Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Air Quality Committee Newsletter

Vol. 17, No. 1 **December 2013**

MESSAGE FROM THE COMMITTEE CHAIR

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Congratulations to the Air Quality Committee (AQC) members, committee vice chairs, and newsletter regional reporters! At the 21st Fall Conference in Baltimore, Section Chair Bill Penny announced that our committee and the Pesticides, Chemical Regulation, and Right-to-Know Committee tied for "Best 2012–2013 Environmental Committee" and "Best 2012–2013 Environmental Committee Newsletter." We have created a high bar for ourselves for the 2013–2014 ABA Year. In this message, I offer a report on the Section's 21st Fall Conference in Baltimore, changes in committee vice chair positions and programming as well as an introduction to your 2013–2014 AQC leadership team and suggestions for ways to become involved before concluding with a preview of upcoming events.

21st Fall Conference: The 21st Fall Conference in Baltimore had a record attendance of nearly 500 participants and was a very successful event although the EPA speakers were unable to participate due to the government shutdown. Section members, including me, were given the opportunity to play a greater role than originally planned.

The conference opened with a tree planting project Wednesday morning. The Section partnered with the Alliance for Community Trees (ACT), and a local nonprofit, the Parks & People Foundation. Your Membership vice chair, Phil Bower, picked up a shovel and helped plant large city trees. For those wanting to meet other Section members and to become involved in the Section and the ABA, I urge you to participate in the Section's public service projects. Anyone interested in participating in the ABA's One Million Trees Project should contact Neil C. Johnston, co-chair of the SEER Special Committee on Public Service (njohnston@handarendall.com) or our new committee Public Service vice chair, Heidi Knight.

The CLE sessions started on Wednesday afternoon with a well-attended, two-hour panel titled "How to Get Hired by In-House Counsel." The selection process was illustrated using a program format inspired by the Food Network show "Chopped." A panel of in-house counsel critiqued the performance and discussed a number of likes and dislikes. Written materials included an article on law firm newsletters.

Next, Kenneth R. Feinberg, special master of the September 11th Victim Compensation Fund and administrator of the BP Deepwater Horizon Disaster Victim Compensation Fund, gave the keynote address. Attendees networked during the Welcome Reception and Kenneth Feinberg book signing, and Law Student Scholars also enjoyed a meeting.

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Randy Dann and Thomas G. Echikson, Editors

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AMERICAN BAR ASSOCIATION
SECTION OF ENVIRONMENT, ENERGY, AND RESOURCES

CALENDAR OF SECTION EVENTS

December 11, 2013
Coal-Fired Power Rules on Trial Debrief of Cross State Rule and Mercury Air Toxics Oral Arguments
Webinar/Teleconference
Primary Sponsor: The District of Columbia Bar

December 18, 2013
U.S. Nuclear Export Law: Compliance for Commercial Nuclear Power Plants
Webinar/Teleconference
Primary Sponsor: Section of Public Utility, Communications, and Transportation Law

January 24-25, 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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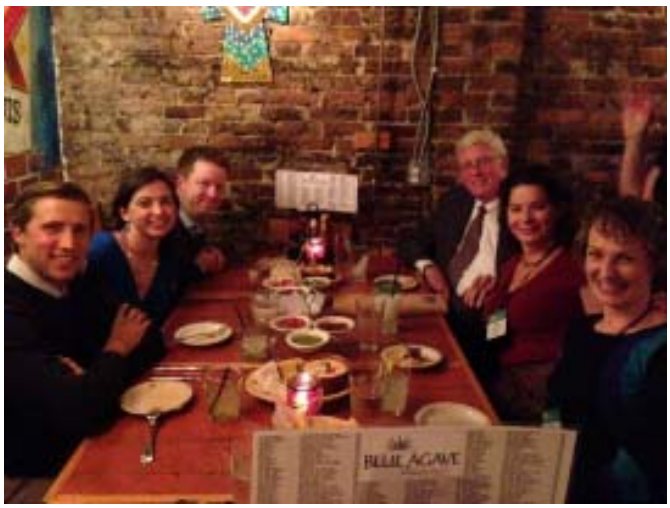
Thursday's plenary session, "Beltway Perspectives: Legal Issues and Policy Priorities for 2014," was moderated by Elizabeth Shogren, National Public Radio environmental reporter, with Section members substituting for EPA and U.S. House of Representatives and U.S. Senate speakers. The session concluded with a video message from U.S. House of Representatives Congressman Elijah E. Cummings (D-MD).

Friday's plenary session was "From the Top: Second Term Priorities and Perspectives." The plan was to hear from a panel of senior EPA officials—EPA's Deputy Assistant Administrator of Air and Radiation, Janet McCabe; EPA's Acting Assistant Administrator of Water, Nancy Stoner; and EPA's Assistant Administrator of Chemical Safety and Pollution Prevention, James J. Jones—with EPA's Acting General Counsel, Brenda Mallory, moderating. Instead, attendees were treated to a panel discussion by SEER members of EPA's priorities and challenges for the next 12 to 18 months. I replaced Janet McCabe. Brent Fewell replaced Nancy Stoner, and Lynn Bergeson replaced James Jones. Roger Martella moderated.

Topics explored during breakout sessions included air toxics, state authority on climate change, environmental markets, renewable energy, cooperative federalism, and environmental enforcement and compliance. There was also a breakout session moderated by Channing Martin, called "Transaction Jeopardy! Getting the Deal Done." Laughter by its participants could be heard in the adjoining conference rooms and hallways. The CLE sessions concluded with an ethics session on Friday.

Each day included morning and afternoon networking breaks. The committee luncheon (now called Interest Area Luncheon) was on Thursday, and the Technical Roundtable presentations took place over lunch on Friday. Young lawyers and law students enjoyed a speed networking event.

Following the close of the CLE sessions, attendees mingled during the Local Flair Reception and committee dinners. AQC members joined the Climate, Sustainable Development, and Ecosystems Committee for a Mexican dinner at Blue Agave Restaurant (see photo below). Following dinner, attendees were treated to a dessert reception hosted by Section Chair Bill Penny's law firm.



Bobby Martin, Sara Bazemore, Warren Bazemore, David Vaughn, Barbara Little, and Maggie Peloso.

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

Membership: Our committee is one of the larger SEER committees with more than 500 members and growing. Membership vice chair is Phil Bower. Should you have questions about the benefits of joining the AQC, contact Phil or me. If you join our committee, Phil will send you a welcome letter and e-mail. Phil's welcome e-mails contain hyperlinks and information on committee membership benefits, including programs, Web site/social media, list serve, public service, newsletters, and telephone and e-mail addresses for committee leadership. Phil also arranged our committee dinner during the 21st Fall Conference in Baltimore. In addition to his responsibilities as Membership vice chair, Phil

regularly participates in and reports on the ABA's One Million Trees Project.

Programming for Conferences, Webinars, and Committee Conference Calls: Vice chairs for Programs are Marty Booher, Shannon Broome, and Jocelyn Thompson. The at-large vice chair with specific responsibility for Programs is Howard Hoffman. We need your help identifying hot topics and preferred speakers on the subject matters of interest to you, and we welcome your suggestions and ideas. Program proposals should be sponsored by more than one committee. For a program proposal for a conference to be accepted, the proposed topic must be broad enough to interest at least 150 conference attendees.

The Section will no longer use the term "Quick Teleconference" (QT). Instead, there will be webinars on topics of broad interest not offering CLE and webinars offering CLE; however, webinars offering CLE require 12 weeks' advance planning. The Section is trying to anticipate and then rapidly respond to developments so that we can attract larger audiences for webinars. Committee conference calls are free and are intended for topics that might not appeal to a larger audience. Each committee is allocated two committee conference calls for the ABA year.

The Section is also encouraging cosponsorships requests and has pre-approved a number of non-ABA entities for programs cosponsored with the ABA. The Air & Waste Management Association is one of the pre-approved non-ABA entities, and we have been approached about cosponsoring webinars with the A&WMA.

If you would like to help coordinate presentations and discussion on programs for section conferences, webinars, and committee conference calls, please contact us.

Writing and Publications: Writing opportunities abound and are an excellent way to become involved. Linda Tsang serves as AQC vice chair for Publications and is responsible for keeping members apprised of writing opportunities, reaching out to new members to write on air quality topics, and advocating for air quality articles in Section publications, such as *Trends* and *NR&E*. At the annual meeting of the *NR&E* Editorial Board during the 21st Fall Meeting, the board approved the following themes for the 2013–2014 issues of *NR&E*: "International"; "Transactions"; "Species"; and "Toxics." I encourage you to think about potential air quality articles for each of these issues. We will use the committee list serve to advise you of *NR&E* calls for article proposals and deadlines.

Randy Dann and Tom Echikson are vice chairs for the newsletter and are looking for members interested in writing guest columns. Our newsletter for 2013–2014 will include regional reports for all ten EPA Regions plus the U.S. EPA Headquarters report. Jonathan Martel is vice chair for *Year in Review* and needs volunteers to write summaries of cases and rules. We encourage all members, including young lawyers and law students, interested in writing for the newsletter, *Year in Review*, *Trends*, *NR&E* or other publications, to contact me or the appropriate vice chairs.

