

Air Quality Committee Newsletter

Vol. 16, No. 4

August 2013

MESSAGE FROM THE COMMITTEE CHAIR

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Welcome to the fourth issue of this year's Air Quality Committee Newsletter! In this message, I preview future air quality programs and review our committee accomplishments to date. As the ABA 2012–2013 year draws to a close, please join me in thanking our committee vice chairs for jobs well done.

Membership: Our committee is currently 561 members strong and growing. I thank Membership vice chair Phil Bower for welcoming new committee members by sending to each new member personal letters and e-mails. Phil's welcome e-mails contain information on committee membership benefits including programs, website/social media, the list serve, public service opportunities, and newsletters. Phil also arranged our committee dinner during the 20th Fall Meeting in Austin, Texas. In addition to his responsibilities as Membership vice chair, Phil regularly reports on the ABA's One Million Trees Project and even organized a tree planting project in his community.

Newsletter: Four newsletters in one year is a goal that many committees do not achieve, but our Newsletter vice chairs Kristin Hines Gladd and Ben Snowden have done so. Congratulations to them and to our regional reporters for their hard work keeping us current on air quality developments on a timely and regular basis.

Publications: *The Year in Review* is now an electronic-only publication. The online version provides links to cases and statutory and regulatory materials. You may download the full publication or individual chapters and read it on your desktop, laptop, tablet, or smart phone. The Air Quality Chapter provides a concise summary of court decisions and rulemakings in twenty-three pages. I thank Jonathan S. Martel, committee vice chair for *The Year in Review*, for his work in organizing and editing the Air Quality Chapter. Committee vice chair for publications Linda Tsang has also been busy finding writing opportunities for committee members. *Trends* has featured one or more articles on air quality topics in every recent issue. The November/December 2012 issue of *Trends* includes two articles: "D.C. Circuit Clears Path for GHG Rules, but Politics Remain," by Michael Gerrard; and "Court Vacates EPA 'Adjacency' Determination under the Clean Air Act," by S. Lee Johnson. An article in the January/February 2013 issue of *Trends*, "The Cross-state Air Pollution Rule: Will EPA Learn from Experience?" by Mohammad O. Jazil and Joseph A. Brown, discusses EPA's transport rule. In the March/April 2013 issue, Trish McCubbin examines "Regulation of Air Pollutants in the Obama Administration." The May/June 2013 issue of *Trends* includes two articles discussing different national standards and enforcement of standards regulating fine particulate matter (PM_{2.5}): (1) "Got Mask? All Choked Up in Beijing," by Margret J. Kim and Robert E. Jones; and (2) "D.C. Circuit PM_{2.5} Decision Raises Challenges for PSD Permit Applicants," by Margaret Peloso.

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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

September 24, 2013
The State of Our State and Beyond: Local and National Perspectives on Grid Modernization, Infrastructure Resiliency, and Carbon Emissions Reduction Initiatives
New Jersey Law Center
New Brunswick, NJ
Primary Sponsor: New Jersey State Bar Association

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

January 24-26, 2014
Winter Council
The Sanctuary
Scottsdale, AZ

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

April 10-11, 2014
ABA Petroleum Marketing Attorneys' Meeting
The Ritz-Carlton Hotel
Washington, DC

May 2-4, 2014
Spring Council
The Hutton Hotel
Nashville, TN

June 4-6, 2014
32nd Annual Water Law Conference
The Red Rock Resort, Casino and Spa
Las Vegas, NV

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

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Social Media: Cheri Budzynski and Laura Swingle, vice chairs for Social Media, regularly post air quality developments and Section and Committee activities on LinkedIn and Twitter. We now have forty-seven followers on Twitter and seventy-nine members have joined our Air Quality Subgroup on LinkedIn. We hope to see more of our members engaged in discussions and exchanging information using social media.

Website/List Serve: Thanks to the efforts of our vice chair for Electronic Communications, Michael Balster, our committee website is one of the most viewed SEER committee websites. Our Committee website contains Hot News alerts; contact information for committee leadership; a membership roster; information on committee public service projects; and links to the committee list serve, programs and podcasts, books, blog articles, and other resources on air quality issues. Since last August, we have used the list serve more than fifty times keep you informed of air quality developments, Section and committee activities, and opportunities to become involved. Keep up the good work sharing substantive materials, such as new guidance documents, court decisions, rule makings, or other air quality developments, for distribution to the committee list serve and posting on our committee website, Air Quality Subgroup on LinkedIn, or Twitter.

21st Fall Conference: Air Quality practitioners will not want to miss the Fall Conference in Baltimore in October. On Wednesday, October 9, 2013, we will partner with the Alliance for Community Trees and a local nonprofit, the Parks & People Foundation, for tree planting in the morning followed by a two-hour session entitled “How to Get Hired by In-house Counsel.” The agenda for Thursday and Friday includes plenary and break-out sessions on air quality topics. Plenary sessions are: “News from the Capitol: Administration and Congressional Priorities for Energy and Environmental Law and Policy” and “From the Top: Second Term Priorities and Perspectives from Senior EPA Officials,” featuring Janet McCabe, U.S. EPA Deputy Assistant Administrator, Office of Air and

Radiation, as well as the assistant administrators for water and waste.

The following four break-out sessions may be of interest: (1) “Clean Air Developments Every Lawyer Should Know” will provide an overview of Section 112 of the Clean Air Act and illustrate those provisions using the new Boiler MACT and MATS standards for power plants, emission standards for oil and gas sources, and changes in regulation of emissions during periods of startup, shutdown, and malfunction for various sources. Confirmed speakers are Wendy Blake, Assistant General Counsel, Air and Radiation Law Office, Office of General Counsel, U.S. EPA; F. William Brownell, Hunton & Williams, LLP (Washington, D.C.); and Julie R. Domike, Kilpatrick Townsend & Stockton LLP (Washington, D.C.). (2) “State Authority on Climate Change: Where Are the Commerce Clause Boundaries?” Confirmed speakers are Shannon S. Broome, Katten Muchin Rosenman LLP (Washington, D.C.) and Professor Robert Percival of the University of Maryland School of Law. (3) “Environmental Markets 2.0: The Evolving Use of Market-based Mechanisms.” Confirmed speakers are: D. Cameron Prell, McGuire Woods LLP (Washington, D.C.) and Tauna M. Szymanski, Hunton & Williams, LLP (Washington, D.C.). (4) “Cooperative Federalism: Under Assault or In Balance?” Confirmed speakers are Jon Mueller, Vice President for Litigation, Chesapeake Bay Foundation (Annapolis, MD); David Paylor, Virginia Department of Environmental Quality (Richmond, VA); and Katie Sweeney, General Counsel, National Mining Association (Washington, D.C.). While not air-quality specific, other break-out sessions that may be of interest include oral arguments and presentations by well-known trial attorneys and a hands-on demonstration of advanced technology and ethical issues.

In addition to continuing legal education opportunities, there will be networking breaks, an “interest area” luncheon, a speed networking break for young lawyers and law students, and technical roundtables by environmental consultants and service providers. The Section dinner event will be at the American Visionary Art Museum, and we will organize a committee dinner

on Friday, October 11. Section leadership and new and returning committee chairs and vice chairs will meet on Saturday, October 12.

