would be suspended for so long as the areas continue to meet the standard.

On January 20, 2012, EPA proposed a SIP revision intended to update Pennsylvania's nonattainment new source review (NSR) regulations to meet EPA's 2002 NSR reform regulations and to satisfy the requirements related to anti-backsliding. 77 Fed. Reg. 2937. Additionally, the proposed revision makes clarifying changes to regulations that are not related to NSR reform.

X. Pennsylvania—Marcellus Shale Air Emission Data

On December 6, 2011, PADEP alerted 99 companies involved in shale natural gas development around Pennsylvania that they must submit to the agency data on their facilities' air emissions for 2011. The reports are due March 1, 2012. The initial notifications of air emissions from natural gas exploration, authorized under section 4(3) of the Pennsylvania Air Pollution Control Act (35 P.S. § 4004(3)) and 25 Pa. Code § 135.3 (relating to reporting), will allow PADEP to develop its first emissions inventory for the natural gas industry. Basic information about air contamination sources will be required, including company contact, lease/facility location, and equipment and production data, or hours of operation, type of control equipment used, amount of gas produced, amount of fuel used and amount of frac water processed. Air emissions data for sources associated with natural gas development, including production, processing, and related activities, also will be reported to PADEP.

To comply, owners and operators will download spreadsheets from the PADEP Oil and Gas Reporting-Electronic system specific to their facilities that provide for reporting of the different processes associated with the natural gas activities. Owners/operators are to provide emissions data and source reports for sources including stationary engines, heaters, tanks/

impoundments, dehydration units, pneumatic pumps, fugitives venting and blowdown, drill rigs, and well completions. Emissions data are to be reported for air contaminants, including CO, NO_x, PM₁₀, PM_{2.5}, SO₂, Pb, and VOCs. Emissions of hazardous air pollutants, including benzene, ethylbenzene, formaldehyde, N-hexane, toluene, 2,2,4-trimethylpentane and total HAPs, must also be reported. PADEP anticipates that the Shale Air Emissions Data Management System will be available in February 2012 to allow reporting to begin. PADEP will be offering compliance assistance training.

XI. Pennsylvania—PADEP Urges Dismissal of Clean Air Council Petition

On January 5, 2012, PADEP Secretary Mike Krancer urged EPA to dismiss a petition that the Clean Air Council filed with EPA in November 2011, claiming that Pennsylvania is failing to implement requirements in its SIP and asking EPA to sanction the Commonwealth. The latest SIP submittal of 2009, embodying a 2008 regulation to expedite permitting of minor air emission sources, was submitted to EPA for its approval in April 2009, but has not yet been approved by EPA. EPA's lack of response has triggered suits by several environmental groups for lack of action on Pennsylvania's and other states' plans.

XII. Pennsylvania—SEPTA Grant

On December 8, 2011, EPA announced a \$1.2 million grant to help the Southeastern Pennsylvania Transportation Authority (SEPTA) improve air quality in and around its rail yards, through the conversion of a locomotive to a clean diesel engine. The funding, made possible through EPA's Diesel Emissions Reduction Act program, helps SEPTA repower the engine of a conventional diesel maintenance locomotive with two generator sets (GenSet), and a diesel particulate filter. The repower will reduce diesel emissions and save fuel for SEPTA. The repower of the 1950s-era locomotive is expected to be complete by mid-2012. The locomotive is one of six in SEPTA's fleet used for maintenance, repairs, and to rescue stranded trains. GenSet locomotives reduce NO_x and PM emissions by approximately 80 percent and can reduce CO₂

emissions by 25 percent through technologies that monitor engine idling and switch to "sleep" mode after a period of inactivity. To learn more about EPA's Mid-Atlantic Clean Diesel program, visit www.epa.gov/reg3artd/diesel/index.htm.

XIII. Pennsylvania Urges Revision of the Federal Interstate Transport Rule

PADEP is urging EPA to revise the Cross-State Air Pollution Rule (CSAPR) because of concerns that it will stress electricity markets, cause waste-coal fueled electrical generation to be less cost-effective, and violate states' rights. The rule may have a substantial impact on Pennsylvania's waste-coal fueled power plants, which utilize decades-old piles of discarded coal that was once deemed to have heat content too low to be used by power plants. The power plants remove from the environment piles of waste coal, which have the potential to cause acid mine drainage. According to PADEP, CSAPR would require such plants to be equipped with costly add-on controls by 2014, which would do little to improve air quality, as these plants have minimal effect on downwind areas' ability to attain NAAQS. Operators, which have combined to reclaim nearly 3,400 acres of abandoned mine lands at no cost to taxpayers, may retire the facilities if they are too costly to operate.

