

Air Quality Committee Newsletter

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MESSAGE FROM THE COMMITTEE CHAIR

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While it is an exciting time to be an air quality practitioner, it is also challenging staying current. The U.S. Supreme Court heard oral arguments in the CSAPR (Cross-State Air Pollution Rule) litigation, agreed to review the D.C. Circuit's decision concerning the Environmental Protection Agency's (EPA's) prevention of significant deterioration (PSD)/title V Tailoring and Timing Rules for greenhouse gases and scheduled oral arguments for February 24, 2014. On the same day as the oral arguments in CSAPR, the D.C. Circuit heard oral arguments in the MATS (mercury and air toxics standards) litigation. In addition, EPA has proposed carbon pollution standards for new power plants and is expected to propose carbon pollution standards for existing power plants in June. In this message, I review the air quality programs and committee activities during the upcoming Spring Conference in Salt Lake City that are designed to help you stay current and prepare you to respond to these and other air quality developments. I also report on the Section's new program planning process for the Fall Meeting in October 2014, and discuss some ideas for webinars and committee conference calls that are being considered. I offer suggestions for ways to become involved in the Air Quality Committee, such as sharing information, social media, writing opportunities, public service, and committee social functions in addition to program planning.

43rd Spring Conference: The Spring Conference is scheduled for March 20–22, 2014, in Salt Lake City, Utah. The schedule of events has changed from past conferences, and you may want to review it before making travel arrangements. There will be four all-conference plenaries and nine breakout sessions. The tree planting project has been moved to the afternoon of the last day of the meeting. New this year will be a *free* workshop titled “Communication and Mediation for the Environment and Natural Resources Lawyer,” on Thursday morning cosponsored with the University of Utah, S.J. Quinney College of Law Natural Resources Law Forum, that will examine successful communication tools in social media, dispute resolution, and general practice and explore how environmental, energy, and natural resources lawyers may connect scientific information for added value. The half-day workshop will take place at the University of Utah campus, which is located a short mass-transit ride away from the Grand America Hotel, the host hotel for the conference. Refreshments and a boxed lunch will be provided.

On Thursday afternoon, there will be two plenary sessions followed by the Technical Roundtables. Thursday's first plenary session, titled “EPA Priorities Leading into the 2014 Mid-Term Elections and the Home Stretch for the Obama EPA,” will feature several of EPA's leading officials discussing some of the agency's top priorities for 2014 and action items to accomplish by 2016. Roger R. Martella Jr., of Sidley Austin

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

CALENDAR OF SECTION EVENTS

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 Meeting
The Hutton Hotel
Nashville, TN

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

August 7-12, 2014
ABA Annual Meeting
Sheraton Boston Hotel
Boston, MA

October 8-11, 2014
22nd Fall Conference
Trump National Doral Miami
Miami, FL

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

LLP, in Washington, D.C., will moderate. Thursday's second plenary session, titled "Energy Development on State Lands," will explore energy developments taking place in the states and how the laws, regulations, and policies of state land management are affecting such development. Speakers include Ryan M. Lance of Crowell & Moring LLP, in Cheyenne, Wyoming; David Neslin of Davis Graham & Stubbs LLP, in Denver, Colorado; and Harry Weiss of Ballard Spahr LLP, in Philadelphia, Pennsylvania. Following the Technical Roundtables, there will be a welcome reception and the Section dinner, which is included in the registration fee. After the Section dinner, law students and young lawyers will have a networking event.

Programming on Friday morning will start with breakout sessions and end with a plenary session. The Friday breakout sessions include one titled "Hot Topics in Air: The Coming Climate Regulations." Representatives from government, industry, and the nongovernmental organization community will explain the expected greenhouse gas standards for new and existing power plants and state implementation of these new standards. The air hot topics breakout session will address actions the administration will or is likely to take over the next three years to address climate change. Speakers include Kenneth L. Kimmell, commissioner of the Massachusetts Department of Environmental Protection and secretary of RGGI, Inc., in Boston, Massachusetts; and Frank Prager, vice president, Environmental and Public Policy, Xcel Energy Services, Inc., in Denver, Colorado. Thomas A. Lorenzen, a partner at Dorsey & Whitney LLP Washington, D.C., and former assistant chief in the Environment and Natural Resources Division at the Department of Justice, will moderate. Additional breakout sessions that may be of interest to the air quality practitioner include (1) "Agency Guidance in Litigation: Coping Mechanisms," which will explore the potential effects of agency guidance in compliance negotiations and enforcement proceedings; (2) "Global Environmental Legal Issues: The In-House Perspective," which will explore cutting-edge global environmental and

natural resource issues and how multinational companies are responding to these issues; and (3) "Environmental Considerations in Business Transactions," which will include a discussion of EPA's vapor intrusion guidance and indoor air quality. Other breakout sessions will explore renewable energy development and use of brownfields for energy projects.