43rd Spring Conference: Program proposals for the 43rd Spring Conference in Salt Lake City on March 20-22, 2014 were due June 5, 2013. Among the program proposals submitted by our committee leadership are: (1) “Preparing for the Worst after West: The Regulatory Response to Recent Industrial Disasters, and How Lawyers Can Prepare for and Handle High-profile Accidents”; (2) “Nearly a Quarter Century Later: Is It Time for Significant Amendments to the Clean Air Act and If So, What Should Change?”; (3) “Ambient Air Monitoring to Assess Air Quality and Health Impacts Associated with Oil and Gas and Other Sources of Emissions”; and (4) “Up in the Air: Air Quality and Greenhouse Gas Implementation and Permitting Developments You Need to Know.” We are also co-sponsoring the In-House Counsel Committee’s program proposal on “Good Internal Environmental Auditing Practices.”

Quick Teleconferences/Webinars/Committee Conference Calls: Our vice chairs for Programming have arranged for two Quick Teleconferences (QTs). Jonathan Peress recently organized a QT in June on the expanding intersection between EPA and FERC, and Shannon Broome organized a QT in February on EPA’s boiler MACT and commercial and industrial solid waste incinerator (CISWI) rules. The Section continues to express interest in vice chair for Programming Marty Booher’s proposal for a QT on EPA’s Air Quality Agenda for President Obama’s Second Term.

Upcoming Events: The 22nd Fall Conference, chaired by Air Quality Committee member John Jacus, will be held at the Trump National Doral Golf Resort & Spa in Miami on October 8-11, 2014. Watch for further details on the Section website, Twitter, and Facebook, and via Section e-mail.

EPA REGIONAL REPORTS

EPA HEADQUARTERS

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SIP Requirements Rule: On June 6, 2013, EPA published a proposed rule titled “Implementation of the 2008 National Ambient Air Quality Standards for Ozone: State Implementation Plan Requirements” addressing state implementation plan (SIP) requirements for the 2008 ozone National Ambient Air Quality Standards (NAAQS) of 0.075 parts per million (ppm) averaged over eight hours. 78 Fed. Reg. 34,178. The proposed rule, called “SIP Requirements Rule,” includes requirements pertaining to attainment demonstrations, reasonable further progress (RFP), emission inventories, reasonably available control technology (RACT), new source review in nonattainment areas (NAAs), deadlines for SIP submissions and compliance with emission control measures in the SIP, and other implementation-related requirements. In addition, EPA addresses antibacksliding requirements that would apply when the 1997 ozone NAAQS is revoked. EPA previously revoked the 1997 ozone NAAQS for purposes of transportation conformity (77 Fed. Reg. 30,160 (May 21, 2012)) and proposes to revoke the 1997 ozone NAAQS for all other purposes, including antibacksliding requirements, on the date the final SIP Requirements Rule for the 2008 ozone NAAQS is published in the *Federal Register*. EPA held a public hearing in Washington, D.C., on June 25, 2013. 78 Fed. Reg. 34,964 (June 11, 2013). Comments due Sept. 4, 2013. 78 Fed. Reg. 44,485 (July 24, 2013).

For SIP submission deadlines, EPA proposes two approaches. Under one approach, states would submit each required SIP element separately according to the time periods specified in section 182 of the Clean Air Act (CAA). Those time periods are: twenty-four months for emission inventories and RACT SIPs; three years for 15 percent RFP plans for Moderate and above areas, and attainment plans for Moderate areas;

and four years for attainment plans and demonstrations and 3 percent per year RFP plans for Serious and above areas. These periods would run from the effective date of an area's designation for the 2008 ozone NAAQS. Under the alternative approach, called "State's Choice," the state would have the choice of meeting the statutory deadline for each required SIP element, or following a consolidated submittal approach. For states electing the latter, all of the required SIP elements for a NAA would be submitted at one time, no later than thirty months after the effective date of the area's designation for the 2008 ozone NAAQS.

For modeling and attainment demonstration SIPs, EPA proposes to continue to require photochemical modeling for Serious and higher-classified areas and for multistate NAAs and to require states with an area classified as Moderate to submit an attainment demonstration based on photochemical modeling or another equivalent analytical method. EPA is also proposing that control measures relied upon to demonstrate attainment should be implemented by the beginning of the last full ozone season before the area's attainment date.

For purposes of the RFP requirement, EPA proposes that all SIP-approved or federally promulgated emissions reductions that occur after the baseline emissions inventory year are creditable. Additionally, EPA proposes that all emission reductions creditable toward meeting RFP requirements must be from sources located within the NAA; however, if the Agency receives a "clear legal justification" for allowing credit for reductions outside the NAA to satisfy the RFP requirements for the 2008 ozone NAAQS, EPA "will seriously consider including this approach in the final rule." 78 Fed. Reg. 34,178, 34,191.

EPA proposes that the RFP plan for a 2008 NAA provide for a 15 percent reduction in volatile organic compound (VOC) emissions from the baseline emissions in the six years following the baseline emissions inventory year if no portion of that 2008 NAA has already fulfilled the 15 percent RFP plan requirement for VOC. If the 2008 NAA is classified as Serious or higher, the RFP plan for that 2008 NAA

must, in addition, achieve an average of 3 percent additional emissions reductions per year for each subsequent three-year period after the conclusion of the initial six-year period. Alternatively, if an area can demonstrate that it has in fact achieved a 15 percent reduction in VOC emissions from a 1990 baseline, EPA proposes to allow that area to substitute nitrogen oxide (NO_x) reductions for VOC reductions to meet the 15 percent RFP requirement. Even if EPA does not finalize the proposal to allow all areas to substitute NO_x reductions for VOC reductions, EPA proposes to allow such substitution for areas located in the Ozone Transport Region that would be subject to the 15 percent RFP requirement for the first time as a designated NAA for the 2008 ozone NAAQS.

For 2008 ozone NAAs that consist entirely of one or more NAAs, or pieces of NAAs, for a former ozone NAAQS where such areas fulfilled the 15 percent RFP plan requirement for VOC for that former ozone NAAQS, EPA proposes that such areas are not required to fill that requirement again. EPA proposes to interpret the RFP requirement to mean that a Moderate area must achieve a 15 percent reduction in baseline VOC emissions but may substitute NO_x emission reductions for VOC emission reductions. Serious and higher-classified areas would be required to achieve a total of 18 percent emissions reduction in the first six years and NO_x emission reductions could be substituted for VOC emission reductions.

For 2008 ozone NAAs that include portions consisting of all or a piece of one or more NAAs for a previous NAAQS and that fulfilled the 15 percent RFP plan requirement for VOC for that previous NAAQS and portions that have never been subject to or never have fulfilled the 15 percent RFP plan requirement for VOC for a previous NAAQS, EPA proposes that the state choose between: (1) treating the entire area as an area that never met the 15 percent requirement; or (2) treating the 2008 NAA as divided into two portions: the former non-RFP plan portion and the former RFP plan portion. For the former non-RFP plan portion of the 2008 NAA, the plan would establish a separate 15 percent VOC reduction requirement, but VOC emissions reductions to meet the 15 percent requirement could come from across the entire 2008

NAA if the former RFP plan portion of the area also has a VOC reduction target as part of its RFP plan for the 2008 ozone NAAQS. If the RFP plan for the 2008 ozone NAAQS for the former NAA relies solely on NO_x reductions, then the portion of the NAA never before subject to nonattainment requirements would remain responsible for the 15 percent VOC reductions.

Additionally, EPA is taking comment on an air quality-based approach that would require states to translate an area's RFP emissions reduction targets (in tons) into ozone improvement targets (ppb) based on air quality modeling or other analyses. The emission reduction targets for the area would be expressed in terms of the pollutant (VOC or NO_x) most effective in reducing ozone concentrations in the area. RFP milestones would be satisfied if the area implements the target emissions-reduction strategies and achieves the targeted ozone air quality improvement over the relevant RFP assessment period. Another approach would be to give states additional RFP credit given for reducing VOCs with the greatest ozone-forming potential.