XIV. Pennsylvania—Natural Gas Conversions for Vehicles

On December 1, 2011, PADEP issued technical guidance clarifying that natural gas conversions are authorized under Pennsylvania's Clean Vehicles program. New passenger car or light-duty truck conversion systems certified by EPA or the California Resources Air Board may be installed on vehicles in Pennsylvania. The guidance document, published in the December 3, 2011, *Pennsylvania Bulletin*, was among the recommendations the Marcellus Shale Advisory Commission made to Governor Corbett. It will provide manufacturers, sellers, and consumers of passenger cars and light-duty trucks with information about the requirements to ensure that converted vehicles comply with Pennsylvania's Clean Vehicles program.

XV. Pennsylvania—Report on Air Toxics Near Schools

On November 10, 2011, two final reports on monitoring of outdoor air toxics around four western Pennsylvania schools were made available. One report, for Sto-Rox elementary and middle schools in McKees Rocks in Allegheny County, concluded that the levels monitored outside of the schools do not pose a health concern for school-age children and school staff for long-term exposure. The Sto-Rox schools were recommended for air monitoring due to their proximity to a coke oven and two chemical manufacturing facilities that emit air toxics, and based on computer modeling. Air monitoring at the school has been discontinued. The second report covered Clairton educational center in Clairton and South Allegheny middle school and high school in McKeesport, which were included in the study due to emissions from coke ovens. Clairton monitoring has been discontinued because the toxics monitored were below levels of significant concern. More monitoring is being conducted at McKeesport to characterize the potential for health concerns from long-term exposure to coke oven emissions. *See* www.epa.gov/schoolair/schools.html for more information on these and other school air monitoring programs.

XVI. Virginia—SIP Revisions

On January 26, 2012, EPA issued a final rule approving Virginia's SIP revision adding a new chapter (9VAC5-45—Consumer and Commercial Products) to regulate VOC emissions from portable fuel containers, consumer products, architectural and industrial coatings, adhesives and sealants, and asphalt paving operations within the Northern Virginia and Fredericksburg VOC emissions control areas. 77 Fed. Reg. 3928. The SIP revision also includes new and revised documents incorporated by reference into the Virginia regulations (9VAC5-20-21—Documents Incorporated by Reference) in order to support the new and revised regulations. This rule is effective on February 27, 2012.

On January 25, 2012, EPA proposed a limited approval and limited disapproval of six revisions to the

Virginia SIP that address regional haze for the first implementation period. 77 Fed. Reg. 3691. EPA is proposing a limited approval of these SIP revisions to implement the regional haze requirements for Virginia on the basis that the revisions, as a whole, strengthen the Virginia SIP. Also in this action, EPA is proposing a limited disapproval of these same SIP revisions because of the deficiencies in the Commonwealth's regional haze SIP submittal arising from the D.C. Circuit's remand of the Clean Air Interstate Rule. EPA is also proposing to approve this revision as meeting the infrastructure requirements relating to visibility protection for the 1997 8-hour ozone NAAQS and the 1997 and 2006 PM_{2.5} NAAQS. Interested parties may submit comments to EPA by February 24, 2012.

On December 12, 2012, EPA took direct final action to approve revisions to the Virginia SIP to incorporate revisions to general conformity requirements promulgated in July 2006 and April 2010. 76 Fed. Reg. 77,150 (final rule); 76 Fed. Reg. 77,182 (proposed rule). EPA is approving this Virginia SIP revision to update its state general conformity requirements rule for federal actions (Virginia's General Conformity Rule) to align with the federal General Conformity Requirements Rule, effective February 10, 2012.

XVII. West Virginia SIP Revisions

On January 24, 2012, EPA took direct final action to approve a revision to the West Virginia hospital/medical/infectious waste incinerator (HMIWI) section 111(d)/129 plan. 77 Fed. Reg. 3389 (final rule), 77 Fed. Reg. 3422 (proposed rule). The revision contains a modified state rule for solid waste combustion that was updated as a result of the October 6, 2009, amendments to federal emission guidelines and new source performance standards (NSPS), 40 C.F.R. part 60, subparts Ce and Ec, respectively. While West Virginia's revised regulation contains requirements for various types of solid waste incineration units, the revisions and approval action relate only to HMIWI units. This rule is effective on March 26, 2012, unless adverse comment is received.

