

## Air Quality Committee Newsletter

Vol. 16, No. 3

May 2013

---

### MESSAGE FROM THE COMMITTEE CHAIR

Gale Lea Rubrecht  
Jackson Kelly PLLC  
galelea@jacksonkelly.com

---

In this message, I offer a report on the air quality programs and other activities during the 42nd Spring Conference held in Salt Lake City on March 21–23, 2013, and a preview of air quality programming for the Fall Meeting in October and Quick Teleconferences and/or Committee Conference Calls. In addition to programming and speaking opportunities, I discuss ways to become involved in the Air Quality Committee, ranging from engaging in a discussion using our Air Quality subgroup on LinkedIn or other social media, posting a law firm blog on our committee Web site, sharing a new air quality development for distribution to our committee list serve, volunteering to help expand our committee public service project, and writing opportunities.

**42nd Spring Conference:** For the first time since I have been attending the meeting in Salt Lake City we woke up to snow in the downtown. Those who arrived early reported skiing in powder at the nearby resorts, while other early arrivals engaged in the Section’s tree planting project, explored Temple Square and downtown Salt Lake City, researched their family genealogy, and visited with friends. Among the air quality-related sessions that I attended were the opening plenary session on the effect of the 2012 election on environment, energy, and resources policy, and a breakout session on the National Ambient Air Quality Standards (NAAQS). Dina Cappiello, national

environment reporter for the Associated Press in Washington, D.C., offered an informative and interesting, non-legal perspective at the opening plenary session. Describing coal-fired power plants as the “big enchilada,” she predicted that the final new source performance standard (NSPS) for greenhouse gases (GHGs) for new power plants was “not going to happen.” Roger Martella suggested that the Environmental Protection Agency (EPA) might finalize a “shored up” version of its proposed rule and at the same time grant reconsideration, as the agency recently did with the boiler maximum achievable control technology (MACT) standard, or re-propose the NSPS for GHGs for new power plants. John Cruden predicted that any rules promulgated by EPA would end up in the courts. Speakers for the NAAQS breakout session included Lorie Schmidt, associate general counsel for EPA. She stated that the next ozone NAAQS will not be finalized in March 2013, explaining that EPA is still engaged in back-and-forth discussions with its Science Advisory Board, and that EPA would not finalize the next ozone NAAQS until sometime in 2014.

On Friday, March 22, 2013, air quality committee members from around the country and a University of Utah law student gathered for dinner and camaraderie at the Garden Restaurant on the tenth floor of the Joseph Smith Building overlooking the lights of Temple Square and downtown Salt Lake City. We were enjoying good food and company when the retractable roof of the restaurant opened and a newly engaged couple and a child celebrating a birthday released

*continued on page 3*

Air Quality Committee Newsletter  
Vol. 16, No. 3, May 2013  
*Ben Snowden and  
Kristin Hines Gladd, Editors*

*In this issue:*

Message from the Committee Chair  
Gale Lea Rubrecht ..... 1

**Air Quality and Natural Gas Development:  
Preventing Winter Ozone in Utah's Uintah  
Basin**  
Jessica L. Lowrey ..... 5

**AQC Lawyer Organizes One Million Trees  
Project Planting in Wisconsin**  
Roma Nandwani ..... 8

**Regional Reports:  
EPA Headquarters**  
Gale Lea Rubrecht ..... 9

**EPA Region 1**  
Dixon Pike and Brian Rayback ..... 11

**EPA Region 2**  
Philip Karmel ..... 13

**EPA Region 3**  
Barbara Little ..... 14

**EPA Region 4**  
Bill Lane ..... 16

**EPA Region 5**  
Gary Pasheilich ..... 18

**EPA Region 6**  
Laura L. LaValle ..... 19

**EPA Region 7**  
Brandon Neuschafer ..... 21

**EPA Region 8**  
Randy Dann and Eric Waeckerlin ..... 22

**EPA Region 9**  
Eric L. Hiser ..... 23

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

**CALENDAR OF SECTION EVENTS**

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

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

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

**2014**  
March 20-22, 2014  
**43rd Spring Conference**  
The Grand America Hotel  
Salt Lake City, UT

October 8-11, 2014  
**22nd Fall Conference**  
The Trump Doral Golf Resort & Spa  
Miami, FL

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

Copyright © 2013. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, e-mail: [copyright@americanbar.org](mailto:copyright@americanbar.org).

Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

*continued from page 1*

balloons into the night sky. Sara Bazemore of Nelson Mullins Riley & Scarborough LLP in Myrtle Beach, South Carolina provided the camera for our waiter to take the group picture you see in this newsletter.

**21st Fall Conference:** The Planning Committee for the Fall Conference in Baltimore in October 2013 has accepted our programming proposal on air quality hot topics. The breakout session, “Clean Air Developments Every Lawyer Should Know,” will provide an overview of the air toxics provisions (section 112 of the Clean Air Act) and illustrate those provisions using the new boiler MACT, Mercury and Air Toxics Standards (MATS) for power plants, emission standards for oil and gas sources, and changes in emissions regulation during periods of start-up, shutdown, and malfunction for various sources. This session will also explain the basic requirements of these new air toxics rules; discuss the controversies and litigation surrounding each of these rules; and explore the challenges these regulations present to regulated industry and states, and how implementation of these rules and policies will interact with regulatory efforts and other programs to reduce criteria pollutants and greenhouse gases. Speakers have already been confirmed. That’s a hint that it’s not too soon to begin thinking about program proposals for the 43rd Spring Conference! If you have suggestions for future programming or speakers, contact a committee vice chair for Programming or me.

**Quick Teleconferences/Webinars/Committee Conference Calls:** Shannon Broome, vice chair for Programming, organized a Quick Teleconference (QT) on February 13, 2013, on EPA’s boiler MACT and commercial and industrial solid waste incinerator (CISWI) rules. Committee vice chairs for Programming Jonathan Peress and Marty Booher have submitted a proposal for a QT on EPA’s air quality agenda for President Obama’s second term. If their proposal is not accepted as a QT, we plan to offer it as one of our free Committee Conference Calls. Your committee vice chairs and I are also looking at the program proposals that were submitted, but not accepted, for the Fall Meeting as subjects of a possible

QT and/or Committee Conference Call. These include implementation of GHG regulation under the Clean Air Act; ambient air monitoring to assess air quality and health impacts associated with oil and gas and other sources of emissions; expansion and development of air quality standards for agricultural sources; and renewables. If you have any recommendations for a QT, webinar, or Committee Conference Call, please contact one of your committee vice chairs for Programming or me.

**Social Media:** Cheri Budzynski and Laura Swingle, committee vice chairs for Social Media, regularly post air quality developments and Section and committee activities on LinkedIn and Twitter. Now, we need for you to engage in discussions and exchange information on air quality issues with committee members using LinkedIn and Twitter. For those looking for ways to become involved, join our Air Quality subgroup on LinkedIn and start a discussion.

**Web Site:** Michael Balster, committee vice chair for Electronic Communications, regularly posts Hot News items on our committee Web site. I encourage you to send items of interest to Michael for posting on the Committee Web site. He can also post law firm blog articles on the committee Web site. If you have written a blog article on an air quality issue and would like to submit it for consideration for posting on the committee Web site, contact Michael.

**List Serve:** We continue to use the list serve to keep you informed of air quality developments, Section and committee activities, and opportunities to become involved. From time to time, I hear from one of you in response to a Hot News e-alert. To make the list serve a useful resource, I encourage each of you to share substantive materials, such as new guidance documents, court decisions, rulemakings, or other air quality developments by sending to me ([galelea@jacksonkelly.com](mailto:galelea@jacksonkelly.com)) for distribution to the committee list serve and posting on our committee Web site, Air Quality subgroup on LinkedIn, Twitter, or Facebook. We promise to give you credit.

**Public Service:** In this issue of our newsletter, we feature a report by Roma Nandwani on the successful

tree-planting project that our committee vice chair for Membership, Phil Bower, organized in Madison, Wisconsin. We are looking for ways to expand our committee public service project posted on our Web site concerning suggestions for simple ways to help reduce ozone and links to state-specific, EPA, and public interest groups and other Web sites for additional information. We welcome your ideas for committee public service projects. If you have ideas for committee-specific public service projects, please share them with me. We would welcome your involvement.

**Writing and Publications:** The March/April 2013 issue of *Trends* includes an article entitled “Regulation of Air Pollutants in the Obama Administration” by Patricia Ross McCubbin. In addition to *Trends*, *NR&E* also offers writing opportunities. Themes of future *NR&E* issues include “Waste: Cradle to Cradle” and “Roberts’ Rules.” For those interested in submitting an article for the “Waste: Cradle to Cradle” issue, a first draft is due July 8, 2013, and a final draft is due July 30, 2013. Watch for “Call for Article Proposals” for the Supreme Court issue in June 2013, with first drafts due on September 27, and final drafts

due on October 25. 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. Linda Tsang, our committee vice chair for Publications, can help you if you are interested in writing an article on an air quality topic for *Trends*, *Natural Resources & Environment*, or a Section book or other publication.

This issue of our committee newsletter features a guest article on the prevention of winter ozone in Utah’s Uintah Basin. We continue to seek guest articles for our newsletter. The deadline for our next newsletter is June 17, 2013. If you are interested in writing a guest article for our next newsletter, contact committee vice chairs for the Air Quality Committee Newsletter, Kristin Hines Gladd and/or Ben Snowden.

*The Year in Review 2012* will be the first all-electronic edition of the Section’s annual report. You should have received an e-notification when it became available this spring. I thank Jonathan Martel, vice chair for *Year in Review*, for his leadership and everyone who volunteered to write summaries of cases and rules for the air quality section of *The Year in Review 2012*.