For the emission inventory for the RFP requirement, EPA proposes that states use the calendar year for the most recently available triennial emission inventory at the time RFP plans are developed or an appropriate and justifiable alternate year as the baseline year. If states choose a pre-2011 baseline year, EPA proposes that the six-year period for achieving the 15 percent reduction starts in January of the year following the selected baseline year so that the six-year period concludes more than one year prior to the start of the attainment year for the area. For a multistate NAA, all states associated with the NAA must agree on the same alternate year to use as the baseline year for RFP.

Because all of the NAAs meeting the criteria for mandatory inspection and maintenance (I/M) under the 2008 ozone NAAQS are already operating I/M programs, no new I/M programs are currently required. If new I/M programs are required in the future, I/M SIPs would be due and compliance required no later than one year and four years,

respectively, after the effective date of the area's nonattainment designation and classification for the 8-hour ozone standard.

For the contingency measures requirement, EPA proposes to interpret it in the same manner it has interpreted that requirement for the 1-hour and 1997 ozone NAAQS, except EPA proposes that for Moderate and above areas that have completed the initial 15 percent VOC reduction required by the CAA, the 3 percent emissions reductions of the contingency measures may be based entirely on NO_x controls if that is what the state's analyses have demonstrated would be most effective in achieving attainment. EPA is soliciting comments on how Extreme areas can demonstrate they have implemented all feasible measures for purposes of their RFP SIPs and that their reasonably available control measures (RACM) analyses can legally address CAA contingency measure requirements.

After July 20, 2012, the effective date of designations for the 2008 ozone NAAQS, a permit applicant of a major new source or major modification of an existing source in a NAA for the 2008 ozone NAAQS must satisfy the applicable requirements for the area's highest nonattainment classification, whether for the 2008 ozone NAAQS or a previous ozone NAAQS for which the area remains nonattainment. During the interim period between nonattainment designations and a new EPA-approved SIP for the 2008 ozone NAAQS, states must follow Appendix S of 40 C.F.R. Part 51, except that no waivers may be granted beyond eighteen months from the date of designation.

EPA is encouraging states to consider emission reductions from energy efficiency/renewable energy policies and programs, land use planning, and travel efficiency. EPA is also encouraging states to take a multipollutant approach to ozone, PM_{2.5}, regional haze, and, where applicable, air toxics when developing 2008 ozone SIPs. *Id.* at 34,207.

In addition to SIP requirements, the proposed rule addresses antibacksliding issues related to the transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS. Upon revocation of the 1997 ozone

NAAQS, which EPA proposes would occur upon publication of the final SIP Requirements Rule for the 2008 ozone NAAQS in the *Federal Register*, antibacksliding provisions would apply to an area in accordance with its designations and, as applicable, its nonattainment classifications for the 1997 (and, if applicable, 1-hour) ozone NAAQS at the time of revocation of the 1997 ozone NAAQS.

For antibacksliding requirements for the transition from the 1997 ozone NAAQS to the 2008 ozone NAAQS, EPA proposes the following as “applicable requirements”: (1) reasonably available control technology (RACT); (2) vehicle I/M programs; (3) major source applicability cutoffs for purposes of RACT; (4) rate of progress and/or RFP reductions; (5) Clean Fuels Fleet program; (6) clean fuels for boilers; (7) transportation control measures during heavy traffic hours; (8) enhanced (ambient) monitoring; (9) transportation controls; (10) vehicle miles traveled provisions; (11) NO_x requirements under section 182(f) of the CAA; (12) attainment demonstrations; (13) nonattainment contingency measures; (14) nonattainment new source review (NSR) requirements; and (15) Section 185 fees for Severe and Extreme areas. *Id.* at 34,215.

EPA proposes not to include the Stage II vapor recovery program in the list of measures that need to be retained for antibacksliding purposes during transition to the 2008 ozone NAAQS. Areas that already have Stage II programs in their SIPs could remove these programs upon making appropriate showings, following EPA approval of such SIP revisions. These SIP revisions would not need to move Stage II requirements to contingency measures when Stage II is removed from the active SIP. The proposal would not apply to ozone transport region (OTR) states, which have an independent CAA Section 184(b)(2) requirement to implement Stage II programs or measures capable of achieving emissions reductions comparable to those achieved by Stage II.

For NSR antibacksliding requirements, EPA proposes to replace its proposed NSR Anti-Backsliding Rule. EPA’s final rule will address all outstanding NSR antibacksliding issues for both the 1-hour and 1997

ozone NAAQS. These include how ongoing obligations to implement antibacksliding requirements pertaining to NSR thresholds and offset ratios under the 1-hour and 1997 ozone NAAQS can be terminated in light of revocation of the 1-hour ozone NAAQS and the impending revocation of the 1997 ozone NAAQS. *Id.* at 34,212.

For Section 185 antibacksliding requirements for the 1-hour ozone NAAQS, EPA is addressing the issue for individual Severe and Extreme areas in a separate rulemaking. For Section 185 antibacksliding requirements for the 1997 ozone NAAQS, EPA notes that no fees can be triggered until 2020 (the calendar year after the earliest attainment deadline for areas designated Severe or Extreme for the 1997 ozone NAAQS). *Id.* at 34,213. EPA proposes to include an antibacksliding requirement for NAA contingency measures for failure to attain or to meet an RFP milestone for the 1997 ozone NAAQS by the applicable deadlines for that NAAQS.

Table 2, at page 34,218 of the preamble to the proposed rule summarizes the proposed NSR/prevention of significant deterioration (PSD) obligations and other applicable requirements based upon the designation of an area for the 2008 NAAQS and for the 1-hour and 1997 ozone NAAQS at the time of revocation. In areas initially designated attainment for the 2008 ozone NAAQS but that were still designated nonattainment for the 1997 ozone NAAQS as of the effective date of their attainment designations under the 2008 ozone NAAQS, nonattainment NSR would continue to apply until the 1997 ozone NAAQS is revoked. After the 1997 ozone NAAQS is revoked, areas designated as attainment for the 2008 ozone NAAQS would be required to implement PSD requirements.

For an area designated attainment for the 2008 ozone NAAQS and redesignated to attainment for the 1997 ozone NAAQS (as of revocation of the 1997 ozone NAAQS), EPA proposes as its preferred approach that the area’s approved maintenance plan will satisfy its maintenance plan obligation for the 2008 ozone NAAQS.

For areas designated attainment for the 2008 ozone NAAQS and maintenance for the 1997 ozone NAAQS (as of the date of revocation of the 1997 ozone NAAQS), EPA proposes that the area's approved maintenance plan for the revoked 1997 ozone NAAQS satisfies both its obligations for maintenance for the 2008 ozone NAAQS and its obligation to submit a second approvable maintenance plan for the revoked 1997 ozone NAAQS.

For areas designated attainment for the 2008 ozone NAAQS and nonattainment for the 1997 ozone NAAQS (as of revocation of the 1997 ozone NAAQS), EPA's preferred approach is that such areas would not be required to adopt any outstanding applicable requirements for the revoked 1997 standard. EPA also proposes that the approved PSD SIPs for these areas satisfy the obligation to submit an approvable maintenance plan for the 2008 ozone NAAQS under Section 110(a)(1). Alternatively, EPA proposes that the area be required to show maintenance for the 2008 ozone NAAQS. This maintenance showing, which would not be a formal SIP revision, would be due three years after the effective date of designations for the 2008 ozone NAAQS and would contain a demonstration of continued maintenance of the 2008 ozone NAAQS in the area for ten years from the effective date of the area's designation as attainment for the 2008 ozone NAAQS.