On December 2, 2011, EPA issued a final rule determining that the Parkersburg-Marietta, West Virginia-Ohio (WV-OH) fine particle (PM_{2.5}) nonattainment area and Wheeling, WV-OH PM_{2.5} nonattainment area have attained the 1997 annual PM_{2.5} NAAQS by their applicable attainment date of April 5, 2010. 76 Fed. Reg. 75,464. These determinations are based upon complete, quality-assured, and certified ambient air monitoring data for the 2007–2009 monitoring period. EPA is finding these areas to be in attainment, effective January 3, 2012.

On November 8, 2011, EPA issued a final rule effective December 19, 2011, regarding the Charleston, West Virginia, nonattainment area for the 24-hour 2006 PM_{2.5} NAAQS. 76 Fed. Reg. 71,450. EPA is determining that this area has clean data for this standard, based upon certified ambient air monitoring data showing that the area has monitored attainment of the standard based on the 2007–2009 data and data available to date for 2010 in EPA’s AQS database. EPA’s determination releases the area from the requirements to submit an attainment demonstration, associated RACM, RFP, contingency measures, and other planning SIPs related to attainment of the standard for so long as the area continues to meet the standard.



TRENDS
ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER

Trends: Section newsletter now in new electronic format

The Section’s newsletter *Trends* can be found in a new electronic format at www.ambar.org/EnvironTrends. Individual articles are now being posted in html format and contain hyperlinks to important cases and other resources cited in the text.

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EPA REGION 6

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I. EPA Issues GHG PSD Permit for Texas Power Plant

On November 10, 2011, EPA issued the first greenhouse gas emissions permit in Texas since taking over permitting authority after the state refused to implement the federal prevention of significant deterioration (PSD) permitting program for greenhouse gases. The permit authorizes a new 590-megawatt combined-cycle natural gas-fired unit at the Lower Colorado River Authority (LCRA) Thomas C. Ferguson Power Plant in Horseshoe Bay, Texas. The permit provides greenhouse gas emission limits for two combined-cycle natural gas-fired combustion turbine-generators rated at approximately 195 megawatts each (including limits for start-up and shutdown activities), fugitive natural gas emissions from piping components, a diesel-fired emergency generator, a diesel-fired fire water pump, and sulfur hexafluoride insulated electrical equipment. Limits on start-up and shutdown emissions from the combustion turbines are also specified. The permit limits carbon dioxide emissions from all sources to a total of just over 1.8 million tons per year. LCRA submitted the permit application on March 15, 2011. EPA received no comments regarding the proposed permit during the 30-day public comment period. The application process required an assessment of the potential effects on species protected under the Endangered Species Act, a National Historic Preservation Act review, and an environmental justice analysis.

II. EPA Episodic Release Reduction Initiative

EPA Region VI has initiated a new voluntary emissions reduction initiative on the Gulf Coast. Dubbed the Episodic Release Reduction Initiative, the new program has roots in a similar program in 1999 viewed as successful by the agency. The kickoff meeting for the initiative was held on January 12, 2012, in Addison, Texas. EPA invited the operators of

seventeen facilities to the meeting. EPA indicates that invitees were selected based on two factors: (1) the facility belonged to a group with allegedly the largest number of episodic releases to the National Response Center over the past five years, and (2) the facility had allegedly high impacts on environmental justice communities. EPA anticipates that those facilities that participate will meet periodically through mid-2013 to share and perhaps develop new best practices—both with respect to reductions of emissions events and communications to communities about those events.

III. Arkansas—Regional Haze SIP

On October 11, 2011, EPA published a proposed rule to partially approve and partially disapprove an Arkansas SIP revision that addresses regional haze-related Clean Air Act requirements intended to prevent any future and remedy any existing anthropogenic impairment of visibility in mandatory class I areas caused by air contaminant emissions from numerous sources located over a wide geographic area. *76 Fed. Reg. 64,186*. The publication also included proposed partial approval and partial disapproval of a portion of a SIP revision that Arkansas submitted on April 2, 2008, and supplemented on September 27, 2011, to address the interstate transport requirements that the Arkansas SIP contain adequate provisions to prohibit emissions from interfering with measures required in another state to protect visibility.

IV. Louisiana—Ozone Attainment Designation

Effective December 30, 2011, EPA redesignated the five parish area around Baton Rouge from moderate nonattainment to attainment of the 1997 8-hour ozone NAAQS. *76 Fed. Reg. 74,000* (Nov. 30, 2011). With that action EPA also revised the Louisiana SIP to include a maintenance plan, 2022 motor vehicle emissions budget for the Baton Rouge area, and a maintenance plan contingency measure. The published final rule also includes the control technique guideline rules update necessary for redesignation to attainment status.