Friday's plenary session, titled "Supreme Court Review: Narrowing Decisions on Water, Air, and Jurisdiction," will take place in the afternoon and will review and analyze all of the cases decided in the last two terms pertaining to environmental, natural resources, and energy law as well as the role of other decisions that are likely to have procedural or jurisdictional implications on these practice areas. Speakers include John C. Cruden, president of Environmental Law Institute in Washington, D.C (and recently nominated to be the assistant attorney general of the Environment and Natural Resource Division of the U.S. Department of Justice); Peter D. Keisler of Sidley Austin LLP in Washington, D.C.; and Richard J. Lazarus, Howard and Katherine Aibel Professor of Law, Harvard Law School. Mr. Keisler argued for industry and labor petitioners in CSAPR in the U.S. Supreme Court. Norman A. Dupont of Richards Watson & Gershon in Los Angeles, California, will moderate.

The Young Lawyer and Law Student Speed Networking Event will take place on Friday followed by a reception. Dinner will be on your own Friday. On Saturday, March 22, 2014, there will be hot topics sessions on enforcement and ethics. The Section's tree planting project will take place at the end of the conference on Saturday afternoon.

New Process for Planning Conference Programs: The Section is changing its process for conference program planning. Under the old model, the Conference Planning Committee requested program proposals from committees but rejected 90 percent of them. For the 22nd Fall Conference at the Trump National Doral Golf Resort & Spa, October 8–11, 2014, the Section is beginning the conversation with

hot topics. Program vice chairs, committee chairs, and others were invited to join Peter Wright, chair of the Section's Education Service Group, for three conference-planning calls to brainstorm and propose panel topics, speakers, and formats. The first call covered environmental topics, the second call energy and resources topics, and the third call cross-practice topics. John Jacus, Program Planning chair for the Fall Conference, facilitated the calls. Participants were asked three questions: first, what topics are hot—why and the shelf life of the topic; second, who do you want to hear—specific speakers, speakers with particular positions, speakers with particular affiliations; and third, what formats—talking head panels, hypotheticals, plenary, debates, other. The Program Planning Committee “assembles the best,” and “selections are based on study and experience.” Programs must have “broad appeal.” The Education Service Group has data assembled from evaluations of past conferences, webinars, Quick Teleconferences, the emerging issues identified in committee action plans, and other resources. For topics that do not have “broad appeal,” webinars and committee conference calls provide alternatives to conferences. We welcome your ideas for conference programs. If you have suggestions for topics, speakers, or formats, contact committee vice chairs for Programming, Marty Booher, Shannon Broome, and Jocelyn Thompson, or me.

Webinars and Committee Conference Calls: Last December, I sent out a call for your ideas for air quality topics for webinars that could be cosponsored by the committee and the Air & Waste Management Association. You responded, and I thank you. I have also met with Jim Powell, executive director of the Air & Waste Management Association. Your suggestions, which I have shared with Jim Powell, include (1) legal and technical implications of the changing regulation of start-up, shutdown, and malfunction events; (2) EPA petroleum maximum achievable control technology—residual risk review; (3) the U.S. Supreme Court's ruling in the CSAPR litigation and its implications; (4) the U.S. Supreme Court's ruling in the GHG rules cases and its implications; (5)

EPA carbon pollution standards for new power plants (Clean Air Act (CAA) § 111(b)); (6) EPA carbon pollution standards for existing power plants (CAA § 111(d)); (7) lessons learned from regional and state CO₂ trading programs; (8) legal and technical aspects of carbon capture and storage for coal-fired power plants and natural gas combined cycle turbines; (9) update on greenhouse gas reporting and the issues that have arisen; (10) air quality monitoring and permitting under the revised National Ambient Air Quality Standards (NAAQS) (SO₂, NO₂, and PM); (11) implementation of the 2010 one-hour SO₂ NAAQS; (12) implementation of the next ozone NAAQS; (13) ambient air monitoring to assess air quality and health impacts associated with oil and gas and other sources of emissions; (14) air quality standards for agricultural sources; (15) vapor intrusion; (16) beyond the United States and international air pollution transport: Canada, China, and Mexico; (17) legal and technical perspectives on PSD construction permits after recent court opinions; (18) potential Colorado Air Quality Control Commission air quality rulemaking for the oil and gas industry; (19) pending state, federal, and other air quality studies in the Rocky Mountain West and Colorado targeted toward the oil and gas industry; (20) pending implementation of EPA's tribal new source review permitting program for minor sources on Indian Country lands; (21) permitting, offset, and emission control issues in the Uintah Basin of Utah; (22) “life-cycle” offsets and analysis of GHG emissions in environmental review documents, including both the National Environmental Policy Act and state environmental documents; (23) regulation of air toxics from fracking activities, including recent South Coast Air Quality Management District rule 1148.2; (24) regulation of hydrofluorocarbons (HFCs), per the president's June announcement that the United States and China have agreed to work together to phase down the production and use of HFCs; and (25) ongoing issues with the renewable fuel standard II (RFS2).

