

Air Quality Committee Newsletter

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MESSAGE FROM THE COMMITTEE CHAIR

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By the time you receive this issue of the newsletter, your Air Quality Committee (AQC) leadership team will have been on the job for almost six months and has only six months left to fulfill its goals for 2012–2013. In this message, I offer a report on air quality programs and committee activities during the upcoming Spring Conference in March, a preview of air quality program proposals submitted for a Quick Teleconference and the Fall Meeting in October, and an update on social media, public service, and writing opportunities.

42nd Spring Conference: The Spring Conference will be held in Salt Lake City on March 21–23, 2013, and I encourage you to attend. The program includes a breakout session titled “NAAQS: Update and Implementation—the What, When, Where and How.” Speakers include Peter S. Glaser of Troutman Sanders in Washington, D.C.; Lorie Schmidt, associate general counsel, U.S. Environmental Protection Agency; and Peter Zalazal, staff attorney with the Environmental Defense Fund in Boulder, Colorado. Bernard F. Hawkins Jr. of Nelson Mullins Riley & Scarborough LLP in Columbia, South Carolina, will moderate. There will also be a breakout session titled “Expanding Trends in RCRA Litigation,” which will address how RCRA suits have expanded to areas traditionally covered by the Clean Air Act and other statutes; and a session titled “A Supreme Court and Appellate Court Update,” which will include a discussion of *American*

Trucking Association v. City of Los Angeles, involving allegations that trucking concession agreements—developed to address community air pollution concerns at the port—are preempted under the Federal Aviation Administration Authorization Act. We will have a committee dinner during the Spring Conference and will use the list serve, Web site, and social media to advise you of the details. There will also be a public service project, TreeUtah, in the morning on Thursday, March 21. Volunteers will plant trees in one of Salt Lake County’s parks. I encourage you to participate in this fun event and meet other Section and committee members.

21st Fall Conference: The Air Quality Committee has submitted programming proposals on the following emerging issues for the Fall Meeting in Baltimore in October 2013: hot topics such as the Boiler MACT and Utility Mercury and Air Toxics Standards; Ambient Air Monitoring to Assess Air Quality and Health Impacts Associated with Oil and Gas and Other Sources of Emissions; The Renewable Crossroads: Future Directions for Biofuels—EPA Regulations, Policy Challenges, and the Courts; and Implications of the Changing Regulation of Start-up, Shutdown, and Malfunction Events. The committee is also cosponsoring program proposals on greenhouse gases and vapor intrusion regulatory developments. We welcome your ideas for meeting programs. If you have suggestions for programming or speakers, contact me or a committee vice chair for Programming.

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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

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

October 9-12, 2013
21st Fall Conference
Baltimore, MD

**For full details, please visit
www.ambar.org/EnvironCalendar**

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Quick Teleconferences/Webinars/Committee

Conference Calls: Committee vice chairs for Programming Jonathan Peress and Marty Booher have proposed a Quick Teleconference (QT) on EPA's Air Quality Agenda for President Obama's Second Term. In addition to QTs, the Section is encouraging each committee to hold up to two committee conference calls (free for members) during the 2012–2013 ABA year. If you have any recommendations for a QT, webinar, or committee conference call, please contact Jonathan Peress, Marty Booher, or me.

Social Media: Our committee vice chairs for Social Media regularly post air quality developments and Section and committee activities on LinkedIn and Twitter. We encourage you to join our Air Quality Subgroup on LinkedIn, and we invite you to engage in discussions and exchange information on air quality issues with committee members using LinkedIn and Twitter.

Web Site and List Serve: Michael Balster, committee vice chair for Electronic Communications, has updated our committee Web site and regularly posts "Hot News" items. We are also using the list serve to keep you informed of air quality developments, Section and committee activities, and opportunities to become involved. I encourage 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 Michael or on LinkedIn, Twitter, or Facebook by Cheri Budzynski and Laura Swingle.

Public Service: Our committee vice chair for Membership, Phil Bower, recently organized a successful tree-planting project in Madison, Wisconsin. We hope to feature a report by a law student on Phil's tree planting project in our next newsletter. We are also continuing a committee public service project concerning ground-level ozone and have posted on our Web site suggestions for simple ways to help reduce ozone, as well as links to a number of Web sites with additional information, including state-specific, U.S. EPA, and public interest groups. If you have ideas for

committee-specific public service projects, please share them with me. We would welcome your involvement.

Writing and Publications: Interested in writing an article on an air quality topic for *Trends*, *Natural Resources & Environment (NR&E)*, or a Section book or other publication? *NR&E* has issued a Call for Article Proposals for the "Food" issue. Themes of future *NR&E* issues include "Waste: Cradle to Cradle" and "Roberts' Rules." I encourage you to think about potential air quality articles for each of these issues. We will continue to use the committee list serve to advise you of future *NR&E* calls for article proposals and deadlines.

Committee vice chairs for the newsletter, Kristin Hines Gladd and Ben Snowden, have secured regional reporters for all of the EPA Regions for our committee newsletter. This is an achievement, as it has been a long time since our newsletter had reporters for all of the EPA Regions. In addition, we have one guest article on the regulation of small nonroad engines under the Clean Air Act in this issue. We continue to seek guest articles for our newsletter.

Thank you to everyone who volunteered to write summaries of cases and rules for *Year in Review*. Jonathan Martel, vice chair for *Year in Review*, reports that the air quality section is now going through the editing process.

Remember that committee newsletters and *Trends* are now in electronic format only, and *Year in Review* will be electronic for the first time this year. If you want to receive these publications, the ABA must have your current e-mail address.

Upcoming Events: The Water Law Conference has been moved from San Diego to Las Vegas and will be held June 5–7, 2013. The 2014 Fall Conference, chaired by Air Quality Committee member John Jacus, will be in Miami. Watch for further details on the Section Web site, Twitter, and Facebook, as well as via Section e-mail.

SMALL SPARK-IGNITION ENGINES: A SLEEPER THREAT TO AIR QUALITY

Catherine M. Wilmarth and
W. Ryan Stephens

Often overlooked by the public as a source of air pollution, gasoline-powered lawn and cleaning equipment can nonetheless have significant air quality impacts. Machines such as lawn mowers, snow blowers, chain saws, leaf vacuums, and power washers may contain small gasoline-fueled engines, also referred to as small spark-ignition (SI) engines, which emit a number of regulated air pollutants. In recent years, the Environmental Protection Agency (EPA) has expanded the regulation and enforcement of emission standards for small SI engines, with particular emphasis on small SI engines manufactured outside of the United States and imported into the American market.

I. The Pollutants

Under Clean Air Act (CAA) regulations, small SI engines include (with some exceptions) all gasoline-powered nonroad engines with a gross power output at or below 19 kilowatts. Like all gasoline engines, small SI engines emit a number of regulated pollutants, including volatile organic compounds (VOCs), particulate matter, carbon monoxide (CO), hydrocarbons (HC), and nitrogen oxides (NO_x). VOCs cause irritation in and damage to numerous body parts and systems, and some have been linked to cancer. Carbon monoxide is a poisonous gas that can reduce the delivery of oxygen to the body's organs and tissues, and at high levels can cause death. Fuel hydrocarbons include toxic compounds and may cause cancer. Nitrogen oxides have been shown to have adverse effects on the respiratory system. More significantly, hydrocarbons, carbon monoxide, and nitrogen oxides contribute to the formation of ground-level ozone, which has many deleterious effects, including the impairment of lung function, the slowing of plant growth, and contribution to smog.

Small SI engines generally emit these pollutants at higher rates (in terms of hours of operation and work

produced) than larger engines. For example, running a typical gas-powered lawn mower for one hour may produce the same hydrocarbon emissions as driving an average car nearly 200 miles under typical driving conditions. Many of these pollutants are the result of incompletely combusted fuel that is released into the air as exhaust, or when fuel evaporates into the atmosphere.

One reason that small SI engines tend to have higher emissions is that they are typically two-stroke engines, which are lighter and easier to maintain than the four-stroke engines found in larger equipment, but which tend to combust fuel less completely. Furthermore, small SI engines came under the purview of Clean Air Act regulation more recently than most larger engines, with the 1990 amendments and emissions standards first promulgated in 1995. Consequently, industry and manufacturing sectors for small SI engines are not as advanced as the automobile industry in developing and implementing cleaner technologies.

II. Regulation of Small SI Engines Under the Clean Air Act

Part A of title II of the CAA regulates mobile sources of air pollution. Section 203 of the CAA, 42 U.S.C. § 7522, prohibits the importation or sale of any engine that has not been certified to be in compliance with the emission standards set out in regulation. Section 213(b), 42 U.S.C. § 7547, requires the development of emission standards for nonroad engines, including small SI engines. Section 213(d) expands the enforcement provisions of title II, part A to nonroad engines.

Regulations in 40 C.F.R. parts 90 and 1054 set emission standards for small SI engines. Part 90 contains Phase 1 and Phase 2 exhaust emission standards and compliance provisions, which are applicable to new nonroad small SI engines for specified model years. The Phase 1 exhaust emission standards set limits for the amounts of HC+NO_x, HC, CO, and NO_x emitted by engines starting in the 1997 model year. The Phase 2 standards, which became effective in model years 2001–2007 (depending on the size and class of engine), set HC+NO_x and CO limits

for gasoline-powered engines, as well as non-methane HC+NO_x limits for engines fueled by natural gas.

Part 1054 contains Phase 3 exhaust emission standards, which were finalized in 2008. 73 Fed. Reg. 59,034 (Oct. 8, 2008). These more stringent standards took effect with respect to most handheld products in the 2010 model year; to Class II engines with a displacement of more than 225 cubic centimeters (cc) in the 2011 model year; and to non-handheld Class I engines with a displacement of less than 225 cc in the 2012 model year. The Phase 3 standards set limits for emissions of HC+NO_x and for emissions of CO. The evaporative emission standards in 40 C.F.R. part 1060 also apply starting in model years 2010–2012, with increasingly stringent standards taking effect for handheld engines in model years 2010–2016.

These standards are intended to force industry to improve emission-control technology for small SI engines. In the Draft Regulatory Impact Analysis for the 2008 rule, EPA discussed SI engine technology and emissions control technologies in detail, and concluded that manufacturers may further reduce small SI engine emissions through improved engine calibration and catalytic after-treatment. Both of these measures will help to reduce exhaust emissions that come from lawn and cleaning equipment. To comply with increasingly stringent standards, many manufacturers of small SI engines have added catalytic treatment, or have changed from side valves to overhead valves.

EPA applies the same compliance assurance techniques to these small engines as it does to other vehicles and engines. Manufacturers must submit an application to EPA describing the engines and proving that they meet emission standards when running. If EPA agrees, it will issue a certificate to all engines of similar design and output (called an “engine family”). The CAA requires all manufacturers selling small SI engines and any person importing such engines to prove that the engines are certified. Manufacturers also must label their engines in specific ways and provide warranties that their vehicles and equipment meet will emission standards throughout their useful life.