For areas that are designated nonattainment for both the 2008 ozone NAAQS and a prior ozone NAAQS (as of the revocation of the 1997 NAAQS), EPA proposes that such areas would be subject to applicable requirements for that prior NAAQS, as well as the pertinent requirements for the current 2008 ozone NAAQS.

For areas designated nonattainment for the 2008 ozone NAAQS and maintenance for the 1997 ozone NAAQS, EPA proposes that the area's approved Section 175A maintenance plan for the revoked 1997 ozone NAAQS would satisfy the obligation to submit a second approvable maintenance plan under Section 175A for the revoked 1997 ozone NAAQS.

Fifteen areas listed in Table 1 of Appendix D, at page 34,232, which are designated nonattainment for the 2008 ozone NAAQS and, at the time of proposal, nonattainment for the 1997 ozone NAAQS but not the 1-hour ozone NAAQS, would be subject to antibacksliding requirements for the 1997 ozone NAAQS unless they are redesignated to attainment for the 1997 standard before its revocation. EPA is also proposing that once the nonattainment NSR antibacksliding requirement(s) for the 1997 ozone NAAQS cease to apply, PSD would apply and the state may request that the corresponding NSR requirements be removed entirely, rather than be retained in the SIP as a maintenance plan contingency measure.

Eighteen areas listed in Table 2 of Appendix D, at page 34,233, which are currently designated nonattainment for all three NAAQS, would be subject to applicable requirements, including nonattainment NSR, for the 1-hour and 1997 ozone NAAQS (to the extent those requirements have not been suspended by a Clean Data Determination), unless they have been redesignated to attainment for the 1997 ozone NAAQS before its revocation. These areas must apply nonattainment NSR in accordance with their highest nonattainment classification under any ozone standard for which they are (or were at the time of revocation) designated nonattainment, as well as any Section 185 requirements for areas classified Severe or Extreme at the time of revocation for a prior standard.

EPA proposes two procedures by which a state may: (1) demonstrate it is no longer required to adopt any applicable requirements for an area that have not already been approved into the SIP for a revoked ozone NAAQS; (2) remove nonattainment NSR provisions from the SIP; and (3) shift to the contingency measures portion of the SIP requirements that are already contained in the SIP. The two proposed procedures are: (1) formal redesignation of the area to attainment for the 2008 ozone NAAQS; and (2) a "redesignation substitute" procedure for a revoked NAAQS.

To qualify for this "redesignation substitute," a state would make a showing that addresses the substance of

the redesignation criteria. After notice-and-comment rulemaking, EPA approval would have the same effect on the area's nonattainment antibacksliding obligations as would a redesignation to attainment for the revoked standard. EPA proposes that the showing, based on the CAA's criteria for redesignation to attainment (CAA Section 107(d)(3)(E)), would include attainment of the relevant revoked 1-hour or 1997 ozone NAAQS; a showing that attainment was due to permanent and enforceable emissions reductions; and a demonstration that the area can continue to maintain the standard over the next ten years. Redesignation criteria would be met by the existing approved SIP, under which the area has attained the revoked standard, and reinforced by the requirements for the new 2008 ozone NAAQS. Under both proposed procedures, a state seeking to revise its SIP to remove antibacksliding measures from its SIP must demonstrate that such revision would not interfere with attainment or maintenance of any applicable NAAQS or any other requirement of the CAA.

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Join the ABA SEER: Air Quality LinkedIn group: http://www.linkedin.com/groups?gid=4657630&trk=myg_ugrp_ovr

EPA REGION 1

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I. Regional Updates

On June 7, 2013, the nine states participating in the Regional Greenhouse Gas Initiative (RGGI) announced the results of their 20th auction of carbon dioxide (CO₂) allowances. At the June 5, 2013 auction, 38,782,076 CO₂ allowances were sold at a clearing price of \$3.21. The auction generated \$124.4 million for the RGGI states. Allowances sold represent 100 percent of the allowances offered for sale by the nine states. Bids for the CO₂ allowances ranged from \$1.98 to \$5.55 per allowance.

http://www.rggi.org/docs/Auctions/20/Auction_20_Market_Monitor_Report.pdf

II. State Updates

A. Connecticut

1. The Connecticut Department of Energy and Environmental Protection (DEEP) issued a final study on Connecticut's existing Renewable Portfolio Standard on April 26, 2013. This analysis was called for by energy legislation, Public Act 11-80, passed in June 2011. A copy of the final study is available at <http://www.dpuc.state.ct.us/DEEPenergy.nsf/c6c6d525f7cdd1168525797d0047c5bf/6c38cc027dda2d0a85257b590049aa48?OpenDocument>

2. DEEP provided notice of its intent to amend the SIP to address the 2010 one-hour sulfur dioxide (SO₂) NAAQS. A copy of the SIP submittal is available at www.ct.gov/deep/lib/deep/air/so2/ct_so2-infr-sip_final.pdf.

B. Maine

1. The Maine Department of Environmental Protection (DEP) has proposed amendments to its perchloroethylene dry cleaner regulations intended to simplify compliance and improve enforceability. <http://www.maine.gov/tools/whatsnew/attach.php?id=510396&an=2>

2. The DEP is proposing to amend its solvent cleaning regulation by adding a new section regulating industrial solvent cleaning. The new provisions would apply to virtually any activity in which solvent cleaning takes place at an industrial facility, and not just to solvent cleaning machines, as under the existing regulation. <http://www.maine.gov/tools/whatsnew/attach.php?id=518859&an=2>

C. Massachusetts

1. On April 22, 2013, the Patrick-Murray administration launched the Massachusetts Electric Vehicle Incentive Program, which will provide \$2.5 million in grant funding to municipalities across the Commonwealth to help purchase electric or plug-in hybrid passenger vehicles and install dual electric charging stations. <http://www.mass.gov/eea/pr-2013/earth-day-launch-of-mevi-program.html>

2. The Massachusetts Department of Environmental Protection (DEP) penalized the contractor and the homeowner for asbestos violations found during an inspection at a residence in Milton, MA. The Boston-based contractor was penalized \$53,937, with \$9,000 payable to the Commonwealth and the remaining \$44,937 suspended. The owners of the residence were jointly penalized \$31,100, with \$3,000 payable and the remaining \$28,100 suspended provided no further violations occur within the next year. <http://www.mass.gov/eea/agencies/massdep/news/releases/landworks-industries-penalized-for-asbestos-violations.html>

3. The DEP recently held a public comment period on its Draft 2011 Greenhouse Gas Emission Factors. The Massachusetts greenhouse gas (GHG) reporting rule requires all retail sellers of electricity to report GHG emissions associated with the electricity they sell. The final emission factors will be used by retail sellers to report GHG emissions. <http://www.mass.gov/eea/docs/dep/air/climate/rse11tsd.pdf>

D. New Hampshire

1. The New Hampshire Department of Environmental Services (DES) is proposing to delete the sulfur standards for gaseous fuels from the general

recordkeeping requirements for combustion devices. <http://des.nh.gov/organization/commissioner/legal/rulemaking/documents/enva903.03-ip.pdf>

2. The DES is proposing to readopt and revise the emission standards for particulate matter and visible emissions from stationary fuel-burning devices. The changes are intended merely to clarify the rules, but the DES expects that substantive changes may be required later this year. <http://des.nh.gov/organization/commissioner/legal/rulemaking/documents/enva2000-ip.pdf>

E. Rhode Island

1. A shipbuilding and repair facility in Warren, Rhode Island, has agreed to pay a \$24,000 penalty and spend at least \$230,000 on a clean air project to resolve EPA claims that it violated both federal and state clean air regulations. The facility builds and repairs vessels, such as transport ferries and small cruise ships. Another Rhode Island boatyard will pay a \$31,500 penalty and take steps to reduce emissions of volatile organic compounds (VOCs) from paints and thinners used at its Portsmouth, Rhode Island, facility under a settlement with EPA.

