

## Air Quality Committee Newsletter

Vol. 16, No. 1

December 2012

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### MESSAGE FROM THE COMMITTEE CHAIR

Gale Lea Rubrecht  
*Jackson Kelly PLLC*  
*galelea@jacksonkelly.com*

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The 2012–2013 ABA year has started and your Air Quality Committee (AQC) leadership team is off to the races. I want to thank Jonathan Peress for his service as AQC chair for the past two years. Jonathan will continue to serve as a committee vice chair for Programs and will chair the Quick Teleconference Planning Committee for the ABA Section of Environment, Energy, and Resources. In this message, I offer a report on the 20th Section Fall Meeting in Austin, changes in committee vice chair positions and programming, an introduction to your AQC leadership team, suggestions for ways to become involved, and a preview of upcoming conferences.

**Recap of Fall Meeting:** The Section Fall Meeting opened with a public service project at the Ann Richards School, a public, all-girls' school serving more than 600 girls in grades 6–11. Under the watchful eye of members of Keep America Beautiful, approximately 30 Section members planted five native trees in front of the school and weeded and mulched around trees in the rear courtyard. Participation in the Section's public service projects is rewarding and an excellent way to get to know other Section members and become involved in the Section and the ABA. Those interested in participating in the ABA's One Million Trees Project should contact Neil C. Johnston, chair of the SEER

Special Committee on Public Service  
([njohnston@handarendall.com](mailto:njohnston@handarendall.com)).

The CLE sessions at the Fall Meeting included a number of air quality programs, including (1) "The Challenge of EPA's Power-Plant Regulations and Their Impacts on the Electric System," moderated by AQC member Bill Fang of Edison Electric Institute; (2) "Is This Federalism? *Texas v. EPA*," moderated by Thomas G. Mason; and (3) "Air 'Hot' Topics," moderated by AQC member Steven Kohl. Other CLE sessions included a greenhouse gas program that explored EPA rule challenges, cap and trade, the low carbon fuel standard, common-law litigation, and public trust. AQC member Mary Ellen Ternes moderated, and AQC vice chair for Programs Shannon Broome presented.

The Fall Meeting also offered numerous networking opportunities. On Wednesday, following a meeting between Law Student Scholars and SEER Guides, everyone gathered for a welcome reception. The next day, we had the opportunity to have lunch with fellow "air" lawyers and technical experts. The committee luncheon was so well attended that committee members had to take turns sitting at the AQC table. Young lawyers and law students enjoyed a speed networking event on Thursday afternoon, and that evening, lawyers donned western attire and cowboy boots for dinner at the Bob Bullock Texas State History Museum, with live music by the Jason Roberts Combo. After the CLE sessions on Friday, we gathered for the Local Flair Reception and then

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Ben Snowden and  
Kristin Hines Gladd, Editors

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

**CALENDAR OF SECTION EVENTS**

January 25-27, 2013  
**ABA SEER Winter Council Meeting**  
La Concha Resort  
San Juan, PR

February 6-12, 2013  
**ABA Midyear Meeting**  
Dallas, TX

February 26, 2013  
**Key Environmental Issues in US EPA  
Region 4**  
Atlanta, GA

March 21-23, 2013  
**42nd Spring Conference**  
Grand America Hotel  
Salt Lake City, UT

April 11-12, 2013  
**ABA Petroleum Marketing Attorneys'  
Meeting**  
Washington, DC

April 18, 2013  
**ABA Public Lands and Resources Law  
Symposium**  
Missoula, MT

April 19-21, 2013  
**ABA SEER Spring Council Meeting**  
Greenough, MT

June 5-7, 2013  
**31st Annual Water Law Conference**  
Las Vegas, NV

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

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headed off to Manuel's Mexican Restaurant for a joint committee dinner with the Climate Change, Sustainable Development, and Ecosystems Committee. More than 30 committee members attended. Kudos to Phil Bower, Membership vice chair, for organizing a great dinner.

On Saturday, your AQC leadership team attended a joint council, committee chair, and vice chair meeting and then met with their peers on other SEER committees. Section leadership outlined plans for the upcoming year, including changes in committee vice chair positions and programming and planning for upcoming conferences.

**Social Media:** New this year is the position of vice chair for Social Media. Cheri Budzynski and Laura Swingle are co-chairing that position and are already managing an AQC subgroup on LinkedIn that I encourage each of you to join. I also encourage each of you to send me substantive materials, such as new court decisions or rulemakings, for distribution to the committee list serve and posting on our committee Web site by our vice chair for Electronic Communications, Michael Balster, or on LinkedIn, Twitter, or Facebook by Cheri and Laura.

**Public Service:** Although the public service vice chair for each SEER committee has been phased out, the Section encourages committee-specific public service projects in addition to participation in Section-wide initiatives. The AQC plans to explore partnering with other organizations for tree planting events in our local communities. We are also discussing continuing a public service project next summer that would involve providing information and links to air pollution control agencies for actions that individuals can take to reduce ozone formation during the summer ozone season. If you have ideas for committee-specific public service projects, please share them with me. We would welcome your involvement.

**Programming:** Outgoing chair Jonathan Peress now chairs the Section QT Planning Committee, which has adopted a number of changes for 2012–2013,

including committee conference calls and a new approach to Quick Teleconferences (QTs). The Section is reducing the number of QTs, and encourages each committee to hold up to two committee conference calls (free for members) during the 2012–2013 ABA year. Neither the committee conference calls nor the QTs will offer CLE credit. Look for the first Section QT around January 2013. For the Section to consider a QT proposal, the topic must be such that at least 50 people will dial in to listen and participate. The vice chairs for Programs and I welcome your suggestions for committee conference calls and Section QTs.

The vice chairs for Programs have already begun work on program proposals. The 42nd Spring Conference in Salt Lake City will include a session on new National Ambient Air Quality Standards (NAAQS) and NAAQS implementation, including the transport rule litigation. AQC vice chairs for Programs are also working on proposals concerning (1) new emission standards for industrial, commercial, and institutional boilers, and implementation of new emission standards for electric generating units and oil and gas sources; (2) implementation of greenhouse gas regulation under the Clean Air Act; (3) ambient air monitoring to assess air quality and health impacts associated with oil and gas and other sources of emissions; and (4) expansion and development of air quality standards for agricultural sources.

Vice chairs for Programs are Marty Booher, Shannon Broome, Michael Formica, John Jacus, Jonathan Peress, and Chris Thiele. The at-large vice chair with specific responsibility for Programs is Howard Hoffman. We welcome your suggestions and ideas for programs for conferences, committee conference calls, and QTs. If you would like to help coordinate committee conference calls, QTs, and programs for Section conferences, please contact us. Program proposals should also be sponsored by more than one committee, and the proposed topic must be broad enough to interest at least 150 conference attendees.

**Writing and Publications:** Writing opportunities abound and are an excellent way to become involved. Linda Tsang serves as vice chair for Publications and is

responsible for keeping members apprised of writing opportunities, reaching out to new members to write on air quality topics, and advocating for air quality articles in Section publications, such as *Trends* and *NR&E*. We will use the committee list serve to advise you of *NR&E* calls for articles and deadlines.

Kristin Hines Gladd and Ben Snowden are vice chairs for the newsletter and are looking for regional reporters and members interested in writing guest columns. Jonathan Martel is vice chair for *Year in Review* and needs volunteers to write summaries of cases and rules. We encourage all members, including young lawyers and law students, interested in writing for the newsletter, *Year in Review*, *Trends*, *NR&E*, or other publications to contact either me or the appropriate vice chairs. Committee newsletters and *Trends* are now in electronic format only, and *Year in Review* is going electronic in 2012.

**Upcoming Events:** The 42nd Spring Conference (formerly called the Annual Conference on Environmental Law) will be held in Salt Lake City on March 21–23, 2013. The 31st Water Law Conference will be held in Las Vegas on June 5–7, 2013. The 21st Fall Conference will be in Baltimore October 9–12, 2013, and the 22nd Fall Conference, chaired by Air Quality Committee member John Jacus, will be held in Miami in 2014. Watch for further details on the Section Web site, Twitter, and Facebook and via Section e-mail.

**One Million Trees Project:** Now is a perfect time to start planning a spring local service project with your firm or community to support the One Million Trees project. You can organize a local tree planting, raise funds to support the project's tree partners, or plant your own trees. You can make donations to tree partners or report your own plantings on the project's Web site, [www.ambar.org/EnviroTrees\\_ContactPhilBower](http://www.ambar.org/EnviroTrees_ContactPhilBower) (pbower@whdlaw.com) with any questions.

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## 2012–13 AIR QUALITY COMMITTEE LEADERSHIP

### Committee Chair

Gale Lea Rubrecht, [galelea@jacksonkelly.com](mailto:galelea@jacksonkelly.com)

### Outgoing Chair

Jonathan Peress, [NJPeress@clf.org](mailto:NJPeress@clf.org)

### **Vice Chairs:**

#### Committee Newsletter

Kristin Hines Gladd, [GladdK@ayreslawgroup.com](mailto:GladdK@ayreslawgroup.com)  
Ben Snowden, [BSnowden@kilpatricktownsend.com](mailto:BSnowden@kilpatricktownsend.com)

#### Electronic Communications (formerly, Technology)

Michael Balster,  
[michaelbalster@paulhastings.com](mailto:michaelbalster@paulhastings.com)

#### Membership

Phil Bower, [pbower@whdlaw.com](mailto:pbower@whdlaw.com)

#### Programs

Marty Booher, [mbooher@bakerlaw.com](mailto:mbooher@bakerlaw.com)  
Shannon Broome,  
[shannon.broome@kattenlaw.com](mailto:shannon.broome@kattenlaw.com)  
Michael Formica, [formicam@nppc.org](mailto:formicam@nppc.org)  
John Jacus, [John.Jacus@dgslaw.com](mailto:John.Jacus@dgslaw.com)  
Jonathan Peress, [NJPeress@clf.org](mailto:NJPeress@clf.org)  
Chris Thiele, [chris.thiele@bgllp.com](mailto:chris.thiele@bgllp.com)