III. Enforcement

EPA considers the importation of noncompliant small SI engines manufactured abroad a threat to air quality in the United States, and in recent years has ramped up enforcement actions against manufacturers, importers, and marketers of noncompliant engines and equipment imported into the United States. The Department of Justice has also stated an enforcement focus for recent and coming years on the foreign manufacture and importation of small engines used in portable and stationary equipment, including small SI engines.

Discoveries of noncompliant equipment are frequently made at U.S. ports during inspection of imported goods with the help of the Department of Homeland Security’s Bureau of Customs and Border Protection (CBP), as well as through inspections at retail locations where equipment containing small SI engines is sold. Under section 208 of the CAA, EPA can also demand that a manufacturer or importer turn over records to EPA, which may lead to the discovery of additional violations.

EPA has several enforcement options upon discovering the importation of uncertified or otherwise noncompliant engines or equipment. EPA, in conjunction with the CBP, can seize the goods and force exportation of noncompliant engines or equipment. Importers may also owe fines to CBP for goods that are seized or held by CBP. EPA may also demand a halt in production or a recall of a noncompliant product. EPA may also assess penalties up to the statutory maximum of \$37,500 per engine in violation.

In recent years, EPA has brought a number of enforcement cases based on the importation of noncompliant small SI engines. For example, in 2008 EPA entered into a settlement with Jenn Feng Industrial Co., Ltd., McCulloch Corporation, MTD Products, Inc., and MTD Southwest, Inc. The four companies manufactured, certified, imported, and sold 20,000 chain saws that exceeded emission standards and were not built in conformity with the design specifications for which the engines were certified. The companies also violated several record keeping and testing

requirements. The excess emissions attributed to these violations included 268 tons of volatile organic compounds. The companies agreed to pay \$2 million in penalties, spend \$5 million on mitigation projects, and institute compliance assurance plans.

In May 2010, in the largest Clean Air Act importation enforcement case to date, automotive and after-market service chain Pep Boys and importer Baja, Inc., agreed to pay \$5 million in civil penalties for importing almost 250,000 Chinese-made motorcycles, recreational vehicles, and generators that did not comply with CAA requirements. The importation of equipment powered by small SI engines accounted for a significant portion of the violations, and such equipment was also the focus of much of the injunctive relief (including emissions offset projects) required by the settlement.

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EPA REGIONAL REPORTS

EPA HEADQUARTERS

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A. Air Toxics

1. Boilers: The U.S. Environmental Protection Agency (EPA) issued final revisions to air toxics standards for major source boilers and process heaters, and for area source boilers, on January 31, 2013 (78 Fed. Reg. 7137) and February 1, 2013 (78 Fed. Reg. 7488), respectively. Less than 1 percent of the nation's 1.5 million boilers are required to meet numerical emission limits for mercury, acid gas, and fine particles. The boilers that are covered are the largest and most-polluting and are found at refineries, chemical plants, and other industrial facilities. Nearly 200,000 small boilers must meet the standards through routine tune-ups. According to EPA, for every \$1 spent on compliance costs, the revised standards provide \$13 to \$29 in health benefits.

EPA estimates that there are approximately 14,000 major source boilers and process heaters in the United States. Under the revised rule, all of those will be required to conduct periodic tune-ups and about 12 percent will be required to meet numerical emission limits. The agency published a final major source boilers and process heaters rule pursuant to court-ordered deadlines on March 21, 2011 (76 Fed. Reg. 15,608), but issued a notice of reconsideration the same day (76 Fed. Reg. 15,266). Changes to the 2011 final rule include additional subcategories for light and heavy industrial liquids; new emission limits for particulate matter (PM) that are different for each biomass fuel subcategory; new emission limits for carbon monoxide (CO); and alternative monitoring approaches for demonstrating continuous compliance for the PM limit. The final rule also allows alternative total selective metals emission limits to regulate metallic air toxics instead of using PM as a surrogate and replaces numeric dioxin emission limits with work practice standards. Owners and operators of major

source boilers will have three years to comply from the date the final rule is published in the *Federal Register* or until early 2016 and could be granted a fourth year or until early 2017 if they need to install pollution controls. EPA estimates compliance costs to be \$1.4 to \$1.6 billion, or \$130 million less than the standards announced in 2011.

The area source standards cover approximately 183,000 boilers. Of the covered units, over 99 percent require only periodic tune-ups, and some of these also need to perform a one-time energy assessment. Approximately 600 coal-burning units (less than 1%) representing the largest of these sources are required to meet numerical emission limits. The approximately 1.3 million boilers located at area source facilities that run on natural gas are not covered by the final area source rule.

Changes to the March 21, 2011, area source boiler rule (76 Fed. Reg. 15,554) include extending by two years the initial compliance date for existing area source boilers subject to the tune-up requirement; revising the deadline for initial notification for existing area source boilers to no later than January 20, 2014; requiring tune-ups every five years instead of every two for seasonally operated units, limited-use units, small oil-fired units, and units with oxygen trim systems; revising the PM emission-limit requirements for new oil-fired boilers; reducing the fuel sampling and performance testing requirements; providing an option of continuous emissions monitoring for the CO emission limit; and allowing sources already operating under certain energy management programs to satisfy the energy assessment requirement.

New and existing large coal-fired boilers must meet numerical emission limits based on Maximum Achievable Control Technology (MACT) for mercury and CO. New and existing small coal-fired boilers and all existing biomass boilers and oil-fired boilers are subject to periodic tune-up management practices. Existing area source boilers must comply by March 21, 2014. EPA estimates the cost of the area source standards to be approximately \$490 million per year, with the value of the health benefits associated with

reduced exposure to fine particles to be \$200 to \$520 million in 2015.

2. Cement Kilns: On February 12, 2013, EPA published final revisions (78 Fed. Reg. 10,006) to air toxics rules for Portland cement manufacturing previously issued on September 9, 2010 (75 Fed. Reg. 54,970). The revisions apply to both existing and new Portland cement facilities that do not burn hazardous waste or nonhazardous secondary materials as fuels. The revisions retain emission limits for mercury, acid gasses, and total hydrocarbons, as well as requirements that kilns continuously monitor compliance with limits for mercury, total hydrocarbons (or organic air toxics as an alternative), and PM.

EPA determined that PM emissions could not be reliably measured using the 2010 final rule's monitoring requirements. The revisions to the rule adjusted the PM monitoring requirements but still require that kilns monitor continuously to demonstrate compliance with the PM limits. Kilns with PM or organic air toxic emissions that remain below 75 percent of the emission limits in the final rule have greater flexibility in meeting the daily operating limits that facilities must use to demonstrate continuous compliance.

Coal mills that use kiln exhaust are considered part of the cement kiln, meaning emissions from coal mills are included when determining if a kiln is meeting emission limits. The revisions changed the alternative emission limit for organic air toxics that kilns may meet instead of the limit for total hydrocarbons and revised the open clinker pile standards. Existing kilns must comply by September 9, 2015, and may request an additional year, if needed. EPA estimates the revised rule will have compliance costs of \$52 million less than those in the 2010 rule.

3. Stationary Engines: On January 14, 2013, EPA finalized amendments to air toxics standards for stationary reciprocating internal combustion engines that generate electricity and power equipment at industrial, agricultural, oil and gas production, power generation, and other facilities. The amendments address requirements for area source stationary spark ignition (SI) engines above 500 horsepower (HP);

engines scheduled to be replaced in the next few years due to state or local rules, as well as certain engines installed in 2006; engine testing for formaldehyde emissions; engines used in emergency demand response programs; engines used in remote areas of Alaska; and engines for offshore vessels operating on the Outer Continental Shelf (OCS).

For area source stationary SI engines above 500 horsepower (HP), which are typically natural gas-powered and used to power equipment for oil and gas production, EPA is replacing numerical emission limits for existing area source stationary SI 4-stroke engines above 500 HP that are located in populated areas with requirements to (1) install catalytic controls; (2) conduct an initial test and annual performance checks of the catalyst; and (3) either equip the engine with a high temperature shutdown device to protect the catalyst or monitor the catalyst inlet temperature continuously. Such engines located in remote areas must meet management practices.

Tier 1 and Tier 2-certified stationary compression ignition (CI) engines that are scheduled to be replaced due to state or local rules may meet management practices until January 1, 2015, or 12 years after installation date, but not later than June 1, 2018. The amendments specify that existing stationary area source Tier 3-certified CI engines installed before June 12, 2006, are in compliance with the standards.

The amendments add an alternative compliance demonstration option for existing and new SI 4-stroke rich burn non-emergency engines greater than 500 HP located at major sources subject to a formaldehyde reduction requirement to include testing emissions of total hydrocarbons (THC) to show that the engine is achieving THC emissions reductions of at least 30 percent. Engines used in emergencies to produce electricity and pump water for flood and fire control may be used to respond to emergency demand, as well as to test and maintain engines for up to a total of 100 hours per year. Emergency engines that operate, or commit to operate, for more than 15 hours annually must use ultra-low sulfur diesel fuel starting in 2015. Also starting in 2015, entities with engines of 100 HP or larger that operate, or commit to operate, for more

than 15 hours, up to 100 hours, per year for emergency demand response will need to submit an annual report including location, dates, and times of operation. During a hurricane, ice storm, or other emergency, any engine of any size can operate without meeting control requirements or emission limits.

Existing area source stationary CI non-emergency engines above 300 HP that are located on offshore vessels operating on the OCS must meet management practices. The amendments also broaden the definition of remote area sources in Alaska to allow certain engines in Alaska to meet management practices rather than numerical emission standards. EPA estimates capital and annual costs of compliance with the updated rules to be \$840 million and \$490 million, respectively, which is a reduction of \$287 million (capital) and \$139 million (annual), respectively, in compliance costs from the original 2010 rules. 75 Fed. Reg. 51,570 (Aug. 20, 2010); 75 Fed. Reg. 9648 (March 3, 2010). Although the updated standards result in fewer emissions reductions than the 2010 rules, EPA states that they will still reduce emissions of air toxics, CO, PM, nitrogen oxides, and volatile organic compounds, and estimates the monetized co-benefits to be \$830 million to \$2.1 billion.

4. Solid Waste Incineration Units: On February 7, 2013, EPA announced final revisions to the new source performance standards (NSPS) and emissions guidelines for commercial and industrial solid waste incineration (CISWI) units. 78 Fed. Reg. 9112. The final revisions establish or revise standards for four subcategories of CISWI units: incinerators; energy recovery units; waste-burning kilns; and small, remote incinerators. The revisions also further subcategorize energy recovery units and waste-burning kilns for CO emission limits only.