If you want to receive committee newsletters, *Trends*, and *The Year in Review*, the ABA must have your current e-mail. To provide the ABA with your current e-mail address, visit [www.americanbar.org](http://www.americanbar.org) and click on “myABA” or call the ABA Member Service Center at 800-285-2221.

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

**Left side from front to back:** Michael Stagg, Waller Law; Michael Balster, Paul Hastings LLP; Gale Lea Rubrecht, Jackson Kelly PLLC; Dave Rubrecht, MRC Global Inc.; Lou Tosi, Shumaker, Loop & Kendrick, LLP. **Right side front to back:** Sara Bazemore, Nelson Mullins Riley & Scarborough LLP; Lauran Sturm, Waller Law; Erin St. John, Univ. of Utah S.J. Quinney College of Law; Tony Drollas; Cheri Budzynski, Shumaker, Loop & Kendrick, LLP

---

## AIR QUALITY AND NATURAL GAS DEVELOPMENT: PREVENTING WINTER OZONE IN UTAH'S UINTAH BASIN

Jessica L. Lowrey

---

*[This is a condensed version of the article “Sewing Up the Regulatory Hole: Preventing Winter Ozone in Utah’s Uintah Basin,” forthcoming in the Seattle Journal of Environmental Law.]*

### I. Introduction

Picture a dark, brown cloud of smog settling over the land. Ozone levels are so high that breathing the air could decrease respiratory function or exacerbate asthma. Are you picturing a city like Houston or Los Angeles on a hot summer day? Try the wide-open plains of northeast Utah in the middle of winter.

In 2011, researchers from Utah State University observed ozone levels in Utah’s Uintah Basin at 185 percent of the levels that the Environmental Protection Agency (EPA) considers safe for human health. UINTA BASIN WINTER OZONE AND AIR QUALITY STUDY, DECEMBER 2010–MARCH 2011, Document No. EDL/11-039, at 42 (2011) [hereinafter UINTA BASIN OZONE STUDY]. Despite this, EPA does not consider the area in non-attainment under the Clean Air Act. Scientists, land managers, and the oil and gas industry are beginning to realize that extensive mineral development in the region is contributing to the ozone problem.

### II. The Ozone Problem in the Uintah Basin

The Uintah Basin is an area of about 5,853,000 acres in northeast Utah. About 70 percent of that area is owned by the federal government and managed for mineral development by the Bureau of Land Management (BLM). Resources in the basin are already heavily developed, with over 15,000 oil and gas wells in existence. Based on pending projects, the BLM foresees the addition of 15,796 new well pads housing some 28,417 new wells. UNITED STATES BUREAU OF LAND MANAGEMENT, VERNAL FIELD OFFICE, GREATER UINTA BASIN OIL AND GAS CUMULATIVE IMPACTS TECHNICAL SUPPORT DOCUMENT, Table 3-2 (2012) [hereinafter UINTA CUMULATIVE IMPACTS DOC].

A recent Environmental Impact Statement (EIS) for the Greater Natural Buttes Project Area (GNBPA) of the Uintah Basin cataloged the different sources of nitrogen oxides (NO<sub>x</sub>) and volatile organic compounds (VOCs) from natural gas development. These sources include: drill rig engines and boilers; drilling and production traffic; production wells; water tank batteries; and compressor engines. Another significant source of VOCs is hydraulic fracturing, or “fracking.” UNITED STATES BUREAU OF LAND MANAGEMENT, VERNAL FIELD OFFICE, GREATER NATURAL BUTTES FINAL ENVIRONMENTAL IMPACT STATEMENT, FES 12-8, Table 4.1-3 (2012) [hereinafter GREATER NATURAL BUTTES EIS].

While not all of the projected new development in the Uintah Basin will be natural gas, a large portion of it will. And all the approved development in the GNBPA will involve fracking.

### III. Four Federal Statutes + Two Agencies = A Regulatory Hole

Four major federal laws apply to air quality and natural gas development on federal public lands, but none has been able to prevent the ozone problem in the Uintah Basin.

The Clean Air Act (CAA) protects and improves air quality by regulating criteria pollutants like ozone, but it does not require permits for small sources of pollution like natural gas wells, even though they contribute to ozone formation. 42 U.S.C. § 7602(j). The Mineral Leasing Act authorizes the BLM to lease and permit natural gas development, but it contains no environmental safeguards. 30 U.S.C. § 181. The National Environmental Policy Act (NEPA) requires all federal agencies to consider the environmental impacts of their “major” activities, including leasing and permitting natural gas wells, but it does not require an agency to choose the least harmful alternative or even mitigate any foreseeable damage. 42 U.S.C. § 4332; *see also Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). Finally, while the Federal Land Use Policy and Management Act (FLPMA) requires the BLM to conduct land use planning before leasing any lands for natural gas development, the incremental process through which

the BLM issues permits to small land areas prevents a NEPA analysis broad enough to contemplate the environmental impacts of large-scale natural gas development. 43 U.S.C. §1712.

These gaps in the federal regulatory scheme result in each agency only addressing its own limited jurisdictional area without comprehensively addressing the problem.

#### **IV. New Policies That May Help Sew Up the Regulatory Hole**

The absence of comprehensive air quality regulations addressing impacts from natural gas development has been clear to EPA for some time, and the agency is working on solutions.

##### **a. MOU Between Federal Agencies to Increase Air Quality Monitoring**

In June 2011, EPA negotiated a Memorandum of Understanding (MOU) with the Department of Interior and the Department of Agriculture to increase consistency in air quality monitoring and mitigation related to oil and gas operations on federal public lands. *See* <http://www.doi.gov/news/pressreleases/upload/29704-Joint-MOU-Air-Quality-FINAL.pdf>. The primary focus of the MOU is to institute standardized procedures for identifying the air quality impacts of proposed oil and gas development. This is accomplished in two steps: (1) establishing an emissions inventory; and (2) if necessary, performing air quality modeling. *Id.* § V.E.

Thus, for example, after the lead agency (the BLM in the case of the Uintah Basin) identifies the “reasonably foreseeable number of oil and gas wells” expected in the planning area, *id.* § V.E.1, it prepares an “emissions inventory of criteria pollutants and volatile organic compounds,” *id.* § V.E.2, which is a preliminary assessment of all the likely emissions of the proposed action that will contribute to local and regional air quality. *Id.* § III. The BLM only conducts air quality modeling if the emissions inventory determines that the expected emissions will cause or contribute to an exceedance of the National Ambient Air Quality Standards (NAAQS) and the proposed action is in or near a nonattainment area for the

NAAQS, or in or near an area that is already predicted to exceed the NAAQS. *Id.* § V.E.3.

While the MOU is likely to increase air quality modeling in areas of non-attainment, it does not force increased modeling or better mitigation in attainment areas. Further, despite the fact that the MOU pledges to “identify reasonable mitigation and control measures and design features to address adverse impacts to air quality,” it does not change the legal authority of any signatory agencies or impose any additional responsibilities on them. As a result, the BLM retains significant discretion as to when and how it conducts air quality monitoring, when it requires mitigation by natural gas developers, and how it evaluates mitigation measures and determines whether to implement them in permits or leases. *Id.* § IV.

##### **b. New EIS for Natural Gas Development in the Uintah Basin Focuses on Ozone Mitigation**

The BLM is increasing its consideration of air quality impacts as it issues permits for new gas wells in the Uintah Basin. In March 2012, the BLM released a project-level EIS evaluating proposed oil and natural gas drilling in the GNBPA. GREATER NATURAL BUTTES EIS, *supra*, § 1.1. All the alternatives analyzed in the EIS involve fracking, which is the process of pumping fluids under high pressure into otherwise impenetrable geological formations in order to create fractures that allows hydrocarbons a path to the surface. *Id.* § 2.5.3.3. All of the alternatives, including no action, are also likely to involve ozone levels above the NAAQS. *Id.* § 4.1.1.4. But, because the area is in attainment for the applicable NAAQS, the MOU’s air quality modeling was not triggered and EPA did not protest the approval of new development.

However, the GNBPA EIS does include voluntary mitigation and adaptive management programs. The project proponent, Kerr-McGee, has voluntarily agreed to an “ozone action plan” that includes using low-emissions devices and green well completions (systems to reduce methane loss during well completion). *Id.* § 4.1.2.6. Kerr-McGee also agreed to implement a project-specific adaptive management plan that includes enhanced ozone mitigation measures in the event of an exceedance of the NAAQS. *Id.* The

enhanced mitigation measures include reducing the number of drill rigs operating at any one time and using natural gas engines, which have lower emissions than traditional diesel engines. *Id.*

### **c. EPA Regulations Require Ozone Mitigation in All New Natural Gas Development**

Finally, in April 2012, EPA released new regulations for natural gas operations that require more stringent pollution control measures regardless of attainment status. The final rules result from a review of four regulations: (1) a new source performance standard (NSPS) for VOCs; (2) a NSPS for sulfur dioxide; (3) an air toxics standard for major sources of oil and natural gas production; and (4) an air toxics standard for major sources of natural gas transmission and storage. UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, OVERVIEW OF FINAL AMENDMENTS TO AIR REGULATIONS FOR THE OIL AND NATURAL GAS INDUSTRY, FACT SHEET, 1 (2012), available at <http://www.epa.gov/airquality/oilandgas/pdfs/20120417fs.pdf> [hereinafter NSPS REGS FACT SHEET].

The final rules are the first federal air standards for natural gas wells to address the emissions from fracking. The new regulations require natural gas developers to reduce emissions of VOCs by 95 percent in newly fracked or re-fracked wells. *Id.* at 1. The required changes include either burning or capturing gas that is currently being leaked into the atmosphere during the well completion process (i.e., “green completions”). UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, SUMMARY OF REQUIREMENTS FOR PROCESSES AND EQUIPMENT AT NATURAL GAS WELL SITES 1–2 (2012), available at <http://www.epa.gov/airquality/oilandgas/actions.html>. This process allows developers to sell the captured gas, and EPA estimates that the new regulations will result in a cost savings to industry between \$11 and \$19 million when the rules are fully implemented in 2015. NSPS REGS FACT SHEET, *supra*, at 1.