#### At-large vice chair for Programs

Howard Hoffman, [howardjhoffman@gmail.com](mailto:howardjhoffman@gmail.com)

#### Social Media

Cheri Budzynski, [CBudzynski@slk-law.com](mailto:CBudzynski@slk-law.com)  
Laura Swingle, [lswingle@jacksonkelly.com](mailto:lswingle@jacksonkelly.com)

#### The Year in Review

Jonathan Martel, [Jonathan\\_Martel@aporter.com](mailto:Jonathan_Martel@aporter.com)

#### Publications

Linda Tsang, [LTSang@bdlaw.com](mailto:LTSang@bdlaw.com)

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## EPA REGIONAL REPORTS

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### EPA HEADQUARTERS

Gale Lea Rubrecht

Jackson Kelly PLLC

Charleston, West Virginia

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#### A. Air Toxics

1. Portland Cement Manufacturing: On July 18, 2012, the Environmental Protection Agency (EPA) published a proposed rule to amend two 2010 air rules for portland cement manufacturing: (1) the national emission standards for hazardous air pollutants (NESHAP) for new and existing cement kilns, and (2) new source performance standards (NSPS) for new kilns. 77 Fed. Reg. 42,368. The proposed rule would adjust the way cement kilns continuously monitor particulate matter (PM) emissions, adjust PM and organic hazardous air pollutant (HAP) emission limits, and extend the compliance deadline for existing kilns to September 9, 2015. EPA is proposing to require manual stack testing instead of a PM continuous emission monitoring system (CEMS) for compliance determinations. The proposed rule would amend PM standards under the NESHAP for existing and modified sources of 0.07 pounds per ton (lb/ton) clinker and 0.02 lb/ton clinker for new and reconstructed sources. PM CEMS equipment is still required but continuous parametric monitoring, rather than direct measurement of compliance with a numerical PM emissions limit, would be allowed.

EPA is not proposing any changes to the standards for mercury, total hydrocarbons (THC), or hydrogen chloride for existing cement kilns. As an alternative to the THC emissions standard, the rule allows for an alternative organic HAP standard, which EPA proposes to increase from 9 parts per million (ppm) to 12 ppm for existing and new sources. EPA proposes that sources monitor compliance via recordkeeping during start-up and shutdown. The proposed compliance date for all existing source standards would be extended to September 9, 2015. EPA estimates that the proposed changes, if finalized, would result in a

cost savings of \$12.2 million compared to the 2010 rule. 77 Fed. Reg. 46,371.

2. Pulp and Paper Industry: On September 11, 2012, EPA published a final rule amending the NESHAP for the pulp and paper industry. 77 Fed. Reg. 55,698. After conducting the risk and technology review required by Clean Air Act (CAA) section 112(d)(6) and 112(f)(2), EPA readopted the maximum achievable control technology (MACT) codified at 40 C.F.R. part 63, subpart S. Although EPA had proposed strengthening the kraft pulping process condensate standards by increasing the HAP removal requirement from 92 percent to 93 or 94 percent, EPA did not amend the standards in the final rule because the associated costs and impacts were not reasonable. *Id.* at 55,705–06.

Consistent with the D.C. Circuit's decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008), the final rule eliminates the exemptions to emission limits during periods of start-up, shutdown, and malfunction; adds reporting and recordkeeping requirements associated with periods of malfunction; and includes an affirmative defense to civil penalties for violations of emission limits from malfunctions. The final rule also adds a requirement for repeat emissions testing for select process equipment. The rule requires mills to submit electronic performance test reports to EPA's WebFIRE database, and adds four new test methods for measuring methanol emissions from pulp and paper processes. The final rule took effect on September 11, 2012. EPA estimates costs of \$5.9 million for capital improvements and approximately \$2.1 million per year for testing, monitoring, reporting, and recordkeeping.

3. Stationary Reciprocating Internal Combustion Engines: On June 7, 2012, EPA published a proposed amendment to the NESHAP for stationary reciprocating internal combustion engines (RICES), commonly used to produce electric power, pump water, and operate compressors. 77 Fed. Reg. 33,812. The proposed amendments include alternative testing options for certain large spark-ignition (SI) stationary RICES, management practices for a subset of existing SI stationary RICES in sparsely populated

areas, and alternative monitoring and compliance options for engines in populated areas. EPA also proposed to include a limited temporary allowance for existing stationary emergency area source engines to be used for peak shaving and non-emergency demand response, and to increase the hours that stationary emergency engines may be used for emergency demand response. 77 Fed. Reg. 37,361.

For area source engines over 500 horsepower (HP) that are area sources of HAPs, EPA proposes to replace existing emission limits with either management practices or equipment standards (depending on location). For engines at area sources remote from human activity, EPA is proposing management practices, including schedules for inspections and replacement of the engine oil and filter, spark plugs, hoses, and belts. For non-remote areas, EPA proposes to replace emission limits with an equipment standard consisting of an initial compliance test, annual catalyst check, and either continuous monitoring of the catalyst inlet temperature or requiring a high-temperature shutdown device on the engine to protect the catalyst.

Under the proposed rule, any existing stationary diesel-fueled/compression ignition (CI) engine above 300 HP at an area source of HAPs that was certified to meet the Tier 3 emission standards (Tier 2 for engines above 560 kW) and that was installed before June 12, 2006, is in compliance with the NESHAP. The proposed rule specifies that existing stationary Tier 1 and 2 certified CI engines located in area sources of HAPs that are subject to state and local requirements mandating replacement of the engine can meet management practices until the later of: (1) January 1, 2015, or (2) 12 years after installation date, but not later than June 1, 2018, after which time the carbon monoxide emissions standards in table 2d of subpart ZZZZ would apply.

EPA is also proposing to increase allowable hours for owners and operators to operate a stationary emergency RICE as part of an emergency demand response program or for voltage support. The rule would allow emergency engines to operate for 100 hours per year for monitoring and testing; demand response for Energy Emergency Alert Level 2

situations; and responding to situations when there is at least a 5 percent or more change in voltage. EPA is also proposing to add a temporary limited allowance for stationary emergency engines located at area sources of HAPs to be used up to 50 hours per year for any non-emergency purpose, including peak shaving. The temporary limited allowance would expire on April 16, 2017. Under this proposal, if finalized, facilities with stationary emergency engines will need to track their use to avoid exceeding annual hourly limits on non-emergency use.

## **B. Climate Change**

On July 12, 2012, EPA published its final “Step 3” of the greenhouse gas (GHG) Tailoring Rule for prevention of significant deterioration (PSD) and title V permitting. 77 Fed. Reg. 41,051. In the original Tailoring Rule, which was published in June 2010 and established Steps 1 and 2, EPA committed to complete, by July 1, 2012, a Step 3 rulemaking addressing whether to lower the thresholds from the Step 1 and Step 2 levels. EPA decided not to reduce the thresholds below the levels set in the Tailoring Rule (for PSD, 75,000 or 100,000 tons per year of CO<sub>2</sub> equivalent depending upon the source, and for title V, 100,000 tons per year of CO<sub>2</sub> equivalent) because it found that state permitting authorities are not prepared to implement lower GHG applicability thresholds at this time.

The Step 3 rule also finalized one of two approaches EPA proposed in March 2012 (77 Fed. Reg. 14,226) to streamline the GHG permitting process. EPA finalized the proposed revisions to the plantwide applicability limitations (PALs) permitting program allowing GHG PALs on either a mass (tons per year) or a CO<sub>2</sub>-equivalent basis, and to use this approach as an alternative for determining whether a project is a major modification and whether GHG emissions are subject to regulation. EPA adopted the “minor source” approach, under which GHG-only sources may obtain a GHG PAL and remain a “minor source” as long as their GHG emissions remain below the PAL. EPA did not finalize the “major source” opt-in approach. EPA also decided not to finalize its proposed approach to create a basis on which to issue synthetic minor permits

for GHGs where EPA is the PSD permitting authority. EPA states that by April 30, 2016, it will complete a “Step 4” rulemaking to determine if it would be appropriate to lower the thresholds at that time.

### C. Mobile Sources

1. Waiver of Stage II Vapor Recovery: On May 16, 2012, EPA published a final rule determining that onboard refueling vapor recovery (ORVR) technology is in widespread use throughout the national motor vehicle fleet for purposes of controlling motor vehicle refueling emissions. 77 Fed. Reg. 28,772. Accordingly, EPA is waiving the requirement in section 182(b)(3) of the Clean Air Act mandating that states implement Stage II gasoline vapor recovery systems at gasoline-dispensing stations in nonattainment areas classified as serious, severe, and extreme for the ozone National Ambient Air Quality Standards (NAAQS). States previously required to implement a Stage II program may take appropriate action to remove the program from their state implementation plan (SIP).

EPA projects that during 2013–2015, approximately 30,600 gasoline-dispensing facilities in up to 19 states and the District of Columbia could decommission and remove Stage II systems from their dispensers. EPA projects cost savings for gas station owners and operators of about \$10.2 million dollars in year one, \$40.5 million in year two, and \$70.9 million in year three, with long-term savings of about \$91 million per year or more than \$3000 per gas station per year.

CAA section 184(b)(2) imposes a separate Stage II requirement on all states (and D.C.) located in the Ozone Transport Region (OTR) of the northeastern United States. Both attainment and nonattainment areas in the OTR must implement control measures capable of achieving emissions reductions comparable to those achievable through Stage II controls. (Most states in the OTR simply adopted Stage II programs rather than identify other measures that achieved comparable reductions.) This Stage II requirement for the OTR will continue to remain in place even after May 16, 2012. Under the final rule, EPA will issue nonbinding guidance on developing and submitting

approvable SIP revisions for estimating what Stage II comparable emission reductions could be given the ORVR widespread usage determination.

2. Heavy-Duty Highway Program: On June 8, 2012, EPA published a proposed rule (77 Fed. Reg. 34,149) and a direct final rule (77 Fed. Reg. 34,130) to amend the 2007 heavy-duty highway rule published January 18, 2001 (66 Fed. Reg. 5001). The proposal would (1) grant relief for emergency vehicles from power or speed inducements related to low levels of diesel exhaust fluid for selective catalytic reduction (SCR) systems; (2) revise emission-related maintenance and scheduled maintenance intervals for motor vehicles and nonroad compression-ignition engines; and (3) provide short-term relief from performance inducements related to the emission control system for nonroad equipment operating in temporary emergency service.