Committee newsletters, *Trends*, and *Year in Review* are now available exclusively in electronic format. For you to receive these publications, the ABA must have your current e-mail address.

Social Media: Cheri Budzynski is Social Media vice chair and is managing an AQC subgroup on LinkedIn that I encourage each of you to join. I also encourage each of you to send me (galelea@jacksonkelly.com) substantive materials, such as EPA letters, guidance documents, new court decisions, or rulemakings, for distribution to the committee list serve and posting on our committee Web site by our vice chair for Electronic Communications, Michael Balster, or on LinkedIn, Twitter, or Facebook by Cheri.

Web Site/List Serve: Michael Balster is Electronic Communications vice chair. Our committee Web site is one of the most viewed SEER committee Web sites, and was displayed on the big screen during the committee chairs meeting in Baltimore. Our committee Web site contains current and archived Hot News alerts, contact information for committee leadership, membership roster, programs and podcasts, law firm blog articles on air quality

issues, committee public service project, committee list serve, books, and other resources on air quality. We use the list serve regularly to keep you informed of air quality developments, Section and committee activities, and opportunities to become involved. We encourage you to share substantive materials, such as new guidance documents, agency letters, court decisions, rulemakings, or other air quality developments, for distribution to the committee list serve and posting on our committee Web site, Air Quality subgroup on LinkedIn, or Twitter.

43rd Spring Conference: The Spring Conference will again be held at the Grand America Hotel in Salt Lake City, Utah, and will include an air hot topics panel on the coming climate change regulations. Plenary 1 will address energy development on state lands, and Plenary 2 will review Supreme Court decisions on water, air, and jurisdiction. March 20–22, 2014, will be the fifth and final year that Salt Lake City will host the Spring Conference.

Upcoming Events: On January 31, 2014, there will be a one-day conference sponsored by the Environmental Law Institute, Edison Electric Institute, and SEER Climate, Sustainable Development, and Ecosystems Committee on Clean Air Act § 111(b) and (d) and EPA's proposed performance standards for greenhouse gas emissions from new power plants and anticipated rulemaking for existing power plants in Washington, D.C. The May 2–4, 2014, Spring Council Meeting at the Hutton Hotel in Nashville, Tennessee, on May 2–4, 2014, will coincide with a symposium at Vanderbilt University Law School on the practice of law. The 32nd Annual Water Law Conference will be held at the Red Rock Resort, Casino and Spa on June 4–6, 2014. The 22nd Fall Conference, chaired by Air Quality Committee member John Jacus, will be held at The Trump Doral Golf Resort & Spa in Miami, Florida, on October 8–11, 2014, and the 2015 Fall Conference will be in Chicago. Watch for further details on the Section Web site, Twitter, and Facebook and via Section e-mail.

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Carbon Pollution Standards for New Power Plants: On September 20, 2013, the U.S. Environmental Protection Agency (EPA) proposed performance standards for new fossil fuel-fired electric utility steam generating units and stationary combustion turbines. Unlike EPA's April 2012 proposal (77 Fed. Reg. 22,392), EPA is proposing separate standards for fossil fuel-fired electric steam generating units, i.e., utility boilers and integrated gasification combined cycle (IGCC) units, and natural gas-fired stationary combustion turbines. For new fossil fuel-fired boilers and IGCC units (subpart Da sources), EPA is proposing that partial carbon capture and storage or sequestration (CCS) satisfies the criteria in Clean Air Act (CAA) §111 and is the "best system of emission reduction" (BSER) adequately demonstrated. For new combustion turbines (subpart KKKK sources), EPA is proposing natural gas combined cycle (NGCC) as the BSER. The proposed emission limits would apply upon the effective date of the final rule.

EPA states that market conditions will lead electricity generators to choose new natural gas-fired power plants that would meet the proposed standard without installation of additional controls and projects that no new coal-fired electric generating units (EGUs) without CCS will be built in the absence of its proposal. EPA does not anticipate that its proposal will result in notable carbon dioxide (CO_2) emission changes, energy impacts, monetized benefits, costs, or economic impacts by 2022. EPA believes that its rule will not have any impacts on the price of electricity, employment or labor markets, or the U.S. economy.

To determine applicability, EPA is proposing to define an EGU slightly differently from the way it is currently defined in subpart Da of 40 C.F.R. part 60 or in the original proposal of April 2012. Applicability would be based on electric sales alone, so that the proposed standards of performance apply to a facility if the facility actually supplies more than one-third of its potential electric output and more than 219,000 megawatt hours (MWh) (as opposed to 25 MW) net electric output to the grid per year. EPA is also proposing a different definition of "potential electric output" that allows the source the option of calculating its potential electric output on the basis of its actual design electric output efficiency on a net output basis, as an alternative to the one-third default value. For stationary combustion turbines, EPA is proposing to revise the averaging period for electric sales from an annual basis to a three-year rolling average. The April 2012 proposal would have applied to facilities that primarily burn non-fossil fuels but also co-fire a fossil fuel. EPA is now proposing to cover sources that burn fossil fuel for more than 10 percent of the heat input during three years, and, for combustion turbines, sources combusting over 90 percent natural gas on a heat input basis over three years. EPA is also proposing revisions that would make applicability consistent for both facility-owned combined heat and power (CHP) and third-party-owned CHP. The proposal includes within the definition of utility boilers, IGCC, and stationary combustion turbines any integrated equipment that provides electricity or useful thermal output to the boiler, the stationary combustion turbine, or to power auxiliary equipment. EPA's proposed EGU definition does not exclude simple cycle combustion turbines, but EPA states most of them would not be affected.

While EPA identifies the pollutant it is proposing to regulate as GHGs, only CO_2 emissions would be subject to the proposed standards of performance. EPA is not proposing separate emission limits for nitrous oxide (N_2O) or methane (CH_4) but is soliciting information about the quantity of N_2O and CH_4 emissions from power plants and possible controls.

For new combustion turbines with a heat input rating greater than 850 MMBtu per hour, EPA is proposing a standard of 1000 pounds of CO_2 per megawatt-hour lb CO_2/MWh, but is also soliciting comment on

a range of 950–1100 lb CO_2/MWh. For new combustion turbines with a heat input rating less than or equal to 850 MMBtu per hour, EPA is proposing a standard of 1100 lb CO_2/MWh, but is soliciting comment on an emission limitation range of 1000–1200 lb CO_2/MWh. New stationary combustion turbine EGUs should be able to meet the proposed performance standards without the need for add-on controls.

For new fossil fuel-fired utility boilers and IGCC units, EPA is proposing an emission limit of 1100 lb CO_2/MWh, but is soliciting comment on an emission limitation in the range of 1000–1200 lb CO_2/MWh. EPA is also proposing an 84-operating-month rolling average compliance option that would be available for affected subpart Da boilers and IGCC facilities. Under EPA's proposed approach, new fossil fuel-fired boilers and IGCC units would be required to meet a standard of 1100 lb CO_2/MWh on a 12-operating-month rolling average, or alternatively a lower—but equivalently stringent—standard on an 84-operating-month rolling average, between 1000 lb CO_2/MWh and 1050 lb CO_2/MWh. Commenters suggesting emission rates below 1000 lb CO_2/MWh are asked to address potential concerns about operational flexibility, whereas commenters suggesting emission rates above 1200 lb CO_2/MWh are asked to address potential concerns about providing adequate reductions and technology development to be considered BSER.

EPA is proposing that the emission standards apply at all times, including during periods of start-up and shutdown. For violations of emissions standards that are caused by malfunctions, EPA is proposing an affirmative defense to civil penalties but not for injunctive relief. While EPA is proposing that the affirmative defense to civil penalties for violations of emission limits that are caused by malfunctions would apply to both the 12-operating-month standard and the 84-operating-month rolling average compliance option, EPA is also taking comments on whether it is appropriate to have an affirmative defense for the 84-operating-month rolling average compliance option.

To calculate compliance, EPA is proposing to sum the emissions for all operating hours and divide that value by the sum of the useful energy output over a rolling 12-operating-month period. In the alternative, EPA is soliciting comment on requiring calculation of compliance on an annual (calendar year) period.

For monitoring requirements, EPA is proposing that owners/operators of coal-fired power plants install, certify, maintain and operate continuous emission monitoring systems (CEMS) to measure CO_2 concentration, stack gas flow rate, and "if needed" stack gas moisture content in order to determine hourly CO_2 mass emissions rates (tons/hr). As an alternative to CO_2 CEMS, owners/operators of EGUs that burn exclusively gaseous or liquid fuels would be allowed to install fuel flow meters and to calculate the hourly CO_2 mass emissions rates. Implementation of this option would require hourly measurements of fuel flow rate and periodic determinations of the gross caloric value of the fuel. In addition to requiring monitoring of the CO_2 mass emission rate, the proposed rule would require EGU owners/operators to monitor the hourly unit operating time and "gross output," expressed in MWh. The gross output includes electrical output plus any mechanical output, plus 75 percent of any useful thermal output. EGU owners/operators would be required to submit a monitoring plan that includes both electronic and hard copy components. The proposed rule includes special compliance provisions for units with common stack or multiple stack configurations. The traditional three-run performance tests (i.e., stack tests) would not be required.