<http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/d3b7ef94183c3d7f85257b67006616c2!OpenDocument>.
<http://yosemite.epa.gov/opa/admpress.nsf/d0cf6618525a9efb85257359003fb69d/c99c88801692b09485257b5e00598d50!OpenDocument>

2. In March 2013, the Rhode Island Department of Environmental Management issued revised air quality modeling guidance for stationary sources. <http://www.dem.ri.gov/pubs/regs/regs/air/airtoxmd.pdf>

F. Vermont

On March 29, 2013, the Vermont Agency of Natural Resources proposed a rule to limit idling of motor vehicles. <http://www.anr.state.vt.us/air/MobileSources/docs/Notice%20with%20Draft%20Rule.pdf>

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During his twenty-five years of practice, Dixon has been involved in hundreds of air permitting, enforcement, and rulemaking matters representing a wide variety of business and manufacturing interests on the federal level and in dozens of states.

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EPA REGION 2

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NYSDEC Repeals Regulation on Indirect Sources of Air Pollution

Effective May 19, 2013, the New York State Department of Environmental Conservation (NYSDEC) repealed its regulation entitled “Indirect Sources of Air Contamination,” previously codified at 6 N.Y.C.R.R. Part 203. The regulation, enacted in 1971, required a permit for any new facility located in Manhattan south of 60th Street that would “indirectly” cause air pollution by resulting in associated vehicular traffic. In the rulemaking document, NYSDEC concluded that the regulation is no longer needed because carbon monoxide concentrations (such as those resulting from vehicles using a new parking garage) in the area are now far below the carbon monoxide NAAQS and because new transportation projects (such as tunnels and highways) are typically subject to environmental reviews under the National Environmental Policy Act, the State Environmental Quality Review Act, and/or the Transportation Conformity provisions of the Clean Air Act.

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The Year in Review

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EPA REGION 5

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I. Judicial Developments

1. On July 8, 2013, the U.S. Court of Appeals for the Seventh Circuit decided *United States v. Midwest Generation, LLC, et al.*, 7th Cir., No. 12-1026 and No. 12-1051, which considered whether the past failure to obtain a PSD permit and employ Best Available Control Technology (BACT) per 42 U.S.C. § 7475 constitutes a “continuing violation” of the Clean Air Act for purposes of the statute of limitations in an enforcement action. In 1999, Midwest Generation acquired several electric generating plants that the previous owner had unlawfully modified without obtaining permits or implementing BACT controls. The United States brought an enforcement action against Midwest Generation in 2009.

The court held that enforcement action was barred by the five-year federal statute of limitations meaning that any enforcement action based on failure to meet preconstruction permitting requirements would have to be brought within five years after construction. The court rejected the government’s argument that every day a plant operates without a permit (and, therefore, without BACT controls) constitutes a new violation of the Clean Air Act’s preconstruction permitting requirements, although it recognized the possibility that continued operation without BACT controls may violate some other requirement of the statute, regulations, or implementation plan. The court reasoned that “[o]nce the statute of limitations expired, Commonwealth Edison was entitled to proceed as if it possessed all required construction permits.” The Seventh Circuit’s opinion accords with decisions from the Eighth and Eleventh Circuit Courts of Appeals holding that the continued operation of a new or modified plant without obtaining a construction permit does not constitute a new violation of the Clean Air Act. *See Sierra Club v. Otter Tail Power Co.*, 615 F.3d 1008 (8th Cir. 2010); *National Parks and*

Conservation Association Inc. v. Tennessee Valley Authority, 502 F.3d 1316 (11th Cir. 2007).

2. On March 28, 2013, the United States Court of Appeals for the Sixth Circuit issued a decision in *United States v. DTE Energy*, 711 F.3d 643 (6th Cir. 2013). The court considered whether EPA could challenge certain preconstruction emissions projections that would increase following a construction project in Michigan. The district court had concluded that such a determination was premature if reporting requirements were met, and that enforcement will be warranted only if and when post-construction monitoring demonstrates an increase in emissions. EPA challenged the decision, and the Sixth Circuit reversed finding that EPA may bring limited preconstruction enforcement to ensure that emissions projections are properly made.

II. Regional Developments

A. Illinois

In April, EPA issued a final rule to add a “small container exemption” for pleasure craft surface coating operations in the Chicago and Metro-East St. Louis 8-hour ozone nonattainment areas. 78 Fed. Reg. 23,495 (Apr. 19, 2013).

In May, EPA issued proposed and direct final rules to resolve issues raised in the June 7, 2012, (77 Fed. Reg. 33,659) conditional approval of certain VOC content limits for coatings and associated provisions for additional consumer products categories. Additionally, EPA also approved language for VOC limit applicability for architectural and industrial maintenance coatings. 78 Fed. Reg. 26,301; 78 Fed. Reg. 26,258 (May 6, 2013).

Also in May, EPA issued proposed and direct final rules to approve an Illinois SIP revision to reflect current NAAQS for ozone and particulate matter (PM) and to add new incorporations by reference associated with ozone, lead, and particulate matter NAAQS into the SIP. The direct final rule becomes effective July 22, 2013, unless EPA receives adverse comments by June 24, 2013. 78 Fed. Reg. 30,770; 78 Fed. Reg. 30,829 (May 23, 2013).

B. Indiana

EPA issued a supplement to its proposed approval for the Indianapolis area redesignation to attainment for the 1997 annual NAAQS for PM_{2.5}. The supplement addresses several issues, including the effects of the August 21, 2012, vacatur of the Cross-State Air Pollution Control Rule and the January 4, 2013, remand of two final rules implementing the 1997 PM_{2.5} standard. 78 Fed. Reg. 20,857 (Apr. 8, 2013).

EPA issued proposed and direct final rules to approve an Indiana SIP revision for particulate matter to incorporate the 2006 PM_{2.5} NAAQS and remove the annual PM₁₀ NAAQS. 78 Fed. Reg. 23,492; 78 Fed. Reg. 23,524 (Apr. 19, 2013).

EPA issued proposed and direct final rules to amend the Indiana standards for nitrogen dioxide (NO₂) and SO₂ to be consistent with the national standards promulgated in 2010. The direct final rule becomes effective July 15, 2013, unless EPA receives adverse comments by June 13, 2013. 78 Fed. Reg. 28,143; 78 Fed. Reg. 28,173 (May 14, 2013).

EPA issued proposed and direct final rules to revise the Lake and Porter SIPs for the 1997 8-hour ozone standard and the 1997 annual PM_{2.5} standard to replace the previously approved motor vehicle emissions budgets with those developed using EPA's Motor Vehicle Emissions Simulator (MOVES) 2010a emissions model. The direct final rule becomes effective July 15, 2013, unless EPA receives adverse comments by June 14, 2013. 78 Fed. Reg. 28,550; 78 Fed. Reg. 28,503 (May 15, 2013).

C. Ohio

EPA issued proposed and direct final rules 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 MOVES emissions model. 78 Fed. Reg. 16,826; Fed. Reg. 16,785 (Mar. 19, 2013).