First, EPA is proposing revisions to allow manufacturers of emergency vehicles to seek EPA approval of modifications to emission control systems so that they do not lead to decreased engine power, speed, or torque when the dedicated vehicle is performing mission-critical life-saving work. For new engines or vehicle certifications, the modified controls or settings would generally be approved as auxiliary emission control devices (AECDs). These revisions are published in a direct final rule (77 Fed. Reg. 34,130), effective August 7, 2012.

Second, EPA is proposing to revise the emission-related maintenance and scheduled maintenance intervals for all motor vehicles and nonroad compression-ignition engines to specify minimum maintenance intervals for replenishment of consumable chemical reductant in connection with the use of SCR technologies. For light-duty vehicles and light-duty trucks that use SCR, EPA proposes to set a fluid refill interval equal to the scheduled oil change interval; for centrally fueled heavy-duty vocational vehicles such as dump trucks, concrete mixers, and refuse trucks, and for SCR-equipped nonroad diesel engines, an interval at least as far (in miles or hours) as the vehicle’s fuel capacity; and for all other vehicles, an interval that is no less than twice the range of the vehicle’s fuel capacity.

Third, EPA is proposing to offer short-term flexibility for general purpose nonroad vehicles while operating in temporary emergency service. The relief is intended primarily for new engines used for power generation or in construction equipment; however, EPA may grant approval for other engines and/or equipment in use.

3. Renewable Fuel Standard: On September 27, 2012, EPA published a final rule, effective November 26, 2012, establishing an applicable volume of 1.28 billion gallons for biomass-based diesel for calendar year 2013, representing an increase over the 1.0 billion gallons required in 2012. 77 Fed. Reg. 59,459. The percentage standards for cellulosic biofuel, biomass-based diesel, advanced biofuel, and total renewable fuel for 2013 will be proposed in a separate notice of proposed rulemaking.

On October 9, 2012, EPA issued a direct final rule (77 Fed. Reg. 61,281) and a parallel proposed rule (77 Fed. Reg. 61,313) containing amendments to the definition of heating oil under the renewable fuel standard (RFS) program and the diesel sulfur fuel program. The amended definition expands the scope of renewable fuels that can generate Renewable Identification Numbers (RINs) as “home heating oil” to include fuel that will be used to generate heat to warm buildings or other facilities where people live, work, recreate, or conduct other activities. The direct final rule also amends two aspects of the diesel sulfur program: (1) to provide additional flexibility for transmix processors who produce locomotive and marine diesel fuel; and (2) to amend the fuel marker requirements to allow solvent yellow 124 to transition out of the distribution system. In the absence of adverse comments or a public hearing request, the direct final rule takes effect on December 10, 2012.

4. Light-Duty Vehicles: On October 15, 2012, EPA and the National Highway Traffic Safety Administration published a final rule (effective December 14, 2012) establishing GHG emissions and corporate average fuel economy (CAFE) standards for light-duty vehicles for model years (MY) 2017 and beyond. 77 Fed. Reg. 62,624. EPA’s program includes (1) credit banking and trading; (2) air conditioning improvement credits; (3) off-cycle credits; (4) incentives for electric vehicles,

plug-in hybrid electric vehicles, fuel cell vehicles, and compressed natural gas vehicles; (5) incentives for advanced technologies, including hybridization for full-sized pickup trucks; (6) treatment of compressed natural gas, plug-in hybrid electric vehicles, and flexible fuel vehicles; and (7) provisions for intermediate and small volume manufactures. EPA projects these standards will result in an industry average fleetwide emission level of 163 grams per mile of carbon dioxide in MY2025, equivalent to 54.5 miles per gallon if achieved exclusively through fuel economy improvements. The standards are projected to save approximately 4 billion barrels of oil and 2 billion metric tons of GHG emissions with net benefits up to \$451 billion.

## D. NAAQS

1. Nitrogen Dioxide and Sulfur Dioxide Secondary Standards: On April 3, 2012, EPA published a final rule (effective June 4, 2012) retaining the existing secondary standards for nitrogen dioxide (NO<sub>2</sub>) and sulfur dioxide (SO<sub>2</sub>). 77 Fed. Reg. 20,218. Contrary to the July 13, 2011, proposed rule, EPA concluded in the final rule that it is neither necessary nor appropriate to set one-hour NO<sub>2</sub> and SO<sub>2</sub> secondary standards identical to the 2010 primary or health-based standards at the levels of 100 parts per billion (ppb) and 75 ppb, respectively. *Id.* at 20,263.

Further, while EPA recognizes that the existing secondary nitrogen oxides (NO<sub>x</sub>) and sulfur oxides (SO<sub>x</sub>) standards do not provide adequate protection from acid deposition on sensitive aquatic and terrestrial ecosystems, EPA did not set a new multi-pollutant standard to address deposition-related acidification and sensitive aquatic ecosystems due to uncertainties with the Aquatic Acidification Index (AAI) approach and multi-pollutant standard. Instead, EPA will undertake a five-year field pilot program to “enhance [its] understanding of the degree of protectiveness that would likely be afforded by a standard based on the AAI” and “aid the Agency in considering in future reviews an appropriate multi-pollutant standard that would be requisite to protect public welfare” for the next review of the secondary NO<sub>x</sub> and SO<sub>x</sub> NAAQS.

2. Ozone: On May 21, 2012, EPA published the final nonattainment designations for the ozone standards promulgated in 2008 for all areas in the United States except for 12 counties in Illinois, Indiana, and Wisconsin that EPA was still evaluating. 77 Fed. Reg. 30,088. On May 31, EPA signed a final rule designating all or parts of 11 counties in Illinois, Indiana, and Wisconsin as the Chicago-Naperville, IL-IN-WI nonattainment area and the remaining county and parts of counties as unclassifiable/attainment. EPA classified the Chicago-Naperville, IL-IN-WI nonattainment area as a marginal area. 77 Fed. Reg. 34,221 (June 11, 2012).

Forty-six areas are designated “nonattainment” for the 2008 ozone standards. Two are tribal areas designated separately from the surrounding state areas for the first time. Only three of the areas in the current rule have not previously been designated as nonattainment for previous ozone standards. Each nonattainment area is classified as either marginal, moderate, serious, severe, or extreme based on how close it is to meeting the NAAQS. For the 2008 ozone NAAQS, there are 35 marginal areas, 3 moderate areas, 2 serious areas, 3 severe areas, and 2 extreme areas. The new nonattainment designations are based on data submitted by the states after EPA’s 2008 revision of the primary and the secondary eight-hour ozone NAAQS to 75 ppb. *See* 73 Fed. Reg. 16,436 (Mar. 27, 2008).

The final designations, effective July 20, 2012, started the clock running for SIPs. States with nonattainment areas must submit SIPs demonstrating how their nonattainment areas will meet the standards in July 2015. Attainment deadlines range from 2015 for marginal areas to 2032 for extreme areas. EPA was obligated by a consent decree to promulgate the final designations by May 31, 2012. Meanwhile, EPA continues to work on the next five-year review of the ozone NAAQS and currently expects to propose action in 2013.

3. Fine Particulate Matter (PM<sub>2.5</sub>): On June 29, 2012, EPA published a proposed revision to the NAAQS for fine particulate matter (particles with a diameter of 2.5 micrometers or less) (PM<sub>2.5</sub>). 77 Fed. Reg. 38,890.

EPA is proposing to strengthen the annual “primary,” or health-based, standard from 15 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) to 13 to 12  $\mu\text{g}/\text{m}^3$ , and to establish a separate PM<sub>2.5</sub> “secondary” standard to improve visibility, primarily in urban areas, at a level of either 30 or 28 deciviews. EPA is also proposing to retain the existing 24-hour PM<sub>2.5</sub> primary standard at 35  $\mu\text{g}/\text{m}^3$ , the existing 24-hour PM<sub>10</sub> primary standard at 150  $\mu\text{g}/\text{m}^3$ , and the existing secondary standards for PM<sub>2.5</sub> and PM<sub>10</sub> to address non-visibility welfare effects. EPA states that the proposed range of 13 to 12  $\mu\text{g}/\text{m}^3$  for the annual primary standard is consistent with the advice of EPA’s Clean Air Scientific Advisory Committee, and that due to federal CAA programs, such as the Cross-State Air Pollution Rule, Mercury and Air Toxics Standards, and Heavy-Duty Highway Diesel Rule, “99 percent of U.S. counties are projected to meet the proposed standards without undertaking any further actions to reduce emissions.” EPA is obligated under a consent order to issue the final standards by December 14, 2012.

## **E. New Source Performance Standards**

1. Power Plants: On April 13, 2012, EPA published a proposed rule to create the first national CO<sub>2</sub> New Source Performance Standard (NSPS) for new power plants. 77 Fed. Reg. 22,392. The proposed standard would regulate only CO<sub>2</sub> emissions, not other GHGs. EPA proposes that a new category of fossil-fuel-fired power plants meet an output-based standard of 1000 pounds of CO<sub>2</sub> per megawatt hour (lb CO<sub>2</sub>/MWh gross). EPA expects that new natural gas combined cycle (NGCC) power plant units should be able to meet the proposed standard without add-on controls, whereas new coal-fired units would have to incorporate technology such as carbon capture and storage (CCS) to meet the standard—although it is generally accepted that CCS will not be commercially viable for years.

The proposed standard would apply to new fossil-fuel-fired electric generating units (including boilers, integrated gasification combined cycle units, and stationary combined-cycle turbine units) larger than 25 megawatts, but not to existing power plants (even in cases of modifications or reconstruction). The

proposed rule would also grandfather approximately 15 coal-fired units that had received CAA preconstruction permits by March 27, 2012, if those units commence construction within twelve months of the proposed rule's publication in the *Federal Register*. According to EPA, six of these units have plans to implement CCS. *Id.* at 22,421–22. New units that do not burn fossil fuels would also be exempt, as would new simple-cycle combustion turbines, municipal waste combustors, and commercial or industrial solid waste incineration units. *Id.* 22,398, 22,436 (to be codified at 40 C.F.R. § 60.5510(b) (1)–(2)).