Changes to the final standards published on March 21, 2011 (76 Fed. Reg. 15,704) include revised numerical emission limits for some new and existing CISWI units for some of the nine pollutants listed in section 129 of the Clean Air Act; and revised monitoring provisions, including CO and PM monitoring requirements. For CO, EPA removed the oxygen correction requirements during periods of start-up and shutdown emissions and

retained full-load stack test requirements for CO coupled with continuous oxygen monitoring. For PM, EPA is requiring PM continuous parametric monitoring systems for all waste-burning kilns and for energy recovery units with an annual heat input greater than 250 million metric British thermal unit (mmBtu) per hour.

CISWI units must either install add-on controls to comply with the emission limits or use alternative waste disposal options, such as diverting waste to a landfill. Owners and operators of existing CISWI units must comply with the new standards no later than three years after EPA approves a state plan or five years after publication of the final rule in the *Federal Register*, whichever is earlier. For new sources, the effective date is either six months after publication of the final rule in the *Federal Register* or the date of the source's start-up, whichever is earlier.

EPA estimates compliance costs to range from \$258 to \$275 million per year and the benefits associated with the reduced exposure to fine particles to be from \$420 to \$1000 million in the year 2015. EPA states the standards will reduce emissions of metals and dioxins, acid gases, PM, nitrogen dioxides, and CO. Because units may be considered boilers, process heaters, or cement kilns if they are not combusting solid waste, EPA also finalized changes to its March 21, 2011 rule (76 Fed. Reg. 15,456) to determine which nonhazardous secondary materials would be considered waste and which would be considered fuel. 78 Fed. Reg. 9112, 9135–76 (Feb. 7, 2013).

B. NAAQS

1. Ozone: On January 15, 2013, EPA published a final rule finding that 28 states, the District of Columbia, and the Commonwealth of Puerto Rico have not made complete infrastructure state implementation plan (SIP) submissions to address basic Clean Air Act (CAA) program elements such as monitoring requirements and legal authority necessary to implement the 2008 eight-hour ozone national ambient air quality standards (NAAQS). 78 Fed. Reg. 2882. In the past, EPA has interpreted CAA section 110(a)(1) as establishing a required submittal date for SIPs addressing the “good

neighbor” provision in section 110(a)(2)(D), which requires states to prohibit significant contribution to nonattainment and interference with maintenance in nearby areas. However, the final rule does not include any findings of failure to submit SIPs addressing interstate transport because petitions are pending for rehearing en banc of the D.C. Circuit's decision in *EME Homer City Generation v. EPA*, 696 F.3d 7 (D.C. Cir. 2012), which held that EPA must first quantify significant contribution to nonattainment and interference with maintenance before a state's SIP may be deemed deficient. The 28 states are Arizona, Arkansas, California, Hawaii, Illinois, Iowa, Kansas, Louisiana, Maine, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Dakota, Oklahoma, Pennsylvania, South Dakota, Utah, Vermont, Washington, Wisconsin, and Wyoming. The final rule takes effect February 14, 2013, starting the running of a 24-month clock for EPA to promulgate a federal implementation plan to address the outstanding SIP elements unless the affected states submit, and EPA approves, a SIP that corrects the deficiency.

2. Particulate Matter: On January 15, 2013, EPA published revised final NAAQS for PM. 78 Fed. Reg. 3086. EPA tightened the standards by revising the “primary” annual fine particle (PM_{2.5}) standard from 15 micrograms per cubic meter (mg/m³) to 12mg/m³ and retained the existing 24-hour fine particle standard of 35 mg/m³ and the existing coarse particle pollution (PM₁₀) standard of 150 mg/m³. “Primary” standards, like the revised annual PM_{2.5} standard of 12 mg/m³, provide public health protection, including protecting the health of sensitive populations such as asthmatics, children, and the elderly, while “secondary” standards provide public welfare protection, including protection against decreased visibility and damage to animals, crops, vegetation, and buildings. Sources of direct emissions of PM_{2.5} include motor vehicles, smoke stacks, and fires. Fine particles also form when gases emitted by power plants, industrial processes, gasoline and diesel engines, and other sources react in the atmosphere.

The final rule sets forth EPA's schedule for designating areas and implementing the revised primary annual

PM_{2.5} standard. By 2013, states must make recommendations for areas to be designated as “attainment,” “nonattainment,” or “unclassifiable.” By August 2014, EPA will issue to states its so-called 120-day letters, responding to states’ recommendations for attainment and nonattainment areas. States then have 120 days to comment on any modifications to their recommendations and provide new information and analyses to EPA if appropriate. EPA will then make final designations by December 2014, which would likely become effective in early 2015, i.e., 60 days after the final designations are published in the *Federal Register*.

The effective date of designations is important because it starts the clock running for attainment demonstrations and deadlines. Three years after the effective date of the designations, states are required to submit their SIPs outlining how they will reduce pollution to meet the revised standards. Thus, attainment SIPs would be due in early 2018. EPA states it plans to propose additional guidance and implementing regulations for the revised PM_{2.5} standard relating to SIP and permitting requirements for the revised standards, and that it intends to issue a final implementation rule around the same time it makes final designations in late 2014. States would be required to meet the revised PM_{2.5} NAAQS by early 2020, or not later than five years after designations, but may request an extension until 2025.

Based on 2009–2011 air quality data, 66 counties do not currently meet the revised annual standard of 12mg/m³. According to EPA’s press release, “fewer than 10 counties, out of more than 3,000 counties in the United States, will need to consider any local actions to reduce fine particle pollution in order to meet the new standards by 2020. . . . The rest can rely on air quality improvements from federal rules already on the books to meet this standard.” Press Release, EPA, EPA Announces Next Round of Clean Air Standards to Reduce Harmful Soot Pollution, (Dec. 14, 2012). EPA projects that by 2020 99 percent of U.S. counties will meet the revised standard without any additional actions.

The final rule updates the nation’s PM_{2.5} monitoring network by requiring states to relocate “a small number of monitors” to measure fine particles near heavily traveled roads in areas with populations of one million or more. The relocations will be phased in over a two-year period from 2015 to 2017. According to EPA, the existing national PM_{2.5} monitoring network consists of about 900 monitors. EPA estimates that about 52 existing monitors needed to be relocated to meet the near-roadway requirement.

EPA had proposed to set a separate secondary 24-hour standard to provide protection against PM-related visibility effects or haze in cities and in some of the nation’s national parks and wilderness areas; however, EPA concluded that the current secondary 24-hour PM_{2.5} standard of 35 mg/m³ will provide visibility protection equal to or greater than 30 deciviews. In the final rule, EPA determined that 30 deciviews is the target level of visibility impairment protection requisite to protect public welfare.

EPA estimates the annual cost of implementing the revised annual PM_{2.5} NAAQS to range from a low of \$53 million to a high of \$350 million and the value of health benefits to be between \$4 billion to \$9.1 billion per year in 2020, or a return of \$12 to \$171 for every dollar invested in PM emissions reduction.

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EPA REGION 1

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I. State Updates

A. Connecticut

1. The Connecticut Department of Energy and Environmental Protection (DEEP) accepted public comment on a proposed air quality permit-by-rule for combined heat-and-power (CHP) systems. The proposed permit-by-rule would be available to the owners of CHP projects of less than 10 megawatt (MW) capacity that meet the applicability requirements for an individual permit under DEEP's new source review (NSR) permit program. An owner of such a CHP project would be able to operate under the permit-by-rule as an alternative to obtaining a NSR permit. The comment period ended December 12, 2012.

2. On January 10, 2013, DEEP announced the award of \$360,000 in grants to seven municipalities to reduce diesel emissions by replacing on-road heavy-duty diesel trucks with new, low-emission trucks. The funds were provided by American Electric Power Service Corporation pursuant to a 2007 consent decree resolving alleged Clean Air Act violations in multiple states.

3. On December 13, 2012, DEEP announced that Connecticut would join a multistate effort pushing for federal standards on methane emissions. Connecticut joined Delaware, Maryland, Massachusetts, New York, Rhode Island, and Vermont in notifying EPA they intend to sue, if necessary, to prompt agency action on methane gas emissions from new and existing methane sources in the oil and gas sector.

B. Maine

1. The Maine Department of Environmental Protection (DEP) finalized a number of amendments to its air permitting regulations. Among the amendments are the incorporation of recent revisions to the federal fine particulate matter (PM_{2.5}) NSR program and provisions for use of plant-wide applicability limits.

2. DEP recently incorporated by reference the national ambient air quality standards (NAAQS) and ambient increments for prevention of significant deterioration. In addition, the rulemaking updated the ambient increments to establish an increment for PM_{2.5} and repeal the state standard for chromium.

3. DEP is proposing to amend the volatile organic compound (VOC) limits for miscellaneous metal parts and products coating operations and expand the categories that are covered by the rule. The new rule would include plastic parts and products for the first time and provide five major surface coating categories with multiple subcategories in each. The compliance deadline would be January 1, 2014.

C. Massachusetts

1. In December 2012, the Massachusetts Department of Environmental Protection (MassDEP) promulgated amendments to its Low Emission Vehicle (LEV) Program regulation. These amendments adopted two recent revisions made by the California Air Resources Board (CARB) to the greenhouse gas emission standards for motor vehicles. The first revision applies to model year (MY) 2009–2011 vehicles. The second revision applies to MY 2012–2016 vehicles.

2. On January 10, 2013, MassDEP held a stakeholder meeting to solicit comments on its recommendations for changes to the current stage I and stage II Vapor Recovery Programs. MassDEP is recommending elimination of stage II requirements for all gasoline dispensing facilities (GDFs) by mid-2013 and new requirements that GDFs install CARB-certified stage I enhanced vapor recovery systems by 2017.

D. New Hampshire

1. The New Hampshire Department of Environmental Services (DES) is proposing its annual update to incorporate by reference federal new source performance standards and national emission standards for hazardous air pollutants. The update will add a reference to the new subpart UUUUU, National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units.

2. DES revised the state's existing ambient air quality standards to make them consistent with recent revisions to the NAAQS. These changes affect the standards for PM, sulfur dioxide, nitrogen dioxide, ozone, and lead.

3. DES recently amended its existing rules by, among other things, allowing sources to appoint more than one responsible official; establishing modeling thresholds that will require modeling only for large emitters; and exempting sources emitting VOCs and subject to Reasonably Available Control Technology with actual emissions less than 10 tons per year (tpy) from obtaining a permit.

E. Rhode Island

1. The Rhode Island Department of Environmental Management (RI DEM) posted proposed state implementation plan (SIP) revisions and accepted public comments through December 31, 2012, on proposed Rhode Island Infrastructure SIP revisions for the revised eight-hour average NAAQS for ozone, which was promulgated in 2008, and the one-hour average NAAQS for nitrogen dioxide (NO₂), which was promulgated in 2010.

2. RI DEM is updating its dispersion modeling guidelines to delineate procedures to be used for conducting dispersion analyses to demonstrate compliance with the acceptable ambient levels for toxic air contaminants listed in Rhode Island Air Pollution Control Regulation No. 22, "Air Toxics," and with the NAAQS for criteria air pollutants.