In addition to requirements for the wells themselves, the new EPA regulations require a 95 percent reduction of VOC emissions from storage vessels, pneumatic controllers, and compressor stations located at well sites or between well sites and processing stations. *Id.* EPA estimates that reducing VOC

emissions by 95 percent will result in combined annual emissions reductions of 190,000 to 290,000 tons of VOCs. *Id.* Utah does not have any state regulations for green completions, so this is a step in the right direction for controlling ozone in the Uintah Basin.

The NSPS regulations do have significant limitations. They do not regulate mobile sources of VOCs and NO<sub>x</sub> (e.g., cars, trucks, and trains) nor do they regulate existing wells. Thus, the regulations will not alleviate the already high levels of winter ozone observed in the Uintah Basin for the last three years.

## **V. Conclusion**

The BLM may say “let it flow,” but new natural gas development in the Uintah Basin should not come at the expense of air quality. The new policies and regulations are a step in the right direction, but they are not enough. While EPA could tighten its NAAQS for ozone or declare the Uintah Basin in non-attainment, the ozone problem cannot be solved without significant changes in BLM procedures. The BLM should implement air quality modeling as early as possible in its permitting process and try to project the emissions of any likely development scenario. The development scenarios should be based on available gas resources, not merely gas development that has been proposed or already approved. If this practice were followed, the BLM could create permitting scenarios that would prevent an exceedance of the NAAQS and cease approving new permits once that threshold is hit.

Finally, the natural gas industry cannot be left off the hook. Developers should not wait to be told when and how to mitigate the emissions impacts of their projects. Rather, like Kerr-McGee in the Uintah Basin, developers should take the lead and implement voluntary ozone mitigation to promote and protect air quality and public health.

*Jessica L. Lowrey* is a graduate of the University of Colorado Law School and is currently a judicial law clerk to the Honorable Terry Fox of the Colorado Court of Appeals. She has an M.S. in environmental studies from the University of Colorado, Boulder and a B.S. in natural resources management from the University of Maryland, College Park.

---

## AQC LAWYER ORGANIZES ONE MILLION TREES PROJECT PLANTING IN WISCONSIN

Roma Nandwani

---

On a snowy Saturday in November, attorneys from the Madison, Wisconsin area gathered at Swan Creek Park in nearby Fitchburg with shovels, ready for the task at hand: planting 17 trees along a bike path. Trees provide many environmental and aesthetic benefits to the community, such as cleaner air, reduced energy use, and a wildlife habitat. However, the ability of many communities to replace and maintain urban trees is severely threatened by budget cuts and invasive species. To help educate others about these issues in Dane County, Wisconsin, environmental lawyer Phillip Bower organized this tree-planting event as part of the One Million Trees Project, a program sponsored by the ABA Section of Environment, Energy, and Resources (SEER). This tree-planting event can easily be replicated in other communities.

“The idea to participate came to me as part of my membership as the Public Service Vice Chair of the Air Quality Committee,” Phil says. “What better way to help address this problem in our local community than by getting members of the legal community together to plant some trees and learn about the value of urban trees and some of the threats to our local tree cover?”

Phil had several goals for the project: (1) raise funds from the legal community to purchase trees to plant; (2) organize local legal professionals to come out and plant the trees; and (3) educate the legal community about the benefits of urban trees, threats to trees, and how to properly plant a tree. To implement the project, Phil worked with representatives of the Wisconsin Department of Natural Resources (WDNR) and the city of Fitchburg’s Parks, Recreation, and Forestry Department.

Phil and his team raised \$1700 for the project and solicited volunteers using a variety of methods. Phil contacted local law firms and attorneys and the state bar environmental section through in-person meetings, e-mails, and phone calls. The team sent personalized letters to all licensed attorneys with Fitchburg

addresses. The Dane County Bar Association published in-kind ads in its newsletter and sent e-mail blasts to its members. The city sent press releases to local media and designed a banner to be placed in Swan Creek Park to advertise the event. SEER also publicized the event on its Web site and via e-mails to SEER members in Wisconsin. Phil’s firm, Whyte Hirschboeck Dudek, held “jeans days” to raise funds. Furthermore, a mini grant for publicity was secured from the Alliance for Community Trees NeighborWoods Program.

At the day of the tree planting, volunteers were provided with coffee and breakfast treats while representatives of the city and WDNR explained the types of trees that would be planted and about threats to urban trees, such as the emerald ash borer. The volunteers then moved out to the tree planting site for a demonstration planting before grabbing their own tools, supplied by Fitchburg, and digging in. The volunteer attorneys and law students had a great time networking and expressed a sense of accomplishment after all the trees were planted, mulched, and watered.

The tree-planting event in Swan Creek Park has been recognized with several awards, including the Wisconsin Arborist Association’s International Society of Arboriculture Gold Leaf Award for 2013, which rewards individuals for outstanding beautification activities. Phil Bower was also named a finalist volunteer of the year by the Alliance for Community Trees.

*Roma Nandwani* (roma.nandwani@gmail.com) is a J.D. candidate at the University of Virginia Law School (class of 2013) and a law clerk in the Environmental Litigation Group of Katten Muchin Rosenman LLP.

---

### EPA HEADQUARTERS

Gale Lea Rubrecht  
Jackson Kelly PLLC  
Charleston, West Virginia

---

#### 1. SIP Call for Start-up, Shutdown, and Malfunction Provisions

On February 22, 2013, the Environmental Protection Agency (EPA) published a proposed rule that would require 36 states to eliminate or drastically narrow exemptions or defenses in their state implementation plans (SIPs) to Clean Air Act (CAA) emission requirements during periods of start-up, shutdown, or malfunction (SSM). 78 Fed. Reg. 12,460. EPA is proposing to find existing SIP provisions related to SSM in these states inadequate to attain or maintain the National Ambient Air Quality Standards (NAAQS) and otherwise inconsistent with the CAA, and is proposing a “SIP Call,” which will require the relevant states to submit SIP revisions. Beyond the burden on the states, the SSM rule, if finalized, will have significant implications for all types of emission sources throughout the United States, including power plants, refineries, industrial and chemical manufacturing facilities, and oil and gas. Comments are currently due May 13, 2013. 78 Fed. Reg. 20,855 (Apr. 8, 2013).

The proposed SSM rule responds to a petition for a rulemaking filed by Sierra Club on June 30, 2011. That petition resulted from Sierra Club’s successful challenge to EPA’s SSM rules for National Emission Standards for Hazardous Air Pollutants (NESHAPs) in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). Sierra Club petitioned EPA to undertake a rulemaking to eliminate SSM rules in 38 states and the District of Columbia or, at a minimum, require states to revise the rules to conform to EPA’s current interpretation of the CAA. EPA is proposing to grant most of the relief sought by the Sierra Club.

While the existing SSM rules vary from state to state, the proposed federal SSM rule would generally require states to (1) eliminate automatic exemptions or state

“discretionary” exemptions for excess emissions during SSM; (2) eliminate affirmative defenses to emissions violations based on start-up and shutdown; and (3) eliminate affirmative defenses based on malfunctions, to the extent they are inconsistent with CAA requirements. EPA argues that SIP provisions that provide an automatic exemption from otherwise applicable emission limitations are substantially inadequate to meet CAA requirements because CAA section 302(k) requires that emission limitations must be “continuous.” 78 Fed. Reg. 12,468, 12,484–85.

Under EPA’s proposal, SIPs can include an affirmative defense for excess emissions arising from “malfunctions” that occur when a facility experiences “an unplanned event,” but not for excess emissions that occur when a facility is operating in a “planned” start-up or shutdown mode. *Id.* at 12,469–70. The affirmative defense for “malfunctions” may provide a shield from monetary penalties but may not preclude injunctive relief, such as installation of new pollution controls or process changes, to limit or prevent future problems. EPA is also proposing that if a facility could not meet applicable emissions limitations during start-up or shutdown, a state could “develop specific alternative requirements that apply during such periods, as long as they meet other applicable” CAA requirements.

For those states subject to a final SIP Call, EPA is also proposing to establish a date 18 months from the date of promulgation of the final findings of inadequacy and SIP Call for the state to remove exemptions for SSM events and affirmative defenses for start-up and shutdown events, and to modify malfunction affirmative defenses so that they are consistent with EPA guidance. *Id.* at 12,489. Should a state fail to submit a timely revised SIP, EPA will promulgate a federal implementation plan (FIP) and impose other sanctions. EPA is obligated by a consent decree to promulgate the final rule by August 27, 2013. If EPA promulgates the final rule in August 2013, then state SSM rules would be due by February 2015.

The 36 states subject to the SIP Call are Alabama, Alaska, Arizona, Arkansas, Colorado, Delaware, the District of Columbia, Georgia, Florida, Illinois, Indiana,

Iowa, Kansas, Kentucky, Louisiana, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, Rhode Island, South Carolina, South Dakota, Tennessee, Virginia, Washington, West Virginia, and Wyoming. EPA concluded in the proposed rule that the SIPs in Nebraska, Idaho, and Oregon (which were included in Sierra Club's petition) do not require revision. EPA also rejected Sierra Club's request that EPA discontinue reliance on interpretive letters from states to clarify any potential ambiguity in state SIP submissions.

## **2. Tier 3 Motor Vehicle Emission and Fuel Standards**

On March 29, 2013, EPA proposed new vehicle emissions standards for passenger cars and trucks, as well as new fuel standards that would lower the sulfur content of gasoline starting in 2017. EPA claims that, if finalized, the proposed standards (known as the "Tier 3 program") would be one of the most cost-effective air quality control measures currently available, costing about a penny per gallon of gasoline and about \$130 per vehicle. EPA projects that in 2030 the annual cost of the program would be approximately \$3.4 billion and estimates the annual monetized health benefits of the proposed standards would range from \$8 to \$23 billion.