Recognizing that CCS “would add considerably to the costs of a new coal-fired power plant,” EPA is proposing a 30-year averaging compliance option applicable only to new coal-fired or pet coke-fired units. *Id.* at 22,398. According to EPA, coal-fired sources that elect this option could install CCS as part of the original project and use some or all of the initial 10-year period to optimize the system, while coal-fired sources that choose to delay installation of CCS for up to 10 years could take advantage of advancements in the technology that could reduce costs and enhance performance. *Id.* at 22,398–99. EPA seeks comment on the 30-year compliance option and on alternative mechanisms for establishing practicably enforceable short-term limits during the 30-year period. *Id.* at 22,398. EPA intends to review the availability and cost of CCS in eight years as part of its statutorily required review of the new source standards. *Id.*

All new sources that commence construction after the date of publication in the *Federal Register* of the *proposed* rule (Apr. 13, 2012) will need to adhere to the standards, if finalized. CAA § 111(a)(2). However, EPA states that the “emission limit would be effective upon the effective date of the final action.” *Id.* at 22,406. In other words, the standard would not be enforceable until the final rule is promulgated.

Although the proposed standard does not apply to existing power plants, EPA states that it will “serve as a necessary predicate of the regulation of existing [power plants]” in future years. EPA also claims that the proposed rule will “send a strong signal”—presumably,

of the Agency's intention to promulgate further GHG regulations—”both domestically and internationally.” *Id.* at 22,401. In the United States, the Agency asserts that the proposed rule “encourages” what it sees as “the current trend towards cleaner generation” and says the proposal “can further stimulate investment in CCS and other clean coal technologies” and may encourage less GHG-intensive forms of power generation internationally. *Id.*

EPA maintains that aligning the proposed standard with the Cross-State Air Pollution Rule (CSAPR, which has since been vacated by the D.C. Circuit) and the December 2011 Mercury and Air Toxic Standards provides regulatory certainty, while facilitating the electric utility industry's investment decisions and informing its compliance decisions to meet all of its Clean Air Act obligations. *Id.* at 22,396. EPA explains that it is focusing first on reducing CO<sub>2</sub> emissions from power plants because they constitute the largest category of stationary sources of CO<sub>2</sub> emissions in the United States. *Id.* at 22,395, 22,396, 22,403. The proposed standard was issued pursuant to a December 23, 2010, consent decree. *See* 75 Fed. Reg. 82,392 (Dec. 30, 2010). EPA has not said when it intends to finalize the rule.

2. Nitric Acid Plants: On August 14, 2012, EPA published final NSPS for nitric acid plants, limiting NO<sub>x</sub> emissions from new, modified, and reconstructed production units. 77 Fed. Reg. 48,433. The NO<sub>x</sub> emissions limit is lowered from 3 pounds per ton of nitric acid produced to 0.50 pound based on a 30-day revised emission rate, and is applicable at all times, including start-up, shutdown, and malfunction. Continuous emission rate monitoring systems are required. EPA estimates that the final rule will reduce NO<sub>x</sub> emissions by 2100 tons per year, with annualized compliance costs of \$585,000 for five new and one modified source in 2016.

3. Petroleum Refineries: On September 12, 2012, EPA issued a final rule (effective November 13, 2012) amending the NSPS for process heaters and flares that were modified, reconstructed, or constructed after May 14, 2007, and June 24, 2008, respectively. 77 Fed. Reg. 56,422. EPA estimates 400 flares will be

subject to the rule, reducing emissions of SO<sub>2</sub> by 3200 tons per year (tpy), NO<sub>x</sub> by 1100 tpy, and volatile organic compounds (VOCs) by 3400 tpy from the baseline, with co-benefits of CO<sub>2</sub> equivalents by 1,900,000 metric tons per year. EPA anticipates capital costs of \$460 million and net annualized cost savings of about \$79 million per year.

For new process heaters, the final rule establishes concentration-based NO<sub>x</sub> emissions limits and alternative heating value-based NO<sub>x</sub> emissions limits. For new natural draft process heaters, the limits are 40 parts per million by volume (ppmv) NO<sub>x</sub> (0.04 lb/mmBtu). For new forced draft process heaters, the final rule raises the limit to 60 ppmv NO<sub>x</sub> (0.06 lb/mmBtu). Co-fired (oil and gas) process heaters must meet either 150 ppmv NO<sub>x</sub> or alternative heating value-based limits. For newly constructed, modified, and reconstructed natural draft and forced draft process heaters, EPA changed the averaging time for compliance from a 365-day to a 30-day rolling average applicable during periods of normal operation. Owners and operators may also obtain EPA approval for a site-specific NO<sub>x</sub> limit for process heaters with difficulty meeting the standards under certain situations.

EPA did not finalize the proposal that new flares meet the long-term 60 ppmv for hydrogen sulfide (H<sub>2</sub>S) fuel gas concentration limit, but instead established a suite of standards that include work practice standards and monitoring requirements. Specifically, refineries are required to (1) develop and implement a flare management plan; (2) conduct a root cause analysis and take corrective action when the volume of waste gas sent to the flare exceeds 500,000 standard cubic feet per day above the baseline flow or contains sulfur that, upon combustion, will emit more than 500 pounds of SO<sub>2</sub> in a 24-hour period; and (3) optimize management of the fuel gas by limiting the short-term concentration of H<sub>2</sub>S to 162 ppmv during normal operating conditions.

The final rule requires that flares be equipped with flow and sulfur monitors except where flares are used infrequently or are configured such that they cannot receive high sulfur gas. For infrequently used flares, the

NSPS allows for monitoring of the differential pressure between the flare header and the flare water seal to determine if a gas release to the flare has occurred. An exceedance triggers a requirement to perform a root cause analysis and corrective action analysis unless the discharge is related to flare gas recovery system compressor cycling or a planned start-up or shutdown of a refinery process unit, or ancillary equipment connected to the flare following the procedures in the flare management plan.

*Gale Lea Rubrecht* is a member of Jackson Kelly PLLC and practices in the firm's Charleston, West Virginia, office. She chairs the Air Quality Committee and may be reached at [galelea@jacksonkelly.com](mailto:galelea@jacksonkelly.com).



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## EPA REGION 1

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

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### I. Regional Updates

1. **RGGI:** RGGI Inc., the nonprofit corporation created to support development and implementation of the Regional Greenhouse Gas Initiative (RGGI), has released the first three-year *Compliance Summary Report*. The report, which covers the period from January 1, 2009, through December 31, 2011, indicates that 206 of 211 power plants subject to RGGI met program compliance obligations. Average annual CO<sub>2</sub> emissions during this three-year period were 126 short tons, representing a 23 percent reduction compared to the preceding three-year period (2006–2008). From 2009 through 2011, electricity consumption in RGGI states declined by 2.4 percent.

Since the last update, RGGI held its 15th, 16th, and 17th auctions of CO<sub>2</sub> allowances. At the respective auctions, 21,559,000 (15th), 20,941,000 (16th), and 24,589,000 (17th) allowances were sold at the same market-clearing price of \$1.93 per ton. The next auction is scheduled for December 5, 2012. Nine northeast states currently participate in RGGI: Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont.

2. **Enforcement:** EPA Region 1 has released its 2011 compliance and enforcement annual results, reporting that total pollutants were reduced by 2.3 million pounds through enforcement in FY2011. EPA highlighted three federal enforcement actions in its summary report, one of which involved Clean Air Act enforcement (*United States v. Alltex Uniform Rental Service, Inc. and G&K Services, Inc.*, Civil Action No. 1-cv-342 (D.N.H.)). In this action, an industrial laundry in New Hampshire agreed to pay a \$65,000 civil penalty and to undertake a supplemental environmental project with a value of at least \$220,000 to replace old wood stoves with newer models and install equipment that will eliminate approximately 20 tons of VOC emissions per year.

### II. State Updates

#### A. Connecticut

1. On April 4, 2012, Connecticut's Public Utilities Regulatory Authority authorized Connecticut Light & Power Company (CL&P) and the United Illuminating Company (UI) to move ahead with their LREC/ZREC Program. This program, initiated by Public Act 11-80, promotes, funds, and expands behind-the-meter renewable generation. CL&P and UI have issued a Request for Proposal seeking bids for Low Emission Renewable Energy Credit (LREC) and Zero Emission Renewable Energy Credit (ZREC) projects. Customers with qualifying renewable projects may bid to sell Connecticut Class I renewable energy credits created by their project under a long-term, 15-year contract.

2. On September 10, 2012, revisions to several key Connecticut Department of Energy and Environmental Protection air permitting regulations became effective, including revisions to Definitions (22a-174-1); Procedural Requirements for New Source Review and Title V Permitting (22a-174-Za); and Permit to Construct and Operate Stationary Sources (22a-174-3a).

#### B. Maine

In March 2012, Maine enacted a law, LD 1738, extending the term of licenses for minor source air emissions from five to 10 years. For currently licensed minor sources, the new 10-year license period will begin upon the next renewal. Major source licenses will continue to have five-year terms. Additionally, EPA approved revisions to Maine's SIP that include a demonstration that Maine meets the requirements of Reasonably Available Control Technology (RACT) for NO<sub>x</sub> and VOCs for the 1997 eight-hour ozone standard. Finally, the Maine Department of Environmental Protection proposed to incorporate by reference the NAAQS and ambient increments for PSD. In addition, the rulemaking would update the ambient increments to establish an increment for PM<sub>2.5</sub>, and repeal the state chromium standard.