In addition to monitoring requirements, the proposed rule includes notification, record keeping, and reporting requirements. Owners/operators of affected EGUs would be required to comply with applicable notification requirements, keep records of the calculations performed to determine the total CO_2 mass emissions and gross output for each operating month, submit quarterly electronic emissions reports using the Emissions Collection and Monitoring Plan System (ECMPS) Client Tool,

and report selected data elements periodically using the ECMPS. While the ECMPS is not currently programmed to receive excess emission report information from EGUs, EPA states it will make the necessary modifications to the system in order to fully implement the reporting requirements upon promulgation of the final performance standards for GHG emissions from new power plants. All required records would be kept on-site for a minimum of two years, after which the records could be maintained off-site.

EPA is considering two options for codifying the requirements. Under the first option, EPA is proposing to codify the standards of performance for the respective sources within existing 40 C.F.R. part 60. Applicable GHG standards for EGUs would be included in subpart Da and applicable GHG standards for stationary combustion turbines would be in subpart KKKK. Under this approach, EPA states that the establishment of different requirements for different sets of sources constitutes sub-categorizations within the existing categories. Under the other option, EPA is proposing to combine the two source categories for purposes of regulating CO_2 emissions (but not for regulating emissions of conventional pollutants) and to codify all of the proposed regulatory requirements in a new subpart TTTT. EPA states that subpart TTTT cannot be considered a new source category that EPA is placing on the list of categories for regulation under CAA § 111(b)(1)(A) because it would continue to constitute sub-categorizations within the existing category, since EPA is merely combining two existing categories.

Additionally, EPA states it has a rational basis for promulgating standards for GHG emissions from power plants because it has already determined that GHG emissions may reasonably be anticipated to endanger public health and welfare and because power plants, as an industry, constitute the largest emitters in the inventory by a significant margin. In 2011, fossil fuel combustion by the electric power sector accounted for 39.6 percent of all energy-related CO_2 emissions. EPA concludes that even if CAA § 111 is interpreted to require that EPA make endangerment and cause-or-contribute-significantly findings as prerequisites for its performance standards for EGU emissions from power plants, the same facts that constitute EPA's rational basis for promulgating standards for GHG emissions from power plants should be considered to constitute those findings. EPA also concludes that it does not need to make a pollutant-specific endangerment finding. EPA says that this is true even if it creates a new subpart TTTT.

Regarding title V fee requirements for GHGs, EPA is proposing to exempt GHGs from the presumptive fee calculation but to account for the cost of the GHG permitting through a cost adjustment to ensure that fees will be collected that are sufficient to cover the program costs. Alternatively, EPA is proposing that permitting agencies that do not use the presumptive fee approach can continue to demonstrate that their fee structures are adequate to implement their title V programs, including GHG permitting, even if that amount is below the presumptive minimum. For the GHG fee adjustment, EPA is proposing two alternative options. The first option includes an additional cost for each GHG-related activity of certain types that a permitting authority would process over the period covered by the presumptive minimum fee calculation. Under this option, EPA is proposing to include three general activities: (1) "GHG completeness determination (for initial permits or for updated applications)" at 43 hours; (2) "GHG evaluation for a modification of related permit action" at 7 hours; and (3) "GHG evaluation at permit renewal" at 10 burden hours. The GHG cost adjustment for the presumptive fee would be calculated by multiplying the burden hours for each activity by the cost of staff time (in $ per hour), including wages, benefits, and overhead, as determined by the state for the particular activities undertaken. The second option involves an increase in the per ton rate used in the presumptive minimum calculation. Under the second option, EPA would increase the fee rate used in the presumptive minimum calculation for each required air pollutant, excluding GHGs. According to EPA, 7 percent represents the amount by which GHG permitting increases permitting authority burden above the

baseline burden. At the current rate for part 70 of $46.73, a 7 percent increase would result in a GHG fee adjustment of about $3.27 for a new rate of $50 per ton for each regulated pollutant for the presumptive fee calculation. EPA is proposing similar revisions to the part 71 fee schedule for federal operating programs fees.

EPA is requesting comments on all aspects of its proposed rulemaking, including the regulatory impact analysis. Comments are due 60 days after publication of the proposed rule in the *Federal Register*.

EPA REGIONAL REPORTS

EPA REGION I

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Regional Greenhouse Gas Initiative (RGGI)

On September 4, 2013, the nine states participating in RGGI (all six New England states, plus Delaware, Maryland, and New York) announced the results of their 21st auction of carbon dioxide (CO_2) allowances. At the September 4, 2013, auction, $38,409,043 CO_2 allowances were sold at a clearing price of $2.67. The auction generated $102.5 million for the RGGI states. Allowances sold represent 100 percent of the allowances offered for sale by the nine states.

Connecticut

On October 9, 2013, Connecticut Department of Energy and Environmental Protection (CTDEEP) announced that it will issue an RFP later in October for electric power produced by biomass, landfill gas, and run-of-river hydropower facilities that meet Connecticut's Class I renewable requirements. The department is seeking proposals for energy and renewable energy credits from both new and existing facilities, located both in-state and throughout the Northeast.

On July 16, 2013, CTDEEP proposed to tighten its RGGI program to implement reductions agreed upon by the RGGI states in early 2013 to lower the 2014 regional cap from 165 million tons of CO_2 to 91 million and to reduce the cap an additional 2.5 percent per year from 2015 to 2020.

Maine

Maine Department of Environmental Protection is proposing amendments to its CO_2 budget trading program rules that would update the allowance allocation provisions, change certain definitions, add a new offset category, and delete the sulfur hexafluoride offset category. Proposed changes include the creation of a cost containment reserve and an adjusted trading program budget.

Massachusetts

Like Connecticut and Maine, the Massachusetts Department of Enviornmental Protection (MassDEP) is proposing amendments to the existing carbon dioxide budget trading program. These amendments are being proposed in order to implement changes resulting from the 2012 Regional Greenhouse Gas Initiative program review. These changes include (1) a reduction in the regional CO_2 budget (the RGGI cap) for the years 2014 through 2020, (2) adjustments to the RGGI cap in the years 2014–2010 to account for the private bank allowances, and (3) updates to the RGGI offsets program, including a new forestry protocol.

MassDEP is proposing a new regulation to control emissions of sulfur hexafluoride from gas insulated switchgear (GIS). The regulation would limit all companies that purchase new GIS to a 1 percent emission rate for such equipment. In addition, the regulation would require that sulfur hexafluoride be handled appropriately when removed from service.

New Hampshire

The New Hampshire Department of Environmental Services (NHDES) is proposing to readopt and amend its rules for volatile organic compounds

(VOCs) for consumer products. VOC limits will be added for, among other products, adhesive removers, dual-purpose air freshener/disinfectants, and automotive windshield cleaner.

NHDES is proposing further amendments to the CO_2 budget trading program pursuant to recent changes made to the RGGI Model Rule. Specifically, these amendments establish requirements for forest offset projects and incorporation of the Forestry Offset Allowance Quantification Protocols by reference. These changes will affect any individual or entity that is interested in obtaining CO_2 offset allowances.

Vermont

In July, the Vermont Department of Environmental Conservation released its strategic plan for 2013–2015. The plan includes strategies relating to redeveloping brownfields, increasing permitting assistance, and planning for natural disasters.

EPA REGION 3

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Enforcement Actions: On June 27, 2013, EPA announced that Matheson Tri-Gas, Inc., a manufacturer and supplier of gas products, paid a $73,790 penalty for not submitting a required risk management plan for a facility at 1401 Stauffer Road, Palm, Pa. (Montgomery County). Under the federal Clean Air Act, facilities that maintain certain quantities of regulated substances must submit a risk management plan to EPA that explains steps the facility would take to reduce the risk of accidental releases of flammable substances. The plan must also explain how the facility would minimize the consequences of any accidental releases that might occur. Regulated substances at Matheson Tri Gas included methane, propylene, and isobutane. EPA alleged that the company did not submit a risk management plan to EPA until 20 months after it acquired the plant.

On July 11, 2013, EPA and the Department of Justice announced that Holcim Inc., the owner and operator of a Portland cement manufacturing facility in Hagerstown, Md., and its previous owner St. Lawrence Cement, agreed to a settlement including a $700,000 civil penalty and installation of advanced sulfur dioxide (SO_2) abatement controls to resolve prevention of significant deterioration (PSD) and nonattainment new source review (NSR) violations. Holcim and St. Lawrence allegedly made modifications to the cement kiln resulting in significant net increases of SO_2 emissions without first obtaining the requisite new source permit. In addition to the civil penalty, Holcim will spend at least $150,000 on an environmental mitigation project replacing an outdated piece of equipment with a newer model that emits lower levels of pollutants. A copy of the consent decree is available at http://www.epa.gov/enforcement/air/cases/holcim.html.