The proposed tailpipe emissions standards include standards for particulate matter (PM) and for the sum of non-methane organic gases (NMOG) and nitrogen oxides (NO<sub>x</sub>), presented as NMOG+NO<sub>x</sub>. The proposed emissions standards would apply to all light-duty vehicles and some heavy-duty vehicles, and would differ by vehicle class and test cycle. The proposed PM standards apply to individual vehicles, while the proposed NMOG+NO<sub>x</sub> standards are fleet-average standards.

EPA states that, compared to current standards, the proposed standards for light-duty vehicles would reduce fleet average NMOG+NO<sub>x</sub> standards by 80 percent and per-vehicle PM standards by 70 percent, and that the proposed heavy-duty tailpipe standards

would result in a 60 percent reduction in both fleet average NMOG+NO<sub>x</sub> and per-vehicle PM standards. In addition, EPA is proposing to extend the regulatory useful life period during which the standards apply from 120,000 miles to 150,000 miles.

The proposed tailpipe standards would be phased in generally between model years 2017 and 2025. They also include flexibility provisions, including credits for early compliance and the ability to offset some higher-emitting vehicles with extra-clean models; more lead time for small businesses and small volume manufacturers; and a hardship provision that would allow additional time to comply if a manufacturer cannot meet requirements after a good-faith effort and would otherwise face severe economic hardship.

EPA is also proposing evaporative emissions standards that represent a 50 percent reduction from current standards. The proposed evaporative emissions standards would apply to all light-duty and on-road gasoline-powered heavy-duty vehicles. Like the proposed tailpipe emissions standards, the evaporative emissions standards would also include phase-in flexibilities, credit and allowance programs, more lead time for small businesses and small volume manufacturers, and a hardship provision. EPA is also proposing to extend the useful life period during which the standards apply from 120,000 miles to 150,000 miles.

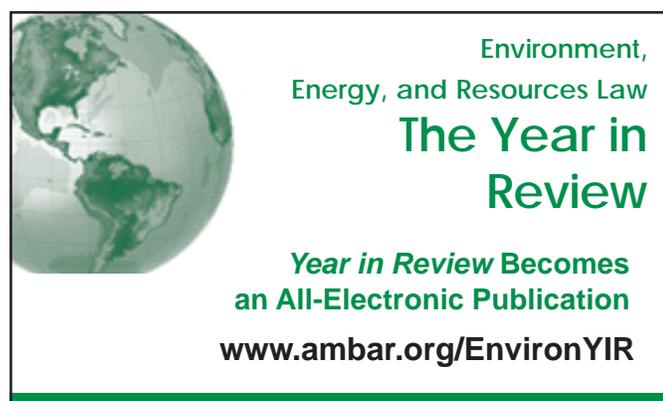
For fuel standards, EPA is proposing that gasoline contain no more than 10 parts per million (ppm) of sulfur on an annual average basis by January 1, 2017. EPA is also proposing either to maintain a current 80-ppm refinery gate and 95-ppm downstream caps or lower them to 50 and 65 ppm, respectively. According to EPA, lower sulfur gasoline improves the effectiveness of emission control systems in new and existing vehicles and allows the development of some lower-cost technologies to improve fuel economy and reduce greenhouse gas emissions. The proposed fuel standards would also include flexibility provisions, such as an averaging, banking, and trading program that would allow refiners and importers to spread out their investments through an early credit program and rely on ongoing nationwide averaging to meet the 10-ppm

sulfur standard. For small refiners and small volume refineries processing 75,000 barrels of crude oil per day or less, EPA is proposing to delay the compliance date for three years or until January 1, 2020.

EPA is also proposing to update the federal emissions test fuel specifications that would apply to new vehicle certification, assembly line, and in-use testing. Key changes include moving to a test fuel containing 15 percent ethanol by volume, although EPA is also seeking comment on 10 percent ethanol by volume, lowering octane, and lowering the existing sulfur specification to be consistent with proposed Tier 3 requirements. For the first time, EPA is also proposing test fuel specifications for E85 (85 percent ethanol fuel).

To support the proposed standards, EPA states that the Tier 2 and Clean Diesel programs, both of which treated vehicles and fuels as an integrated system to reduce emissions, had no serious negative impacts on the refining industry. According to EPA, the Tier 3 proposal is harmonized with the California Air Resources Board Low Emission Vehicle program, making it possible for automakers to sell the same vehicles in all 50 states; and is also designed to be implemented over the same time period as EPA's greenhouse gas program for reducing emissions from light-duty vehicles starting in model year 2017. The proposed Tier 3 standards respond to a May 21, 2010, presidential memorandum.

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



Environment,  
Energy, and Resources Law  
**The Year in  
Review**  
Year in Review Becomes  
an All-Electronic Publication  
[www.ambar.org/EnvironYIR](http://www.ambar.org/EnvironYIR)

---

## EPA REGION 1

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

---

### I. Regional Updates

#### Regional Greenhouse Gas Initiative

In February 2013, the nine Northeastern and Mid-Atlantic states participating in the Regional Greenhouse Gas Initiative (RGGI) released an updated RGGI model rule that is intended to guide the RGGI states as they follow state-specific statutory and regulatory processes to update their CO<sub>2</sub> Budget Trading programs. The model rule includes a reduction of the 2014 regional CO<sub>2</sub> budget, known as the “RGGI cap,” from 165 million to 91 million tons—a reduction of 45 percent—and additional reductions of 2.5 percent each year from 2015 to 2020. *See* [http://www.rggi.org/design/program\\_review](http://www.rggi.org/design/program_review).

### II. State Updates

#### A. Connecticut

1. On March 18, 2013, the Department of Energy and Environmental Protection (DEEP) released a draft Study of the Connecticut Renewal Portfolio Standard and a schedule for public input on the study. Among other changes, subsidies would be phased out for older biomass plants and landfill gas that do not provide optimal economic or environmental benefits. In addition, all Class I renewables could compete for power contracts—based on price—in the “contracted tier.” A copy of the draft study can be found at <http://www.dpuc.state.ct.us/DEEPEnergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/67d62db9c92d7f6885257b320066e509?OpenDocument>.

2. DEEP proposed amendments to its Low Emissions Vehicles (LEV) and Zero Emissions Vehicles (ZEV) programs. The amendments would align DEEP's program with recent actions by the California Air Resources Board. *See* [http://www.ct.gov/deep/lib/deep/air/regulations/proposed\\_and\\_reports/march\\_2013/reg\\_36b\\_and\\_36c\\_per1.pdf](http://www.ct.gov/deep/lib/deep/air/regulations/proposed_and_reports/march_2013/reg_36b_and_36c_per1.pdf).

3. DEEP recently held a public hearing on proposed changes to its regulation for control of volatile organic compound (VOC) emissions from large aboveground

storage tanks. DEEP is proposing to remove the option of using an un-domed floating roof tank to store VOCs; revise floating roof requirements; and clarify maintenance, inspection, and repair requirements. *See* [http://www.ct.gov/deep/lib/deep/air/regulations/proposed\\_and\\_reports/january\\_2013/sec22a-174-20a\\_revision\\_for\\_notice.pdf](http://www.ct.gov/deep/lib/deep/air/regulations/proposed_and_reports/january_2013/sec22a-174-20a_revision_for_notice.pdf).

4. On February 25, 2013, DEEP announced a short-term air permit amnesty program for public and private K-12 schools. DEEP's press release states that the objectives of the program are to ensure full compliance with all federal and state air permitting requirements, while assisting schools in achieving cost savings through energy efficiency. *See* <http://www.ct.gov/deep/cwp/view.asp?A=4380&Q=519500>.

## B. Maine

1. The Department of Environmental Protection is proposing a new rule that will limit VOC emissions from fiberglass boatbuilding operations and during the manufacture and repair of fiberglass boats. Maine's proposed rule is based on EPA's Control Techniques Guidelines and would apply to VOC emissions from boatbuilding sources with 5400 pounds/year or more. *See* <http://www.maine.gov/tools/whatsnew/attach.php?id=510397&an=2>.

## C. Massachusetts

1. Eight states led by Attorney General Coakley's Office, Massachusetts Department of Environmental Protection (Mass DEP), EPA, and a number of citizens' groups joined together to negotiate a revised consent decree with American Electric Power (AEP). If the modified consent decree is approved by the U.S. District Court, AEP and its subsidiaries must meet more stringent emissions reductions of sulfur dioxide (SO<sub>2</sub>) than under the original 2007 agreement. As part of the modified consent decree, AEP has agreed to give a total of \$6 million to Massachusetts, Vermont, Rhode Island, Maryland, New Hampshire, Connecticut, New Jersey, and New York. Massachusetts will receive \$1 million. As part of the original 2007 consent decree, AEP provided \$24 million in mitigation payments to the eight states involved, including \$3.1 million for Massachusetts. *See* <http://www.mass.gov/ago/news-and-updates/press-releases/2013/2013-02-25-american-electric.html>.

2. Mass DEP recently adopted revisions to its miscellaneous metal parts and products regulation to add dimethyl carbonate and propylene carbonate as excluded compounds. *See* <http://www.mass.gov/dep/air/laws/vocmmpf.pdf>.

## D. New Hampshire

1. The New Hampshire Department of Environmental Services (DES) has extended the expiration date of the General State Permit for Internal Combustion Engines Used as Emergency Generators (GSP-EG) to April 30, 2014. DES chose to extend the expiration date to allow for the recent changes to federal regulations pertaining to Reciprocating Internal Combustion Engines (RICE) to be finalized. *See* [http://des.nh.gov/organization/divisions/air/pehb/apps/permit\\_air\\_emissions\\_gsp\\_eg.htm](http://des.nh.gov/organization/divisions/air/pehb/apps/permit_air_emissions_gsp_eg.htm).