#### C. Massachusetts

1. In February 2012, the Massachusetts Department of Environmental Protection (MassDEP) proposed amendments to 310 CMR 7.05 (Fuels All Districts) and 310 CMR 7.00 (Definitions) that would lower the

allowable sulfur content in fuel oil for stationary sources to 0.05 percent (500 parts per million (ppm)) sulfur by weight for distillate oil and 1 percent (10,000 ppm) sulfur by weight for residual oil, beginning July 1, 2014. These sulfur content limits for distillate and residual oils would be further reduced to 0.0015 percent (15 ppm) and 0.5 percent (5000 ppm), respectively, beginning July 1, 2018. In May, MassDEP proposed an amendment to Appendix C of 310 CMR 7.00 to address EPA's Tailoring Rule, which establishes a new applicability threshold for greenhouse gas emissions under the title V permitting program and the PSD program. The proposed amendments only relate to the title V permitting program; Massachusetts's PSD program will be addressed in future rulemaking.

2. On August 17, 2012, the Massachusetts Department of Energy Resources finalized regulations governing the eligibility of biomass energy for Renewable Energy Credits (RECs) for compliance with the Massachusetts Renewable Energy Portfolio Standard. The rule defines "eligible biomass woody fuel" to exclude whole tree chips unless from certain thinning activities and to include only slash, tops, and branches, with additional eligibility criteria based on the soil quality and the size of the harvest site. To be eligible for RECs, biomass generation units using standard technology must demonstrate an overall efficiency of 60 percent to achieve a full credit. Units achieving 50 percent efficiency earn only half a REC. In addition, biomass power plants would be required to conduct life-cycle emissions analyses and demonstrate greenhouse gas emissions reductions of at least 50 percent over 20 years.

#### **D. New Hampshire**

EPA recently determined that the Boston-Lawrence-Worcester, MA-NH ozone nonattainment area is in attainment with the 1997 eight-hour (0.08 ppm) ozone standard. The New Hampshire Department of Environmental Services (DES) amended Env-A 300, *Ambient Air Quality Standards*, to change the standards for PM, SO<sub>2</sub>, NO<sub>2</sub>, ozone, and lead to make them consistent with revised NAAQS. Additionally, the DES amended Env-A 600, *Statewide Air Permit System*, to, among other things establish modeling thresholds to require modeling only for larger emitters; exempt certain sources of VOCs subject to RACT from having to obtain a permit; streamline the permitting process for sources registered under the

General State Permit; and allow the DES to propose amendments to a permit for a minor source to make any necessary adjustment to the permit after notifying the source and giving it an opportunity to object.

#### **E. Rhode Island**

The Rhode Island Department of Environmental Management (DEM) updated its regulatory agenda to initiate rulemaking to amend Air Pollution Control Regulation No. 9 (Air Pollution Control Permits) and No. 22 (Air Toxics) during the third quarter, and expects to file the amended Air Pollution Control Regulation No. 37 (Low Emissions Vehicle Program) by the fourth quarter of 2012. The DEM also plans to repeal Air Pollution Control Regulation No. 41 (NO<sub>x</sub> Budget Trading Program) during the third quarter of 2012, reduce the allowable sulfur content of home heating oil and residual fuel oil in the fourth quarter, and adopt requirements for limiting VOC emissions from fiberglass boat manufacturing before the end of the year.

#### **F. Vermont**

1. In April of 2012, the Vermont Department of Environmental Conservation (DEC) announced a grant program to provide funding to school districts to replace older diesel buses with new buses equipped with more advanced pollution control technology. Grant recipients had until September 30, 2012, to complete their upgrade projects.

2. On August 15, 2012, the Vermont DEC proposed amendments to its Low Emission Vehicle (LEV) Program, intended to keep it consistent with California's LEV program.

*Brian M. Rayback* is a partner at Pierce Atwood, where his practice involves a broad array of environmental and land use issues, with emphasis on air, water, and land use law.

*Dixon P. Pike* is a partner at Pierce Atwood, where his practice concentrates on environmental law with particular focus on state and federal air laws. During his 25 years of practice, Dixon has been involved in hundreds of air permitting, enforcement, and rulemaking matters representing a wide variety of business and manufacturing interests on the federal level and in dozens of states.

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## EPA REGION 2

Philip E. Karmel  
Bryan Cave LLP  
New York, New York

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### **I. NYSDEC Enacts Article 10 Regulations Addressing CO<sub>2</sub> and Environmental Justice**

On June 28, 2012, the New York State Department of Environmental Conservation (NYSDEC) promulgated two sets of regulations to implement the Power NY Act of 2011 (A. 8510/S. 5844). The Act renewed authorization of Article 10 of the New York State Public Service Law and reestablished it as the process for permitting major electric generating facilities in the state.

The NYSDEC regulations, codified at 6 N.Y.C.R.R. part 251, limit CO<sub>2</sub> emissions from new electric generating facilities with a capacity of at least 25 megawatts (MW), and from increases in capacity of at least 25 MW from existing facilities. 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 storage. The Act also includes environmental justice (EJ) provisions requiring analysis of the impacts of proposed major generating facilities and expansions on nearby communities. Regulations implementing these provisions are codified at 6 N.Y.C.R.R. part 487.

A full EJ analysis of a proposed power project is required if: (1) a “minority community” or “low-income community” is within the “impact study area” (as those terms are defined in the regulations); *or* (2) 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 75 percent of the stated thresholds for constituting a minority or low-income community *and* “reasonably available air quality data” or “health outcome data that have been made available to the public statewide at the zip code level” 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, 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 and implement measures 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. New York City Announces Financing Plan to Reduce Emissions of Particulate Matter from Boilers**

In 2011, New York City enacted regulations requiring the phaseout of heavy heating oils (no. 4 and no. 6) in building boilers, as discussed in the May 2011 issue of this newsletter. On June 13, 2012, Mayor Michael Bloomberg announced an initiative to provide more than \$100 million in financing to assist buildings in retiring boilers that use these heating oils and replace them with more efficient and less-polluting boilers. The City’s press release is available at <http://tinyurl.com/dxeca5o>.

*Philip Karmel* is a partner at Bryan Cave LLP in New York City. He can be reached at [pekarmel@bryancave.com](mailto:pekarmel@bryancave.com).

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## EPA REGION 3

Barbara Little  
Jackson Kelly PLLC  
Charleston, West Virginia

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### I. Regional Updates

1. On September 25, 2012, the EPA settled an enforcement action against Legacy Landings, LLC, owner of a property in Gibsonia, Pennsylvania, to protect the nearby public from asbestos hazards at the site. Legacy Landings has agreed to properly clean up and dispose of asbestos-containing material released from abandoned greenhouses and other buildings on property formerly occupied by the Pittsburgh Cut Flower Company. A site inspection confirmed the presence of friable asbestos. Trespassers had frequented the property and salvaging activities likely contributed to the asbestos releases on-site. Legacy is required to locate and properly dispose of the friable asbestos, and to limit site access and help prevent further disturbance of asbestos.

2. On July 31, 2012, EPA and the U.S. Department of Justice announced that Hercules Incorporated agreed to pay a \$175,000 penalty to settle alleged violations of federal environmental laws in the processing of cellulose fiber at its Hopewell, Virginia, plant. Hercules allegedly failed to adequately demonstrate compliance with the cellulose products manufacturing National Emission Standards for Hazardous Air Pollutants (NESHAP), and violated related leak detection and repair regulations.

Under a consent decree lodged on July 2, 2012, Hercules is required to comply with the NESHAP standard for cellulose product manufacturing. Hercules will spend approximately \$200,000 on the consent decree requirements, resulting in an estimated reduction of 150 tons of hazardous air pollutants per year. Hercules also agreed to conduct additional testing, update its operating permit to document testing and monitoring activities, and engage in a two-year enhanced leak detection and repair program.

3. In May 2012, EPA settled with the operators of six gas stations in the District of Columbia for alleged violations of CAA regulations limiting VOCs and air toxics emissions. Following EPA inspections in November 2011, these six stations were cited for violating the NESHAP for gasoline dispensing facilities, which requires gas stations to install and maintain vapor recovery control systems for their underground tanks and gasoline dispensing pumps, and to minimize and clean up spills. In settlement agreements with EPA, the gas station operators have agreed to pay a total of \$8800 in civil penalties, with individual station penalties ranging from \$1400 to \$2100. As part of the agreements, the stations did not admit liability for the alleged violations but have stated that they are now in compliance with the applicable requirements.

### II. State Updates

#### A. Delaware

##### **State Implementation Plan (SIP) Revisions**

1. EPA has approved the attainment demonstration portion of the attainment plan submitted by Delaware as a SIP revision for the 1997 eight-hour ozone NAAQS for the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE moderate nonattainment area (Philadelphia Area) by the applicable attainment date of June 2011. 77 Fed. Reg. 60,914.

2. EPA is proposing to make a determination of attainment regarding the Philadelphia-Wilmington, PA-NJ-DE PM<sub>2.5</sub> nonattainment area for the 2006 24-hour PM<sub>2.5</sub> NAAQS based upon certified ambient air monitoring data for the 2008–2010 and 2009–2011 periods, and upon preliminary data available to date for 2012. The designation status of this area will remain nonattainment for the 2006 24-hour PM<sub>2.5</sub> NAAQS until such time as EPA determines that the area meets the CAA requirements for redesignation to attainment. 77 Fed. Reg. 60,089.

3. EPA approved a SIP revision incorporating preconstruction permitting requirements for PM<sub>2.5</sub> into the state's PSD and nonattainment new source review (NSR) programs. In addition, EPA is approving SIP revisions addressing program infrastructure elements necessary to implement the 1997 NAAQS for PM<sub>2.5</sub>

and ozone; the 2006 PM<sub>2.5</sub> NAAQS; and the 2008 lead NAAQS. 77 Fed. Reg. 60,053.

4. EPA approved SIP revisions amending VOC-control regulations for sources (Plastic Parts; Metal Furniture; Large Appliances; and Miscellaneous Metal Parts) covered by EPA's Control Techniques Guidelines (CTGs) to meet the requirement to implement reasonably available control technology on emission sources covered by EPA's CTGs. 77 Fed. Reg. 58,953.

5. EPA approved a SIP revision addressing program infrastructure elements necessary to implement the 2008 lead NAAQS. 77 Fed. Reg. 55,419.