V. Louisiana—Petition Alleges Failure of State's Title V Program

On December 14, 2011, the Environmental Integrity Project and Louisiana Bucket Brigade submitted a joint petition to EPA Region 6 alleging that the Louisiana Department of Environmental Quality (LDEQ) has failed to properly implement and enforce Louisiana's title V permitting program. The petition alleges that LDEQ does not comply with the Clean Air Act requirements for collecting fees to administer and enforce the program, and that such failure to properly fund the program has resulted in program deficiencies, including failure to issue permits on a timely basis, failure to monitor and assure permit compliance, and failure to take timely and adequate enforcement action. The petition, which was filed days after EPA's inspector general released a report noting flaws in Louisiana's program, compares Texas's title V permitting program favorably to Louisiana's program with respect to money spent on the program and spending level per regulated facility.

VI. Louisiana—SIP Amendment re CTGs for Volatile Organic Compounds

On December 2, 2011, EPA published a final rule amending the Louisiana SIP to implement measures in response to the control techniques guidelines (CTGs) issued in 2006, 2007, and 2008 for the control of emissions of volatile organic compounds (VOCs). The CTGs cover the following consumer and commercial products source categories: (1) Flexible Packaging Printing Materials, Lithographic Printing Materials, Letterpress Printing Materials, Industrial Cleaning Solvents, and Flat Wood Paneling Coatings; (2) Paper, Film, and Foil Coatings; Metal Furniture Coatings; and Large Appliance Coatings; and (3) Miscellaneous Metal Products Coatings, Plastic Parts Coatings, Auto and Light-Duty Truck Assembly Coatings, Fiberglass Boat Manufacturing Materials, and Miscellaneous Industrial Adhesives.

VII. New Mexico—SIP Revision re PSD Permitting for GHGs

On December 29, 2011, EPA published a final rule (*76 Fed. Reg. 81,836*) revising the New Mexico SIP

regarding the Albuquerque/Bernalillo County prevention of significant deterioration program as applied to greenhouse gas emissions under EPA's GHG emissions tailoring rule. The revision establishes threshold emission levels for determining which new and modified sources become subject to the state's PSD permitting requirements for GHGs. The rule clarifies the applicable thresholds in the state's SIP and addresses and incorporates associated revisions to state regulations. The rule went into effect on January 30, 2012.

VIII. Oklahoma—SIP Infrastructure Amendments

On January 26, 2012, EPA published notice (77 Fed. Reg. 3933) of its approval of Oklahoma SIP submittals addressing infrastructure elements necessary to implement, maintain, and enforce the 1997 8-hour ozone, the 1997 fine particulate matter (PM_{2.5}), and 2006 PM_{2.5} NAAQS. The revisions also address infrastructure SIP requirements related to interstate transport for the 2006 PM_{2.5} NAAQS. The effective date of the final rule is February 27, 2012.

IX. Oklahoma—Interstate Transport

On December 29, 2011, EPA published a final rule (76 Fed. Reg. 81,838) revising provisions in the Oklahoma SIP that address interstate transport provisions for the 1997 8-hour ozone NAAQS, the 1997 PM_{2.5} NAAQS, and the 2006 24-hour PM_{2.5} NAAQS. The effective date of this final rule is January 30, 2012.

On December 27, 2011, EPA published a final rule (76 Fed. Reg. 80,760) to find that emissions from Oklahoma and five other states (Iowa, Kansas, Michigan, Missouri, and Wisconsin) significantly contribute to downwind nonattainment or interfere with maintenance of the 1997 ozone NAAQS in other states. The published rule also finalizes ozone season NO_x program requirements in CSAPR as the federal implementation plans (FIPs) for all the referenced states except Kansas. Additionally, the final rule identifies budgets, associated variability limits, and allowance allocations to be used for each state under the FIPs. The rule's effective date is January 26, 2012.

X. Oklahoma—Regional Haze

On December 28, 2011, EPA published a final rule (76 Fed. Reg. 81,728) partially approving and partially disapproving Oklahoma SIP revisions regarding its regional haze program and the visibility-related requirements of the 1997 8-hour ozone and 1997 PM_{2.5} NAAQS. The rule disapproves the sulfur dioxide best available retrofit technology requirements for six sources, and establishes a federal implementation plan to implement SO₂ emission limits for those sources. EPA took no action regarding whether Oklahoma has satisfied the reasonable progress requirements of the regional haze SIP. The rule's effective date is January 27, 2012.