Delaware

EPA-Approved SIP Revisions

On September 24, 2012, EPA updated the materials incorporated by reference into the Delaware state implementation plan (SIP). (78 Fed. Reg. 58,465)

On September 19, 2013, EPA proposed a supplement to EPA's proposed approval of Delaware's SIP of November 19, 2012, attainment designation for 1997 annual $PM_{2.5}$ national ambient air quality standards (NAAQS) for the Philadelphia-Wilmington (PA-NJ-DE) $PM_{2.5}$ nonattainment area addressing the potential effects of a January 4, 2013, decision of the D.C. Circuit remanding to EPA two final rules implementing the 1997 $PM_{2.5}$ NAAQS. EPA proposed to revise its approval of Delaware's attainment plan for the 1997 annual $PM_{2.5}$ NAAQS to not rely upon regulations that were part of the plan submitted by Delaware because they are not necessary to demonstrate attainment. EPA also proposed to approve the 2009 and 2012 motor vehicle emissions budgets

(MVEBs) for New Castle County in Delaware. (78 Fed. Reg. 57,573)

On August 30, 2013, EPA proposed approval of Delaware's SIP submittal for basic program elements infrastructure requirements for the 2008 8-hour ozone NAAQS. (78 Fed. Reg. 53,709)

On August 14, 2013, EPA proposed approval of Delaware's infrastructure requirements for the 2010 nitrogen dioxide NAAQS. (78 Fed. Reg. 49,409)

District of Columbia

EPA-Approved SIP Revisions

On July 3, 2013, EPA took direct final action to approve a negative declaration for hospital/medical/infectious waste incinerator units within the District of Columbia. This negative declaration certifies that units subject to the requirements of §§ 111(d) and 129 of the CAA do not exist within the jurisdictional boundaries of the District Department of the Environment (DDOE). (78 Fed. Reg. 40,015)

Other D.C. Air Quality News

On September 25, 2013, the DDOE issued immediately effective new lead regulations to fully implement the District's Lead-Hazard Prevention and Elimination Act. Important provisions of the regulations include DDOE renovation permit requirement in cases of work in pre-1978 housing or in a child-occupied facility built before 1978 that disturbs more than 500 square feet of paint, or when the work disturbing paint will cost more than $20,000 (20 District of Columbia Municipal Regulations § 3310); creation of Dust Sampling Technician, an entry-level position for which individuals can qualify relatively easily and offer attractive prices for property owners and managers (20 DCMR §§ 3307.8, 3309, 3310.6.); requirements of use of lead-safe work practices (§ 3302); definition of "lead-free unit" is clarified (§§ 3313.5, 3314.5, 3314.6, 3314.7); definition of the term "regularly visits," in regard to children in home; (§ 3399); exceptions to the general requirement for a DDOE lead abatement permit whenever an abatement activity is to be performed (§§ 3316.1, 3316.2); requirements related to the demolition of a pre-1978 building (§§ 3316.3, 3316.4).

Maryland

EPA-Approved SIP Revisions

On September 28, 2013, EPA approved a SIP revision for control of VOC emissions from pleasure craft coating operations. (78 Fed. Reg. 59,240)

Other Maryland Air Developments

On July 23, 2013, the governor of Maryland released results of a survey, conducted by George Mason University's Center for Climate Change Communication, finding that 80 percent of Marylanders surveyed (2000) believe human-caused climate change is occurring and has made recent weather events worse; 60 percent would like to see more of their electricity come from renewable sources such as solar and wind power. A majority also said they supported nearly all of the state policies designed to increase the sustainability of communities that were assessed in the survey.

Immediately following the survey publication, Governor Martin O'Malley hosted hundreds of scientists, business leaders, environmental advocates, and community activists at a climate change summit to announce Maryland's Greenhouse Gas Reduction Act plan (the plan) and discuss how Marylanders can take action to help the state reach its goal of reducing greenhouse gas (GHG) emissions 25 percent by 2020.The majority of the plan programs are already in place and along with new technologies and policies over the next several years are anticipated to result in a 55 million metric ton reduction in GHG emissions and approximately $1.6 billion in economic benefits. The plan will support more than 37,000 jobs. Key parts of the plan are:

- Maryland Renewable Energy Portfolio Standard (RPS). This establishes a market for new sources of renewable electricity generation by requiring that Maryland power

providers supply 18 percent of electricity from renewable sources by 2020, increasing to 20 percent by 2022.

- EmPOWER Maryland: This program is designed to reduce both Maryland's per capita total electricity consumption and peak load demand by 15 percent by 2015. It includes many state- and utility-managed energy efficiency and conservation programs. Strengthening this existing program should allow the state to increase its per capita electricity consumption reduction target above 15 percent and enable Maryland to achieve additional reductions.

- Zero Waste: Ensure all products in Maryland can be reused, recycled, or composted. By reducing the volume of landfill waste, GHG emissions are reduced. Recycling reduces the energy needed to make products from raw materials. The goal is to better utilize or recycle 60 percent of Maryland's government-managed solid waste by 2020. Maryland's county recycling rates already average around 45 percent.

- Maryland Clean Cars Program: Directly regulates CO_2 emissions from motor vehicles, effective for model year 2011 vehicles and after, significantly reducing GHG emissions.

- Regional Greenhouse Gas Initiative (RGGI): This program is a cooperative regional cap-and-trade initiative among nine Northeast and Mid-Atlantic states to reduce CO_2 emissions from fossil fuel-fired power plants. Revenues from the program support energy efficiency programs and augment EmPOWER and RPS. Announcement of revision of Maryland CO_2 cap-and-trade regulations included discussion of the following:

On August 13, 2013, MDE proposed amendments to Code of Maryland Regulations 26.09, Maryland CO_2 budget trading program, including (1) a reduction in the Maryland CO_2 emissions budget; (2) adjustments to the emissions budget through 2020 to offset the large private bank of allowances to ensure a binding cap; (3) adoption of a new mechanism, the Cost Containment Reserve (CCR), to reduce price volatility in the allowance market; (4) addition of an interim compliance period; (5) addition of new "minimum reserve price" and "long term contract price" definitions; (6) replacement of the existing afforestation offset protocol with a new, more inclusive, forest offset protocol; and (7) revisions to other definitions.

Pennsylvania

EPA-Approved SIP Revision

On August 8, 2013, EPA issued a direct final rule approving revisions to Pennsylvania's update to SIP-approved motor vehicle emissions budgets (MVEBs) for NO_x and VOCs, and an updated point source inventory for NO_x and VOCs for the 1997 8-hour ozone NAAQS SIP for Lancaster County. EPA's approval of the updated MVEBs makes them available for transportation conformity purposes. (78 Fed. Reg. 48,323)

On August 14, 2013, EPA proposed an attainment determination for the Pittsburgh-Beaver Valley, Pennsylvania, $PM_{2.5}$ nonattainment area showing attainment of the 2006 24-hour $PM_{2.5}$ NAAQS, based upon quality-assured and certified ambient air monitoring data for 2010–2012. The final attainment determination will suspend the requirement to submit an attainment demonstration and associated reasonably available control measures (RACM), a reasonable further progress (RFP) plan, contingency measures, and other SIP revisions related to attainment of the standard for so long as the area continues to attain the 2006 24-hour $PM_{2.5}$ NAAQS. EPA also proposed approval of Pennsylvania's request to establish motor vehicle emission budgets for the Pittsburgh area to meet transportation conformity requirements. This action would not constitute a redesignation to attainment under § 107(d) (3) of the CAA. The designation status of the Pittsburgh area would remain nonattainment for the

2006 24-hour $PM_{2.5}$ NAAQS until such time as EPA determines that the Pittsburgh area meets requirements for redesignation to attainment. (78 Fed. Reg. 49,403)

Other Pennsylvania Air Quality News

On August 20, 2103, the U.S. Court of Appeals for the Third Circuit reversed the Middle District of Pennsylvania's dismissal of state law tort claims on grounds of CAA preemption. *Bell v. Cheswick*, ___ F.3d ___ (No. 12-4216). In *Bell*, a class of 1500 individuals living within one mile of a coal-fired electric generating station in Springdale, Pennsylvania, filed common law nuisance, negligence, and trespass claims against the facility's owner, GenOn Power Midwest LP. Class members complained of noxious odors and particulates emanating from the plant. The federal district court had granted a motion to dismiss on the grounds that the plaintiffs' tort claims encroached on and interfered with the Clean Air Act regulatory scheme and were thus preempted. *Bell v. Cheswick*, 903 F. Supp. 2d 314, 322 (W.D. Pa. 2012). The Third Circuit reversed, holding that the CAA does not preempt tort claims filed under the common law of Pennsylvania. The court relied on the U.S. Supreme Court's decision in International Paper v. Ouellette, 479 U.S. 481 (1987), which held that the Clean Water Act's savings clause preserves the right of claimants to file suit under the laws of the "source state," i.e., the state where the source is located. The Third Circuit found no significant difference between the savings clauses and preemptive provisions of the Clean Water Act and the Clean Air Act.