## **B. District of Columbia SIP Revisions**

EPA proposed to approve a component of the District of Columbia's April 2, 2008 SIP revision—the PM<sub>2.5</sub> 2002 base year emissions inventory—that was submitted to meet nonattainment requirements related to the District of Columbia's portion of the Washington DC-MD-VA nonattainment area (DC Area) for the 1997 PM<sub>2.5</sub> NAAQS SIP. 77 Fed. Reg. 50,964.

## **C. Maryland SIP Revisions**

1. EPA approved the PM<sub>2.5</sub> 2002 base year emissions inventory portion of the Maryland SIP revision submitted by the Maryland Department of the Environment on April 3, 2008 to meet nonattainment requirements related to Maryland's portion of the Washington, DC-MD-VA nonattainment area for the 1997 PM<sub>2.5</sub> NAAQS SIP. 77 Fed. Reg. 61,513.

2. EPA approved a SIP revision for the "Control of Volatile Organic Compounds Emissions from Vehicle Refinishing," establishing new VOC content limits and standards for coating and cleaning solvents used in vehicle refinishing. 77 Fed. Reg. 59,093.

3. EPA proposed to approve the PM<sub>2.5</sub> 2002 base year emissions inventory portion of Maryland's SIP to meet nonattainment requirements related to the Washington County nonattainment area for Maryland's 1997 PM<sub>2.5</sub> NAAQS SIP. 77 Fed. Reg. 59,156.

4. EPA proposed to approve a SIP revision deferring until July 21, 2014 the application of the PSD permitting requirements to biogenic carbon dioxide (CO<sub>2</sub>) emissions from bioenergy and other biogenic stationary sources in the State of Maryland. 77 Fed. Reg. 55,171.

5. EPA proposed to approve an attainment demonstration for the 1997 eight-hour ozone NAAQS for the Philadelphia-Wilmington-Atlantic City, PA-NJ-MD-DE, moderate nonattainment area (Philadelphia Area) by the applicable attainment date of June 2011. 77 Fed. Reg. 50,966.

6. EPA is proposing to approve several SIP revisions pertaining to Maryland's adoption of the California Low Emission Vehicle (LEV), or California Clean Car, Program. 77 Fed. Reg. 50,969. Maryland regulations adopt by reference California's light- and medium-duty new vehicle standards, and specifically require all new 2011 and later model year passenger cars, light trucks, and medium-duty vehicles having a gross vehicle weight rating of 14,000 pounds or less sold in Maryland to meet California emission standards. Maryland submitted supplemental SIP revisions to modify its own program to match updates to California's program and harmonize with recently established greenhouse gas and fuel economy standards (both federal and California state standards) applicable to 2012–2016 model year vehicles.

7. EPA approved several SIP revisions for PSD and NSR programs, including NSR reform, NO<sub>x</sub> as a precursor to ozone, PM<sub>2.5</sub>, and greenhouse gases. EPA is also approving SIP revisions to program infrastructure elements related to implementation of the 1997 eight-hour ozone and PM<sub>2.5</sub> NAAQS, and the 2006 PM<sub>2.5</sub> NAAQS. 77 Fed. Reg. 45,949.

## **Other Maryland Air Quality News**

On August 21, 2012, Maryland Secretary of the Environment Robert M. Summers released a statement severely criticizing the U.S. Court of Appeals for the District of Columbia's ruling in *EME Homer City Generation L.P. v. Environmental Protection Agency*, No. 11-1302 (D.C. Cir. Aug. 21, 2012), vacating EPA's Cross-State Air Pollution Rule

(CSAPR). Maryland was among the states that intervened in the case in support of EPA. The Secretary stated that the decision dealt a significant blow to Maryland's efforts to improve air quality, because as much as 70 percent of Maryland's air pollution problem comes from upwind states.

#### **D. Pennsylvania SIP Revisions**

1. EPA determined that the Pittsburgh Area is now in attainment for the 1997 annual PM<sub>2.5</sub> NAAQS, suspending the requirement to submit an attainment demonstration and associated reasonably available control measures, reasonable further progress (RFP) plan, contingency measures, and other planning SIP revisions related to the attainment of the standard for as long as the area continues to attain the 1997 annual PM<sub>2.5</sub> NAAQS. 77 Fed. Reg. 62,147.
2. EPA has granted limited approval to a SIP revision pertaining to the plan approval requirements by the Pennsylvania Department of Environmental Protection (DEP) for the construction, modification, and operation of sources. EPA's approval is primarily intended to streamline the process for minor permitting actions. 77 Fed. Reg. 60,910.
3. EPA approved a SIP revision relating to the control of VOC emissions from the manufacture, sale, use, or application of adhesives, sealants, primers, and solvents. 77 Fed. Reg. 59,090.
4. EPA approved SIP revisions to program infrastructure elements related to implementation of the 1997 eight-hour ozone and PM<sub>2.5</sub> NAAQS, and the 2006 PM<sub>2.5</sub> NAAQS. 77 Fed. Reg. 58,955.
5. EPA approved a SIP revision demonstrating attainment of the 1997 annual PM<sub>2.5</sub> NAAQS for the Philadelphia-Wilmington, PA-NJ-DE nonattainment area. This SIP revision includes the Philadelphia Area's attainment demonstration and the motor vehicle emission budgets used for transportation conformity purposes in Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties. The attainment plan also includes a base year emissions inventory and contingency measures. EPA has also determined that a

RFP plan is not required because Pennsylvania projected that attainment of the 1997 PM<sub>2.5</sub> NAAQS occurred in the Philadelphia Area by the attainment date of April 2010. 77 Fed. Reg. 51,930.

6. EPA proposed to approve the PM<sub>2.5</sub> 2002 base-year emissions inventory portion of the SIP revision for the Pittsburgh-Beaver Valley, PA nonattainment area. The emissions inventory is part of the November 10, 2009, SIP revision that was submitted to meet nonattainment requirements related to the area for the 1997 PM<sub>2.5</sub> NAAQS SIP. 77 Fed. Reg. 60,339.

#### **Other Pennsylvania Air Quality News**

1. On September 25, 2012, the Clean Air Council (CAC) filed an appeal against the Pennsylvania DEP arguing that it is inconsistently implementing its policy regarding when multiple pollution-emitting sources will be considered one facility for the purpose of permitting. Whether emissions from dispersed facilities are aggregated affects whether a major source air permit is required.

CAC argued for the DEP to aggregate emissions from widely placed Marcellus Shale natural gas drills and compressor stations to trigger CAA title V major source permit thresholds. To satisfy EPA's aggregation guidance (74 Fed. Reg. 2376, Jan. 25, 2009), the environmental community has argued that the sources are "adjacent" because they are "interdependent." The DEP chose instead to adopt guidance setting a distance limit, where facilities would only have to obtain the less-stringent minor source air permits if they are far enough apart under the test.

Despite the State's position against aggregation of natural gas drilling *equipment*, on July 26, 2012, it agreed with Sunoco's request to aggregate two refineries that are miles apart but connected by a pipeline (and therefore "interdependent," according to the State). The refineries (Marcus Hook and the Philadelphia Refinery) are located 17 miles apart and will be regulated under a single air permit, allowing the Marcus Hook refinery to shut down and the Philadelphia Refinery to increase emissions, offset by pollution cuts from Marcus Hook's closure.

The environmental community argued that the State is using the very criteria that it has been unwilling to use in aggregation determinations at drilling sites. These concerns may put further pressure on EPA to craft a national rulemaking. A rule would likely be based on a 2009 memo from Gina McCarthy, the Assistant Administrator for EPA's Office of Air and Radiation, restoring three criteria for such analyses, including whether facilities are "contiguous or adjacent," in "common control," and part of the same industrial grouping.

2. On August 28, 2012, CAC amended an earlier petition asking EPA to revoke Pennsylvania's SIP over the State's aggregation policy, citing the DEP's Sunoco determination. EPA's position on the issue is unclear, but the agency appeared to suggest aggregation of the two refineries in a related consent decree with Sunoco. In its permit determination, the DEP says the two refineries are a single facility for CAA New Source Review, title V, and PSD permitting.

### **E. Virginia SIP Revisions**

1. EPA approved the PM<sub>2.5</sub> 2002 base-year emissions inventory portion of the Virginia SIP revision submitted by the Virginia Department of Environmental Quality (DEQ) to meet nonattainment requirements related to Virginia's portion of the Washington, DC-MD-VA nonattainment area for the 1997 PM<sub>2.5</sub> NAAQS SIP. 77 Fed. Reg. 60,626.

2. EPA proposes to approve SIP revisions to allow the terms and conditions of various elements of the preconstruction program in Virginia to be combined into a single permit; establish limitations for issuance of Plantwide Applicability Limits; and provide an exemption to Virginia's NSR program for the use of alternate fuels. 77 Fed. Reg. 55,168.

3. EPA is proposing to approve revisions to the Virginia SIP, submitted August 25, 2011, pertaining to Virginia's PSD and nonattainment NSR programs incorporating preconstruction permitting regulations for PM<sub>2.5</sub>. EPA is also proposing to approve SIP revisions to program infrastructure elements related to implementation of the 1997 eight-hour ozone and

PM<sub>2.5</sub> NAAQS, the 2006 PM<sub>2.5</sub> NAAQS, and the 2008 lead NAAQS. 77 Fed. Reg. 45,523.

### **Other Virginia Air Quality News**

On September 19, 2012, the DEQ adopted new enforcement guidelines (enforcement manual chapter entitled "Chapter 4, Civil Charges and Civil Penalties") to increase penalties for environmental violations by boosting the gravity-based component of penalties by 5 percent or \$5000 per violation (whichever is less), and including additional penalties for any other violations that may have occurred within the prior 36 months. The new policy also requires the agency to evaluate a violator's ability to pay prior to signing a consent order.

### **F. West Virginia SIP Revisions**

1. EPA is proposing to approve the PM<sub>2.5</sub> 2002 base-year emissions inventory portion of the West Virginia SIP for the Huntington-Ashland, WV-KY-OH nonattainment area (Huntington Area) to meet nonattainment requirements related to West Virginia's portion of the Huntington Area for the 1997 PM<sub>2.5</sub> NAAQS SIP. 77 Fed. Reg. 60,085.