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EPA REGION 2

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I. Second Circuit Court of Appeals: Clean Air Act Preemption of Common Law Claims

In 2008, New York City transit and bus company employees filed tort claims against bus and engine manufacturers for injuries alleged to arise from their inhalation of diesel exhaust fumes, pleading claims for negligent failure to warn and negligent inclusion of design features that would allow the installation of a device that circumvents federal emissions requirements. Plaintiffs' claims were based primarily on allegations that defendants' equipment failed to meet Clean Air Act (CAA) emissions standards, and that defendants failed to warn plaintiffs about the latent dangers of bus exhaust fumes. The U.S. District Court for the Southern District of New York had granted defendants' motion for judgment on the pleadings, holding that the Clean Air Act preempted plaintiffs' claims. On July 11, 2012, the U.S. Court of Appeals for the Second Circuit summarily affirmed, citing CAA section 209(a), which states that "[n]o State . . . shall adopt or attempt to enforce any standard relating to the control of emissions from . . . any new motor vehicle engines." 42 U.S.C. § 7543(a). *See Jackson v. General Motors Corp.*, 770 F. Supp. 2d 570 (S.D.N.Y. 2011), *aff'd sub nom. Butnick v. General Motors Corp.*, No. 11-1068 (2d Cir. July 11, 2012).

II. RGGI Changes Brewing

The Regional Greenhouse Gas Initiative (RGGI) is a cap-and-trade program for carbon dioxide (CO₂) emissions from electric generating units with a capacity greater than 25 megawatts (MW) in nine states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont). The current annual CO₂ emissions cap of 165 million tons exceeds by a wide margin the annual emissions of the affected units (approximately 91 million tons of CO₂). As a result, the RGGI states solicited comments on a proposed model

rule to reduce the emissions cap (the comment period closed on January 17, 2013). On January 9, 2013, New York Governor Andrew Cuomo, in his State of the State Address, proposed lowering the cap to reduce emissions below current levels.

A lower cap would raise the cost of allowances and provide further impetus for retiring coal-fired power plants in the region, although a number of such plants are likely to be retired in any event as a result of the phase-in of the Utility MACT rule finalized on December 16, 2011. *See* Final Rule, National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9304 (Feb. 16, 2012).

III. EPA Proposes to Approve the N.Y.-N.J. Attainment Demonstrations with Respect to the 1997 Eight-Hour Ozone Standard

On December 11, 2012, EPA proposed to approve the submissions made by New York and New Jersey that three moderate nonattainment areas for the 1997 eight-hour ozone standard of 0.08 parts per million (ppm) (the New York-Northern New Jersey-Long Island area, the Philadelphia-Wilmington-Atlantic City area, and the Poughkeepsie area) are now in compliance with that standard. *See* 77 Fed. Reg. 73,570 (Dec. 11, 2012). The proposed rule, if enacted, would not affect the status of the New York-Northern New Jersey-Long Island and Philadelphia-Wilmington-Atlantic City areas as nonattainment areas with respect to the 2008 eight-hour ozone standard of 0.075 ppm.

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EPA REGION 3

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I. Regional Updates

Enforcement Actions

1. On October 18, 2012, Atlas Resources LLC natural gas production facility in Avella, Washington County, Pennsylvania agreed to pay \$84,506 for alleged failure to provide state and local emergency responders with required information on hazardous chemicals during 2008 and 2009 and vapor releases from natural gas condensate tank storage. Atlas discontinued operation of its natural gas extraction wells in Washington County until the company completes audits at eight of its production facilities located there. The audits are based on EPA's recently adopted new source performance standards (NSPS) and national emission standards for hazardous air pollutants (NESHAPs) in the oil and gas sector.
2. Mersen USA in St. Marys, Pennsylvania, agreed to pay a \$79,000 penalty on October 23, 2012 for alleged failure to timely submit required Emergency Planning and Community Right-to-Know Act (EPCRA) Toxic Release Inventory (TRI) reports on toxic chemicals. No releases were involved.
3. On November 8, 2012, Johnstown Wire Technologies, Inc., in Cambria County, Pennsylvania, agreed to pay a \$14,000 penalty for an alleged 14-hour delay in notifying federal, state, and local emergency response officials after the facility released an estimated 16,000 pounds of hydrochloric acid.

Regulatory Actions

1. EPA approved several state implementation plan (SIP) revisions demonstrating attainment of the 1997 annual fine particulate matter (PM_{2.5}) NAAQS. *See* "State Updates" below.
2. On January 16, 2013, EPA Region 3 released the annual TRI report for Pennsylvania, Delaware, Maryland, Virginia, West Virginia, and the District of

Columbia showing a decrease of 32.5 million pounds (13.8 percent) of chemical releases as compared to 2010.

II. State Updates

A. Delaware

State Implementation Plan (SIP) Revisions

1. Delaware approved an amendment to Regulation 1102-Permits, Appendix A, providing permit exemptions for certain internal combustion engines, effective February 4, 2013. (77 Fed. Reg. 71,700, Dec. 4, 2012)
2. Effective January 7, 2013, the state approved an attainment determination for Wilmington (Philadelphia-Wilmington) for the 2006 24-hour fine particulate matter (PM_{2.5}) NAAQS based upon quality-assured, quality-controlled, and certified ambient air monitoring data for the 2008–2010 and 2009–2011 periods. The attainment determination suspends the requirements for the Area to submit an attainment demonstration and associated reasonably available control measures (RACM), reasonable further progress (RFP) plan, and contingency measures so long as the Area continues attaining the 2006 24-hour PM_{2.5} NAAQS. However, this is not a re-designation to attainment status. (78 Fed. Reg. 882)

B. District of Columbia

SIP Revisions

On November 16, 2012, the Department of the Environment finalized rules amending the New Source Review (NSR) program. (*D.C. Register*, 59 DCR 001217)

C. Maryland

SIP Revisions

1. On November 16, 2012, Maryland proposed reopening the comment period for carbon monoxide (CO) emissions from bioenergy and other biogenic sources for Prevention of Significant Deterioration (PSD) review. (77 Fed. Reg. 68,721)
2. Maryland approved the PM_{2.5} 2002 base year emissions inventory portion of the SIP revision to meet nonattainment requirements for Washington County

and Baltimore for the 1997 PM_{2.5} NAAQS, effective January 7 and 8, 2013, respectively. (77 Fed. Reg. 72,966, Dec. 7, 2012; and 73,386, Dec. 10, 2012)

Other Maryland Air Quality News

1. On November 1, 2012, the Maryland Department of the Environment (MDE) entered into a settlement agreement imposing a \$35,000 penalty against Allegheny Energy Company for failure to submit required semiannual monitoring reports between 2007 and 2010.
2. On October 15, 2012, MDE entered into a settlement agreement imposing a \$50,000 penalty against Sunoco Terminals for failure to timely test the air pollution control device for volatile organic compounds (VOCs) at its gasoline terminal.

D. Pennsylvania

SIP Revisions

1. Pennsylvania approved by direct final action a revision to control nitrogen oxides from glass melting furnaces (77 Fed. Reg. 71,117) and incorporated the consumer products provisions (25 Pa. Code sections 130.201–.471) of the Pennsylvania Department of the Environment (PA DEP) Air Pollution Control Act for Allegheny County (77 Fed. Reg. 71,115). Both rules were promulgated November 29, 2012, and became effective January 28, 2013.
2. Pennsylvania proposed a SIP revision that the Pittsburgh-Beaver Valley Area attained the 1997 eight-hour ozone national ambient air quality standards (NAAQS) by the attainment date of June 15, 2010, based upon complete, quality assured, and certified ambient air monitoring data for the 2007–2009 and 2009–2011 monitoring periods. Comments were due January 9, 2013. (77 Fed. Reg. 73,387, Dec. 10, 2012)
3. Pennsylvania approved the PM_{2.5} 2002 base year emissions inventory to meet nonattainment requirements for the Pittsburgh-Beaver Valley area for the 1997 PM_{2.5} NAAQS, effective on January 14, 2013. (77 Fed. Reg. 74,115)

4. Pennsylvania approved an attainment determination for Philadelphia for the 2006 24-hour PM_{2.5} NAAQS based upon quality-assured, controlled, and certified ambient air monitoring data for the 2008–2010 and 2009–2011 periods. The attainment determination suspends the requirements for Philadelphia to submit an attainment demonstration and associated RACM, RFP plan, and contingency measures so long as the Area continues to attain the 2006 PM_{2.5} NAAQS. However, this is not a re-designation to attainment status. Effective January 7, 2013. (78 Fed. Reg. 882)

Other Pennsylvania Air Quality News

1. The PA DEP finalized new guidance to determine whether emissions from oil and gas operations are from a single source in order to simplify whether sources are considered “contiguous or adjacent” in line with the Sixth Circuit’s decision in *Summit Petroleum Corp. v. EPA*, Nos. 09-4348 & 10-4572 (6th Cir. Aug. 7, 2012). In *Summit Petroleum*, the court rejected EPA’s finding that a range of facilities dispersed across a 43-square-mile area constituted a single stationary source because they were functionally related, finding the agency’s determination “contrary to the plain meaning of the term ‘adjacent.’” *Summit Petroleum*, Nos. 09-4348 & 10-4572, at 2. The new Pennsylvania guidance places emphasis on the issue of physical proximity, noting that interdependence may be considered, but the plain meaning of the terms “contiguous” and “adjacent” should be the dispositive factor when determining whether stationary sources are located on contiguous or adjacent properties. PA DEP, Single Stationary Source Determinations for Oil and Gas Industries, Fact Sheet, at 2. To simplify the determination process, the state applies a 0.25-mile rule: facilities located within that interval should be considered contiguous or adjacent. Pennsylvania is following in the footsteps of other states, including West Virginia, Texas, Oklahoma, and Louisiana.

2. The PA DEP began accepting applications on December 1, 2012, for its Natural Gas Vehicle Grant program, which will provide up to \$20 million over the next three years to help pay for the incremental purchase and conversion costs of heavy-duty natural gas fleet vehicles. In the first year, \$10 million in grants will be available, \$5 million of which is slated for local

transportation organizations, including nonprofit agencies providing public transportation services and public transportation, and port and redevelopment authorities. Nonprofit organizations, for-profit companies, local transportation organizations, state-owned or state-related universities, commonwealth or municipal authorities, and the Pennsylvania Turnpike Commission will be eligible to apply for the remaining amount. An additional \$7.5 million in funding will be available the second year, with \$2.5 million the third year. Eligible vehicles must weigh 14,000 pounds or more and be fueled with compressed natural gas or liquefied natural gas. Bi-fuel vehicles are also eligible. Grant awards will be capped at 50 percent of the incremental purchase or retrofit cost per vehicle, with a maximum total of \$25,000 per vehicle. The incremental purchase cost is defined as the difference between a vehicle eligible for these grants and one powered by traditional fuels, such as diesel or gasoline. For this first year, grant applications were due February 1, 2013. Grants will be awarded in late March 2013.