XI. Texas—Dispute over Extent of Ozone Nonattainment

By letter dated January 11, 2012, the Texas Commission on Environmental Quality (TCEQ) commented on the EPA response to the state's recommendations for 2008 ozone NAAQS nonattainment designations. TCEQ asserts that EPA has no scientific justification for its proposal to expand the Houston-Galveston-Brazoria area to include Matagorda County, or for its proposal to expand the Dallas-Fort Worth area ozone nonattainment area to include Hood and Wise Counties.

XII. Texas—Lead Infrastructure SIP

On October 5, 2011, TCEQ adopted the lead infrastructure SIP revision for the 2008 lead NAAQS. The SIP revision documents how the infrastructure elements listed in section 110(a)(2) of the Clean Air Act are addressed in the Texas SIP.

XIII. Texas—Sierra Club Threatens to Sue EPA for Failing to Act on SIP Submittals

On October 27, 2011, the Sierra Club issued a notice of intent to sue EPA, alleging failure to take action on 26 Texas SIP submittals by various deadlines from December 15, 2008, to October 1, 2011. The Sierra Club's notice also alleges that EPA failed to issue notices of failure to Texas for unfiled SIP elements

relating to the Houston/Galveston/Brazoria and Dallas/Fort Worth 1997 ozone nonattainment areas. Those elements include moderate nonattainment new source review (NSR) rules for both areas, and a severe nonattainment NSR rule for the Houston area due April 15, 2010.

XIV. Texas—NSR-Related SIP Revisions

On November 2, 2011, EPA published approval of portions of three Texas SIP revisions submitted by Texas in 1993, 1998, and 2010 (76 Fed. Reg. 67,600). The SIP revisions include amendments and additions to Texas's NSR permitting rules in 30 Texas Administrative Code chapter 116. The August 31, 1993, revision creates two new sections (30 TAC §§ 116.174 and 116.175) for the use of emission reductions as offsets in NSR permitting. The July 22, 1998 revision, codified at 30 TAC § 116.116(f), provides for using discrete emission reduction credits to exceed permitted emission limits and updates citations to other Texas regulations. The October 5, 2010, revision updates citations to other Texas regulations in 30 TAC § 116.116(f).

XV. Texas—RACT for Ozone Nonattainment Area

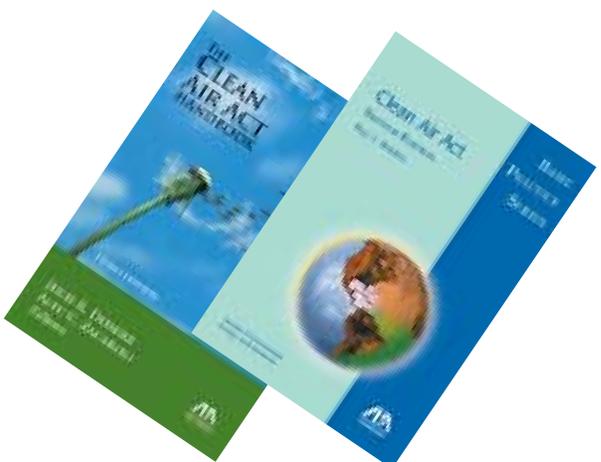
On December 7, 2011, TCEQ adopted a Houston-Galveston-Brazoria (HGB) reasonably available control technology (RACT) analysis update SIP revision for the 1997 8-hour ozone NAAQS. This SIP revision provides a RACT analysis update that includes seven CTGs that were not addressed in the HGB attainment demonstration SIP revision for the 1997 8-hour ozone NAAQS. The revision also incorporates concurrent CTG-related rulemaking for VOCs in the HGB area. TCEQ determined that all or a portion of the CTG recommendations for the following activities are RACT for the HGB area, and adopted rules to implement VOC emission-limiting CTG recommendations: Flexible Package Printing; Industrial Cleaning Solvents; Large Appliance Coatings; Metal Furniture Coatings; Paper, Film, and Foil Coatings; Miscellaneous Industrial Adhesives; and Miscellaneous Metal and Plastic Parts Coatings.