2. On March 25, 2013, DES released a draft SIP revision to eliminate Stage II vapor recovery requirements in the state. *See* <http://www.des.state.nh.us/organization/divisions/air/do/sip/documents/stageii-termination.pdf>.

## E. Rhode Island

1. The Department of Environmental Management (DEM) has updated 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. *See* <http://www.dem.ri.gov/pubs/regs/regs/air/airtoxmd.pdf>.

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

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

---

## EPA REGION 2

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

---

### I. RGGI States Agree to 45 Percent Reduction in Regional CO<sub>2</sub> Budget for 2014

On February 7, 2013, the nine states (CT, DL, ME, MD, MA, NH, NY, RI, and VT) participating in the Regional Greenhouse Gas Initiative (RGGI) released a revised RGGI model rule. It includes a region-wide cap for 2014 of 91 million tons of CO<sub>2</sub> from affected electric generating units (i.e., those with a nameplate capacity of 25 megawatts (MW) or more) in the RGGI region. This represents a 45 percent reduction from the region-wide cap of 165 million tons under the prior model rule. The cap would decline further by 2.5 percent per year from 2015 to 2020. Each of the participating states has agreed to revise its individual program regulations for RGGI by January 1, 2014.

As a point of comparison, emissions from affected units in the nine-state RGGI region in 2005 were 163 million tons of CO<sub>2</sub>. Accordingly, if RGGI is implemented as currently planned, the required reduction to 78 million tons of CO<sub>2</sub> in 2020 would represent an impressive 52 percent reduction in annual CO<sub>2</sub> emissions from affected sources in the power sector over that period. By reducing the supply of allowances, the revisions to the RGGI program are expected to increase the cost of allowances—and resulting revenue to the participating states—substantially.

### II. NYSDEC Issues Rule Revising Air Permitting Regulations

On February 13, 2013, the New York State Department of Environmental Conservation (NYSDEC) issued a rule effecting numerous amendments to state air permitting regulations codified at parts 200 and 201 of title 6 of the New York Code of Rules and Regulations (NYCRR). *See* Notice of Adoption, NYS Register, pp. 19–22 (Feb. 13, 2013). Among the numerous amendments were those relating

to temporary emission sources; NYSDEC inspection of regulated sources; removal of references to “severe ozone nonattainment area”; portable emission sources; stationary internal combustion engines used for demand response or peak shaving; ventilating systems at landfills; Portland cement plants; the required scheduling for commencing construction of a source after issuance of a permit; new permitting requirements for sources emitting persistent, bioaccumulative toxic (PBT) chemicals above certain thresholds; new requirements for permit renewals and modifications; and new requirements for emissions capping in facility permits.

### III. NYSDEC Revises Regulations Implementing Diesel Emissions Reduction Act

In August 2006, the New York state legislature enacted the Diesel Emissions Reduction Act (DERA), codified at section 19-0323 of the Environmental Conservation Law, to reduce diesel emissions from heavy duty vehicles operated by or operating “on behalf of” state agencies and public authorities. The statute required the use of ultra-low sulfur diesel fuel and best available retrofit technology (BART). On January 30, 2013, NYSDEC revised its implementing regulations (codified at 6 NYCRR part 248) to provide, in response to two court decisions, that the regulations do not apply to vehicles operated by subcontractors to the state. On April 5, 2013, NYSDEC issued a discretionary enforcement letter stating that, due to the enactment of chapter 58 of the laws of 2013, it would not be enforcing the BART requirements and certain other requirements of the part 248 regulations until January 1, 2015.

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

---

---

## EPA REGION 3

Barbara Little

*Jackson Kelly PLLC*

*Charleston, West Virginia*

---

### I. Regional Updates

1. On January 16, 2013, EPA Region 3 released the 2011 annual Toxics Release Inventory (TRI) report revealing a decline in hazardous air pollutant (HAP) emissions of 8 percent from 2010, even while total releases (to air, water, or land) of toxic chemicals increased for the second year in a row. The decreases in HAPs were led by decreases in hydrochloric acid and mercury, assumed to be the result of installation of controls at coal-fired power plants and a shift to other fuel sources. Releases into surface water decreased 3 percent but releases to land increased 19 percent since 2010, with the latter due primarily to land disposal at metal mines involving large facilities handling large volumes of material.

2. On February 22, 2013, U.S. District Judge William D. Quarles Jr. sentenced Rodney Hailey to nearly 13 years in prison, followed by 3 years of supervised release, for engaging in a massive fraud scheme by selling \$9 million in renewable fuel credits that Hailey falsely claimed were produced by his company, Clean Green Fuel, LLC, Baltimore, Maryland. Hailey had registered his company under the Renewable Fuel Standard program as a producer of bio-diesel fuel derived from renewable sources and sold over 35 million Renewable Identification Numbers (RINs), when in fact Clean Green Fuel had produced no fuel at all. Hailey, 34, was also ordered to pay restitution of approximately \$42.2 million to over 20 companies and forfeit \$9.1 million in proceeds from the fraud, including cars, jewelry, his home, and bank accounts already seized by the government. The prosecution originated from EPA's Air Enforcement Division.

### II. State Updates

#### A. Delaware

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

1. The 2002 base year emissions inventory for the Delaware portion of the Philadelphia-Wilmington, PA-

NJ-DE nonattainment area for the 1997 fine particulate matter (PM<sub>2.5</sub>) NAAQS was approved, effective April 3, 2013. 78 Fed. Reg. 14,020 (Mar. 4, 2013).

2. Delaware's adoption of EPA's greenhouse gas (GHG) permitting provisions as promulgated on June 3, 2010, was approved, effective April 1, 2013. 78 Fed. Reg. 13,496 (Feb. 28, 2013).

#### B. District of Columbia

##### ***SIP Revisions***

1. EPA proposed approval of attainment demonstration for the 1997 8-Hour Ozone NAAQS for the Washington, DC-MD-VA Moderate Nonattainment Area—for DC, Maryland, and Virginia SIP revisions. 78 Fed. Reg. 17,161 (Mar. 20, 2013).

2. Proposed approval of amendments to chapters 1 and 7 of title 20 (Environment) of the D. C. Municipal Regulations (DCMR) for the control of volatile organic compounds (VOCs) to meet reasonably available control technology (RACT) for sources, as recommended by the Ozone Transport Commission (OTC) model rules and EPA's Control Techniques Guidelines (CTG) standards. EPA also proposed to approve the District Department of the Environment (DDOE) negative declarations for the following VOC source categories: auto and light-duty truck assembly coatings; fiberglass boat materials; paper, film and foil coatings; and flat wood paneling. 78 Fed. Reg. 9648 (Feb. 11, 2013).

3. On January 18, 2013, Mayor Gray announced the selection of Keith Anderson as the permanent director of the DDOE. Mr. Anderson has served as the department's interim director since September 1, 2012.

#### C. Maryland

##### ***SIP Revisions***

1. Approval of Maryland SIP revision deferring until July 21, 2014 the application of the prevention of significant deterioration (PSD) permitting requirements to biogenic CO<sub>2</sub> emissions from bioenergy and other biogenic stationary sources in the state of Maryland, effective April 1, 2013. 78 Fed. Reg. 13,497 (Feb. 28, 2013).

2. Effective February 25, 2013, approval of the Maryland Department of the Environment (MDE) adoption of various test methods, calculations methods, work practice standards, and exemptions consistent with EPA's CTGs for seven source categories: paper, film, and foil coatings; industrial cleaning solvents; miscellaneous metal and plastic parts coatings; large appliance coatings; offset lithographic printing and letterpress printing; flat wood paneling coatings; and flexible packaging. 78 Fed. Reg. 5290 (Jan. 25, 2013).

### **Other Maryland Air Quality News**

1. Lifoam Industries—Harford County: On December 17, 2012, the MDE agreed to a \$40,000 settlement agreement with Lifoam Industries for alleged violations of air pollution control equipment operational requirements.

2. Sherwin-Williams Company—Baltimore City: On December 21, 2012, MDE entered into a settlement agreement for a \$30,000 penalty to address alleged violations of air pollution requirements involving Sherwin-Williams Company's failure to properly use air pollution control equipment at its paint manufacturing plant. Sherwin-Williams has since returned to compliance.

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

1. The Pittsburgh Area attained the 1997 8-hour ozone NAAQS by the 2010 attainment date, based on ambient air monitoring data for the 2007–2009 monitoring period, and it continues to attain the 8-hour ozone standard based on the 2009–2011 monitoring period and preliminary 2012 data. This determination suspends the requirement for the Pittsburgh Area to submit an attainment demonstration, reasonably available control measures (RACM), a request for proposals (RFP) plan, and contingency measures for as long as the area continues to attain the 8-hour NAAQS. There is not a redesignation to attainment. Effective May 6, 2013. 78 Fed. Reg. 20,244 (Apr. 4, 2013).

2. Approval of Motor Vehicle Emissions Budgets (MVEBs) for the following counties: Philadelphia,

Montgomery, Delaware, Chester, and Buck. 78 Fed. Reg. 19,991 (Apr. 3, 2013).

3. Approval of revision pertaining to the Air Pollution Control portion of the Allegheny County Health Department (ACHD) Rules and Regulations, relating to ACHD's PSD program and a determination that ACHD has met its statutory obligations with respect to the infrastructure requirements of the CAA relating to PSD permitting and necessary to implement, maintain, and enforce the 1997 ozone NAAQS, as well as the 1997 and 2006 PM<sub>2.5</sub> NAAQS, effective April 1, 2013. 78 Fed. Reg. 13,493 (Feb. 28, 2013).

4. Proposed rule approving ACHD requirements of RACT for NO<sub>x</sub> and VOCs as demonstrating that all requirements for RACT for the 8-hour ozone NAAQS are met; approval of negative declaration that no facilities exist in Allegheny County for CTG categories; and a new RACT determination for a specific source. 78 Fed. Reg. 13,007 (Feb. 26, 2013).