E. Virginia SIP Revisions

1. On December 20, 2012 (effective January 22, 2013), Virginia approved SIP revisions including allowing elements of the preconstruction program to be combined into a single permit; establishing limitations for plant-wide applicability limits; clarifying the exemption for the use of alternate fuels; and other minor administrative amendments. (77 Fed. Reg. 75,380)

F. West Virginia SIP Revisions

1. Effective December 28, 2012, West Virginia approved by direct final action an amendment of 45 CSR 8, Ambient Air Quality Standards, which changed the effective date of the incorporation by reference of the NAAQS for sulfur oxides, nitrogen dioxide, lead, PM, and CO, as well as their monitoring reference and equivalent methods. (77 Fed. Reg. 65,493, Oct. 29, 2012)

2. On December 11 and 12, 2013, West Virginia approved PM_{2.5} 2002 base year emissions inventory SIP portion to meet nonattainment requirements for the

following areas: Charleston (77 Fed. Reg. 73,923); Parkersburg (at 73,924), and Huntington (at 73,544) for the 1997 PM_{2.5} NAAQS.

3. On December 11, 2013, West Virginia proposed approving a re-designation to attainment for the Parkersburg (77 Fed. Reg. 73,560) and Wheeling (at 73,575) areas, including maintenance plans with insignificance determinations for on-road motor vehicle contributions.

4. On December 26, 2012, West Virginia proposed approving the 2002 base year emission inventory for the Weirton nonattainment area for the 1997 annual PM_{2.5} NAAQS. (77 Fed. Reg. 75,933)

5. Effective December 28, 2012, West Virginia approved re-designation of the Huntington PM_{2.5} nonattainment area as attainment for the 1997 annual PM_{2.5}. EPA also approved the maintenance plan SIP revision, including the insignificance determination for transportation conformity. (77 Fed. Reg. 76,415)

Other West Virginia Air Quality News

The West Virginia Division of Air Quality (DAQ) is trying to implement a new Internet-based emission inventory reporting system, the State & Local Emission Inventory System (SLEIS), to replace i-Steps and comply with EPA requirements. The 2011 inventory from i-Steps will be loaded into SLEIS and will be available for each facility to provide a starting point for the 2012 inventory. Due to a technical problem, DAQ was unable to install the production version of SLEIS by December 31, 2012. When SLEIS is installed (January 2013 anticipated), DAQ will send data request letters for the 2012 point source emissions inventory.

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EPA REGION 4

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I. State Updates

A. Kentucky—Settlement of Enforcement Action Against Kentucky Utilities

Kentucky Utilities Company recently settled a Clean Air Act (CAA) enforcement action brought by EPA. On December 20, 2012, the parties filed an executed consent decree in the U.S. District Court for the Eastern District of Kentucky. If approved, the settlement would resolve allegations that Kentucky Utilities violated emission standards and permitting requirements under several federal and state programs, including New Source Review (NSR) and title V. Under the settlement, Kentucky Utilities will install a sulfuric acid mist emission control system at its power plant in Ghent, Kentucky, at a cost of approximately \$57 million. The company will also pay a civil penalty of \$300,000 and spend at least \$500,000 on environmental mitigation projects.

B. North Carolina—Reform of State Air Toxics Program Moves Forward

On June 28, 2012, Governor Beverly Perdue signed into law House Bill 952 (Session Law 2012-91). The legislation provides a new exemption from the state's air toxics rules for any air emission source that part of is an affected source under a federal maximum achievable control technology (MACT) or generally available control technology (GACT) standard or subject to a case-by-case MACT emission limit in a section 112(j) permit. The legislation, however, requires the state's Division of Air Quality (DAQ) to review permit applications that result in a net increase in toxic air pollutants. If DAQ finds that emissions from a facility will pose an unacceptable risk to human health, the facility must comply with state air toxics rules even if it falls within one of the two exempt categories.

The law also requires DAQ to review the existing air toxics rules and make recommendations concerning

further changes that could reduce unnecessary regulatory burdens and increase the efficient use of DAQ resources while maintaining public health protections. In a report issued December 1, 2012, DAQ presented to the General Assembly the following recommendations:

1. Develop an additional set of toxic permitting emission rates.
2. Exempt certain natural gas and propane-fired boilers from air toxics requirements.
3. Exempt certain emergency engines from air toxics requirements.
4. Do not retain the Standard Industrial Classification (SIC) call rule.
5. Clarify the use of actual rate of emissions in the air toxics rules.
6. Remove the term “unadulterated wood” from the air toxics rules.

DAQ intends to initiate a rulemaking action before the North Carolina Environmental Management Commission (EMC) to implement these recommendations. The full report is available at www.ncair.org/rules/toxics/Air_Toxics_Report_Section3.pdf

C. North Carolina—State Court Denies Appeal of Air/Water Challenge

On January 4, 2013, Superior Court Judge Wayland J. Sermons Jr. denied the appeal of Rose Acre Farms (Rose Acre), an egg farm housing over three million hens, of a final agency decision by the EMC involving a National Pollutant Discharge Elimination System (NPDES) permit issued to Rose Acre. In September 2010, the North Carolina Department of Environment and Natural Resources renewed the facility’s NPDES permit and included best management practices for control of ammonia emissions from the facility. Rose Acre appealed the new permit condition, arguing that regulation of emissions is outside the scope of NPDES permitting. In October 2011, an administrative law judge (ALJ) granted summary judgment for Rose Acre, finding that the facility had no discharge and that a NPDES permit was unnecessary. In its final agency decision, the EMC vacated the ALJ decision and remanded the case for an evidentiary hearing.

Rose Acre sought judicial review of the EMC’s decision in Hyde County Superior Court. While the appeal was pending, the North Carolina General Assembly adopted legislation to clarify that a “discharge” does not include the emission of an air pollutant. After reviewing the record, Judge Sermons concluded that there was a question of fact about whether materials vented from the facility, including ammonia, feathers, and manure, are discharged to the waters of the state. He affirmed the EMC decision and remanded the case to the ALJ for an evidentiary hearing. This case has been watched closely by environmental attorneys across the United States due to the potential implications for concentrated animal feeding operations (CAFOs) and facilities where deposition of air pollutants may occur.

II. Regional SIP Revisions

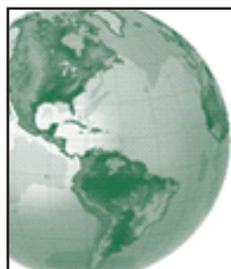
EPA issued rules concerning a number of proposed state implementation plan (SIP) revisions in Region 4:

- EPA approved the re-designation of the Kentucky portion of the tri-state Huntington-Ashland, West Virginia-Kentucky-Ohio PM_{2.5} nonattainment area to attainment for the 1997 annual PM_{2.5} National Ambient Air Quality Standards (NAAQS). 77 Fed. Reg. 75,865.
- EPA approved a re-designation of the portion of York County, South Carolina, that is within the bi-state Charlotte-Gastonia-Rock Hill, North Carolina-South Carolina ozone nonattainment area to attainment for the 1997 eight-hour ozone NAAQS. 77 Fed. Reg. 75,862.
- EPA approved best available retrofit technology (BART) determinations for the regional haze SIP submitted by Florida. 77 Fed. Reg. 71,111.
- EPA approved revisions to the Tennessee SIP involving BART requirements for the Eastman Chemical Company facility. 77 Fed. Reg. 70,689.
- EPA approved the Florida infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. 77 Fed. Reg. 66,927.
- EPA approved the Georgia infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5}

NAAQS, with noted exceptions. 77 Fed. Reg. 65,125.

- EPA approved in part and conditionally approved in part portions of the North Carolina infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. 77 Fed. Reg. 63,234.
- EPA disapproved a portion of the Alabama infrastructure SIP for failure to meet the requirements of CAA section 128. 77 Fed. Reg. 62,499.
- EPA approved changes to the Jefferson County portion of the Kentucky SIP that modify the NSR and Prevention of Significant Deterioration (PSD) permitting regulations. 77 Fed. Reg. 62,150.
- EPA approved the Mississippi infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. 77 Fed. Reg. 61,276 and 61,279.
- EPA approved the Alabama SIP provisions providing for attainment of the 1997 PM_{2.5} NAAQS in the Alabama portion of the tri-state Chattanooga PM_{2.5} nonattainment area. 77 Fed. Reg. 60,904.
- EPA approved in part and conditionally approved in part the Kentucky infrastructure SIP for the 1997 annual and 2006 24-hour PM_{2.5} NAAQS. 77 Fed. Reg. 60,307.

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Environment,
Energy, and Resources Law
**The Year in
Review**

**Year in Review Becomes
an All-Electronic Publication**

The Year in Review 2012 will be the first all-electronic edition of the Section's annual of significant developments. Section members will be informed by e-mail when the 2012 edition becomes available this spring.

EPA REGION 5

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I. Policy Developments

In August, the U.S. Court of Appeals for the Sixth Circuit vacated EPA's determination aggregating Summit Petroleum Corporation's 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 sources are sufficiently physically proximate to be considered "adjacent" under 40 C.F.R. § 71.2. *See Summit Petroleum Corporation v. U.S. Environmental Protection Agency* (Nos. 09-4348; 10-4572) (slip op. Aug. 7, 2012) (the court's ruling is discussed further in the December 2012 issue of the Air Quality Committee Newsletter).

On December 21, 2012, EPA issued a memorandum to all regional EPA offices addressing the *Summit Petroleum* decision, stating that despite EPA's "longstanding practice" of interpreting "adjacent" to include a consideration of the functional interrelatedness as well as the physical distance between sources, the court's decision means that EPA may no longer consider interrelatedness when making adjacency determinations for major source permitting decisions in states in the Sixth Circuit (Kentucky, Michigan, Ohio, and Tennessee). The memo states that EPA is still developing an approach to permitting actions in the Sixth Circuit, but that it will continue considering interrelatedness in other jurisdictions.

Under EPA's existing practice—which it continues to follow outside of the Sixth Circuit—the agency considers three factors in deciding whether separate emission-producing activities constitute a single source:

1. Whether they are under common control of the same person (or persons under common control);
2. Whether they are located on one or more contiguous or adjacent properties; and

3. Whether they are classified in the same major industrial grouping (i.e., the same two-digit SIC code).

See 40 C.F.R. §§ 52.21(b)(6) and 71.2. The guidance memo—which was recently challenged by a trade group representing major manufacturers potentially affected by EPA’s aggregation policy, *see National Environmental Dev’t Ass’n’s Clean Air Project v. EPA*, No. 13-1035 (D.C. Cir. filed Feb. 19, 2013)—is currently available on EPA’s Web site, at <http://www.epa.gov/airquality/nsr/documents/SummitDecision.pdf>.