Webinars and committee conference calls allow us to take a more thorough examination of those issues that are likely to interest only air quality

practitioners. Each committee is allocated two free committee conference calls per year, and we have already had a Joint committee conference call on EPA's carbon pollution standards for power plants. Webinars have a fee and may or may not offer CLE. Webinars offering CLE require more planning and more lead time than webinars that do not offer CLE.

If you would like to help organize a webinar or committee conference call on any of these topics or if you have recommendations for speakers, moderators, or other topics for a webinar, or committee conference call, please contact committee vice chairs for Programming, Marty Booher, Shannon Broome, or Jocelyn Thompson, or me.

Tips for ways to become involved (or how to become a committee vice chair or chair): *Tip #1:* share information. If you are aware of a new air quality guidance document, letter, case, law, or regulatory or technical development, share it with me or any of the committee vice chairs with communication responsibilities (Michael Balster, Cheri Budzynski, Randy Dann, or Tom Echikson) so that we might communicate these developments with the full membership via the list serve, committee Web site, social media, and/or committee newsletter. *Tip #2:* participate online. Join our Air Quality Subgroup on LinkedIn and engage in discussions and exchange information on air quality issues with committee members using LinkedIn and Twitter. If you do not know how to “tweet” or how to join LinkedIn or a LinkedIn subgroup, our committee vice chair for Social Media, Cheri Budzynski, can walk you through the steps. *Tip #3:* write. Writing opportunities abound, and writing is how I became involved and eventually became chair of this committee and a member of the editorial board of *Natural Resources & Environment*. Offer to write a guest article for our committee newsletter by contacting Randy Dann or Tom Echikson, our committee newsletter vice chairs. Become a contributing author for the Section's *Year-in-Review* by contacting committee vice chair Jonathan Martel. Submit an article proposal to *Trends, Natural Resources & Environment*, or a Section book or

other publication. Linda Tsang, our committee vice chair for Publications, can help you find writing opportunities and navigate the process. *Tip #4:* participate in Section and committee public service projects. Sign up for the Section tree planting projects and network with other Section members. Posted on our Web site are suggestions for simple ways to help reduce ground-level ozone and links to state-specific, EPA, and public interest groups and other Web sites for additional information. We are looking for ways to expand the public service section of our Web site and suggestions for other committee public service projects. Our committee vice chair for Public Service, Heidi Knight, and I would welcome your ideas for committee public service projects. *Tip #5:* volunteer to help organize a committee dinner during a Section conference. In 2013, we organized committee dinners for both the Spring Conference and the Fall Meeting. We will organize a committee dinner during the Section's Fall Meeting in Miami, Florida, but we need someone interested in organizing a committee dinner during the Spring Conference. If you are interested in organizing a committee dinner during the Spring Conference, contact our committee vice chair for Membership, Phil Bower, or me. *Tip #6:* Attend committee dinners during conferences.

Feel free to send comments or ideas for the committee to me. You may access my contact information at my ABA profile. I hope to meet many of you in 2014.

Upcoming Events: 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 National 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.

EPA HEADQUARTERS

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Greenhouse Gas Reporting Rule: On November 29, 2013, EPA published a final rule revising its greenhouse gas reporting rule (GHGRR) and establishing final confidentiality determinations for new or substantially revised data elements (78 Fed. Reg. 71,904). The final amendments, which take effect January 1, 2014, affect owners and operators of facilities that directly emit certain greenhouse gases (GHGs) as well as certain suppliers.

The final rule revises table A-1 in the General Provisions of the GHGRR, 40 C.F.R. part 98, subpart A, by updating the list of global warming potentials (GWPs) for determining carbon dioxide equivalent (CO₂e) for certain GHGs. The GHGs with updated GWPs are methane (CH₄), nitrous oxide (N₂O), certain hydrofluorocarbons (HFCs), sulfur hexafluoride (SF₆), certain perfluorocarbons (PFCs), and certain other fluorinated GHGs. The updates make the GWPs in table A-1 consistent with the GWPs published in the Intergovernmental Panel for Climate Change (IPCC) Fourth Assessment Report (AR4). EPA did not include in the final rule the 26 fluorinated GHGs that are not included in the IPCC AR4 as EPA originally proposed, but states it may address these compounds separately. The updated GWPs change the amount of CO₂e reported by existing reporters and, in most cases, increase the emission totals for existing reporters of gases with revised GWPs, primarily methane and fluorinated GHGs. EPA reduced the GWPs for only N₂O, HFC-32, HFC-152a, and sulfur hexafluoride, while increasing the GWPs for the other GHGs. Compare 74 Fed. Reg. 56,260, 56,395–96 with 78 Fed. Reg. 71,948–49. The updated GWPs also result in additional reporters subject to the GHGRR. EPA's reason for the updated GWPs is twofold: first, EPA wants quality and consistency in the data collected, and second, it wants the data to be comparable to international requirements for the annual U.S. GHG Inventory and other U.S. climate programs.