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

1. The Pennsylvania Department of Environmental Protection (DEP) will hold a public hearing on May 2, 2013, at 6:30 p.m. in Allenwood, Union County, to discuss a proposed air quality plan approval for En-Tire Logistics for a new tire-derived fuel steam and power generation plant to produce 7 megawatts of electricity and provide steam to the adjacent NGC Industries facility. En-Tire submitted its application to DEP on March 19, 2012; DEP published a notice of intent to issue the plan on March 30, 2013. Organizations United for the Environment requested a public hearing to discuss the application.

2. On March 7, 2013, EPA alleged violations by Montgomery Chemicals of Conshohocken pertaining to methanol emissions, monitoring, record keeping, and reporting. The company agreed to a \$36,000 penalty and to correct cited violations within six months, and will also install a new scrubber as required by a previous order with DEP.

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

Approval of Virginia transportation conformity requirements in order to be consistent with EPA's

revised transportation conformity requirements, effective May 31, 2013. 78 Fed. Reg. 19,421 (Apr. 1, 2013).

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

Approval of SIP revision amending West Virginia's prior general conformity rule for the purpose of incorporating revisions to EPA's general conformity rule, effective March 25, 2013. 78 Fed. Reg. 4333 (Jan. 22, 2013).

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

## Please Continue to Help our One Million Trees Project!

We need your help to reach our goal of planting one million trees across the U.S. by 2014.

We encourage all ABA members to participate in hands-on tree planting activities in their communities. Members can also contribute to the One Million Trees Project by purchasing trees through our program partners: American Forests, Arbor Day Foundation, or The Black Bear Conservation Coalition.

Have you planted a tree since we started in 2009 that you'd like to register? Would you like to organize a tree planting event in your area?

Visit [www.ambar.org/EnvironTrees](http://www.ambar.org/EnvironTrees) for more information.

---

## **EPA REGION 4**

Bill Lane

*Kilpatrick Townsend & Stockton LLP*  
*Raleigh, North Carolina*

---

### **1. EPA Proposed SIP Call for Start-up, Shutdown, and Malfunction Would Affect All Region 4 States**

On February 22, 2013, EPA issued a proposed rule entitled "State Implementation Plans: Response to Petition for Rulemaking; Finding of Substantial Inadequacy; and SIP Calls to Amend Provision Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction." 78 Fed. Reg. 12,460 (discussed further in this issue in the EPA Headquarters Regional Report). In response to a petition for rulemaking by the Sierra Club, EPA has proposed to initiate a review of SIP provisions relating to start-up, shutdown, and malfunction (SSM) events. Invoking its authority under section 110(k)(5) of the Clean Air Act (CAA), EPA has proposed to issue a "SIP Call" to states whose SIPs are "substantially inadequate to attain or maintain the relevant national ambient air quality standard, to mitigate adequately the interstate pollutant transport described in [the Act], or to otherwise comply with any requirement of [the Act]."

EPA's principal concerns are SIP provisions that allow for an automatic exemption from emission standards during planned start-up and shutdown events, or that establish an invalid enforcement process for unavoidable malfunctions. EPA has entered into a settlement with the Sierra Club that requires EPA to issue a final rule by August 27, 2013. The proposed SIP Call affects 36 states, including all 10 states in Region 4.

In addition, two recent federal appeals court decisions in Region 4 implicate EPA review of SSM provisions in SIPs. On March 6, 2013, the Eleventh Circuit Court of Appeals issued a decision limiting EPA's authority to revise a state's SIP provision under CAA section 110(k)(6). See *Alabama Power Company v. EPA*,

2013 WL 810707 (11th Cir.). The court held that while EPA has discretionary authority to revise a previously approved SIP provision without further submission by the state, the agency must describe the error in the original approval when revising the SIP provision. This case involved opacity requirements during SSM events. The 11th Circuit's jurisdiction includes the Region 4 states of Alabama, Florida, and Georgia.

On March 25, 2013, the Fifth Circuit Court of Appeals (whose jurisdiction includes Mississippi) upheld EPA's partial approval and partial disapproval of a proposed Texas SIP provision that would establish an affirmative defense for SSM events. The court held that EPA's approval of the affirmative defense for unplanned SSM events was reasonable. *See Luminant Generation Co. LLC v. EPA*, 2013 WL 1195649 (5th Cir.). However, the court upheld EPA's determination that the affirmative defense for planned SSM events is inconsistent with the CAA. The Fifth Circuit's decision may presage future SSM litigation.

## **2. Georgia: EPA Proposes to Redesignate Atlanta Area as in Attainment with 1997 8-hour Ozone Standard**

On February 4, 2013, EPA published a proposal to redesignate the Atlanta area as in attainment with the 1997 8-hour ozone NAAQS. 78 Fed. Reg. 7705. The current nonattainment area consists of Fulton County and 19 other counties surrounding the city of Atlanta. In 2004, the Atlanta area was designated as "marginal" nonattainment with the standard. Atlanta failed to reach attainment with the NAAQS by the deadline of 2007, and EPA redesignated the area as "moderate" nonattainment in 2008. The revised deadline for attaining the NAAQS after the redesignation was June 15, 2011.

EPA's proposed redesignation is based on three consecutive years of data (2008 through 2010) showing compliance with the NAAQS prior to the deadline. Monitoring data through the end of 2011 show that the area has continued in attainment. EPA has also proposed to approve the maintenance plan

designed to keep the Atlanta area in compliance with the 1997 ozone NAAQS through 2024.

## **3. SIP Revisions**

EPA proposed and/or finalized the following SIP revisions in Region 4:

- EPA is proposing to approve revisions to the South Carolina SIP relating to PSD, NAAQS, and VOC provisions. 78 Fed. Reg. 4796.
- EPA approved the redesignation of the Birmingham, Alabama, nonattainment area to attainment for the 2006 24-hour PM<sub>2.5</sub> NAAQS. 78 Fed. Reg. 5306.
- EPA proposed to approve infrastructure SIP revisions for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS for Alabama, Georgia, Kentucky, Mississippi, North Carolina, South Carolina, and Tennessee. 78 Fed. Reg. 11,805.
- EPA approved the Tennessee infrastructure SIP revisions for the 2008 8-hour ozone NAAQS. 78 Fed. Reg. 14,450.
- EPA approved the Kentucky infrastructure SIP revisions for the 2008 8-hour ozone NAAQS. 78 Fed. Reg. 14,681.
- EPA proposed to approve NO<sub>x</sub> RACT requirements for the North Carolina portion of the Charlotte-Gastonia-Rock Hill 1997 8-hour ozone nonattainment area. 78 Fed. Reg. 15,895.
- EPA is proposing to approve the Tennessee SIP revisions to meet the 2008 lead NAAQS. 78 Fed. Reg. 17,168.
- EPA approved infrastructure SIP revisions for PSD requirements for the 1997 annual and 2006 24-hour PM<sub>2.5</sub> NAAQS for Kentucky, North Carolina, and Tennessee. 78 Fed. Reg. 18,241.

*Bill Lane* is a partner in the Raleigh, North Carolina, office of Kilpatrick Townsend & Stockton LLP. He can be reached at [blane@kilpatricktownsend.com](mailto:blane@kilpatricktownsend.com).

---

---

## EPA REGION 5

Gary Pasheilich

*Squire Sanders (U.S.), LLP*

*Columbus, Ohio*

---

### A. Indiana and Ohio

1. EPA proposed, via a direct final rule and a companion proposed rule, to approve the request by Ohio and Indiana to revise the Cincinnati-Hamilton 1997 8-hour ozone maintenance air quality state implementation plans (SIP) to replace the previously approved motor vehicle emissions budgets with budgets developed using EPA's Motor Vehicle Emissions Simulator 2010a emissions model. The Cincinnati-Hamilton area includes the Ohio counties of Butler, Clermont, Clinton, Hamilton, and Warren, Ohio; as well as Lawrenceburg Township in Dearborn County, Indiana. Ohio and Indiana submitted identical budgets that cover the Cincinnati-Hamilton 1997 ozone maintenance area. The effective date of the rule was April 1, 2013. 78 Fed. Reg. 6035, 6064 (Jan. 29, 2013).

2. EPA has issued a direct final rule to approve a portion of Indiana's construction permit rule for sources subject to the state operating permit program regulations at 40 C.F.R. part 70, which authorize the state to incorporate terms from federal consent decrees or federal district court orders into these construction permits. EPA is also approving public notice requirements for these permit actions. The rule becomes effective on May 14, 2013, unless adverse comments are received on or before April 15. 78 Fed. Reg. 16,412, 16,449 (Mar. 15, 2013).

3. EPA has proposed approving Ohio's SIP submission revising six Permit-by-Rule provisions, its Permit to Install and Operate program, two permanent exemptions from the Permit to Install requirement, and a General Permit program. The approval will make the various permit programs federally enforceable. The final rule became effective on March 22, 2013. 78 Fed. Reg. 11,748 (Feb. 20, 2013).

4. EPA has issued a direct final rule to approve Ohio's October 30, 2012 and December 12, 2012, requests to revise the Cleveland-Akron-Lorain and Columbus, Ohio 1997 8-hour ozone maintenance air quality SIPs to replace the previously approved motor vehicle emissions budgets with budgets developed using EPA's Motor Vehicle Emissions Simulator emissions model. The rule becomes effective on May 20, 2013, unless adverse comments are received on or before April 18. 78 Fed. Reg. 16,785, 16,826 (Mar. 19, 2013).

### B. Illinois

EPA has issued a finding that seven states, including Illinois, have not made complete "infrastructure" SIP submissions that provide the basic CAA program elements necessary to implement the 2008 lead NAAQS. The finding establishes a 24-month deadline for the EPA to promulgate a federal implementation plan (FIP) unless the individual states submit an approvable SIP revision. The effective date of this rule was March 28, 2013. 78 Fed. Reg. 12,961 (Feb. 26, 2013).