II. Regulatory Developments Regarding PM_{2.5}

On October 29, 2012, EPA issued a final rule to approve portions of the state implementation plan (SIP) submissions from Region 5 states addressing infrastructure requirements for the 2006 24-hour fine particle (PM_{2.5}) National Ambient Air Quality Standards (NAAQS). 77 Fed. Reg. 65,478. The requirements are designed to ensure the adequacy of the structural components in each state’s air quality management program. As part of the rulemaking, EPA also approved portions of Indiana’s SIP submission addressing New Source Review and Prevention of Significant Deterioration (PSD) program requirements.

EPA is also moving forward with approving re-designation requests for the 1997 and 2006 annual fine particulate standards for various Region 5 states. Re-designations include the Detroit-Ann Arbor area in Michigan (77 Fed. Reg. 66,545; 77 Fed. Reg. 66,547); Ohio’s portions of the Huntington-Ashland, Wheeling, and Parkersburg-Marietta areas (77 Fed. Reg. 76,883; 77 Fed. Reg. 71,371; and 77 Fed. Reg. 71,383, respectively); and the Milwaukee-Racine area in Wisconsin (77 Fed. Reg. 76,427).

These determinations follow a November 19, 2012 memo from Assistant Administrator Gina McCarthy to the states’ Air Division directors describing EPA’s intent that states process re-designation requests following the Cross-State Air Pollution Rule vacature. The directive is currently available on the agency’s

Web site at http://www.epa.gov/airtransport/pdfs/CSAPR_Memo_to_Regions.pdf.

A. Indiana

In October 2012, EPA issued final rules to approve a request to revise the 1997 eight-hour ozone maintenance plan for South Bend-Elkhart and Delaware County by replacing previously approved motor vehicle emissions budgets with budgets developed using EPA’s Motor Vehicle Emissions Simulator 2010a emissions model. The rules for each area became effective on January 16, 2013, and January 22, 2013, respectively. 77 Fed. Reg. 74,590; 77 Fed. Reg. 75,384.

B. Illinois

On October 22, 2012, EPA issued an approval to include an adjusted standard for the Greif Packaging, LLC facility in the Illinois state implementation plan (SIP). The new standard revises the rule, *Organic Material Emission Standards and Limitations for the Chicago Area; Subpart TT: Other Emission Units*, to address volatile organic matter from Greif’s fiber drum container manufacturing facility and implements site-specific reasonably available control technology (RACT) requirements for the facility. The rule became effective December 21, 2012. 77 Fed. Reg. 64,422.

On December 28, 2012, EPA issued notice of a partial grant and denial of a petition from the Interdisciplinary Environmental Clinic at the Washington University School of Law and the American Bottom Conservancy, which objected to the operating permit issued for the U.S. Steel Granite City Works facility in Granite City, Illinois. The notice provides that petitioners have 60 days to file an appeal to the U.S. Court of Appeals. 77 Fed. Reg. 76,479.

C. Michigan

On December 3, 2012, EPA issued a final rule partially approving Michigan’s SIP submittal addressing regional haze and visibility issues in mandatory Class I areas. The rule states that Michigan’s submission meets various planning requirements, but inappropriately fails to require best available retrofit technology for two sources. Accordingly, EPA promulgated a federal

implementation plan to include nitrogen oxides (NO_x) limits for the sources and sulfur dioxide (SO₂) emission limits for one of the sources. The rule became effective on January 2, 2013. 77 Fed. Reg. 71,533.

D. Ohio

In December, the Ohio Supreme Court issued a decision in *State ex rel. Ohio Attorney General v. Shelly Holding Company*, No. 2012-Ohio-5700 (slip op. Dec. 6, 2012), addressing the proper methodology for calculating a civil penalty against an asphalt manufacturer for noncompliance with the terms of its air pollution-control permit. The company argued that stack tests, performed at maximum capacity and showing results that exceeded permit limits, do not reflect “normal” operations and should only result in a single day of violation. The court, however, ruled that violations continue (and civil penalties accrue) from the initial date of noncompliance until the facility demonstrates that it no longer violates the permit. The decision is available at <http://www.supremecourt.ohio.gov/ROD/docs/pdf/0/2012/2012-Ohio-5700.pdf>.

E. Wisconsin

On December 18, 2012, EPA issued a proposed rule disapproving revisions to permitting requirements relating to fine particulate matter in Wisconsin’s SIP, finding that the revisions are inconsistent with 2008 requirements for state permitting programs. 77 Fed. Reg. 74,817.

On December 28, 2012, EPA issued a proposed rule to approve revisions to the Wisconsin SIP. The revisions would modify the state’s PSD program to establish emission thresholds for determining whether new stationary sources and modification projects become subject to requirements for greenhouse gas emissions. The revisions defer the application of the requirements to biogenic carbon dioxide emissions from bioenergy and other biogenic stationary sources until July 21, 2014. 77 Fed. Reg. 76,430.

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EPA REGION 6

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I. Regional Developments

By mid-January 2013, EPA Region 6 had received more than 50 applications for New Source Review (NSR) of Prevention of Significant Deterioration (PSD) permits for greenhouse gas (GHG) emissions for proposed projects in Texas and had issued eight GHG permits from those applications. The level of Region 6 staffing dedicated to this program has generally remained steady despite the growing number of applications. Without additional staffing, EPA will face an increasing challenge to meet its internal goal of processing GHG permit applications within 10 months of the date the EPA Regional Office determines an application is complete. The Clean Air Act requires that EPA make a decision on a PSD permit application within one year after the application is complete.

II. State Updates

A. Arkansas

On January 11, 2013, EPA published its proposal to approve the November 6, 2012 state implementation plan (SIP) revision that the Arkansas Department of Environmental Quality (ADEQ) submitted to EPA to provide Arkansas with authority to issue NSR PSD permits for GHG emissions (78 Fed. Reg. 2354). This SIP revision would also defer until July 21, 2015 the application of PSD permitting requirements to biogenic carbon dioxide emissions from biogenic stationary sources. EPA’s proposed approval also includes a February 17, 2010, ADEQ SIP submittal to incorporate by reference requirements for federal PSD permitting under EPA’s November 29, 2005, phase 2 eight-hour ozone national ambient air quality standard (NAAQS) implementation rule. Comments on the proposed rule must be submitted to EPA by February 11, 2013.

B. New Mexico

New Mexico was one of nine states whose attorneys general submitted a joint letter dated December 6,

2012, to the White House Office of Management and Budget urging the White House to support setting more stringent emission limits for fine particulate matter. The attorneys general requested that EPA lower the annual NAAQS for fine particulate matter from the then-current standard of 15 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) to no higher than 12 $\mu\text{g}/\text{m}^3$. EPA proposed setting the annual standard between 12 $\mu\text{g}/\text{m}^3$ and 13 $\mu\text{g}/\text{m}^3$ and requested comment on setting the standard as low as 11 $\mu\text{g}/\text{m}^3$. The letter was also signed by the attorneys general of Connecticut, Delaware, Maryland, Massachusetts, New York, Rhode Island, Vermont, and Washington. Those states sued EPA for failure to timely review and revise the $\text{PM}_{2.5}$ particulate matter standards.

From mid-November to mid-December of 2012 the New Mexico Environment Department (NMED) requested public comment on a draft NMED-developed report entitled “Improving Air Quality Permitting.” The report summarized the findings and recommendations from an internal evaluation of NMED’s air permitting program that included consideration of air programs in other states along with input from NMED permitting staff and the general public. The report contains key recommendations that include improving staffing levels, better utilization of information technologies, and regulatory changes that include development of a permit-by-rule to expedite new construction. NMED plans to consider the report and comments received in developing changes to New Mexico’s air permitting program.

Over the past several months EPA has published final rules revising the New Mexico SIP regarding the regional haze plan for the first implementation period through 2018 (77 Fed. Reg. 71,119, Nov. 29, 2012); regional haze requirements for the 16 Class I areas covered by the Grand Canyon Visibility Transport Commission Report and other federal mandatory Class I areas (77 Fed. Reg. 70,693, Nov. 27, 2012); motor vehicle inspection and maintenance program in the Albuquerque/Bernalillo County area (77 Fed. Reg. 65,821, Oct. 31, 2012); and SIP and federal implementation plan (FIP) provisions for interstate transport (77 Fed. Reg. 64,908, Oct. 24, 2012). During that time frame EPA also published proposed rules to establish a new minor NSR general

preconstruction permitting program (77 Fed. Reg. 71,145, Nov. 29, 2012); address infrastructure and interstate transport requirements regarding the 2006 fine particulate matter NAAQS (77 Fed. Reg. 62,191, Oct. 12, 2012); and amend the New Mexico nonattainment NSR and PSD permitting programs (77 Fed. Reg. 62,200, Oct. 12, 2012).

C. Oklahoma

Over the past several months, EPA announced proposed consent decrees to resolve two Clean Air Act (CAA) citizen suits regarding the Oklahoma SIP (77 Fed. Reg. 67,814, Nov. 14, 2012). The proposed consent decree for *Public Service Co. of Oklahoma v. EPA* (No. 12-9524) resolves a lawsuit challenging the issuance of a December 28, 2011, final rule (76 Fed. Reg. 81,728) that partially approved and partially disapproved SIP revisions submitted to address visibility and interstate transportation CAA provisions. The settlement sets a deadline for EPA to take action on a SIP revision to be drafted and submitted by the state addressing the plaintiff’s claims. EPA also announced a proposed consent decree in *Sierra Club v. Jackson* (No. 1:12-cv-00705) concerning an allegation that EPA failed to take timely action on an Oklahoma SIP revision regarding excess emissions reporting requirements (77 Fed. Reg. 65,684, Oct. 30, 2012). The consent decree establishes deadlines for EPA to take action on the SIP revision at issue.

D. Texas

On January 10, 2013, the state of Texas filed a motion to dismiss its challenge to EPA’s first-ever CAA new source performance standards (NSPS) for natural gas hydraulic fracturing operations in *American Petroleum Institute v. EPA*, No. 12-1405 (D.C. Cir. filed Jan. 10, 2013). Texas had filed one of nine separate petitions for review regarding the final rule published on August 16, 2012 (77 Fed. Reg. 49,489). The motion to dismiss explains that “[u]pon reflection, the Texas Petitioners believe that the issues in this case more directly affect the industry petitioners and can be fully and adequately addressed by them.” The case will remain active because the state’s challenge was consolidated with lawsuits brought by environmental groups and industry associations. The industry petitioners are the American Petroleum Institute, Gas Processors Association, Domestic Energy Producers

Alliance, Independent Petroleum Association of America, Texas Oil and Gas Association, and Western Energy Alliance.

On December 13, 2012, EPA published proposed approval of revisions to the Texas SIP that would require public participation in the issuance of air quality permits (77 Fed. Reg. 74,129). Texas submitted the public participation provisions in four separate SIP revisions, starting on July 22, 1998. EPA has proposed to find that the SIP revisions are consistent with EPA policies and comply with the Federal Clean Air Act and EPA regulations.