EPA issued proposed and direct final rules to fully approve SIP revisions for particulate matter rules that

establish work practices for coating operations; add a section clarifying that sources can be subject to both stationary source and fugitive source PM restrictions; and add a PM emission limitation exemption for jet engine testing. 78 Fed. Reg. 19,128; 78 Fed. Reg. 19,164 (Mar. 29, 2013).

EPA approved several state VOC rules to include source categories covered by the 2008 Control Technique Guideline documents as well as several other miscellaneous rule revisions for attainment of the 2008 ozone standard. 78 Fed. Reg. 24,990 (Apr. 29, 2013).

EPA issued proposed and direct final rules to revise the Canton-Massillon, Ohio, 1997 8-hour ozone maintenance air quality SIP to replace the previously approved motor vehicle emissions budgets with budgets developed using EPA's MOVES emissions model. The direct final rule becomes effective July 15, 2013, unless EPA receives adverse comments by June 14, 2013. 78 Fed. Reg. 28,551; 78 Fed. Reg. 28,498 (May 15, 2013).

D. Minnesota

Due to adverse comment, EPA has withdrawn a January 31, 2013, direct final rule (78 Fed. Reg. 6733) approving a revision to the Minnesota SIP. 78 Fed. Reg. 18,241 (Mar. 26, 2013).

E. Wisconsin

EPA has proposed to approve a SIP revision to amend the state's vehicle inspection and maintenance program in southeast Wisconsin to reflect state program changes implemented since EPA approval of the program on August 16, 2001. 78 Fed. Reg. 24,373 (Apr. 25, 2013).

EPA has proposed to approve SIP revisions to incorporate exemptions for certain sources from construction permit requirements. 78 Fed. Reg. 28,547 (May 15, 2013).

EPA has approved SIP revisions that modify Wisconsin's PSD program to establish appropriate emission thresholds for determining which new stationary sources and modification projects become

subject to Wisconsin's PSD permitting requirements for their greenhouse gas emissions. The revisions also defer until July 21, 2014, the application of the PSD permitting requirements to biogenic carbon dioxide emissions from bioenergy and other biogenic stationary sources. The final rule becomes effective on June 21, 2013. 78 Fed. Reg. 30,208 (May 22, 2013).

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EPA REGION 6

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I. Regional Developments

1. On May 2, 2013, Oklahoma Attorney General E. Scott Pruitt penned a letter on behalf of his state and twelve others, including Texas, urging the U.S. EPA to refrain from regulating methane emissions from hydraulic fracturing operations, arguing that the data and science behind such regulation is suspect. The letter was in response to the notice of intent to file suit under Section 304 of the CAA by a collection of northeastern states challenging EPA's decision not to regulate methane emissions from new and existing oil and natural gas drilling, production, and processing facilities.

2. On May 1, 2013, a group of Texas and Louisiana environmental groups filed a citizen suit in the Court of Appeals for the D.C. Circuit demanding that EPA review emissions factors used to estimate emissions of volatile organic compounds (VOCs) and certain toxic air pollutants from flares, tanks, and wastewater treatment systems. The group alleges that EPA has failed to review AP-42 (Compilation of Air Pollutant Emissions Factors Volume I: Stationary Point and Air Sources) since 1991 and has not reviewed the EPA Locating and Estimating Air Toxics Emissions Series

since at least 2006. The groups point to numerous studies that suggest these emissions factors are out of date, inconsistent with EPA's own science, and underestimate actual emissions from refineries and petrochemical plants. The plaintiffs request that the court order EPA to review and revise the emissions factors, as necessary.

3. On April 19, 2013, Texas, Oklahoma, Louisiana and nine other states filed a petition for certiorari requesting the U.S. Supreme Court to review holdings from its 2007 *Massachusetts v. EPA* decision, in which the Court held that EPA could regulate greenhouse gases (GHGs) under the CAA. The petition appeals a recent decision of the U.S. Court of Appeals for the D.C. Circuit upholding EPA's GHG rules. *American Chemistry Council v. EPA*, No. 10-1167 (D.C. Cir. June 26, 2012). Along with other assertions, the petitioners argue that the Supreme Court should limit its decision in *Massachusetts v. EPA* to apply only to emissions from motor vehicles, which were the subject of that decision. Petitioners also request that the Supreme Court reconsider *Massachusetts v. EPA* in light of the "preposterous consequences" associated with the application of GHG regulations to stationary sources.

II. State Updates

A. Arkansas

On May 7, 2013, EPA proposed approval of portions of Arkansas's SIP submissions regarding interstate transport of fine particulate matter (PM_{2.5}), which address CAA requirements to prohibit air emissions that significantly contribute to nonattainment areas or cause cross-state interference with measures required to protect air quality and visibility. 78 Fed. Reg. 26,568. The particular SIP submissions proposed for approval involve the 1997 annual and 24-hour PM_{2.5} NAAQS and the 2006 revised 24-hour PM_{2.5} NAAQS. Written comments were due by June 6, 2013.

B. Louisiana

On May 9, 2013, EPA approved a revision to the Louisiana SIP regarding a maintenance plan addressing the 1997 8-hour ozone standard for the parish of

Pointe Coupee. 78 Fed. Reg. 27,058. The approved SIP revision, which Louisiana submitted on February 28, 2007, contained a maintenance plan for the 1997 ozone standard for this parish. EPA found that the plan ensures the continued attainment of the 1997 8-hour ozone NAAQS through 2014.

C. New Mexico

On April 17, 2013, New Mexico joined nine other states and two cities in filing a notice of intent to sue (NOI) alleging that EPA missed a deadline to issue a final carbon dioxide performance standard for new fossil fuel-fired power plants. The notice asserts that EPA proposed a new source performance standard for such plants on April 13, 2012, and was required to finalize the rule within one year pursuant to CAA Section 111. The NOI expresses concern over “adverse effects on human health and welfare from climate change” and demands that EPA finalizes the rule without further delay. The Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club also jointly filed an NOI over the delayed finalization of the rule.

D. Texas

1. The 2013 Texas legislative session resulted in a number of changes to the state’s environmental laws, including the following relating to air quality: House Bill 788 requires the Texas Commission on Environmental Quality (TCEQ) to implement a federal PSD GHG permitting program for sources in Texas to take the place of EPA Region 6, which is currently issuing permits for those sources; Senate Bill 1756 creates an option to request “expedited processing” of air permit applications; and Senate Bill 1727 includes a number of changes to the Texas Emissions Reduction Plan Program, which provides financial incentives (rebates/grants) to reduce emissions from qualifying vehicles and equipment.

2. On May 22, 2013, the TCEQ commissioners approved adoption of rules to implement CAA provisions regarding the imposition of a penalty fee for major stationary sources of VOCs located in an area that fails to attain the ozone NAAQS by the applicable attainment date. The rule will apply to the Houston/Galveston/Brazoria (HGB) area because it was

classified as severe for the revoked 1-hour ozone NAAQS and did not achieve the standard by its November 15, 2007, attainment date. The rules schedule the initial fee assessment after rule adoption using the 2012 emissions inventory. The fee will be due annually until the area is redesignated attainment, has a design value of attainment, or other action is taken by the U.S. EPA to end the fee program.