2. EPA proposes to approve the PM<sub>2.5</sub> 2002 base-year emissions inventory portion for the Parkersburg-Marietta, WV-OH nonattainment area for the 1997 PM<sub>2.5</sub> NAAQS SIP. 77 Fed. Reg. 60,087.

3. EPA proposes to approve PM<sub>2.5</sub> 2002 base-year emissions inventory portion for the Charleston, WV nonattainment area for the 1997 PM<sub>2.5</sub> NAAQS SIP; and the 2002 base-year PM<sub>2.5</sub> emissions inventory for the Charleston Area. 77 Fed. Reg. 60,094.

*Barbara Little* has extensive experience in air, water, and waste environmental law, having represented industry both as in-house and outside counsel since 1975. She may be reached at [blittle@jacksonkelly.com](mailto:blittle@jacksonkelly.com).

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## EPA REGION 5

Phil Bower

*Whyte Hirschboeck Dudek S.C.*  
*Madison, Wisconsin*

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### Judicial Developments

The U.S. Court of Appeals for the Sixth Circuit vacated the EPA's determination aggregating Summit Petroleum Corporation's (Summit) natural gas sweetening plant and sour gas wells into a single major source for title V purposes and remanded the case to EPA to determine whether the plant and wells are sufficiently physically proximate to be considered "adjacent" within the ordinary meaning of the term, as employed in 40 C.F.R. section 71.2. *Summit Petroleum Corporation v. U.S. Environmental Protection Agency* (Nos. 09-4348; 10-4572) (Aug. 7, 2012).

Summit owns and operates a natural gas sweetening plant, sour gas production wells, and the pipelines connecting the wells to the plant, all within a 43-square-mile area. On its own, the plant has a potential to emit (PTE) SO<sub>2</sub> and NO<sub>x</sub> just under the title V major source threshold of 100 tons per year (tpy), but the total PTE of the plant and production wells exceeds 100 tpy. EPA issued a determination that the plant and wells were a single stationary source because they were under common control, belonged to the same major industrial grouping, and were "adjacent" because the plant and wells were functionally interrelated. Accordingly, the Agency considered the plant and wells a single stationary source subject to title V permitting requirements.

The Court determined that the use of the term "adjacent," as used in title V regulations requiring that aggregated activity be located on "contiguous or adjacent properties," is unambiguous, and that the Court therefore did not owe any deference to EPA's interpretation of the term. The Court held that EPA had interpreted its own regulatory term in a manner unreasonably inconsistent with its plain meaning and vacated the single-source determination. The Court directed EPA to reassess the aggregation of Summit's

facilities "in light of the proper, plain-meaning application of the requirement that Summit's activities be aggregated only if they are located on physically contiguous or adjacent properties."

In *dicta*, the Court stated that even if the term "adjacent" were ambiguous, its holding would be the same because EPA's interpretation was inconsistent with the regulatory history of EPA's title V plan and guidance memorandums. In dissent, Judge Moore stated that she believed that "EPA's consideration of functional interrelatedness as a factor along with physical distance was both reasonable (and thus worthy of deference) and correct," and that she would have affirmed the Agency's decision to aggregate Summit's stationary sources as a major source.

*Phillip Bower* is a shareholder with Whyte Hirschboeck Dudek S.C. in Madison, Wisconsin, where his practice focuses on environmental law, including air permitting and compliance.

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## EPA REGION 6

Laura L. LaValle  
*Beveridge & Diamond*  
*Austin, Texas*

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### I. Regional Developments

On September 17, 2012, the Obama Administration announced the appointment of Ron Curry as the new Administrator of EPA Region 6. Curry fills the post left vacant by the resignation of Al Armendariz, who resigned in April amid controversy over his remarks comparing his enforcement philosophy to Roman crucifixions. Curry is from Hobbs, New Mexico, and was Cabinet Secretary of the New Mexico Environment Department from 2003 through 2010 under then-Governor Bill Richardson.

Curry's appointment marks the first time a non-Texan has been appointed as Administrator of Region 6. As a New Mexico regulator, Curry pushed for greenhouse gas regulations and stricter requirements for oil and gas operations. He also challenged an EPA-issued permit for a coal-fired power plant on Navajo land and the proposed reopening of the Asarco smelter in El Paso, Texas. Curry also urged EPA to prohibit the construction of new major sources of air pollution in Texas until the State adopted new permitting rules.

### II. Texas State Developments

On May 23, 2012, Texas Railroad Commissioner David Porter announced an initiative to reduce flaring and venting associated with the rapid expansion of oil and gas production. The initiative will include compliance assurance, the amendment of flaring and venting rules, review of flaring technologies, regulatory streamlining, and efforts to use excess gas for power generation.

#### Judicial Developments

1. On March 26, 2012, the Fifth Circuit vacated and remanded EPA's disapproval of the Texas Pollution Control Project (PCP) Standard Permit NSR minor source rules in *Luminant Generation Company, L.L.C. v. EPA*, No. 10-60891, slip op. (Mar. 26,

2012). The Court emphasized that EPA's role in approving SIP is intended to be minor. The Court vacated EPA's original disapproval of the PCP standard permit rules and ordered that EPA limit its review of Texas's regulations to the narrow question of whether they meet Clean Air Act (CAA) requirements.

2. The U.S. Court of Appeals for the Fifth Circuit upheld EPA's decision to disapprove the Texas Qualified Facilities Program submission as part of Texas's SIP. See *BCCA Appeal Group v. EPA*, No. 10-60459, slip op. (June 15, 2012). The Court viewed as dispositive the failure of the program to be limited explicitly to minor sources. Thus, the Court upheld EPA's disapproval of the program despite a near-decade delay past the time frame required for approval. The basis for the decision is distinguishable from its companion case, *Luminant Generation Company, L.L.C. v. EPA* (discussed above). In *Luminant*, the Court remanded EPA's disapproval of the pollution control project program, limiting EPA to review of only the criteria set forth in the CAA.

3. In an opinion handed down on July 30, 2012, in *Luminant Generation Co. v. EPA*, No. 10-60934 (5th Cir. July 30, 2012), the U.S. Court of Appeals for the Fifth Circuit denied petitions by power generators and environmental organizations for review of EPA's final rule partially approving and partially disapproving a revision to Texas's SIP that created an affirmative defense against civil penalties for excess emissions during both planned and unplanned start-up, shutdown, and maintenance (SSM) events. EPA approved the portion of the SIP revision providing an affirmative defense for unplanned SSM events (which was challenged by environmental organizations) and disapproved the portion providing an affirmative defense for planned SSM events (challenged by the power generators). The Fifth Circuit denied both challenges, leaving EPA's final rule in place.

4. On August 13, 2012, in a long-awaited decision, the U.S. Court of Appeals for the Fifth Circuit vacated the EPA's disapproval of the Texas Flexible Permit Program, holding that the Agency's decision was based "on demands for language and program features of the EPA's choosing, without basis in the Clean Air Act or

its implementing regulations.” *Texas v. U.S. EPA*, No. 10-60614, slip op. (5th Cir. Aug. 13, 2012). This decision had been closely watched, as it follows two other recent Fifth Circuit decisions on similar Texas SIP submissions. The decision will have significant repercussions within Texas. As the Fifth Circuit noted, EPA’s disapproval had “unraveled approximately 140 permits issued by Texas under the revision’s terms” and, as a result of the disapproval, “every facility with a flexible permit could face fines or other enforcement action irrespective of emission levels.” Indeed, after issuing its belated disapproval, EPA had compelled many flexible permit holders to enter into a multistep “de-flexing” process that the Agency argued was necessary to demonstrate that facilities had not violated major source NSR requirements. With the Fifth Circuit’s decision, the fate of these permits—and the “de-flex” process—remains in doubt.

*Laura LaValle* is the managing principal and a founder of Beveridge & Diamond’s Texas office, and is cochair of the firm’s Air Practice Group. She can be reached at [LLaValle@bdlaw.com](mailto:LLaValle@bdlaw.com).



The image shows a screenshot of the ABA Trends newsletter website. At the top, there is a navigation bar with links for "myABA", "About Us", "Join the ABA", "Calendar", "Member Directory", "Shop ABA", and "Sign In". Below this is a search bar. The main heading is "TRENDS" in large green letters, with "ABA SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES NEWSLETTER" underneath. A globe icon is to the right of the title. Below the title, there is a section for "NOVEMBER/DECEMBER 2011" with "FEATURED ARTICLES". One article is highlighted: "Bitter Cold War Legacy Highlighted In 'Favorable' Navajo Settlement" by Chris J. Siskler. Another article is "Curbing Illegal Trafficking In Timber And Other Plant Products". There is also a "Print Issues Archive" section and a "Law Student Division" advertisement with the text "Your Legal Career Starts... Here".

*Trends* can be found in a new electronic format at [www.ambar.org/EnvironTrends](http://www.ambar.org/EnvironTrends).

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## EPA REGION 8

Randy Dann and Eric Waeckerlin  
*Davis Graham & Stubbs LLP*

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### I. State Updates

#### A. Colorado

In September 2012, the U.S. EPA announced final approval of Colorado’s SIP for regional haze, which included strategies and controls from Colorado’s 2010 Clean Air, Clean Jobs legislation. The most immediate impact has been felt by two coal-fired power plants operated by Xcel Energy, which were retired and will be repowered at future dates. The approved SIP is expected to reduce emissions from applicable sources by more than 70,000 tons per year by 2018.

Tensions between local and state regulation over the oil and gas industry in response to concerns over hydraulic fracturing continue in Colorado. To this end, the most recent Colorado legislative session saw two opposing bills fail in committee. The first, HB 12-1277, sponsored by Rep. Jones (D-Louisville), would have provided greater local control over oil and gas drilling but did not make it out of the House Local Government Committee. The second bill, SB 12-088, sponsored by Sen. Harvey (R-Dist. 30), would have clarified that regulation of the oil and gas industry is a statewide issue, and would have granted the Colorado Oil and Gas Conservation Commission (COGCC) exclusive jurisdiction over the industry. This bill was postponed indefinitely by the Senate Local Government Committee.