On August 1, 2013, the Pennsylvania Department of Environmental Protection (PADEP) issued a press release stating that it was extending its monitoring study of air pollutants from shale gas facilities through the end of the year. This aspect of the study is examining the long-term concentrations of particulate matter, ground-level ozone, carbon monoxide, nitrogen oxides, and hydrogen sulfides, methane, and some volatile organic compounds. Earlier this year, PADEP released the results of three short-term ambient air quality sampling efforts, which the press release described as finding no violations of ambient air quality standards for the criteria pollutants and no concentrations of toxic air pollutants that would likely trigger "air-related health issues." The purpose of the new study is to examine the potential chronic effects of non-traditional gas development. Along with its press release, PADEP released a technical support document for the study methodology and discusses the sampling locations and protocol.

In GenOn Rema LLC v. EPA, ___ F.3d ___ (No. 12-1022), the Third Circuit denied GenOn Rema's petition for review of an EPA rule directly limiting emissions from its Portland, Pennsylvania, coal-fired electric generating plant. The Portland Generating Station is located in Northampton County, Pennsylvania, directly across the Delaware River within 500 feet of Knowlton Township in Warren County, New Jersey. Emissions of SO_2 from Portland travel directly across the river into areas of New Jersey. In response to a section 126(b) petition filed by New Jersey, EPA found that Portland's SO_2 emissions significantly interfere with the control of air pollution across state borders and issued a rule to address this significant interference. See " Final Response to Petition from New Jersey Regarding SO_2 Emissions from the Portland Generating Station," 76 Fed. Reg. 69,052, 69,053 (Nov. 7, 2011). That rule imposed direct limits on the Portland emissions and a three-year schedule of restrictions to reduce its contribution to air pollution. GenOn Rema challenged EPA's rule as inconsistent with the agency's authority under the Clean Air Act and as arbitrary and capricious. The Third Circuit upheld EPA's rule, finding that it was reasonable for EPA to interpret section 126(b) to be an independent mechanism for enforcing interstate pollution control. The court also held that the contents of the Portland rule are not arbitrary, capricious, or abusive of EPA's discretion.

Virginia

EPA-Approved SIP Revisions

On September 24, 2013, EPA approved a SIP revision addressing the "infrastructure

requirements" for the 2008 lead NAAQS. (78 Fed. Reg. 58,462)

West Virginia

EPA-Approved SIP Revisions

On September 12, 2013, EPA approved the redesignation and SIP revision submitted for the West Virginia portion of the Parkersburg-Marietta, WV-OH $PM_{2.5}$ nonattainment area (area) to be designated as attainment for the 1997 annual $PM_{2.5}$ NAAQS. EPA also approved the West Virginia maintenance plan SIP revision providing for continued attainment of the 1997 annual $PM_{2.5}$ NAAQS for 10 years after redesignation of the area. The maintenance plan includes an insignificance determination for the on-road motor vehicle contribution of $PM_{2.5}$, NO_x, and SO_2 for the area for purposes of transportation conformity. (78 Fed. Reg. 56,168)

Other West Virginia Air Quality News

The West Virginia Natural Gas Horizontal Well Control Act, W.Va. Code §§ 22-6A-1 to -24 required WVDEP to conduct three studies by July 1, 2013, on shale gas development, one of which addresses air quality. WVDEP was to advise the legislature on the need for further regulation of air pollution from well sites. In a June 28, 2013, report, WVDEP advised that, based on the study, no new air rules need to be issued but noted that there are additional air studies under way that will result in more complete information over time. WVDEP already extensively regulates extraction facilities, compression stations, and dehydrators and EPA has increasingly regulated internal combustion engines.

EPA REGION 5

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Illinois

EPA issued a final rule to determine that the Chicago-Gary-Lake County area is attaining the 1997 annual $PM_{2.5}$ standard based on monitoring data from 2007 to 2012. The rule approves the related state implementation plan elements including comprehensive emissions inventories, the maintenance plan, and the motor vehicle emissions budgets. 78 Fed. Reg. 60,704 (Oct. 2, 2013).

Indiana

EPA issued proposed and direct final rules to approve a maintenance plan update for the Lake County, Indiana, SO_2 maintenance area, demonstrating that Lake County will maintain attainment of the 1971 SO_2 NAAQS through 2025. 78 Fed. Reg. 54,173; 78 Fed. Reg. 54,200 (Sept. 3, 2013).

EPA issued a final rule to approve portions of submissions to address the section 110(a)(1) and (2) requirements of the act. EPA is finalizing approval of portions of the submissions intended to meet certain requirements of sections 110(a)(2)(C), 110(a)(2)(D)(i)(II), and 110(a)(2)(J) of the act with respect to the 2006 24-hour $PM_{2.5}$ NAAQS. 78 Fed. Reg. 41,311 (July 10, 2013).

EPA issued a final rule to approve the redesignation of the Indianapolis nonattainment area to attainment for the 1997 annual NAAQS for $PM_{2.5}$. The rule approves the related state implementation plan elements including comprehensive emissions inventories, the maintenance plan, and the motor vehicle emissions budgets. 78 Fed. Reg. 41,698 (July 11, 2013).

Ohio

EPA issued a final rule to approve the redesignation of the Dayton-Springfield nonattainment area to attainment for the 1997 annual NAAQS for $PM_{2.5}$. The rule approves the related state implementation plan elements including comprehensive emissions inventories, the maintenance plan, and the motor vehicle emissions budgets. 78 Fed. Reg. 59,258 (Sept. 26, 2013).

EPA issued a final rule to approve EPA the redesignation of the Ohio portion of the Steubenville-Weirton area to attainment for the 1997 annual and 2006 24-hour NAAQS for $PM_{2.5}$. The rule approves the related state implementation plan elements including comprehensive emissions inventories, the maintenance plan, and the motor vehicle emissions budgets. 78 Fed. Reg. 57,273 (Sept. 18, 2013).

EPA issued a final rule to approve the redesignation of the Cleveland-Akron-Lorain nonattainment area to attainment for the 1997 annual and 2006 24-hour NAAQS for $PM_{2.5}$. The rule approves the related state implementation plan elements including comprehensive emissions inventories, the maintenance plan, and the motor vehicle emissions budgets. 78 Fed. Reg. 57,270 (Sept. 18, 2013).

EPA issued a final rule to approve the redesignation of the Ohio portions of the Parkersburg-Marietta, and Wheeling areas to attainment of the 1997 annual $PM_{2.5}$ standard. The rule approves the related state implementation plan elements including comprehensive emissions inventories, the maintenance plan, and the motor vehicle emissions budgets. 78 Fed. Reg. 53,275 (Aug. 29, 2013).

Michigan and Minnesota

EPA issued a final rule to disapprove in part the Michigan and Minnesota regional haze state implementation plans for failure to mandate best available retrofit technology (BART) for taconite facilities within these states. The rule supplements a February 6, 2013, action that established federal emission limits representing BART for these facilities. The final rule is effective on October 30, 2013. 78 Fed. Reg. 59,825 (Sept. 30, 2013).

Michigan

EPA issued a final rule to approve the redesignation of the Detroit-Ann Arbor nonattainment area to attainment for the 1997 annual and 2006 24-hour NAAQS for $PM_{2.5}$. The rule approves the related state implementation plan elements including comprehensive emissions inventories, the maintenance plan, and the motor vehicle emissions budgets. 78 Fed. Reg. 53,272 (Aug. 29, 2013).

Wisconsin

EPA issued a final rule to approve a state implementation plan revision concerning Wisconsin's vehicle inspection and maintenance (I/M) program in southeast Wisconsin. The revision amends I/M program requirements in the active control measures portion of the ozone SIP to reflect changes that have been implemented at the state level since EPA fully approved the I/M program on August 16, 2001. The rule is effective on October 21, 2013. 78 Fed. Reg. 57,501.

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EPA REGION 6

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Regional Developments

On July 16, 2013, Texas and Oklahoma were among 11 states that filed a complaint against EPA to compel compliance with the Freedom of Information Act (FOIA). See *Pruitt v. EPA*, Docket No. 5:13-cv-0726 (W.D. Okla. 2013). Earlier this year, the states had filed FOIA requests relating to EPA's negotiations with nongovernmental organizations (NGOs) under the Clean Air Act regional haze program, given concerns that EPA's policy of settling lawsuits via consent decree was effectively excluding the states from the intended cooperative implementation process. In May 2013, EPA denied the FOIA request as overly broad. The states now seek an order requiring EPA to process the states' FOIA request, conduct a thorough search for responsive records, disclose the requested records, and waive the processing fee.

State Developments

Arkansas

On August 29, 2013, EPA published a final rule approving portions of revisions to the Arkansas SIP addressing interstate transport requirements under section 110 of the Clean Air Act for the 1997 and 2006 fine particulate matter ($PM_{2.5}$) national ambient air quality standard (78 Fed. Reg. 53,269). The rule became effective on September 30, 2013.