3. On May 14, 2013, the U.S. Court of Appeals of the Fifth Circuit upheld a lower court decision that dismissed renewed tort claims against regional energy companies by victims with property damage from Hurricane Katrina in *Comer v Murphy Oil USA, Inc.*, No. 12-60291 (5th Cir.). These claims have garnered significant media attention over the last eight years, as plaintiffs allege that regional energy companies, as sources of GHGs, are partially responsible for global warming and, therefore, shared causation of Hurricane Katrina. This was not the first time that the Fifth Circuit had addressed these claims; plaintiffs, a group of Mississippi Gulf residents, originally brought these claims in Mississippi federal court in 2005. However, their case was eventually dismissed on appeal because the Fifth Circuit could not maintain a quorum, as eight of the court’s sixteen judges had recused themselves from the case. Plaintiffs were denied certiorari to the U.S. Supreme Court and then filed a new complaint in the same district court in 2011. The district court dismissed the claims, and the Fifth Circuit affirmed, holding that the original district court decision constituted a final judgment on the merits for purposes of res judicata.

4. On May 6, 2013, EPA announced its approval of revisions to the Texas SIP regarding the state’s regulation of nitrogen compounds. 78 Fed. Reg. 26,251. The approval relates to revisions to a SIP submittal regarding emission specifications for lean burn engines fired on landfill or other biogas at nitrogen oxides (NO_x) minor sources and revisions to a separate SIP submittal regarding low-temperature drying and curing ovens used in wet-laid nonwoven fiber mat manufacturing operations when nitrogen-containing resins or other additives are used. These revisions relate to NO_x emission sources in the Dallas Fort-Worth 1997 8-hour ozone nonattainment area.

On May 6, EPA also published its approval of a revision to the Texas SIP concerning the Texas low-emission diesel fuel rules. 78 Fed. Reg. 26,254. The revisions clarify existing definitions and provisions, revise the approval procedures for alternative diesel fuel formulations, add new registration requirements, and update the rule to reflect the current program status. Both rule packages will be effective on July 5, 2013.

5. In a letter dated April 23, 2013, submitted by the Environmental Integrity Project, environmental groups have asked the EPA inspector general to undertake a probe into startup, shutdown, malfunction, and maintenance emissions of twenty companies in Texas that occurred during the period of 2009 to 2012. The groups specifically request that the inspector general review enforcement taken by EPA and TCEQ regarding facilities reporting the largest and most frequent events, and, in particular, examine how the affirmative defense has been applied in those cases. The groups allege that nearly 3,000 “upset” emission events during that time period from these companies resulted in more than 49,000 tons of NO_x, PM, SO₂, and VOCs combined. The environmental groups claim that repeat emissions events have received little agency oversight.

6. On April 23, 2013, the TCEQ adopted two revisions to the Texas SIP. The Infrastructure and Transport SIP Revision for the 2010 SO₂ NAAQS identifies basic program elements enabling Texas to meet NAAQS infrastructure requirements and includes a technical demonstration that Texas neither contributes significantly to nonattainment nor interferes with maintenance of the SO₂ NAAQS in any other state. The HGB 1997 Eight-Hour Ozone Standard Nonattainment Area Motor Vehicle Emissions Budgets (MVEB) Update SIP Revision will replace MVEBs for the HGB area with MVEBs created using EPA’s latest mobile emissions estimation model and will address outstanding contingency obligations for the HGB area and CAA requirements for transportation control measures in severe nonattainment areas.

7. On April 4, 2013, EPA Region 6 issued a letter that followed from lengthy debate between TCEQ and

EPA regarding which agency has the authority to permit non-GHG emissions above PSD significance levels when PSD review is triggered solely by GHG emissions. EPA had initially asserted that, in those instances, EPA should be responsible for permitting of GHG emissions, as well as non-GHG emissions above PSD significance levels. In response to EPA’s request for TCEQ to explain its rationale for asserting authority to permit such non-GHG emissions, TCEQ issued a letter dated February 13, 2013, in which TCEQ explained the legal basis for its position. In EPA Region 6’s April 4, 2013, response letter, EPA stated that, based upon the representations in TCEQ’s letter, “the EPA has no objection to the TCEQ’s proposal to issue PSD permits for such sources that emit non-GHG pollutants when such pollutants are increased in amounts that equal or exceed the PSD significance levels.”

8. On April 2, 2013, EPA published approval of revisions to the Texas SIP for the Houston/Galveston/Brazoria (HGB) 1997 8-hour ozone nonattainment area. 78 Fed. Reg. 19,599. The action finalizes EPA’s proposed approval of portions of two SIP revisions Texas submitted as meeting certain reasonably available control technology (RACT) requirements for VOCs and NO_x in the HGB area. EPA also finalized its proposal to approve the 2007 Voluntary Mobile Emission Reduction Program commitments for the HGB Area. The revisions will be effective on May 2, 2013.

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EPA REGION 7

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I. Regional Developments

EPA Region 7 has been quite busy in the past few months, entering into three substantial settlements relating to chemical accident prevention and risk management programs.

In a settlement impacting all four Region 7 states, Tyson Foods, Inc. agreed to pay a \$3,950,000 civil penalty to resolve chemical accident prevention allegations relating to accidental releases of ammonia occurring at multiple facilities between 2006 and 2010. The releases resulted in property damages, injuries, and one death. According to EPA, the violations “included failures to follow the general industry standards to test or replace safety relief valves, improperly co-located gas-fired boilers and ammonia machinery, as well as failures to abide by the Clean Air Act’s Risk Management Program prevention and reporting requirements.”

In addition to the civil penalty, Tyson Foods agreed to conduct pipe testing and third-party audits of its ammonia refrigeration systems to improve its risk management program (RMP). Tyson Foods will also spend at least \$300,000 to conduct a supplemental environmental project involving the purchase of ammonia-related emergency equipment for local fire departments in eight of the impacted communities.

Region 7 also entered into a Clean Air Act consent decree with Beef Products Inc. relating to a 2007 release of over 1,000 pounds of anhydrous ammonia into an area occupied by employees, resulting in the permanent disability of one employee and the death of another. EPA alleged that Beef Products failed to implement its prepared risk management program. Beef Products will pay a \$450,000 civil penalty and will conduct third-party audits of its RMP compliance program.

Finally, in May 2013, Region 7 entered into its third consent decree with Coffeyville Resources Refining & Marketing (CRRM) in the past eighteen months. The prior two consent decrees related to Clean Air Act violations and a 2007 oil spill. The most recent one centers on the refinery risk management program and requires a comprehensive audit of the facility’s RMP. CRRM is also required to pay a \$300,000 civil penalty. As evidenced by the three settlements discussed in this update, all three major Clean Air Act settlements entered into by EPA Region 7 in the past quarter have focused on risk management program deficiencies.

II. State Updates

A. Iowa

Iowa Department of Natural Resources (DNR) continues to update modeling guidance to implement its NAAQS programs, including its PSD and Non-PSD Dispersion Modeling Guidelines and the Rounding of Modeled Concentrations for Comparison with the National Ambient Air Quality Standards. As outlined by Iowa DNR, specific updates include:

- clarification that current background concentrations should be used when comparing previous modeling results to the NAAQS in the modeling determination flow chart;
- clarification that the modeling determination flowchart is pollutant specific;
- addition of the new 1-hour SO₂ NAAQS to the non-PSD modeling guidelines;
- additional guidance on when intermittent sources may be excluded from modeling analyses for 1-hour NO₂ and SO₂;
- clarification of the proper method for using the daily fine particulate matter (PM_{2.5}) paired-sums background data for modeling analyses associated with non-PSD projects;
- clarification that the DNR’s guidance on rounding modeled concentrations does not apply to PSD projects; and
- updates to modeling guidance to reflect recent court decisions and EPA guidance regarding

the use of PM_{2.5} significant monitoring concentrations and significant impact levels.