The final rule requires existing reporters to use the updated GWPs in table A-1 for their reporting year 2013 annual reports, which must be submitted to EPA by March 31, 2014. The final rule requires reporters who are newly required to report due to changes to GWPs in table A-1 to begin collecting data on January 1, 2014, and to submit their first reports covering the 2014 reporting year by March 31, 2015. Reporters who are required to newly report under any subpart solely as a result of the revised GWPs in table A-1 may use best available monitoring methods (BAMM) from January 1, 2014 to March 31, 2014 for any parameter that cannot reasonably be measured according to the monitoring and quality assurance and quality control requirements of a relevant subpart. First-time reporters may use BAMM during the January 1, 2014 to March 31, 2014 time period without submitting a formal request to EPA but must submit a request to the EPA administrator by January 31, 2014, for an extension to use BAMM beyond March 2014.

The final rule does not require reporters to amend previously submitted reports to reflect the updated GWPs or other amendments in the final rule. Previously submitted reports remain publicly available. EPA will publish a version of CO₂e emissions and supply estimates for the reporting years 2010, 2011, and 2012 using the revised GWPs so that EPA and the public may analyze and compare trends in GHG data using consistent GWPs.

Because certain subpart W (Petroleum and Natural Gas) equations reference the previous GWP value for methane instead of the table, the final rule amends the methane conversion factor and methane GWP used in those subpart W equations. The subpart W equations that EPA amends in the final rule are used to calculate annual mass of GHG emissions for gas venting and natural gas driven pneumatic pump venting and subpart W total GHG emissions.

EPA also finalizes corrections and other clarifications to certain provisions of subpart A

(General Provisions) and other subparts. For example, revisions to subpart A include instructions for the reporting of a U.S. parent company legal name and address; and clarification for requesting an extension of the 45-day period for submission of revised reports. Other amendments concern monitoring and quality assurance, clarifying data reporting, and correcting inconsistencies in monitoring calculation and reporting. These and other amendments to part 98 are summarized by subpart in the memorandum, "Final Table of 2013 Revisions to the Greenhouse Gas Reporting Rule," which is available in the docket as ID No. EPA-HQ-OAR-2012-0934.

In the preamble to the final rule, EPA discusses the relationship of the final rule to EPA's pre-construction and operating permitting programs. EPA's Tailoring Rule (75 Fed. Reg. 31,514, June 3, 2010) codifies table A-1 to the General Provisions of the GHGRR for the purpose of calculating emissions of CO₂e for determining PSD and title V applicability for GHGs. While EPA acknowledges that the revisions to table A-1 may affect permit applicability for a source, EPA states it does not believe that many sources will change their title V applicability as a result of the table A-1 revision.

For a source that has been issued a synthetic minor source permit that limits its potential to emit below the major source thresholds for title V applicability, EPA states it may be advisable to impose limits on GHGs on a mass basis, rather than a CO₂e basis. EPA states that for such mass-based limits, a change in the GWP of the pollutant does not render the source out of compliance with a synthetic minor source limit, although the source may need to obtain a revised synthetic minor source limit to maintain its synthetic minor source status and avoid the need for a title V permit as a major source. In the case of synthetic minor source permit limits established solely in terms of CO₂e, EPA does not expect the GWP revisions to significantly alter CO₂e emissions for most types of sources, particularly sources in which most of their GHG emissions result from fuel combustion. EPA believes that most sources will still be able to comply with their

synthetic minor source permits because there is no GWP change for CO₂ and the change for GWP for the other GHG compounds is generally small.

PSD permits based on earlier GWPs that are issued in final form before January 1, 2014, do not have to be revised or reopened solely due to the promulgation and effectiveness of the final rule revisions; however, the final rule will affect the applicability of the PSD permit program for the proposed construction of new sources and proposed modifications of existing sources. As of January 1, 2014, proposed sources and proposed modifications, including proposed plantwide applicability limits (PALs) and PAL renewals, will need to calculate their GHG potential to emit and determine PSD applicability based on the revised GWPs. Compliance may be determined based on the GWPs that were in effect at the time of permit issuance. The new GWP values will apply immediately upon the effective date of the final rule for PSD programs administered by EPA and delegated states as well as in any state with a state implementation plan (SIP) that automatically updates when certain 40 C.F.R. sections are revised. Some states, however, may need to revise the changes to the GWPs into their SIP before they become effective in their state permitting programs.

Likewise, revisions to the GWPs will occur automatically for federal title V permitting. Some states may also have title V permit programs that automatically update, while other states may require revisions to their approved title V permit programs before the GWP revisions become effective for purposes of title V permitting.