Louisiana

The Fifth Circuit denied review for lack of subject matter jurisdiction of EPA objections to three title V permits issued by the Louisiana Department of Environmental Quality (LDEQ) to Nucor Steel Louisiana for an iron manufacturing facility. See *Louisiana Dep't Env'l Quality v. U.S. Env'l Protection Agency*, Case No. 12-60482, slip op. (5th Cir. Sept. 13, 2013). LDEQ brought suit challenging the objections, issued almost two years after the state had issued the permits. Rejecting arguments that EPA's objections were not proper "objections" and were untimely made, the court held that Clean Air Act section 7661d(c) does not allow judicial review of an objection and is not final agency action. In dicta, the court pointed to other provisions of the act (citizen suit provisions) as potential mechanisms for challenging an EPA objection.

New Mexico

On September 5, 2013, the New Mexico Environmental Improvement Board unanimously approved a plan by the state's environment department providing for the retirement of two coal-fired power generating units at the San Juan Generating Station in northwest New Mexico, and installation of nitrogen oxide control technology on the remaining two units at that facility. Approval of this plan is part of New Mexico's efforts to reduce regional haze. The proposal must also be approved by New Mexico's Public Regulation Commission and EPA.

On August 23, 2013, EPA published a proposed rule to approve portions of a revision to the New Mexico SIP regarding prevention of significant deterioration (PSD) plantwide applicability limit (PAL) permitting provisions (78 Fed. Reg. 52,473). The rule would allow New Mexico to issue PALs to greenhouse gas (GHG) sources. In the proposed rule, EPA took no action on the portion of that SIP revision concerning the GHG biomass deferral rule. Comments on the proposed rule were due September 23, 2013.

On July 9, 2013, EPA published a final rule approving a revision to the New Mexico SIP to address interstate transport requirements prohibiting air contaminant emissions that contribute significantly to nonattainment or interfere with maintenance in any other state for the 2006 fine particulate matter ($PM_{2.5}$) NAAQS (78 Fed. Reg. 40,966). The rule went into effect on August 8, 2013.

Oklahoma

On September 6, 2013, EPA issued a proposed rule to address revisions to the Oklahoma SIP regarding excess emissions reporting requirements (78 Fed. Reg. 54,816). The proposed rule would approve certain provisions and grant limited approval and limited disapproval of other provisions. The proposed rule would also make a finding of substantial inadequacy and issue a "SIP call" for provisions associated with the proposed limited approval and limited disapproval that EPA found to be inconsistent with the Clean Air Act. Comments on the proposal were due by October 7, 2013.

On August 21, 2013, EPA published a proposed rule to approve a revision to the Oklahoma SIP for regional haze (78 Fed. Reg. 51,686). The revision addresses the best available retrofit technology (BART) determination for American Electric Power/Public Service Company of Oklahoma's two 490 megawatt coal-fired steam electric generating units (units 3 and 4) at Northeastern Power Station in Rogers County, proposing to find that the revised BART determination meets the requirements of the regional haze rule in the Clean Air Act. EPA also proposed approval of a related SIP revision addressing the impact of emissions from these units concerning non-interference with programs to protect visibility in other states. The publication also includes a proposal to withdraw federal implementation plan (FIP) emission limits for sulfur dioxide that would otherwise apply to units 3 and 4. Comments on the proposal were due by September 20, 2013.

On July 19, 2013, the U.S. Court of Appeals for the Tenth Circuit upheld EPA's imposition of a federal implementation plan (FIP) to control sulfur dioxide emissions at two Oklahoma Gas & Electric Company coal-fired power plants (*Oklahoma v. EPA*, No. 12-9526, 10th Cir. July 19, 2013). The court held that EPA had authority to reject Oklahoma's state plan to reduce regional haze and lawfully promulgated a FIP. The state of Oklahoma, Oklahoma Industrial Energy Consumers, and Oklahoma Gas & Electric Company (the petitioners) had challenged EPA's rejection of the state's plan to control regional haze (76 Fed. Reg. 81,728).

Texas

During the first week of October, the Texas Commission on Environmental Quality (TCEQ) released draft rules to transition prevention of significant deterioration (PSD) greenhouse gas (GHG) permitting from EPA Region 6 to TCEQ, and to address title V permitting for GHG-related requirements. The draft rules would set up a state permitting program based on the current federal requirements: establishing under Texas law that GHGs are a federally regulated new source review pollutant, defining how carbon dioxide equivalent (CO_2e) emissions are determined, and imposing parallel threshold levels. The draft rules are scheduled to be considered for proposal by the TCEQ commissioners on October 23, 2013.

On September 26, 2013, EPA published a final rule disapproving portions of SIP revisions relating to the Texas Emergency Orders Program that Texas submitted on August 31, 1993, December 10, 1998, February 1, 2006, and July 17, 2006 (78 Fed. Reg. 59,250). EPA found that Texas's proposed Emergency Orders Program failed to meet Clean Air Act requirements for projects subject to major new source review (NSR) by not meeting major NSR public participation requirements and the requirement that an NSR permit be issued prior to commencement of construction of a major source.

On September 9, 2013, EPA published two proposed rules relating to the continuing progress that the Houston/Galveston/Brazoria (HGB) nonattainment area is making toward compliance with the 1997 ozone national ambient air quality standard (NAAQS) (78 Fed. Reg. 55,037, 78 Fed. Reg. 55,029). EPA Region 6's news release regarding the proposals states: "The EPA is proposing to approve the State of Texas' plan for the Houston area to attain the 1997 standard for ground-level ozone pollution by 2018. This means EPA believes the emissions-cutting measures in the state's plan have put the Houston-Galveston-

Brazoria area on track to meet the 1997 federal 8-hour ozone standard of 84 parts per billion by 2018." The proposals relate to Texas state implementation plan (SIP) submittals relating to the HGB area on April 1 and 6, 2010, and May 6, 2013. Written comments on the proposals must be submitted by October 9, 2013.

On September 9, 2013, EPA also published a direct final rule regarding three revisions to the Texas SIP (submitted on December 17, 1999, October 4, 2001, and August 11, 2003) concerning the Texas title V program (78 Fed. Reg. 55,221). The direct final rule will be effective on November 12, 2013, without further notice unless EPA receives relevant adverse comment by October 10, 2013.

The Texas First Court of Appeals issued an opinion on August 29, 2013, holding that two Houston city air quality ordinances were not preempted by the Texas Clean Air Act (TCAA), *City of Houston v. BCCA Appeal Group, Inc.* (No. 01-11-00332-CV). The ordinances established a city air quality program that included a fee schedule and expanded the program's scope to cover emission sources subject to TCEQ regulation. Reversing the trial court, the court of appeals found that the TCAA did not preempt Houston's authority and that the ordinance registration and fee provisions were legal because they operated concurrently with existing state requirements. The court also held that because the ordinances only incorporated parts of the TCAA, and did not include TCEQ discretionary enforcement powers, they did not circumvent the express goals of the legislature to render them invalid.

On August 28, 2013, the TCEQ proposed to remove Port Arthur from the agency's Air Pollution Watch List (APWL) based on reductions in measured benzene levels in recent years. TCEQ added Port Arthur to the APWL in 2001 to address elevated annual average benzene concentrations at the agency's City Service Center monitor. Since that time sources in the Port Arthur APWL area implemented operational improvements that have achieved lower benzene emissions. TCEQ will host a public meeting regarding the proposal in Port Arthur on October 8, 2013, and is accepting public comment through October 11, 2013.

On August 8, 2013, EPA published its proposal to approve and direct final rule revisions to the Texas SIP consisting of a maintenance plan for Victoria County required to ensure continued attainment of the 1997 8-hour ozone NAAQS. EPA is approving Texas' Victoria County SIP submittal as a direct final rule without prior proposal because EPA views the submittal as noncontroversial and anticipates no adverse comments. This SIP revision was to go into effect without further action on October 7, 2013, if EPA received no adverse comments by September 9, 2013. The proposed rule was published at 78 Fed. Reg. 48,373, and the direct final rule was published at 78 Fed. Reg. 48,318.

On June 13, 2013, the Fifth Circuit Court of Appeals issued an opinion upholding a 2010 Dallas city ordinance that allows taxicabs powered by compressed natural gas (CNG) to have priority over gasoline-powered taxicabs in lines for passengers at Dallas' Love Field airport. The Association of Taxicab Owners, which represents gasoline-powered taxis in the Dallas/Fort Worth area, challenged the ordinance on the basis that it was preempted by the federal Clean Air Act since it constituted a backdoor manner of regulating new vehicle emissions. A three-judge panel of the Fifth Circuit upheld the ordinance, finding that it did not impose emissions controls either directly or through its indirect effects, as it did not create a mandatory standard compelling the conversion of taxicabs to CNG and taxicabs had alternative available methods to recover any losses derived from losing a place in line at Love Field.

EPA REGION 8

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Colorado

APCD P.S. Memo Revisions Expand Scope of Reportable Downtime

On October 4, 2013, the Air Pollution Control Division (division) again revised its Permit Section Memo 10-02: "Oil & Gas Atmospheric Condensate Storage Tank Batteries System Reporting Guidance" (P.S. memo) making several changes regarding reportable air emissions under Air Quality Control Commission Regulation No. 7, § XII. Among other things, the division's revised P.S. memo expands the scope of what the division views to be reportable "downtime" in two significant ways. First, the revised P.S. memo reflects the division's new position that well liquid unloading events qualify as reportable downtime. This constitutes a departure from the division's previous position that such events were not required to be reported as downtime. Second, the revised P.S. memo reflects the division's new position that visible emissions from control equipment must be reported as downtime. This position is based on the division's conclusion that control equipment with visible emissions is not operational.