Iowa DNR also implemented the 1-hour SO₂ NAAQS for minor source projects and required that any project subject to SO₂ modeling also consider the 1-hour SO₂ NAAQS.

Iowa DNR has also proposed to adopt the federal air toxics standards for stationary engines. The National Emissions Standard for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines (the RICE NESHAP) is codified at 40 C.F.R. Part 63 Subpart ZZZZ. The Iowa rule revisions implement recent changes made by EPA to the RICE NESHAP and will allow Iowa DNR, rather than EPA, to implement the NESHAP in Iowa. Iowa's governor had previously issued an executive order rescinding adoption of the RICE NESHAP due to the cost to small utilities and the impact on consumer electricity rates, but EPA subsequently modified the RICE NESHAP to address such concerns.

B. Missouri

The Missouri Department of Natural Resources' Air Pollution Control Program is in the process of considering several amendments to its rules. One amendment, applicable only to the St. Louis metropolitan area, would "clarify that the brewery sulfur dioxide (SO₂) emission limit applies only to the total SO₂ emissions from applicable units (*i.e.*, boilers) within a facility and not the total SO₂ emissions from the entire brewery." Another amendment would incorporate portions of EPA's greenhouse gas rules and making other modifications to the new source review construction permitting rules. A third rule would add a hierarchy of compliance methods for demonstrating compliance with filterable PM emissions limitations, starting with continuous emissions monitoring systems and then proceeding to (in order) stack tests; compliance assurance monitoring plans; and other methods, such as engineering calculations, found in permits or approved by the director.

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EPA REGION 8

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I. State Updates

A. Colorado—Ozone Issues on the Western Slope

The Colorado Air Quality Pollution Control Division (APCD) released data showing elevated wintertime ozone levels at its monitor in Rangely. The Rangely monitor is located along Colorado's Western Slope just over the border from Utah. According to preliminary state data (which has not yet undergone QA/QC), the three-year average of the fourth-highest reading at the Rangely monitor was 77 parts per billion (ppb), above the federal standard of 75 ppb. The Rangely monitor shares the same airshed with Utah's Uintah Basin, and it is widely acknowledged that oil and gas and other development in Utah is contributing to the exceedances in Colorado. The apparent interstate ozone transport will present difficult issues for both federal and state regulators as they address the growing wintertime ozone problem in this area. In the meantime, Wild Earth Guardians (WEG) have filed a petition with the Bureau of Land Management (BLM) pursuant to the National Environmental Policy Act (NEPA) requesting that BLM stop the issuance of all oil and gas leases and applications for permits to drill within the BLM's White River Field Office (which is where the Rangely monitor is located) until any significant ozone impacts are appropriately addressed through an Environmental Impact Statement (EIS). The WEG petition, filed on May 15, 2013, requests a response from BLM within sixty days.

B. Montana—EPA Issues Proposal to Disapprove Portions of Montana's SIP

EPA is proposing to disapprove a specific portion of Montana's SIP for demonstrating compliance with the CAA infrastructure requirements for the 1997 ozone NAAQS. Specifically, EPA proposes to disapprove a portion of Montana's November 28, 2007, and December 22, 2009, certifications because the SIP

does not meet the requirements for state boards that approve permits or enforcement orders under CAA § 128. Section 128, in turn, places certain requirements on state boards that must be included in the SIP, including that the boards contain “at least a majority of members who represent the public interest and do not derive any significant portion of their income from persons subject to permits or enforcement orders” and that the SIP contain certain conflict of interest disclosure provisions. EPA’s analysis found that the Montana SIP is deficient in two respects relative to the section 128 “state board” requirements. First, under section 128(a)(2), Montana’s “mere narrative” description of state statutes and rules “is not a requirement in the SIP and does not satisfy the plain text of section 128” with respect to the disclosure of potential conflicts of interest. Second, the statutorily created Board of Environmental Review does not contain adequate provisions to comply with section 128(a)(1)’s requirement regarding “public interest” board composition. Written comments on EPA’s proposed disapproval were due July 1, 2013.

C. Wyoming—EPA Partially Approves and Partially Disapproves Wyoming’s Regional Haze SIP

On June 10, 2013, EPA published in the *Federal Register* its proposed rule to partially approve and partially disapprove Wyoming’s regional haze SIP. 78 Fed. Reg. 34,737 (June 10, 2013). At the same time, EPA proposed a Federal Implementation Plan (FIP) to address the deficiencies identified in EPA’s partial disapproval of Wyoming’s SIP. However, in lieu of the proposed FIP, EPA encouraged Wyoming to submit a revised regional haze SIP to address the identified deficiencies, and it noted that it would propose approval of such revision as expeditiously as practicable.

In particular, EPA proposes disapproval of Wyoming’s best available retrofit technology (BART) determinations for certain electricity generating units (EGUs); NO_x reasonable progress determinations for certain EGUs; reasonable progress goals; and monitoring, recordkeeping, and reporting requirements identified in Chapter 6.4 of the regional haze SIP. EPA proposes approval of the remaining aspects of the state’s regional haze SIP.

D. Utah—UDAQ Proposing Potential Seasonal and Episodic Winter Ozone Controls for the Uintah Basin

The Utah Division of Air Quality (UDAQ) is working on developing an Ozone Contingency Plan checklist that would include a list of seasonal and episodic emission control and/or work practice requirements that operators in the Uintah Basin would be required to implement upon notice from UDAQ of an impending high ozone forecast for the Basin. The list being considered includes, for example, controls and/or work practice standards for dehydrators, pneumatic devices, blow downs, condensate tanks, drill rigs, and compressor engines. The requirements may include short-term shut down or minimization of operations, additional maintenance, and utilization of available emission control requirements. Upon notice from UDAQ of an Ozone Action Day, operators would be asked to implement as many of the identified emission control and/or work practice standards as possible.

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SESSION TITLES:

Wednesday, October 9, 2013

How to Get Hired by In House Counsel
 Keynote Address: Kenneth R. Feinberg, Feinberg Rozen, LLP, Washington, DC

Thursday, October 10, 2013

Plenary Session 1 - News from the Capitol: Administration and Congressional Priorities for Energy and Environmental Law and Policy
 The Corporate Supply Chain Goes Global: What You Need to Know to Counsel Your Multinational Client
 Reacting to Coastal Disasters: Response and Future Preparedness
 Less is More? The Expanding Universe of Low-Level Toxic Tort Claims
 Clean Air Developments Every Lawyer Should Know
 Going Back to the Well: the Next Generation of Fracking Challenges
 Clash of the Titans: Live Litigation
 Road Warriors - A Hands-On Practical Demonstration of Technology and Ethical Perils

State Authority on Climate Change: Where are the Commerce Clause Boundaries?
 Environmental Markets 2.0: The Evolving Use of Market-Based Mechanisms

Friday, October 11, 2013

Plenary Session 2—From the Top: Second Term Priorities and Perspectives from Senior EPA Officials
 Renewable Energy Development: Challenges, Opportunities and Pay-Offs
 TMDL Regulation: How EPA's Chesapeake Bay Initiative May Spread to Your Watershed
 CERCLA Case Studies and Lessons Learned—Novel Approaches and Noteworthy Outcomes
 Cooperative Federalism: Under Assault or In Balance?
 Hot Topics in Environmental Enforcement and Compliance
 Transaction Jeopardy! Getting the Deal Done
 Today's Ethics: More Complicated Than You Thought? Managing Conflicts & Virtual Reality in Today's Environmental, Energy and Natural Resources Law Practices



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