The final confidentiality determinations for new or substantially revised data elements address items other than inputs to emissions equations. In the final rule, EPA finalizes confidentiality determinations for all but two of the new and substantially revised data elements that were proposed. EPA added or revised data elements in the following 14 subparts: A (General Provisions); C (Stationary Combustion); H (Cement Production); K (Ferroalloy Production); X (Petrochemical Production); Y (Petroleum

Refineries); Z (Phosphoric Production); AA (Pulp and Paper Manufacturing); FF (Underground Coal Mines); HH (Municipal Solid Waste Landfills); NN (Suppliers of Natural Gas and Natural Gas Liquids); QQ (Importers and Exporters of Fluorinated Greenhouse Gases Contained in Pre-Charged Equipment or Closed-Cell Foams); RR (Geologic Sequestration of Carbon Dioxide); TT (Industrial Waste Landfills); and UU (Injection of Carbon Dioxide). In the final rule, EPA assigns 26 new or substantially revised data elements to data categories for which EPA issued categorical confidentiality determinations, and assigns 15 new or revised data elements to the inputs to emission equations category. The 15 new or revised data elements assigned to the inputs to emission equations category do not have confidentiality determinations assigned to them. The two proposed data elements that EPA did not finalize and therefore did not finalize category assignments or confidentiality determinations are in subpart AA (Pulp and Paper Manufacturing), annual production of paper products exiting the paper machine(s) prior to application of any off-machine coatings, and subpart FF (Underground Coal Mines), amount of CH₄ routed to each destruction device. A list of the new and substantially revised data elements and the corresponding final confidentiality determinations are set forth in EPA's memorandum dated September 30, 2013, titled "Data category assignments and confidentiality determinations for new and substantially revised data elements in the Final '2013 Revisions to the Greenhouse Gas Reporting Rule and Confidentiality Determinations for New or Substantially Revised Data Elements,'" including attached appendices, which are available on EPA's Web site at <http://www.epa.gov/ghgreporting/reporters/cbi/index.html>.

According to EPA, the updated GWPs in table A-1 will result in a collective increase in annual reported emissions from all subparts of more than 79 million metric tons CO₂e or a 1.1 percent increase in existing emissions. EPA states that this increase includes 4.8 million metric tons CO₂e from an estimated 184 additional facilities that may be newly required to report under part 98 based on the

revised GWPs. EPA expects the additional reporters to report under subparts I (Electronics Manufacturing), W (Petroleum and Natural Gas Systems), HH (Municipal Solid Waste Landfills), II (Industrial Wastewater Treatment), OO (Suppliers of Industrial Greenhouse Gases), and TT (Industrial Waste Landfills), and expects the majority of these additional reporters to be from Petroleum and Natural Gas Systems (subpart W) and Municipal Solid Waste Landfills (subpart HH). For closed landfills with methane generation between 21,000 and 24,999 metric tons/year CO₂e, EPA added a provision in the final amendments to subpart HH that specifically exempts landfills that did not accept waste on or after January 1, 2013, and had methane generation less than 1190 metric tons of methane (25,000 CO₂e).

EPA estimates the total cost of compliance for the additional reporters to be \$2.2 million for the first year and \$1.3 million per year for subsequent years. According to EPA, the annual cost for the additional reporters is an increase of approximately 1.3 percent above the cost of compliance with the GHGRR for existing reporters.

PM_{2.5} NAAQS Implementation: On November 21, 2013, EPA published a proposed rule on classifications and deadlines for submission of SIP submittals for nonattainment areas for the 1997 and 2006 NAAQS for fine particulate matter (PM_{2.5}) (78 Fed. Reg. 69,806). In the proposal, EPA responds to the January 4, 2013, decision by the D.C. Circuit in *NRDC v. EPA*, 706 F.3d 428 (D.C. Cir. 2013), that nonattainment areas for PM_{2.5} NAAQS are subject to the more prescriptive provisions found in subpart 4, rather than the general provisions of subpart 1, of part D of title I of the Clean Air Act. In particular, EPA proposes to classify all current nonattainment areas for either the 1997 or the 2006 PM_{2.5} NAAQS as "moderate" pursuant to subpart 4. EPA is also proposing to set a deadline of December 31, 2014, for submission of remaining required SIP submissions for current 1997 and/or 2006 PM_{2.5} nonattainment areas. Affected areas for the 1997 annual NAAQS are Libby, Montana; San Joaquin Valley, California; and

the Los Angeles-South Coast Air Basin, California. Affected areas for the 2006 24-hour NAAQS are: Fairbanks, Alaska; Imperial County, California; Liberty-Clairton, Pennsylvania; Provo, Utah; and Salt Lake City, Utah. EPA does not intend to apply the D.C. Circuit's January 2013 decision retroactively. Additionally, EPA identifies guidance that is currently available regarding subpart 4 requirements, including the 1992 General Preamble (57 Fed. Reg. 13,498) and redesignation rules for Indianapolis and other areas. EPA further states that "[a]dditional details regarding attainment-related and [New Source Review] SIP elements requirements of subpart 4 may also be addressed under separate EPA guidance and/or rulemaking." Id. at 69,808/2. Subpart 4 requirements for nonattainment areas include (1) new source review; (2) attainment demonstrations; (3) reasonably available control measures and reasonably available control technology; (4) reasonable further progress and quantitative milestones; and (5) precursor requirements for major stationary sources. Comments were due December 23, 2013.