XVI. Texas—SIP Revisions for Dallas-Fort Worth Ozone Nonattainment Area

On December 7, 2011, TCEQ also adopted Dallas-Fort Worth (DFW) SIP revisions for the 1997 8-hour ozone NAAQS to submit to EPA by January 19, 2012, an attainment demonstration SIP revision consistent with the Clean Air Act's requirements for serious ozone nonattainment areas. This SIP revision is required based upon the reclassification of the DFW 1997 area from moderate to serious nonattainment effective January 19, 2011. The SIP revision references photochemical modeling that indicates the DFW area is expected to attain the 1997 8-hour ozone standard by the June 15, 2013, attainment deadline. The two rulemakings incorporated into this revision to meet RACT requirements update control requirements for certain coatings operations and VOC storage tanks.

XVII. Texas—SIP Revision for El Paso

On January 25, 2012, TCEQ adopted an El Paso SIP revision that incorporates a revision to the agency's 2001 memorandum of agreement with the city of El Paso relating to alternative control measures for PM₁₀. The SIP revision also includes changes to 30 Texas Administrative Code chapter 111 in a concurrent rulemaking.



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EPA REGION 8

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I. Colorado—Climate Change Suit Dismissed for Lack of Standing

On November 7, 2011, the district court for the city and county of Denver, Colorado, dismissed a lawsuit filed by various individuals and an environmental group against the state of Colorado and the governor claiming that the state failed to adequately protect the atmosphere by regulating greenhouse gases (GHGs). *Xiuhtezcatl Martinez, et al. v. State of Colorado, et al.*, Case No. 11CV4377. The plaintiffs had sought a declaratory judgment directing defendants to “significantly reduce Colorado’s GHG emissions.” Specifically, the plaintiffs alleged that the defendants were contributing to global warming by failing to reduce Colorado’s share of annual carbon dioxide emissions, in order to reduce carbon dioxide in the atmosphere to less than 350 parts per million (ppm) by the end of this century. The court dismissed the case, finding that plaintiffs lacked standing. Plaintiffs insisted they had standing by virtue of the Public Trust Doctrine. The court held that the Public Trust Doctrine does not exist in Colorado, noting that it has never been recognized by Colorado courts.

II. Colorado, Montana, Wyoming—Ozone Designations

In December 2011, EPA sent Colorado, Montana, and Wyoming letters informing each state of the EPA’s approach for moving forward with ozone designations. EPA is undertaking this action while resolution of a lawsuit for alleged failure of EPA to promulgate area designations for the 2008 ground-level ozone NAAQS remains pending. *Wildearth Guardians v. Jackson*, No. 2:11-cv-01661-ROS (D. Ariz.). EPA and Wildearth Guardians have entered into a proposed

consent decree that would require EPA to promulgate the ozone designations no later than May 31, 2012. The proposed consent decree is open to public comment until January 20, 2012. 76 Fed. Reg. 79,192 (Dec. 21, 2011).

The letters inform the states that EPA plans to promulgate final ozone designations in the spring of 2012. EPA will designate areas as nonattainment for ozone if they violate the 2008 NAAQS of 0.075 ppm for ozone, and other areas as unclassifiable/attainment if there are certified, quality-assured air quality monitoring data demonstrating compliance with the ozone standard or if there are no monitoring data. EPA is proceeding based on the recommendations made by each state in 2009. Supporting Colorado’s recommendations, EPA intends to designate a number of counties in the Front Range as nonattainment, including Denver, Boulder, and Larimer Counties, which include portions of Rocky Mountain National Park. All other areas in the state of Colorado are to be designated as unclassifiable/attainment. EPA intends to designate the entire state of Montana as unclassifiable/attainment. For Wyoming, EPA is supporting the state’s recommendation of nonattainment area designation for the Upper Green River Basin.

Each state is requested to provide EPA with additional information up and until February 29, 2012. Preliminary designations will be published in the *Federal Register* for public comment and review.

III. Utah—2012 Winter Ozone Study

The Uintah Basin 2012 Winter Ozone Study, a comprehensive study of the atmospheric chemistry and precursor gases that form winter-time ozone in the Uintah Basin, recently kicked off in Utah. According to the Utah Division of Air Quality (UDAQ), the study is the largest and most complex air quality study ever conducted in Utah. The study will be conducted from January to March 2012, with preliminary results scheduled for release in July 2012. Participants include UDAQ, EPA, Utah State University, the National Oceanic and Atmospheric Administration’s Chemical Sciences and Global Monitoring Divisions, the University of Colorado’s Institute of Arctic and Alpine

Research, the U.S. Bureau of Land Management, and certain members of the Western Energy Alliance. According to UDAQ, the goal of the study is to develop a conceptual model of how winter-time ozone forms in the basin and to identify appropriate and effective air pollution mitigation strategies.