Under Regulation No. 7, owners and operators of atmospheric condensate tank batteries in the Denver-Metropolitan Area and North Front Range 8-hour ozone nonattainment area (nonattainment area) must utilize air pollution control equipment to reduce systemwide volatile organic compound (VOC) emissions from their commonly owned tanks by 90 percent on a calendar weekly basis for the summer ozone season and 70 percent for the remainder of the year. Owners and operators are required to submit semiannual reports to the division that compare total controlled production with total uncontrolled production to determine compliance with the systemwide standards. Uncontrolled production is production during air pollution control equipment "downtime." The P.S. memo revisions regarding the scope of reportable downtime—i.e., to include well liquids unloading events and visible emissions—may make it more difficult for oil and gas owners and operators to comply with the systemwide VOC emission reduction requirements applicable to condensate storage tanks in the nonattainment area.

The effective date for the revisions to the P.S. memo for reporting well unloading and visible emissions as downtime is January 1, 2014. More information can be found at the division's Web site: http://www.colorado.gov/cs/Satellite?c=Page&childpagename=CDPHE-AP%2FCBONLayout&cid=1251597644148&pagename=CBONWrapper.

EPA Issues Proposal to Approve Colorado SIP

On October 23, 2013, EPA approved Colorado's SIP for demonstrating compliance with the Clean Air Act (CAA) infrastructure requirements of the 1997 and 2006 $PM_{2.5}$ NAAQS. 78 Fed. Reg. 58,186 (to be codified at 40 C.F.R. pt. 52). EPA concurrently approved portions of a Colorado SIP revision that updates Regulation No. 3 of the Colorado Air Quality Control Commission's prevention of significant deterioration (PSD) permitting requirements to incorporate the required elements of the 2008 $PM_{2.5}$ new source review (NSR) implementation rule and the 2010 $PM_{2.5}$ increment rule.

Montana—EPA Issued Final Decision to Disapprove Portions of Montana's SIP

The July 8 Region 8 summary indicated that EPA was proposing to disapprove a specific portion of Montana's SIP for demonstrating compliance with the Clean Air Act's infrastructure requirements for the 1997 ozone NAAQS. Specifically, EPA proposed to disapprove a portion of Montana's November 28, 2007, and December 22, 2009,

certifications because the SIP did not meet the requirements for state boards that approve permits or enforcement orders under CAA § 128. On August 6, 2013, EPA finalized the proposal, disapproving the SIP for failure to meet the infrastructure element regarding state boards. 78 Fed. Reg. 47,572 (Aug. 6, 2013).

Wyoming—D.C. Circuit Rejects Wyoming's Challenge to Portion of EPA's GHG Rules

Late this summer, the D.C. Circuit dismissed Wyoming's challenge to portions of EPA's greenhouse gas (GHG) regulations. *Texas v. EPA*, 726 F.3d 180 (D.C. Cir. 2013). Specifically, the state of Wyoming joined other state and industry petitioners in challenging portions of EPA's GHG rules dealing with permitting and SIP requirements for stationary sources subject to the Clean Air Act's (CAA) PSD program. The appropriate statutory provisions guiding the regulation of GHGs under the PSD program became critical once EPA made its endangerment finding, as well as issued the tailoring, timing, and tailpipe rules. At issue in Wyoming's challenge was EPA's interpretation that the PSD permitting requirements in sections 165 and 167 of the CAA were "self-executing," thereby requiring PSD permits for GHGs without regard to previously approved SIPs. Wyoming and other states asserted that they may continue to issue lawful PSD permits while incorporating new provisions for GHGs into their SIPs. The D.C. Circuit rejected the states' challenge, holding that the PSD permitting requirements are self-executing and prohibit the construction of a major emitting facility without, inter alia, Best Available Control Technology (BACT) technology for each pollutant subject to regulation under the act, irrespective of applicable SIP provisions. With respect to Wyoming's challenge, the court held that the state lacked Article III standing because it failed to show how vacating the rules would redress any purported injuries given the court's conclusion that the claimed injury was required by the statute itself irrespective of EPA's interpretation (i.e., vacating the rules would do nothing to ameliorate the alleged injury with respect to the statutory requirements). The court also rejected the state's arguments that EPA's interpretation violated the tenets of "cooperative federalism" embedded in the CAA, holding instead that the plain text of sections 165 and 167 trump any applicable cooperative federalism considerations. Given that EPA has issued a federal implementation plan (FIP) for Wyoming, the results of the case likely mean that Wyoming needs to either operate under the FIP or revise its SIP accordingly.

North Dakota

Plaintiffs in Five States File Class Action for Natural Gas Flaring

Attorneys from five states have filed class action lawsuits against eight oil and gas companies operating in North Dakota, alleging that the companies owe the plaintiffs millions of dollars in lost royalties from flared natural gas associated with production in the Bakken. The lawsuits, which seek class action certification, were filed in state district court in Divide, Williams, Mountrail, and McKenzie Counties. Generally, the lawsuits allege that the companies are violating the conditions imposed by the North Dakota Industrial Commission when authorizing and allowing producers to obtain exemptions for natural gas flaring under certain circumstances. On the same day, the North Dakota Petroleum Council announced the formation of an industry task force formed to reduce natural gas flaring. The lawsuit and task force highlight the emergence of natural gas flaring in North Dakota as an air quality issue that is likely to see significant attention in the months and years to come.

NDDEH Offers Bakken Operators Settlement for Flash Emissions

On August 15, 2013, the North Dakota Department of Health, Environmental Health Section informed Bakken well operators of the opportunity to enter into an omnibus settlement regarding noncompliance with tank (flash) emissions requirements. The purpose of the settlement is to resolve any past noncompliance issues that resulted from inaccurate emission quantifications and the resulting lack of proper controls. The industrywide offer expires on November 15, 2013, after which time

noncompliance issues will be resolved on a case-by-case basis with no opportunity to obtain the benefit of reduced penalties.

Utah

Proposed NSR Rule Permitting General Approval Orders for Source Categories

On November 6, 2013, the Utah Division of Air Quality (division) adopted a new rule that provides for use of general approval orders (GAOs) in new source review permitting, as an alternative to individual permits (i.e., approval orders) that are reviewed and developed on a case-by-case basis. Under the new rule, R307-401-19, the division is authorized to develop GAOs for source categories, and proposed new or modified sources that fall within those categories can apply to be covered by the applicable GAO rather than obtaining individualized permits. Major sources and major modifications are not eligible for coverage under a GAO. GAOs can apply throughout the entire state or in a specific region or area. GAOs must meet the requirements of the existing NSR permitting rule (e.g., application of BACT) and must go through the normal public review process before being issued by the Division.

Although the proposed rule is not specific to the oil and gas industry, the division is in the early stages of developing a GAO for oil wells and potentially gas wells throughout the state. Other states have successfully utilized general air permits such as GAOs to streamline the permitting process and provide consistency and certainty for sources within particular categories.

Proposed Salt Lake City and Provo Nonattainment Area $PM_{2.5}$ SIPs

On September 11, 2013, the Utah Division of Air Quality proposed state implementation plans (SIPs) for the Salt Lake City nonattainment area and the Provo nonattainment area for the 24-hour fine particulate matter ($PM_{2.5}$) national ambient air quality standard (NAAQS). The control strategies proposed in the two SIPS include installation of BACT at large point sources, area source control measures for specific source categories, and transportation conformity with SIP emission budgets in transportation plans and programs developed by municipal planning organizations and the Utah Department of Transportation in these areas. The public comment period for the two SIPs began on October 1, 2013, and ran through October 31, 2013.

EPA REGION 9

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I. Best Available Retrofit Technology (BART) Developments

Arizona

In December 2012, EPA bifurcated the Arizona Department of Environmental Quality (Arizona) state implementation plan for regional haze and proposed to approve in part and disapprove in part the BART determinations. In Phase 1, which applied to three coal-fired electric generating plants, EPA proposed to disapprove Arizona's BART determinations for oxides of nitrogen (NO_x). Arizona had proposed to require low NO_x burners and overfire air for BART. EPA's federal implementation plan (FIP) imposed selective catalytic reduction (SCR) technology. In Phase 2, EPA proposed to approve in part and disapprove in part Arizona's BART determinations for the balance of sources. In general, EPA disapproved the NO_x limits for an additional power plant and proposed to require additional controls on the power plant, cement and lime kilns, and copper smelters.