On December 9, 2013, EPA published a final rule amending its PSD regulations to remove the significant impact levels (SILs) for PM_{2.5} and significant monitoring concentration (SMC) for PM_{2.5} (78 Fed. Reg. 73,698). The SILs are screening tools used in PSD permitting applications to show that the proposed source's allowable emissions will not cause or contribute to a violation of the NAAQS or PSD increment. The SMC is used to exempt sources from a requirement in the Clean Air Act to collect preconstruction monitoring data for up to one year before submitting a permit application in order to help determine existing ambient air quality. The final rule is in response to the D.C. Circuit's decision in *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013), granting a request from EPA to vacate and remand to EPA the SILs for PM_{2.5} and finding that EPA lacked legal authority to adopt and use the SMC to exempt permit applicants from the statutory requirement to compile and submit ambient monitoring data and vacating the SMC provisions of the PSD regulations. EPA is also vacating the existing concentration for the PM_{2.5}

SMC listed in the regulations so that there is no air quality impact level below which a reviewing authority has the discretion to exempt a source from the PM_{2.5} monitoring requirements. EPA states it will initiate a separate rulemaking in the future regarding the PM_{2.5} SILs that will address the remand. The final rule took effect December 9, 2013.

New Source Performance Standards for

Petroleum Refineries: On December 19, 2013, EPA published a proposed rule (78 Fed. Reg. 76,788) and a direct final rule (78 Fed. Reg. 76,753) to amend the new source performance standards (NSPS) for petroleum refineries. The amendments would apply to petroleum refineries for which construction, reconstruction, or modification commenced after May 14, 2007. The direct final rule amends the definition of "delayed coking unit" found in NSPS subpart Ja at 40 C.F.R. § 60.101(a) by removing the phrase "process piping and associated equipment such as pumps, valves and connectors" from the definition. The direct final rule also removes a redundant definition of delayed coking unit from the rule text at 40 C.F.R. §60.101(a). Emissions from process piping and associated equipment (pumps, valves, and connectors) are covered under regulations in NSPS subparts GGG or GGGa. The controls required under NSPS subpart Ja address emissions from the delayed coking unit's process vent, not emissions from process piping and associated equipment. The problem created by including these sources within the definition of "delayed coking unit" is that very minor changes, such as adding a few valves and connectors for a new sample point or pressure gauge, would be considered a "modification" of the delayed coking unit because these additional valves would increase the emissions from the "delayed coking unit," even though the increase would not occur at emissions points regulated under subpart Ja, and require immediate compliance with the coke drum vent control requirements. Because EPA did not intend for such small changes to the process piping and associated equipment to constitute a "modification" of the delayed coking unit, EPA is removing the phrase "process piping and associated

equipment” from the definition. Unless EPA receives adverse comment by February 3, 2014, the direct final rule automatically takes effect March 19, 2014.

Renewable Fuel Standard: On November 29, 2013, EPA published proposed 2014 standards for the Renewable Fuel Standard (RFS) program (78 Fed. Reg. 71,732). Under the RFS program, EPA is required to determine annual percentage standards for each compliance year by November 30 of the previous year. The percentage standards are calculated so as to ensure use in transportation fuel of the national “applicable volumes” of four types of biofuel: (1) cellulosic biofuel; (2) biomass-based diesel; (3) advanced biofuel; and (4) total renewable fuel. The national volumes of renewable fuel to be used under the RFS program each year are specified in section 211(o)(2) of the Clean Air Act, unless adjusted or waived by EPA. For cellulosic biofuel, EPA is proposing to establish the volume for 2014 at 17 million gallons, which is significantly below the statutory target of 1.75 billion gallons. EPA is projecting that 8 to 30 million ethanol-equivalent gallons of cellulosic biofuel will be available in 2014 and is proposing 2014 volume requirements for cellulosic biofuel of 17 million gallons. EPA is also proposing to rescind the cellulosic biofuel standards for 2011. For biomass-based diesel, EPA is proposing to maintain the applicable volume of 1.28 billion gallons for both 2014 and 2015. For advanced biofuel and total renewable fuel, EPA is proposing reductions in the volume requirements because the total volume of ethanol that can be consumed, and the total volume of non-ethanol renewable fuels that could reasonably be available for 2014 and later years are together expected to be less than the volume requirements established in the Energy Independence and Security Act of 2007. In particular, EPA is proposing 2014 volume requirements of 2.20 billion gallons for advanced biofuel and 15.21 billion gallons for renewable fuel. EPA states in the proposed rule that its objective is to develop an approach for determining appropriate volume requirements that can be applied not only in 2014 but also in 2015 and