IV. North Dakota—Oil & Gas PSD Settlements

A number of oil and gas companies operating in the Bakken formation on the Fort Berthold Indian Reservation in North Dakota entered into separate consent agreements with EPA to resolve alleged prevention of significant deterioration (PSD) violations and install emission control requirements on emission sources at well sites. Based on the unique composition of oil within the Bakken, uncontrolled emissions from many well-site operations—specifically, casinghead gas and tank emissions—exceed major source thresholds, and operators are finding it necessary to obtain synthetic minor source permits under the new tribal NSR rule. *See* 76 Fed. Reg. 38,748 (July 1, 2011). The consent agreements, entered into shortly before the tribal NSR rule became effective, resolve the alleged PSD violations and require the operators to apply for synthetic minor permits under the tribal NSR rule for existing and planned wells on the reservation and, in the meantime, to control casinghead gas and tank emissions via flares or vapor recovery units.

V. South Dakota—Permitting for New Oil Refinery

Circuit Court Judge Mark Barnett of the Sixth Judicial Circuit recently upheld a PSD construction permit issued by South Dakota Board of Minerals and Environment (BME) allowing Hyperion Resources to construct its proposed petroleum refinery and power plant, known as the Hyperion Energy Center (HEC), near Elk Point. The HEC would be the first new U.S. oil refinery built since 1976. The PSD permit, issued in August 2009, was appealed by the Sierra Club challenging, among other things, the agency's BACT determination and air quality modeling analysis. In June 2010, Hyperion requested an extension of the "commence construction" deadline in the permit. The

agency did not finalize the amended permit until September 2011. On appeal, the Sierra Club also argued that Hyperion allowed the initial permit to expire by failing to commence construction of the HEC within 18 months and that the filing of an application for extension of the permit is not sufficient to extend the 18-month deadline.

After review of the record, the court determined that the record supported the agency's BACT determination and that it followed a proper and adequate method of analysis of weighing particular factors in support of its BACT determination. The court also upheld BME's modeling analysis and determined that BME was in the best position to judge the credibility of the witnesses as to the appropriate air quality modeling, air monitoring data, and representative data site. Additionally, the court determined that Hyperion's application for extension of the construction deadline was filed before the 18-month deadline and was therefore timely and appropriate. Accordingly, the PSD permit was not rendered invalid and the extension request was justified given, among other things, the economic recession that caused the various delays in the project.

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

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EPA REGION 9

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I. Arizona—EPA Starts Sanctions Clock for Maricopa County

On January 25, 2011, Arizona withdrew its required PM₁₀ SIP for the Maricopa County nonattainment area. The withdrawn plan contained a motor vehicle emissions budget deemed “adequate” by EPA on May 30, 2008. On February 14, 2011, EPA issued a “failure to submit” finding and started a sanctions clock. It also withdrew its “adequacy” finding and reverted to a previously approved motor vehicle emissions budget. 76 Fed. Reg. 8300.

II. California—Permit for Innovative Gas/Solar Power Plant

On November 16, 2011, EPA issued a permit for the construction and operation of a 570 megawatt natural gas-fired power plant (Palmdale Hybrid Power Project), generating 50 megawatts of solar energy—10 percent of generated power during peak periods—in Palmdale, California. The permit is the first of its kind to limit CO₂ emissions, set at 774 pounds per megawatt-hour of power produced. The plant design combines natural-gas fired and solar technologies to create a “clean and efficient” fossil fuel-fired power plant. Operations should begin in summer of 2013. More information is available at <http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/c22eb37b16f31d08525794a0068f026!OpenDocument>.

III. California—Settlement of Alleged Violations at Biomass Power Plants

On February 15, 2011, EPA and the San Joaquin Valley Air Pollution Control District settled with two biomass power plants (Ampersand Chowchilla Biomass, LLC and Merced Power, LLC) concerning alleged violations of their air permits. The settlement included a combined civil penalty of \$835,000, split

evenly between EPA and the district. It also required upgrading the plants’ automated NO_x emissions systems, and generally minimized air pollutant emissions by mandating improved monitoring and reporting systems and more stringent controls. More information is available at <http://yosemite.epa.gov/opa/admpress.nsf/2dd7f669225439b78525735900400c31/8a0b1b18223656cd85257838005db1eb!OpenDocument>.