On December 5, 2012, the Texas Commission on Environmental Quality (TCEQ) adopted the CAA section 110(a)(1) and (2) Infrastructure and Transport SIP Revision for the 2008 Ozone NAAQS. The SIP revision outlines Texas's provisions supporting the requirements of CAA section 110(a)(2)(A)–(M), which include, among other things, enforceable emissions limitation and control measures, air quality monitoring and modeling, a permitting program, adequate resources under state law to carry out the plan, emissions reporting, emergency powers, public participation, and fee collection. The SIP revision also includes a technical demonstration indicating that Texas meets the interstate transport requirements of the CAA.

On November 14, 2012, TCEQ adopted the Beaumont-Port Arthur (BPA) Attainment Area On-Road Mobile Source Emissions Inventory (MSEI) Motor Vehicle Emissions Budget Update SIP Revision, and the federal CAA, section 110(a)(1) and (2) Infrastructure and Transport SIP Revision for the 2010 Nitrogen Dioxide (NO₂) NAAQS. The BPA SIP revision replaces the MSEI for nitrogen oxides (NO_x) and VOCs for 2005, 2011, 2014, 2017, and 2021 that had been adopted for BPA in 2008, and which were based on EPA's MOBILE model, with MSEI based on EPA's latest mobile emissions estimation model, the Motor Vehicle Emission Simulator. The NO₂ SIP revision documents how the infrastructure elements listed in CAA section 110(a)(2) are addressed in the Texas SIP for NO₂.

On October 25, 2012, EPA published a final rule approving revisions to the Texas air emissions program for major air pollution sources under the federal CAA's NRS program (77 Fed. Reg. 65,119). In addition to several key clarifications regarding the definition of facility and the emissions included in baseline emissions calculations, the package approved the following: plant-wide applicability limit permitting provisions and clarifications; anti-backsliding of major NSR SIP requirements for the one-hour ozone NAAQS in areas that are also nonattainment for the eight-hour ozone NAAQS; and federal requirements for applicability of the eight-hour ozone requirements in nonattainment areas being the date the permit was issued.

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EPA REGION 7

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A. 2011 Iowa Greenhouse Gas Summary Published

As required by state law, Iowa Department of Natural Resources (DNR) published a report detailing greenhouse gas (GHG) emissions in the state during 2011 and analyzing emissions trends. Iowa's gross GHG emissions for 2011 were 135.32 million metric tons of carbon dioxide equivalents (MMtCO₂e). Carbon sinks sequestered nearly 17 MMtCO₂e, leaving a net emission of 118.41 MMtCO₂e. This amount reflected a 0.82 percent increase over 2010 net GHG emissions.

The report detailed contributions to GHG emissions from various sectors as follows: electric power generation (28%); agriculture (26%); residential, commercial, and industrial fuel use (23%); transportation (17%); and other (6%). Nearly all sectors increased over 2010 numbers except electric power generation, which saw a nearly 7.7 percent decrease from 2010.

The share of GHG emissions in Iowa relating to fossil fuel combustion is about 18 percent lower than in the United States as a whole (69% of total emissions in Iowa as opposed to 87% nationwide). Agriculture accounts for about 26 percent of total GHG emissions in Iowa, versus only 6 percent nationwide.

The report is currently available on the Iowa DNR's Web site at http://www.iowadnr.gov/portals/idnr/uploads/air/insidednr/ghgemissions/2011_ghg_inv.pdf.

B. Iowa Air Enforcement Roundup

Iowa DNR recently announced the results of several enforcement matters. Administrative orders were entered against Trajet Products in Glenwood (\$4000 penalty for violations of its title V operating permit); the Des Moines Independent Community School District

(\$5000 penalty for asbestos renovation violations); and Golden Grain Energy in Mason City (\$5750 for construction and operating permit violations). The state also issued multiple administrative orders for open burning violations. Consent orders were entered into with the John Deere Foundry in Waterloo (\$10,000 penalty for air quality permitting violations); Nutra-Flo Company in Sioux City (\$10,000 penalty for construction permit violations); and Image First, LLC (\$3900 penalty for air permitting and record keeping violations).

C. Iowa DNR Seeks Modifications to Construction Permitting Program

In October 2012, Iowa DNR began seeking informal comment on a proposal to adopt federal amendments to the Prevention of Significant Deterioration (PSD) program relating to GHG permitting. The goal is to expand the existing plantwide applicability limit (PAL) provisions to allow Iowa DNR to issue final PAL permits that include the new GHG rules.

In December, Iowa DNR published proposed changes to Form MD, an air construction permitting form used to determine whether emissions associated with a non-PSD project will require an air dispersion modeling analysis. As summarized by Iowa DNR:

For projects at facilities that have not been previously modeled, the revised determination process requires only that the net increase in potential project emissions be compared to the applicable significant emission rates thresholds to determine the need for modeling review. This is also true for facilities that were previously modeled and the predicted impacts are less than one significance level of a NAAQS For facilities that have been previously modeled and were found to have predicted impacts within one significance level of a NAAQS . . . , the revised determination process would allow these facilities to first model only the proposed project emissions. In both instances, facility-wide modeling would not be necessary unless the proposed project emissions exceeded the applicable significant impact level(s) for the affected project pollutant(s).

On January 4, 2013, Iowa DNR began seeking informal comment on proposed changes to construction permitting modeling guidance. Iowa DNR is seeking to streamline the modeling determination process for non-PSD projects, and to implement the 2006 PM_{2.5} and 2010 one-hour NO₂ and SO₂ NAAQS.

D. Nebraska Air Enforcement Roundup

Over the past quarter, the Nebraska Department of Environmental Quality (DEQ) entered into consent orders with Nebraska Corn Processing (\$12,000 penalty and \$12,000 in supplemental environmental projects relating to alleged violations of permitted VOC emissions limitations); Bridgeport Ethanol (\$15,000 for alleged violations of permitted emissions limitations); cornhusker Energy Lexington (\$7290 for construction permitting violations relating to performance testing and compliance); and Advanced Bioenergy (\$13,000 for failure to control emissions).

E. Nebraska DEQ and Kansas DHE Publish SIP Certifications and Proposed Revisions

Nebraska DEQ recently published certifications that its SIP complies with the 2008 ozone eight-hour NAAQS and the 2010 NO₂ one-hour NAAQS. Nebraska DEQ is currently accepting comments and holding public hearings on these certifications.

Similarly, in January of 2013, Kansas Department of Health and Environment (DHE) published SIP revisions to implement and enforce the 2008 ozone eight-hour NAAQS and the 2010 NO₂ one-hour NAAQS. Kansas DHE is currently seeking public input on these revisions.

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EPA REGION 8

Randy Dann and Eric Waeckerlin
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I. Regional Updates

A. Holly Refining Settles Alleged Risk Management Plan Violations

On December 20, 2012, EPA Region 8 announced a settlement with Dallas-based Holly Refining and Marketing Company (Holly) resolving alleged Clean Air Act (CAA) violations at the company's refinery in Woods Cross, Utah. Holly agreed to pay civil penalties of \$115,000 for violations of risk management program requirements under CAA section 112(r) associated with the storage and use of flammable substances and hazardous chemicals.

An EPA inspection of the Woods Cross refinery in 2011 revealed issues with the facility's management of flammable substances and the maintenance program associated with a propane storage unit. Holly has agreed to move forward with the planned closure of the frozen-earth storage unit at its Woods Cross refinery and correct other risk management program violations.

II. State Updates

A. Colorado—Continued Focus on Oil and Gas Regulation

The Colorado Air Quality Control Commission (Commission) and its Air Pollution Control Division (Division) continue to focus on air regulation in the oil and gas sector. In December 2012, the Division adopted proposed revisions to its Regulation No. 7 to address EPA's partial disapproval of Colorado's ozone state implementation plan (SIP) in 2011. The revisions focused on emissions factors, control requirements, monitoring, record keeping and reporting for condensate tanks, compressor stations, gas processing plants, and glycol dehydrators (among others). The commission also granted the division's request for a new rulemaking to consider proposed changes to Regulation No. 6 regarding the relocation of newer engines into Colorado from outside the state. Hearings

are scheduled to begin on these changes in spring 2013, and a proposal can be expected in advance. Finally, the division partially adopted the new federal New Source Performance Standards (NSPS) applicable to hydraulically fractured natural gas wells and will be pursuing full adoption of the NSPS rules in 2013. Critically, the division's partial adoption did not include the federal standards for reduced emission completion (REC), or "green completions." The division will be considering the REC portion of the federal NSPS during the 2013 rulemaking.

B. Montana, North Dakota, and South Dakota—EPA Formally Finds Failure to Submit Ozone SIP

On January 15, 2013, EPA published a final rule in the *Federal Register* finding that 28 states, including Montana, North Dakota, and South Dakota, failed to submit complete infrastructure SIPs under the 2008 eight-hour ozone air quality standards (78 Fed. Reg. 2882, Jan. 15, 2013). The final rule initiates a two-year process and deadline for either EPA to issue a federal implementation plan (FIP) for these states or for the individual states to issue their own plans. The states' eight-hour ozone SIP submittals were complicated by EPA's reconsideration of the 2008 eight-hour ozone National Ambient Air Quality Standards (NAAQS). Although EPA recognized this complication, it stated in the final rule that "at this time EPA is nevertheless required by court order to make these findings." EPA will implement the current standards (0.075 parts per million (ppm)) while it continues the ongoing five-year review of the updated science, which is scheduled to be completed in 2013.

C. Wyoming—Environmental Group Challenges EPA's Approval of Regional Haze Plan

On January 11, 2013, WildEarth Guardians petitioned the U.S. Court of Appeals for the Tenth Circuit to review EPA's December 12, 2012 approval of Wyoming's regional haze plan. Specifically, the lawsuit challenges the method by which the plan addresses state sulfur dioxide (SO₂) emissions from coal-fired power plants. According to the group's Web site:

The EPA's approach relied on a "milestone," or cap on sulfur dioxide emissions. That cap presumed that coal burning power plants, including 13 coal burning units in Wyoming, emit at a rate of 0.15 pounds for every million Btus of heat input (essentially a measure of coal consumption). However, power plants in Wyoming are not only already emitting at rates far below the 0.15 presumption, but often can achieve even lower rates.

http://www.wildearthguardians.org/site/News2?page=NewsArticle&id=8137&news_iv_ctrl=1194.

It appears the lawsuit will challenge the validity of EPA's cap and EPA's position that its approach will achieve SO₂ reductions better than using best available retrofit technology (BART). The petitioner apparently is relying upon an expert report prepared for various environmental groups, which indicates that actual BART (i.e., scrubbers) at Wyoming coal-fired power plants should result in significantly more SO₂ emission reductions than those estimated by EPA.