beyond. EPA is proposing a framework for determining appropriate volumes of total renewable fuel and advanced biofuel that would address the ethanol blend wall, i.e., the point at which the domestic ethanol market becomes saturated or almost saturated, and limitations in availability of qualifying renewable fuels. For total renewable fuel, EPA projects the volume of ethanol that could reasonably be consumed as E10 and higher ethanol blends and would add to that the volume of all non-ethanol renewable fuels that could reasonably be expected to be available. For advanced biofuel, EPA would sum the ethanol-equivalent volumes of the cellulosic biofuel requirement, the biomass-based diesel requirement, and the additional non-ethanol advanced biofuels that could reasonably be expected to be available and be consumed. Under the RFS program, EPA is required to determine annual percentage standards to ensure use in transportation fuel of the national “applicable volumes” of the four types of biofuel. The proposed percentage standards for 2014 are 0.010 percent for cellulosic biofuel; 1.16 percent for biomass-based diesel; 1.33 percent for advanced biofuel; and 9.20 percent for renewable fuel. EPA held a public hearing on the proposed rule on December 5, 2013 (78 Fed. Reg. 69,628). Comments were due January 28, 2014.

Also on November 29, 2013, EPA published notice that it had received a number of petitions for waiver of the 2014 applicable volumes under the renewable fuel standard (78 Fed. Reg. 71,607). Section 211 of the Clean Air Act allows the EPA administrator to waive its national volume requirements if the administrator determines that implementation of those requirements would severely harm the economy of a state, a region, or the United States, or that there is inadequate domestic supply. Comments were due January 28, 2014.

Stratospheric Ozone Protection: On December 24, 2013, EPA published a proposed rule for adjusting the allowance system controlling U.S. consumption and production of hydrochlorofluorocarbons (HCFCs) in 2015–2019 (78 Fed. Reg. 78,072). EPA is required under title

VI of the Clean Air Act to phase out production and import of HCFCs in accordance with U.S. obligations under the Montreal Protocol on Substances That Deplete the Ozone Layer. Under the Montreal Protocol and the Clean Air Act, total U.S. production and consumption of these chemicals is capped, and will be completely phased out by 2030. Beginning January 1, 2015, the United States must decrease production and consumption of all HCFCs by 90 percent of the established cap or baseline. Existing EPA regulations prohibit production and consumption of HCFC-22 and HCFC-142b as of January 1, 2020. At that time, all other HCFC production and consumption are limited to use as a refrigerant in existing air conditioning and refrigeration equipment and must not exceed 0.5 percent of the cap or a reduction to at least 99.5 percent below the cap. In the proposed rule, EPA is proposing HCFC baselines and allocations for 2015–2019. When finalized, the rule will affect industrial gas manufacturing entities; other chemical and allied products merchant wholesalers; air-conditioning and warm air heating equipment and commercial and industrial refrigeration equipment manufacturing entities; air-conditioning equipment and supplies merchant wholesalers; electrical and electronic appliance, television, and radio set merchant wholesalers; plumbing, heating, and air-conditioning contractors; and refrigerant reclaimers, manufacturers of recovery/recycling equipment, and refrigerant recovery/recycling equipment testing organizations.

EPA is proposing to keep the current HCFC production and consumption baselines for 2015–2019, although EPA considered reestablishing baselines using recent production and import data. For the annual HCFC-22 consumption allocation, EPA is proposing two approaches: (1) a linear drawdown approach, which is EPA's preferred approach; or (2) the estimation approach. The linear drawdown approach would decrease the allowance allocation by the same amount every year. EPA is also proposing variations on the linear drawdown, including starting slightly higher and ending at zero in 2018. The estimation approach estimates servicing need and then accounting for need that can

be met by sources other than new production. For the annual HCFC-22 production allowance allocation, EPA is also proposing two allocation options: (1) issuing the maximum production allowances allowed for under the Montreal Protocol, after accounting for production allowances issued for the other HCFCs in each year; or (2) issuing production allowances at the same level as consumption allowances. The first option is EPA's preferred approach and would result in an annual allocation of approximately 28,000 MT or 21.7 percent of the HCFC-22 production baseline. For HCFC-123, EPA's preferred allocation approach is to issue consumption allowances at 100 percent of baseline. EPA is not proposing production allowances for HCFC-123. For HCFC-124, EPA's preferred allocation approach is to issue 200 MT of consumption allowances and to issue production allowances at the same level. For HCFC-142b, EPA's preferred allocation approach is to issue 35 MT of consumption allowances in 2015, decreasing by 5 percent each year to 15 MT in 2019, and to issue production allowances at the same level. In addition to EPA's preferred allocation options for HCFC-123, HCFC-124, and HCFC-142b, the proposed rule includes alternative options.