IV. California—Regional Haze Plan

On May 9, 2011, EPA finalized a SIP revision affecting California’s regional haze plan. 76 Fed. Reg. 34,608. The revision was based on a Clean Air Act provision requiring reasonable progress toward the national goal of achieving natural visibility conditions. It will ensure compliance in California’s 29 class 1 areas, i.e., national parks, forests, wilderness, and seashores.

V. California—PM_{2.5} SIPs

On June 29, 2011, EPA proposed approval of fine particle SIPs affecting the South Coast and San Joaquin Valley, considered two of the country’s most polluted air basins. The SIPs are structured to reduce pollution by 2015 to levels required by the 1997 PM_{2.5} NAAQS. As approved on October 3, 2011, they were based on new state rules reducing diesel emissions from existing diesel engines in trucks, ships, and construction equipment—the largest statewide sources of PM_{2.5}. 76 Fed. Reg. 69,896; 76 Fed. Reg. 69,928. EPA’s approval excluded contingency plans proposing emissions reductions considered insufficient.

VI. California—Interstate Transport

From July 14 to August 8, 2011, EPA finalized provisions of California’s interstate transport SIP concerning four elements required to attain “good neighbor” status under the Clean Air Act’s 1997 NAAQS for ozone and particulate matter. The first and second elements, finalized July 15, ensured against significant contribution to NAAQS nonattainment and prevented interference with ongoing NAAQS maintenance. The third element, finalized August 8, approved and disapproved proposed regulations

meant to block interference with initiatives preventing significant deterioration. The last element, finalized July 14, barred interference with measures required to protect visibility. 76 Fed. Reg. 34,872; 76 Fed. Reg. 48,002; 76 Fed. Reg. 48,006; 76 Fed. Reg. 34,608.

VII. California—Ozone SIP

On September 8, 2011, EPA proposed approval of SIPs targeting compliance by 2024 with the ozone NAAQS for the South Coast and San Joaquin Valley. 76 Fed. Reg. 57,872. The SIPs relied on statewide in-use truck and off-road diesel rules; smog-check improvements; reduced pollution in San Joaquin Valley from over-burning, boilers, composting, and livestock operations; and reduced solvents pollution from marine vessels in the South Coast. As approved on December 16, 2011, the SIPs rely on the development of technologies not yet created. This was permissible based on “extreme” nonattainment ozone designations in San Joaquin Valley and South Coast areas. State and local authorities will use research, demonstration, and grant programs to develop new compliance-enabling technologies.

VIII. Nevada—Clark County Attainment

On March 29, 2011, EPA published a direct final rule announcing Clark County’s “attainment” designation with respect to the 1997 8-hour ozone NAAQS. The designation went into effect on May 31. 76 Fed. Reg. 17,343.

IX. Nevada—Regional Haze SIP

On June 9, 2011, EPA proposed approval of a regional haze SIP outlining Nevada’s plan to reduce visibility impairment in its national parks and wilderness areas. A final rulemaking notice was published on December 13, 2011. EPA did not take action on the best available retrofit technology determination for nitrogen oxides at the Reid Gardner Generation Station, but suggested intent to do so in the near future. A copy of the EPA notice is published at www.epa.gov/region9/air/actions/pdf/nv/NVHazeStateImplementationPlan-PropRule.pdf.

X. Navajo Nation

In October 2010, EPA proposed a source-specific federal implementation plan that would have required the Four Corners Power Plant to reduce visibility-impairing pollution from its five coal-fired boilers. Arizona Public Service, acting on behalf of the plant, alternately suggested installing selective catalytic reduction—considered “the most stringent pollution control technology available”—on the two newest boilers and closing the three older ones by 2014. If successful, the facility would meet a nitrogen oxides emissions limit of 0.098 lb/mmBtu by July 31, 2018, thus reducing annual NO_x emissions from approximately 45,000 tons to 5,800 tons. In a supplemental notice published on February 11, 2011, EPA stated, “We are proposing to find that [the Plant’s] emissions control strategy would achieve more progress than EPA’s . . . proposal towards [improving visibility].” 76 Fed. Reg. 10,530.

XI. Gila River Indian Community

On January 19, 2011, EPA published a final rule approving the Gila River Indian Community’s tribal implementation plan, thereby making the plan federally enforceable. 76 Fed. Reg. 17,028.

ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALL FOR NOMINATIONS

ENVIRONMENT, ENERGY, AND RESOURCES GOVERNMENT ATTORNEY OF THE YEAR AWARD

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