### C. Michigan and Minnesota

1. EPA issued a final rule disapproving Michigan and Minnesota's regional haze SIPs, and imposing a FIP to implement emission limits as best available retrofit technology (BART) for certain taconite ore processing facilities in those states. The CAA and the regional haze rule require implementation plans to contain BART emission limits for sources subject to BART in order to meet the national goal of preventing any future, and remedying any existing, impairment of visibility in mandatory class I federal areas arising from manmade air pollution. The FIP became effective on March 8, 2013. 78 Fed. Reg. 8478, 8706 (Feb. 6, 2013).

2. EPA is proposing to approve Michigan's March 24, 2009, SIP revisions, including revisions to the state's part 2 New Source Review (NSR) permitting rules; the addition of part 19 rules revising the NSR rules for major sources in nonattainment areas to include the federal NSR reform rules; and other revisions that are

affected by the federal NSR rules. 78 Fed. Reg. 8485 (Feb. 6, 2013).

**Gary Pasheilich** is an attorney in the Environmental, Safety, and Health Practice Group at Squire Sanders (US), LLP in Columbus, Ohio, where his practice focuses on a wide range of issues including air permitting and regulatory compliance.



[www.ambar.org/EnvironSocialMedia](http://www.ambar.org/EnvironSocialMedia)

**Join the Air Quality Committee Online!**

Air Quality Committee Web site:

<http://apps.americanbar.org/dch/committee.cfm?com=NR350100>

Connect to the Section on Facebook:

<http://www.facebook.com/ABAEEnvLaw>

Follow us on Twitter: <http://twitter.com/abaenvlaw>

Join the following groups on LinkedIn:

- ABA Section of Environment, Energy, and Resources: [http://www.linkedin.com/groups?gid=1018127&trk=myg\\_ugrp\\_ovr](http://www.linkedin.com/groups?gid=1018127&trk=myg_ugrp_ovr)
- ABA SEER: Air Quality: [http://www.linkedin.com/groups?gid=4657630&trk=myg\\_ugrp\\_ovr](http://www.linkedin.com/groups?gid=4657630&trk=myg_ugrp_ovr)

We will use the committee list serve, Web site, and social media to keep you informed.

For the committee roster of approximately 550 members and other information, log onto the ABA Web site under “myABA” at <https://apps.americanbar.org/abanet/common/MyABA/home.cfm>.

---

## EPA REGION 6

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

---

### I. Regional Developments

Louisiana, New Mexico, Texas, and more than a dozen other states have joined the newly formed Association of Air Pollution Control Agencies (AAPCA). The association will provide a technical forum to assist states with the application of various aspects of the Clean Air Act (CAA) and associated regulations. AAPCA was founded in the fall of 2012 and expects to be fully operational by April 2013. AAPCA was created as alternative to the 30-year-old National Association of Clean Air Agencies (NACAA; formerly, “STAPPA/ALAPCO”), which has taken policy positions with which Texas and other states did not agree. Texas and several other states have discontinued their association with NACAA.

At the end of 2012, EPA Region 6 sent out official invitations to 17 facilities from Louisiana and Texas to participate in its Episodic Release Reduction Initiative (ERRI). The invitations appear to be to those same facilities selected to participate in the ERRI kickoff meeting held over a year ago. According to EPA, facilities were originally selected based on two factors: (1) the facility belonged to a group with allegedly the largest number of episodic releases to the National Response Center over the past five years; and (2) the facility had allegedly high impacts to environmental justice communities. The ERRI program, modeled after a similar initiative launched in 1999, purports to have four core goals: (1) reduce the number and quantity of releases; (2) provide guidance for local officials and communities on accessing release information on state/federal Web sites; (3) participate in regional response teams to enhance emergency preparedness; and (4) prepare and publish a report. Facilities accepting the invitation would be charged with collecting information and developing best practices that would then be disseminated.

## II. State Updates

### A. Arkansas

On April 2, 2013, the U.S. EPA published approval of the state of Arkansas's New Source Review (NSR) prevention of significant deterioration (PSD) permitting program for greenhouse gas (GHG). 78 Fed.Reg. 19,596. The Arkansas Department of Environmental Quality (ADEQ) worked with EPA to develop a state program to replace the existing federal implementation plan (FIP) GHG permitting program. Arkansas submitted the proposed GHG permitting program SIP revision to EPA in November of 2012. Arkansas's authority to issue air permits for new or modified GHG sources will become effective on May 2, 2013. With this approval, Arkansas is the first state in Region 6 to replace a GHG FIP with a state-run program.

### B. New Mexico

On February 15, 2013, the U. S. EPA, the state of New Mexico, and Public Service of New Mexico (PNM) announced an agreement that outlines the elements of a plan to replace the existing federal plan with a state plan for reducing regional haze and increasing visibility at several national parks and monuments, including measures addressing emission controls at the San Juan Generating Station power plant near Farmington, New Mexico. In response to New Mexico's request for consideration of an alternative approach, EPA granted an administrative stay of a federal plan that was to take effect in July of 2012. New Mexico is in the process of developing a state plan, and will submit to EPA a proposed state implementation plan (SIP) revision for the San Juan Generating Station. An approved state plan would replace the FIP.

### C. Texas

On March 27, 2013, the U.S. EPA moved to dismiss a lawsuit by the Sierra Club seeking to require EPA to promulgate a FIP for Texas that complies with the CAA "good-neighbor" provision in section 110(a)(2)(D)(i)(I) with respect to ozone and fine particulate matter emissions. According to EPA, the D.C. Circuit's recent rejection of its Cross-State Air Pollution Rule (CSAPR) in *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir.

2012) left it without authority to promulgate such a FIP for Texas.

In September 2010, Sierra Club brought suit against EPA, alleging that the agency had failed to either approve a SIP or promulgate a FIP to satisfy the good-neighbor provision with respect to the ozone and fine particulate matter NAAQS for Texas.

Subsequently, in connection with its issuance of the CSAPR, EPA promulgated a FIP covering Texas that was intended to achieve this end. In *EME Homer City*, however, the D.C. Circuit vacated that FIP (as well as FIPs that EPA had issued for other states), holding that EPA must first define states' good-neighbor obligations and give them an opportunity to make a SIP submission addressing those obligations. EPA has not yet promulgated a rule to quantify Texas's good-neighbor obligations with respect to ozone and fine particulate matter. Thus, in its recent court filing, EPA argued that absent reversal of *EME Homer City* by the U.S. Supreme Court, it is without authority to promulgate a good-neighbor FIP at this time. The case is *Sierra Club v. U.S. Environmental Protection Agency*, No. 1:10-cv-01541-CKK (D.D.C.).

The Texas legislature is considering two identical companion bills (Senate Bill 536 and House Bill 788) that would require the Texas Commission on Environmental Quality (TCEQ) to implement an NSR PSD permitting program for GHG sources in Texas, as well as a "title V" federal operating permits program for GHGs. Currently, EPA Region 6 is accepting applications and has issued PSD permits for Texas GHG sources. EPA implemented its program pursuant to a FIP in response to the state of Texas's opposition, and still-pending legal opposition, to EPA's regulation of GHGs. Although EPA is issuing PSD permits for GHGs, neither TCEQ nor EPA is issuing title V permits for GHG-related requirements.

On February 27, TCEQ initiated a rulemaking to create a permit by rule (PBR) to authorize emissions from planned maintenance, start-up, and shutdown (MSS) activities at oil and gas handling and production facilities. The new PBR § 106.359 would provide applicants with a streamlined process for obtaining authorization for planned MSS activities. Under Senate

Bill 1134, passed in 2011, certain oil and gas facilities have until January 5, 2014, to claim the authorization. Without authorization, owners and operators will lose the ability to claim an affirmative defense for unauthorized emissions during MSS activities.

On February 5, the *Federal Register* published EPA's proposed disapproval (the "proposed disapproval") of revisions to the Texas SIP). 78 Fed. Reg. 8074. The proposed disapproval applies to portions of the Texas SIP revisions relating to emergency orders that were submitted by Texas on August 31, 1993; December 10, 1998; February 1, 2006; and July 17, 2006. According to EPA, the Texas SIP revisions do not meet the requirements of the CAA, EPA regulations, or applicable policy and guidelines. EPA is reviewing only those portions of the SIP revisions that are applicable to the issuance of air emergency orders. The non-air portions of the SIP submittals will be returned to the state by EPA on the grounds that they cannot be included in the SIP because "under the CAA, SIPs can only include provisions addressing criteria pollutants and their precursors."

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

---

---

## EPA REGION 7

*Brandon Neuschafer*  
*Bryan Cave LLP*  
*St. Louis, Missouri*

---

### A. Iowa SIP Update

The Iowa Department of Natural Resources (IDNR) is seeking public comment on Iowa's SIP for the 2010 one-hour NO<sub>2</sub> National Ambient Air Quality Standard (NAAQS). In 2012, Iowa was designated unclassifiable/attainment for this standard. Iowa's SIP can be found at [www.iowacleanair.com](http://www.iowacleanair.com). Public comments are due May 8, 2013.

In February 2013, EPA sent a letter to the governor of Iowa recommending that Muscatine County be designated as nonattainment for the 2010 one-hour sulfur dioxide NAAQS, based on data from 2008 through 2011. EPA requested additional information from IDNR on this listing, and IDNR in turn issued public notices seeking information on the proposed listing. EPA expected to finalize the nonattainment designation in the summer of 2013. Correspondence concerning the recommendation is available on EPA's Web site at <http://www.epa.gov/so2designations/region7r.html>.