In late January and early February, Arizona and four utilities affected by the Phase 1 rule filed suit in the Ninth Circuit to block EPA's disapproval and FIP. Arizona argued that EPA had not followed the proper procedural steps and failed to provide the state time to respond prior to imposing the FIP. The utilities argued that EPA's final NO_x proposal was

too costly, an emission averaging provision was inappropriate and not promulgated after public notice and comment, and that the decision did not adequately defer to Arizona's judgments on the appropriate visibility metric (Arizona used the "most affected" Class I area; EPA used a "sum of all affected areas" approach) and cost issues (Arizona used site-specific information; EPA used the *Control Cost Manual*). The utilities sought a stay of EPA's FIP. In addition, the utilities filed requests for administrative reconsideration and stays with EPA.

In May and June, EPA granted administrative limited administrative reconsideration to all four utilities on the emission averaging issue. It also granted broader administrative reconsideration to a rural electric cooperative that proposed a "better than BART" alternative to EPA's SCR FIP. EPA did not grant the administrative stay requests. In September, the Ninth Circuit denied Arizona's and the utilities' stay motions.

Navajo Generating Station

On January 17, 2013, EPA proposed to require the Navajo Generating Station (NGS), which operates on tribal land, to install NO_x controls equivalent to 0.055 lb/MMBtu by 2018. It provided an alternative that allowed until 2023, for the NGS owners to install new controls achieving the same limit due to NGS's installation of low NO_x burners in 2009. EPA claimed this would achieve a 28,500 ton NO_x reduction and improve visibility in the Grand Canyon by 5.4 deciviews.

In September 2013, EPA proposed a supplement BART based on the work of the technical work group (TWG) of stakeholders. The TWG proposed a lifetime cap in NO_x emissions over 2009–2044 that would ensure cumulative NO_x emissions from NGS are below that level. EPA proposed to determine that this approach was "better than BART." EPA proposed to find that under the Tribal Authority Rule, it had additional discretion to vary the time frames for BART compliance. Comments are due January 6, 2014.

II. Significant Regulatory Action

On May 14, 2013, EPA ruled that San Diego County has met the 1997 national health-based air quality standard for smog, or ground-level ozone. As a result, San Diego County has been reclassified as an "attainment area" of the 1997 NAAQS standard for 8-hour ozone, and the EPA has approved the state's plan to maintain clean air standards over the next ten years beyond redesignation. Clean air monitoring data since 2009 indicate that San Diego County meets the 0.08 parts per million federal NAAQS standard for ozone. However, more progress is needed for the county to reach the more stringent 0.075 parts per million ozone standard adopted in 2008.

III. Enforcement Actions

Arizona

Pure Wafer agreed to pay a $120,000 settlement to Arizona on July 19, 2013, for failure to obtain a permit for its hazardous air pollutants. ADEQ discovered that Pure Wafer was emitting hydrogen fluoride, a hazardous air pollutant, during an inspection of its facility in Prescott, Arizona. Pure Wafer, a UK company, prepares reclaimed silicon test wafers for the semiconductor industry. Since the inspection, Pure Wafer applied for and obtained a permit on January 2, 2013.

On Oct. 7, 2013, BTZ, Inc., of Yuma, Arizona, agreed to pay a $40,000 penalty to Arizona for failing to properly maintain the air pollution control device at its Yuma plant. Tests revealed that the facility's emission rate for PM_{10} was 15 times the permitted emission limit, prompting investigation into the maintenance of the emissions control device. BTZ operates a hot mix asphalt plant and crushing and screening operations in Yuma. BTZ has since demonstrated compliance upon installation of proper emissions control.

California

In July of 2013, Chevron agreed to pay $190,000 in penalties to the Bay Area Air Quality Management District (BAAQMD) to settle air quality violations

at its refinery in Richmond, California. The violations occurred from 2010 to 2012 and involve several issues—record keeping, routine maintenance, flaring events, and stack releases—that violated the Clean Air Act and the California SIP.

In October of 2013, Plains Products Terminals agreed to pay a $159,000 civil penalty to BAAQMD in settlement for alleged air quality violations at its petroleum storage terminal in Martinez, California. The violations involved failure to operate the facility's vapor recovery system to properly abate hydrocarbon emissions.

In October of 2013, the BAAQMD accepted a civil penalty of $300,300 from Valero Refining Company to settle air quality violations at its petroleum refinery in Benicia, California. Twelve of the 33 violations were data and monitoring related, while the rest involved short-term emission excesses measured by monitoring equipment or leaks from pressure vacuum valves on tanks.

On October 18, 2013, South Coast Air Quality Management District (SCAQMD) petitioned its hearing board—an independent administrative law panel—to require Exide Technologies, an acid battery recycling plant in Vernon, California, to shut down operations until it can adequately control gaseous pollutant emissions including lead and arsenic. The petition alleges continuing violations of SCAQMD emissions rules, and alleges that continuing operation poses a significant risk to the health of surrounding residents. Exide's risk reduction plan is being reviewed by SCAQMD staff.

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Regional Updates

On October 28, 2013, California, British Columbia, Oregon, and Washington signed a compact—the Pacific Coast Action Plan on Climate and Energy (the plan)—to address climate change. The non-binding agreement commits Washington to setting binding limits on greenhouse gas emissions and to deploy market-based mechanisms (i.e., cap-and-trade) to meet those limits. Earlier this year, Washington convened a legislative task force to consider climate change policy, and Governor Inslee has indicated that he would like the state to adopt cap-and-trade regulations similar to California's AB-32 regulations. The plan commits California and British Columbia to maintain their existing carbon pricing programs (cap-and-trade and a carbon tax, respectively), and Oregon will build on existing programs to set a price on carbon emissions. The plan calls for the signatories to link their programs wherever possible to promote consistency and encourage a regional low-carbon economy. The plan also commits the signatories to harmonize 2050 greenhouse gas reduction targets, adopt low-carbon fuel standards, streamline permitting for renewable energy infrastructure, and promote the usage of zero-emission vehicles.

State Updates

Alaska

On August 9, 2013, EPA issued a direct final rule approving a carbon monoxide limited maintenance plan (LMP) for the Fairbanks area. In 2002, EPA determined that the Fairbanks area was in attainment for carbon monoxide. The LMP is intended to keep the Fairbanks area in attainment with carbon monoxide standards for a second ten-year period. 78 Fed. Reg. 48,611.

On September 5, 2013, EPA announced settlements with Shell Gulf of Mexico, Inc., and Shell Offshore, Inc., that resolve alleged violations of CAA permits for oil and gas exploration activities in the Chukchi and Beaufort Seas. Shell agreed to pay $1.1 million to settle EPA's claims with respect to two separate permits issued in early 2012.

Idaho

On October 24, 2013, EPA approved revisions to Idaho's SIP relating to the state board requirements of CAA section 128 and the corresponding state board infrastructure SIP requirements for the 1997 ozone NAAQS. 78 Fed. Reg. 46,549.

Oregon

On September 30, 2013, the Department of Justice lodged a consent decree in the U.S. District Court for the District of Oregon, which requires an Oregon door manufacturer to pay a $50,000 civil penalty for alleged violations of regulations and requirements applicable to the emission of hazardous air pollutants and air operating permits.

On August 1, 2013, EPA found that the federally approved provisions in Oregon's SIP satisfy the CAA's infrastructure requirements for 1997 and 2006 $PM_{2.5}$ NAAQS and the 2008 ozone NAAQS. EPA also found that the federally approved provisions currently in the Oregon SIP meet the interstate transport requirements of the CAA as applied to the 2008 ozone NAAQS, and as applied to visibility for the 2006 $PM_{2.5}$ and 2008 ozone NAAQS. 78 Fed. Reg. 46,514.

Washington

The Department of Ecology (Ecology) has initiated a rulemaking to establish reasonably available control technology (RACT) to limit greenhouse gas emissions from petroleum refineries. Ecology commenced this rulemaking in response to a decision by the U.S. District Court for the Western District of Washington, which found that Washington's SIP requires Ecology to establish RACT for petroleum refinery greenhouse gas emissions. *Wash. Envtl. Council v. Sturdevant*, 834 F. Supp. 2d 1209 (W.D. Wash. 2011).

The Ninth Circuit, however, recently overturned that decision. *Wash. Envtl. Council v. Bellon*, ___ F.3d ___, 2013 WL 5646060 (9th Cir. Oct. 17, 2013). The Ninth Circuit held that the plaintiffs failed to establish a causal link between greenhouse gas emissions from Washington refineries and their alleged injuries. The court also held that the plaintiffs failed to show how a court order would redress their alleged injury. The court accordingly concluded that the plaintiffs lacked standing. The court did not reach the merits of the dispute (i.e., whether Washington's SIP requires Ecology to set RACT for refinery greenhouse gas emissions), and the decision casts doubts on Ecology's current RACT rulemaking.

The Department of Ecology has initiated a rulemaking to update requirements for sources emitting gasoline vapors, including gasoline dispensing facilities, gasoline loading terminals, bulk gasoline plants, and gasoline storage tanks. Requirements for large volume gasoline dispensing facilities are not part of Ecology's current rulemaking. The rulemaking is intended to reconcile Washington's regulations with federal air toxics rules, new source performance standards, and emission guidelines for existing incineration units.

On October 3, 2013, EPA approved a second ten-year limited maintenance plan (LMP) for the Thurston County maintenance area for PM_{10}. 78 Fed. Reg. 61,188.