Meanwhile, on February 29, 2012, Governor Hickenlooper established a task force to develop cooperative strategies for navigating the rising tension between local and state regulation of oil and gas development. On April 18, 2012, the task force sent the Governor its recommendations, notably not calling for a change in legal or regulatory structure and preferring instead a collaborative approach that does not “draw[] bright lines between state and local jurisdictional authority.” If implemented, the task force’s recommendations are likely to have numerous

air-related impacts, including additional local-level permit review; increased public outreach and education obligations; delegated inspection authority to local inspectors; and increased reporting and public transparency related to notices of alleged violations, self-reported incidences, and emergencies.

In April 2012, EPA Region 8 announced its final ozone designations following a lawsuit brought by Wildearth Guardians for EPA's alleged failure to promulgate the designations for the 2008 ground-level ozone NAAQS. *Wildearth Guardians v. Jackson*, No. 2:11-cv-01661-ROS (D. Ariz.).

## **B. Montana**

EPA promulgated a federal implementation plan (FIP) to address regional haze in Montana, effective October 18, 2012. The FIP was in response to the State's 2006 decision not to submit a regional haze SIP. The FIP identifies the requisite control technologies, associated costs, and emissions reductions for each source subject to the FIP. These sources include a cement plant, a power plant, and several compressor stations. The estimated annual costs of emission controls are almost \$14 million. EPA also approved Montana's submittal containing revisions to the smoke management section of Montana's visibility plan, submitted by the Montana Department of Environmental Quality (MDEQ) on February 17, 2012.

EPA's final ozone designations that were issued in April 2012 once again designated the entire state of Montana as unclassifiable/attainment. However, in May 2012, the MDEQ Air Resources Management Bureau announced in its annual Air Quality Monitoring Network Plan that it will be increasing ambient air quality monitoring in central and north-central Montana to address expected future oil and gas development. MDEQ will add two new monitoring stations at Malta and Lewistown, equipped with instrumentation to monitor PM<sub>2.5</sub>, PM<sub>10</sub>, NO<sub>x</sub>, and ozone.

On an unrelated note, on April 23, 2012, PPL Montana (PPL) sued the U.S. EPA in the U.S. District Court for the District of Montana, Billings Division, seeking to enjoin EPA from releasing what it alleges is

confidential business information (CBI) related to its Colstrip power plant. *PPL Montana, LLC v. Jackson*, No. 12-cv-00052-RFC (D. Mont.). At issue is a spreadsheet detailing all major capital improvements at the Colstrip plant from 1980 to 2003. In response to Clean Air Act section 114 requests for information issued in 2001 and 2004, PPL submitted over 15,000 pages of documents to EPA, declaring many CBI. In 2011, EPA notified PPL that it had received a Freedom of Information Act (FOIA) request from the Montana Environmental Information Center (MEIC) and Sierra Club for certain records relating to PPL's Colstrip and Corrette plants. PPL responded that the public release of these records would cause substantial competitive harm. EPA disagreed and informed PPL that it would release the Colstrip spreadsheet absent suit in federal court. As of November 6, 2012, EPA had yet to answer PPL's complaint, but the Agency issued a status report to the Court on October 31, 2012. The Sierra Club and MEIC moved to intervene and the Court granted the uncontested motion, giving the Intervenor full party status subject to certain conditions, including that they will not be permitted access to the contested documents absent a ruling by the Court in EPA's favor.

## **C. South Dakota**

On April 6, 2012, EPA partially approved and partially disapproved a revision to the North Dakota SIP addressing regional haze. 77 Fed. Reg. 20,894 (Apr. 6, 2012). EPA also promulgated a FIP to address the gaps in the plan resulting from the partial disapproval of the SIP. Prior to EPA's final rule, Senators John Tim Johnson (D-SD) and John Thune (R-SD) expressed concern in a letter to EPA with the Agency's proposal to overrule North Dakota's SIP. The Senators noted that coal-based electricity generation had been a key to South Dakota's economic development, and EPA's proposed partial FIP would make limited improvements while costing "hundreds of millions of dollars for additional technology that will be passed along to ratepayers in [South Dakota]." In approving North Dakota's NO<sub>x</sub> Best Available Retrofit Technology (BART) for two stations (Units 1 and 2 at the Milton R. Young Station and Unit 2 at the Leland Olds Station), EPA made a significant change from the proposal, which would have entirely overruled North

Dakota's BART determinations for these two stations. EPA noted that many of the comments regarding the potential increase in electricity rates due to the proposed partial FIP "were no longer relevant" and that annual costs to comply with the FIP "will be relatively modest considering the size of the plants, and impacts to rate payers should be much lower than anticipated by commenters." *Id.* at 20,398. Notably, for purposes of future regional haze rules, EPA stated that it "[does] not consider a potential increase in electricity rates to be the most appropriate type of analysis for considering the costs of a BART determination." *Id.*

#### **D. Wyoming**

In April 2012, EPA issued its final ozone area designations for the 2008 primary eight-hour ozone standard of 0.075 parts per million. Portions of the Upper Green River Basin Area, including Sublette County, and parts of Lincoln and Sweetwater Counties, were designated nonattainment and classified as Marginal.

The Wyoming Department of Environmental Quality (WDEQ) has convened the Upper Green River Basin Air Quality Citizens Advisory Task Force, which is composed of 26 individuals from municipal area and county governments, the Bureau of Land Management, Wyoming Governor's Office, U.S. Forest Service, public health interests, oil and gas industry, and local area residents. The purpose of the task force is to consider and advise WDEQ on potential solutions to reduce ozone in the Upper Green River Basin Area. The task force has no oversight role, but it is tasked to provide feedback to WDEQ and generate recommendations regarding ozone reduction measures that reflect the desires and values of its constituents. The task force is currently developing recommendations regarding VOC and NO<sub>x</sub> control measures from existing, grandfathered, and future oil and gas production sources. Such recommendations could be incorporated into the Wyoming SIP and used to attain the ozone NAAQS. Meeting summaries, press releases, presentations, and other materials can be located at [http://deq.state.wy.us/aqd/Ozone\\_Taskforce.asp](http://deq.state.wy.us/aqd/Ozone_Taskforce.asp).

#### **E. Utah**

The Utah Department of Air Quality (UDAQ) recently issued a new "Policy on Demonstration of Compliance with the NAAQS for New or Modified Sources in Uintah or Duchesne Counties," which requires minor sources operating on state lands to provide offset emission reduction credits or engage in photochemical modeling to demonstrate that a new or modified minor source will not cause or contribute to a violation of the ozone NAAQS. The policy is a result of the State's recent enrollment in EPA's Qzone Advance Program and is designed to provide a framework to achieve early reductions of ozone in areas that are not yet designated nonattainment for the standard. Projects that have submitted a permit application before the effective date are not subject to the new policy. UDAQ initially indicated that the policy would be effective November 1, 2012, but the agency has recently stated that it intends to delay the effective date for several months. The agency is currently accepting comments on the policy.

EPA did not designate any area within Utah as nonattainment for ozone. Based on relevant technical information, including 2008–2010 and preliminary 2009–2011 air quality data, EPA rejected Utah's recommendation to designate Salt Lake, Davis, and portions of Weber Counties as nonattainment for the 2008 ozone standard. EPA did, however, designate portions of the Uintah Basin (i.e., Duchesne and Uintah Counties within the boundaries of the Uintah and Ouray Indian Reservation) as unclassifiable based on existing non-regulatory air quality data, which has recorded ozone levels above the 2008 standard since 2009. Regulatory monitoring has been conducted in the Uintah Basin since April 2011; thus, EPA lacks the three consecutive years of regulatory monitoring necessary to make a nonattainment designation. EPA suggested that if regulatory monitoring continues to indicate ozone violations, a nonattainment designation for the Uintah Basin could come as early as 2013.

QEP Field Services Co. (QEP), formerly Questar Gas Management Co., entered into a consent decree with the United States and certain members of the Ute Indian Tribe of the Uintah and Ouray Reservation

agreeing to pay \$3.65 million in civil penalties and \$350,000 into a tribal Clean Air Trust Fund to resolve alleged CAA violations at its Coyote Wash, Chapita, Island, Wonsits Valley, and River Bend compressor stations on tribal lands in Utah. According to the proposed consent decree, filed in the U.S. District Court for the Central District of Utah, the company failed to comply with various regulatory and permit requirements, including the National Emission Standard for Hazardous Air Pollutants applicable to oil and gas production facilities and reciprocating internal combustion engines (40 C.F.R. part 63, subparts HH and ZZZZ) and federal operating permit requirements at 40 C.F.R. part 71. The proposed consent decree imposes various compliance requirements on QEP designed to reduce emissions at the five compressor stations, including installation of pollution control devices and equipment removal.

#### F. North Dakota

EPA did not designate any area within North Dakota as nonattainment for ozone.

EPA Region 8 issued draft synthetic minor source air quality permits to a number of operators on the Fort

Berthold Indian Reservation in North Dakota. The draft permits were issued under the Tribal New Source Review Rule, 40 C.F.R. § 49.151. The draft permits include, among other things, facility-wide emission caps, production limits, operational requirements, and installation of various pollutant control devices. Notably, EPA determined that an Air Quality Impacts Analysis (i.e., modeling) was not required to process the proposed permits. EPA is expected to issue additional draft permits for operators on the Fort Berthold Reservation in the coming months. More information, including public comments received on the draft permits, can be located at <http://epa.gov/region8/air/permitting/tmnsr.html>.

**Randy Dann** ([randy.dann@dgslaw.com](mailto:randy.dann@dgslaw.com)) is an associate in the Environmental Group of Davis Graham & Stubbs LLP, where his practice focuses on complex environmental litigation, permitting and regulatory compliance, and site remediation.

**Eric Waeckerlin** ([eric.waeckerlin@dgslaw.com](mailto:eric.waeckerlin@dgslaw.com)) is an associate in the Natural Resources Group of Davis Graham & Stubbs LLP, with a practice focusing on regulatory and litigation counseling in the fields of environmental, natural resource, energy, and oil and gas law.

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