### B. Nebraska Enforcement Roundup

1. Nebraska recently announced the settlement of an air enforcement action brought against Preferred Sands of Genoa, LLC. Allegations included a failure to comply with operating parameters of the facility's air permit, and various failures to comply with the requirements of NSPS subpart UUU, relating to calciners and dryers in mineral industries. Preferred Sands of Genoa paid a \$15,000 penalty and agreed to undertake a \$15,000 supplemental environmental project to help rehabilitate a recreational area.

### C. Regional Ozone Levels in St. Louis Hit High Mark

Regional ozone data for the St. Louis region, a marginal nonattainment area, reflects that 2012 was one of the worst summers for regional ozone levels in five years. Recent statements from air pollution control officials for the Missouri Department of Natural Resources and Illinois Environmental Protection Agency indicate that if EPA announces more stringent ozone standards next year, much of the region would be in or close to nonattainment status, possibly requiring efforts to address mobile sources of emissions to be enhanced.

*Brandon Neuschafer* is a partner with Bryan Cave LLP in St. Louis, Missouri. He can be reached at [bwneuschafer@bryancave.com](mailto:bwneuschafer@bryancave.com).

---

---

## EPA REGION 8

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

---

### I. State Updates

#### A. Colorado—Potential New Air Regulations for the Oil and Gas Industry

The Colorado Air Quality Control Commission (commission) and its Air Pollution Control Division (division) have proposed significant revisions to Colorado's air regulations governing the oil and gas industry. The division has begun a stakeholder process, which has included suggested language changes to its regulations nos. 3, 6, and 7, as well as common provisions, monthly meetings, and several opportunities for comment. It is expected that the division will begin a formal rulemaking process later this summer, with a possible rulemaking hearing to commence in November 2013. The division has focused its suggested changes on increased control requirements for condensate, produced water, and crude oil tanks, as well as increased leak detection and repair requirements that would apply to most equipment involved in oil and natural gas exploration and production. The revisions come on the heels of a significant rulemaking effort by the commission in late 2012 focused on new setback distances and baseline groundwater modeling, and are being conceptualized as statewide, state-only requirements that are not part of any state implementation plan or other federal process.

#### B. South Dakota

On January 23, 2013, the South Dakota Supreme Court affirmed the Department of Environment and Natural Resources (DENR) issuance of a prevention of significant deterioration (PSD) air permit to Hyperion Refining, LLC (Hyperion). The permit had been the subject of extensive litigation over the past five years, putting on hold plans for the \$10 billion petroleum refinery and power plant in Union County, South Dakota. The refinery would be the first new refinery in the United States since 1976. As contemplated, the refinery would refine up to 400,000 barrels per day of crude from Canadian oil sands into

ultralow sulfur gasoline, heating oil, diesel fuel, and low sulfur jet fuel. While the state's supreme court upheld the permit's issuance in the face of several different legal challenges, it approved the DENR's best available control technology (BACT) determination of 0.007 lb/mmBtu of carbon monoxide for process heaters. Interestingly, part of the DENR's BACT determination relied on emission limits from a refinery that was never permitted or built, despite EPA's cautions against using cancelled permits for BACT analyses. Despite court approval of the PSD permit, the future of the refinery remains in doubt following the lapse on March 15 of Hyperion's deadline to begin construction.

#### C. Wyoming—Wyoming DEQ Releases Ozone Strategy for Upper Green River Basin

On March 14, 2013, the Wyoming Department of Environmental Quality released its ozone strategy designed to bring the Upper Green River Basin (UGRB) area back into attainment under the ozone National Ambient Air Quality Standard. According to Steve Dietrich, Air Quality Division administrator, the strategy details activities that are targeted to be completed and/or started in the next six months and is intended to provide a road map to reduce ozone precursors. The strategy outlines various activities, many of which are designed to be completed before August 2013, including:

- General conformity SIP revisions;
- Mobile monitoring assessments of methane and ozone precursors in the Pinedale Anticline Project;
- Promotion of the implementation of short-term emission reductions on ozone action days;
- Update of oil and gas BACT guidance;
- Improvement of processes for regulatory ambient monitoring;
- Continued collaboration with the BLM, United States Forest Service, and EPA to implement the general conformity rule for nonattainment areas;
- Development of oil and gas guidance revisions to incorporate leak detection and repair for new and modified upstream sources;

- Reconciliation of the oil and gas guidance with the new source performance standards in 40 C.F.R. part 60, subpart OOOO (“Quad O”); and
- Evaluation of the control effectiveness of combusters in the UGRB.

The strategy also identifies rulemaking subject areas that are targeted to commence before August 2013, including incorporation of Quad O and the development of an emissions statement rule, which would require all sources operating in the ozone nonattainment area to report actual emissions of oxides of nitrogen and volatile organic compounds. More information on the strategy can be found at [http://deq.state.wy.us/aqd/downloads/WDEQAQD\\_UGRB\\_OzoneStrategy\\_031113.pdf](http://deq.state.wy.us/aqd/downloads/WDEQAQD_UGRB_OzoneStrategy_031113.pdf).

#### **D. Utah—High Wintertime Ozone Levels in the Uintah Basin**

The Utah Division of Air Quality has observed high wintertime ozone levels at a number of its air quality monitors in the Uintah Basin. As of February 8, 2013, the annual fourth highest daily maximum 8-hour ozone concentration at the Vernal, Roosevelt, Redwash, and Ouray monitors all exceeded 100 parts per billion (ppb) (Vernal—102 ppb; Roosevelt—104 ppb; Redwash—114 ppb; and Ouray—124 ppb). The high 2013 wintertime ozone levels make it more likely that EPA may designate the Uintah Basin as nonattainment for ozone within the next year or two. The high levels also raise the possibility that the basin could be designated as a “moderate” or higher ozone nonattainment area.

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

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

---

## **EPA REGION 9**

Eric L. Hiser

*Jorden Bischoff & Hiser, PLC*  
*Scottsdale, Arizona*

---

### **I. Significant SIP Developments**

#### **A. Proposed Air Pollution Limits for Navajo Generating Station**

On January 18, 2013, EPA proposed new emission limits for the Navajo Generating Station, a 2250 megawatt coal-fired power plant located in northern Arizona on the Navajo Nation. As best available retrofit technology (BART), the proposed rule calls for installation of selective catalytic reduction (SCR) technology, which, in combination with the existing low-NO<sub>x</sub> burners, would achieve a plantwide emission limit for NO<sub>x</sub> of 0.055 lb/mmBtu, resulting in emissions reductions of 84 percent, or 28,500 tons per year, by 2018. According to EPA, at \$2240/ton, these reductions would be cost-effective and would raise electricity rates by less than 1 percent for the plant’s customers. EPA’s analysis also shows that the emission reductions would result in cumulative visibility benefits of 35 deciviews, and perceptible visibility improvements at 11 Class I federal areas. Recognizing the unusual and significant challenges for a five-year compliance date, EPA also included in the proposed rule an “alternative to BART,” which would give the plant an additional five years, until 2023, to install new controls to achieve the emission limit. Two additional alternatives with longer time frames were also included, which EPA would consider if the plant achieved sufficient NO<sub>x</sub> reductions.

#### **B. EPA Finds South Coast Air Basin Meets PM-10 Standard**

EPA proposed on March 25, 2013, to reclassify the South Coast air basin as an area of attainment for the coarse particulate, or PM-10, standard. Data collected since 2008 at 23 monitoring sites from Santa Clarita to Banning show that the region is in compliance with the federal standard, established in 1987 at 150 micrograms per cubic meter. The milestone was achieved through control measures designed to reduce

dust from paved and unpaved roads, livestock activities, gravel operations, and wood burning. EPA also proposed to approve California's maintenance plan, which demonstrates continued achievement of the PM-10 standard for at least the next ten years through control measures already adopted by the state and local air district.

## II. Enforcement

### A. Utah

Edge Products LLC, a Utah company that manufactured and sold electronic devices that allowed owners of diesel pickup trucks to remove emission controls from their vehicles, agreed to pay a \$500,000 civil penalty for violating the Clean Air Act. The company sold more than 9000 of the devices, which resulted in an estimated 158 tons of excess PM emissions. In addition to the civil penalty, the company is also required to offer to buy back the devices it sold, and to perform a mitigation project costing at least \$157,600 to offset the air pollution resulting from its violations of the act.

### B. Hawaii

On February 28, 2013, EPA announced a settlement with Waste Management of Hawaii, Inc. and the city and county of Honolulu for violations of the Clean Air Act at the Waimanalo Gulch Landfill on Oahu. The agreement, which resolves alleged violations of the Clean Air Act from 2002 to 2005 involving construction and operation of a gas collection/control system, requires Waste Management (the landfill's operator) and the city (the owner) to pay a civil penalty of \$1.1 million. The parties also agreed to implement enhanced gas monitoring and to follow fire response procedures in the event of a fire.

*Eric L. Hiser* (ehiser@jordenbischoff.com) is senior environmental partner at Jordan Bischoff & Hiser, PLC, a Scottsdale, Arizona, law firm with a focus on complex PSD and SIP issues.

---

## 2012–13 Air Quality Committee Leadership

---

### Committee Chair

Gale Lea Rubrecht,  
galelea@jacksonkelly.com

### Vice Chairs:

#### Committee Newsletter

Kristin Hines Gladd,  
GladdK@ayreslawgroup.com  
Ben Snowden,  
BSnowden@kilpatricktownsend.com

#### Electronic Communications

Michael Balster,  
michaelbalster@paulhastings.com

#### Membership

Phil Bower, pbower@whdlaw.com

#### Programs

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

#### At-large vice chair for Programs

Howard Hoffman,  
howardjhoffman@gmail.com

#### Publications

Linda Tsang, LTsang@bdlaw.com

#### Social Media

Cheri Budzynski, CBudzynski@slk-law.com  
Laura Swingle, lswingle@jacksonkelly.com

#### The Year in Review

Jonathan Martel,  
Jonathan\_Martel@aporter.com

---