D. Utah—UDAQ Revises Its Offset Policy for the Uintah Basin

The Utah Department of Air Quality (UDAQ) has recently released a summary of its new and revised permitting guidance for new or modified sources on state lands within Uintah or Duchesne Counties. The new policy will be implemented in coordination with EPA's Ozone Advance Program and is designed to address the high ozone values in the Uintah Basin, while permitting continued development. The agency revised its previous draft guidance, issued in September 2012, and currently anticipates the new permitting guidance will become effective February 1, 2013. The policy will not be applicable to sources with permit applications in public comment before this date, provided no substantive adverse public comments are received.

Under the new guidance, UDAQ will not issue an air quality permit (i.e., approval order) for a new or modified stationary source of volatile organic compound (VOC) emissions in Duchesne or Uintah County unless the owner or operator provides a

satisfactory demonstration that the source will not contribute to a potential violation of the ozone NAAQS, apparently fulfilling the requirements of Utah Administrative Code R307-401-8(1)(b)(vii). The policy provides that such a demonstration can be made by (a) photochemical ozone modeling; (b) obtaining offsets; or (c) an alternate demonstration approved by UDAQ, but UDAQ expects the offset option to be the primary means for making the required demonstration. Any emissions increase of VOC from new or existing sources requiring a permit can make the required demonstration by offsetting the proposed increase in emissions. The offset ratio will be 1:1.

The agency expects offsets (i.e., emission reduction credits) to be generated primarily as follows: (1) voluntary acceptance of lowest achievable emission reduction level controls or other emissions limitations lower than best available control technology; (2) emission reductions not required by federal standards; (3) emission reductions below applicable federal standards; (4) emission reductions not required by state rules; and (5) replacement of grandfathered sources. According to the policy, offsets generated in Indian Country will be accepted in state jurisdiction provided the emission reductions are enforceable by EPA.

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EPA REGION 9

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I. Significant SIP Developments

A. Approval/Disapproval of Arizona State Implementation Plan and Promulgation of Federal Implementation Plan

On December 5, 2012, EPA took final action to approve in part and disapprove in part a portion of Arizona's regional haze state implementation plan (SIP) concerning eight units at the Apache, Cholla, and Coronado electric generating facilities. EPA simultaneously promulgated a federal implementation plan (FIP) to address deficiencies in the disapproved portions of the SIP. Specifically, EPA approved the SIP's best available retrofit technology (BART) emissions limits for sulfur dioxide and coarse particulate matter (PM₁₀), but disapproved the limits for nitrogen oxides (NOx) at the coal-fired units of all three plants. The FIP contains new NOx limits—ranging from 0.055 to 0.07 lb/million metric British thermal unit (mmBtu)—that EPA considers achievable with selective catalytic reduction. The FIP also establishes compliance schedules for BART implementation, as well as requirements for equipment maintenance, monitoring, and record keeping and reporting for all units and pollutants at all three facilities.

Concerning the rest of Arizona's SIP, EPA issued a proposed rule on December 21, 2012, approving in part and disapproving in part Arizona's revised plan to implement the regional haze program for the first planning period through July 31, 2018. EPA proposes to disapprove (1) various BART applicability determinations; (2) purportedly missing compliance schedules and requirements for equipment maintenance and operation; and (3) Arizona's Reasonable Progress Goals for 2018 at all of the state's Class I areas. Further, EPA proposes to find that Arizona's 2007 and 2009 transport SIPs and regional haze plan do not meet the "good neighbor" provisions of the Clean Air Act (CAA) with respect to visibility for the 1997 eight-hour ozone, 1997 fine particulate matter (PM_{2.5}), and 2006 PM_{2.5} National Ambient Air Quality Standard

(NAAQS). Finally, EPA proposes to approve Arizona's decision to set 0.5 deciviews as the threshold for determining whether sources are subject to BART but is seeking comment on whether that threshold is reasonable.

B. Approval of South Coast Air Quality Management District (SCAQMD) Rule 317

EPA Region 9 has approved Rule 317, a revision to SCAQMD's portion of the California SIP. Rule 317 is a local fee rule concerning volatile organic compounds and NO_x that was approved as an alternative to the program required by section 185 of the CAA. The approval was based on EPA's determination that Rule 317 is not less stringent than the program required under section 185 and is therefore approvable as an equivalent alternative program under CAA section 172(e).

C. Hawaii Regional Haze FIP

On October 9, 2012, EPA issued a final FIP to address regional haze in Hawaii and to meet the requirements of the CAA and EPA's rules concerning reasonable progress toward the national goal of preventing any future impairment of visibility, as well as remedying any existing man-made impairment, in mandatory Class I areas. The FIP establishes an emissions cap of 3550 tons of sulfur dioxide (SO₂) per year from three fuel oil-fired electric utility boilers on the Island of Hawaii beginning in 2018.

II. Settlements

A. California

U.S. Battery Manufacturing Company agreed to a settlement with EPA to resolve CAA violations. U.S. Battery, a lead acid battery manufacturer located in Corona, California, failed to perform required semiannual inspections and maintenance; submit performance reports; and conduct performance testing on its air pollution control devices. In its settlement with EPA, U.S. Battery agreed to pay \$167,300 and to install secondary high-efficiency air filters to further reduce lead emissions.

Two Los Angeles companies have agreed to pay a combined total of \$140,000 for violating the CAA by

importing 80 electric generators and 2481 recreational vehicles into the Port of Long Beach without proper emission controls. All Power, LLC, located in Chino, California, will pay \$60,000 for importing generators lacking required catalytic converters. Maxtrade, LLC, located in South El Monte, California, will pay \$80,000 for importing gas-powered all terrain vehicles and motorcycles with improper carburetors and catalytic converters. In addition to the penalties, the companies were required to export the noncompliant generators and vehicles.

B. Hawaii

The County of Maui agreed to a settlement to resolve alleged CAA violations at the Central Maui Landfill in Puunene. The settlement resolves allegations that the county failed to design, construct, and operate a gas collection/control system; apply for a permit from the Hawaii Department of Health; prepare a start-up, shutdown, and malfunction plan; and operate controls within the gas temperature limit. Under the settlement agreement, announced by EPA on October 24, 2012, the county will pay a civil penalty of \$380,000 and implement enhanced monitoring of gases generated by the landfill. The county is also required to build a wind farm to further reduce fossil fuel power plant emissions near the landfill.

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EPA REGION 10

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A. Alaska

State of Alaska v. Clinton, Case No. 3:12-cv-00142-SLG (D. Alaska filed July 13, 2012). In July 2012, the State of Alaska filed suit against the U.S. State Department, EPA, the Department of Homeland Security, and the Coast Guard. The state seeks declaratory injunctive relief invalidating the secretary of state's expansion of the North American emission control area (ECA) to the waters off Alaska, and barring defendants from enforcing any requirement related to the ECA. The extension of the ECA, in conjunction with a final EPA rule promulgated in April 2010, would require that vessels operating within 200 miles of the southeast and south-central coast of Alaska to use low-sulfur fuel beginning August 1, 2012. 40 C.F.R. § 1043.60. The permissible sulfur content of fuel used in the ECA will also be reduced substantially in 2015.

The lawsuit claims that the secretary of state illegally accepted or acceded to an amendment to Annex VI of the International Convention for the Prevention of Pollution from Ships (MARPOL), which extended the ECA to Alaska, without the advice and consent of two-thirds of the Senate, as required under the Treaty Clause of the Constitution. The suit further alleges that the secretary failed to obtain the advice and consent of the Senate as required under the Act to Prevent Pollution from Ships (APPS), 33 U.S.C. §§ 1905–1915, and that EPA's rules issued thereunder requiring the use of low-sulfur fuel were also unlawful. Of particular note is the allegation that EPA admitted that it did not have a scientific basis for inclusion of Alaska in the ECA. Alaska alleges that its seagoing economy, including container ships, oil tankers, cruise ships, and residents who buy and consume goods transported thereby, are imperiled by the designation.

A number of nongovernmental organizations have sought and obtained permission to intervene on both

sides of the dispute, and regional air pollution control agencies in California and Washington states have intervened as defendants. In November 2012, defendants filed briefs opposing Alaska's motion for a preliminary injunction and seeking dismissal of the case.

B. Washington State

Washington Environmental Council, et al. v. Sturdevant, 834 F. Supp. 2d 1201 (W.D. Wash. 2011). In March 2011, the Washington Environmental Council and the Sierra Club filed suit against the Washington Department of Ecology, the Northwest Clean Air Agency, and the Puget Sound Clean Air Agency (both delegated agencies of the Department of Ecology), alleging that the agencies failed to define reasonably available control technology (RACT) for greenhouse gases (GHG), and apply GHG rules to five oil refineries in the state. Two provisions of Washington's state implementation plan (SIP) were at issue: the provision requiring RACT for all emissions units, and a narrative standard prohibiting the emission of any pollutants detrimental to the health, safety, or welfare of any person, or damage to persons, property, or business.

In December 2011, the U.S. District Court for the Western District of Washington granted in part and denied in part the plaintiffs' and intervenor-defendants' (the Western States Petroleum Association) motions for summary judgment. The court confirmed that Washington's state Clean Air Act defined air contaminants in such a way that includes GHGs and that the law and rules were included in the state's SIP. The court further held that the agencies are obligated to apply RACT to GHGs, and must define RACT for all air contaminants and determine whether the oil refineries are in compliance. The court, however, determined that the narrative standard was discretionary and therefore not enforceable by citizen suit.

In a separate order, the court found that the agencies must complete the RACT process within 26 months of the order, which was issued on March 27, 2012. At question still is the applicability of the ruling to facilities

other than the five refineries identified in the lawsuit. The case is currently on appeal to the Ninth Circuit, but the state has been proceeding with the RACT development process as required by the district court.

Seafood Processors Enforcement Action. Three Seattle-based seafood processors settled Clean Air Act violations relating to the use of the ozone-depleting refrigerant R-22. The Montreal Protocol on Substances That Deplete the Ozone Layer provides for the phasing out of refrigerants such as R-22, which the processors use aboard their seafood processor-catcher vessels. EPA regulations limit the amount of R-22 that companies may import. American Seafoods Company LLC illegally imported more than permitted. In addition, the companies' refrigerant system maintenance and repair procedures failed to comply with regulatory standards. In settlement of claims against American Seafoods Company and its corporate affiliate Pacific Longline Company LLC, the companies agreed in June 2012 to phase out the use of ozone-depleting refrigerants and implement a comprehensive leak detection and repair program aboard their vessels. Combined, the companies will pay a fine of \$700,000 and spend between \$9 million and \$15 million to convert refrigeration systems on several vessels to non-ozone depleting refrigerants. In August, Icycle Seafoods Inc. settled similar allegations concerning its repair and maintenance program for refrigeration equipment. It agreed to pay a \$430,000 fine and improve its repair protocols.

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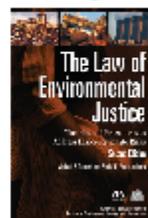
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