For HCFC-225ca/cb, EPA is proposing a limited exemption that would allow owners of existing inventory of virgin HCFC-225ca/cb to continue using it as a solvent after January 1, 2015. The exemption would allow the use of HCFC-225ca/cb in the manufacture of a product but the product would have to be labeled "product manufactured with HCFC-225ca/cb" before introduction into interstate commerce. EPA is also proposing to allow the continued import of HCFC-123 until January 1, 2020, for use as a fire suppression streaming agent for nonresidential applications in accordance with the Significant New Alternatives Policy (SNAP) Program at 40 C.F.R. part 82, subpart G. Additionally, EPA is proposing technical updates to the refrigerant reclamation requirements by incorporating the most recent standards of the Air-Conditioning, Heating, and Refrigeration Institute and updating reporting requirements.

In addition to establishing HCFC baselines and allocations for 2015–2019, EPA is taking comment on its preliminary list of products that might be affected by the labeling requirements that take effect in 2015 and products that have switched to non-ozone depleting substance alternatives and proposing a definition of “use” of a class II controlled substance, which are all HCFCs, in the phaseout regulations (40 C.F.R. part 82, subpart A). EPA hosted a public hearing on January 23, 2014. Comments are due March 10, 2014.

Please Continue to Help our One Million Trees Project!

Trees are important to the environment through their ability to reduce atmospheric carbon dioxide and also contribute to the overall health of communities, wildlife and aesthetics. Since the One Million Trees project began in 2009, the Section has sponsored plantings at each of its major events.

ABA members are encouraged to get involved in hands-on tree planting activities in their communities in addition to purchasing a tree or trees through the program partners. If you have participated in a tree planting project or have planted a tree on your own since 2009, please let us know. To register a tree, visit www.ambar.org/EnvironTrees.

The ABA Fund for Justice and Education on behalf of the Section is accepting donations towards their ongoing projects such as the One Million Trees Project. Your contribution will help maintain the Section’s public service and educational programs. To donate, visit <https://donate.americanbar.org/environ>.

EPA REGIONAL REPORTS

EPA REGION 1

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Regional Greenhouse Gas Initiative (RGGI)

The 22nd auction of CO₂ allowances by the RGGI states occurred December 6, 2013. There were 38,329,378 CO₂ allowances sold at the auction clearing price of \$3 per allowance.

New England Region Ozone

On October 21, 2013, EPA announced that New England states experienced a decrease in the number of unhealthy ozone days compared to 2012. The number of unhealthy ozone days was as follows: 17 days in Connecticut (27 in 2012); 7 days in Rhode Island (12 days in 2012); 6 days in Massachusetts (17 days in 2012); 5 days in Maine (4 days in 2012); 3 in New Hampshire (4 days in 2012); 0 days in Vermont (0 days in 2012). Visit <http://yosemite.epa.gov/opa/admpress.nsf/6d651d23f5a91b768525735900400c28/c59070164bd9734a85257c0b0064581b!OpenDocument> for the EPA News Release.

Connecticut

EPA approved the ozone attainment demonstration submitted by Connecticut to meet Clean Air Act requirements for attaining the 1997 8-hour ozone national ambient air quality standard. EPA is approving Connecticut’s demonstration of attainment of the 1997 8-hour ozone standard as it relates to the Greater Connecticut 1997 8-hour ozone nonattainment area. EPA is also approving the reasonably available control measures (RACM) analysis for this same area. Visit <http://yosemite.epa.gov/opa/admpress.nsf/6d651d23f5a91b768525735900400c28/c59070164bd9734a85257c0b0064581b!OpenDocument> for the *Federal Register* notice.

On November 26, 2013, the Connecticut General Assembly's Regulations Review Committee approved the Department of Energy & Environmental Protection's revisions to its RGGI regulations, reducing the cap from 165 million tons of CO₂ to 91 million tons. Visit <http://www.ct.gov/deep/cwp/view.asp?Q=535904&A=4380> for the news item.

Maine

The Maine Department of Environmental Protection (DEP) proposed to amend its low sulfur fuel rule to incorporate statutory requirements for the use of low-sulfur distillate and residual fuels. These requirements were enacted as part of Maine's effort to address federal visibility planning requirements, and to provide a process for affected sources to apply for an "equivalent alternative sulfur reduction" on a case-by-case basis with DEP and EPA approval. The proposed amendments will, among other things, establish a process (including application submission and compliance deadlines) for sources seeking to utilize an alternative emission reduction strategy. Visit <http://www.maine.gov/tools/whatsnew/attach.php?id=608375&an=1> for the proposal.

Massachusetts

A Methuen, Massachusetts, school bus company agreed to pay a \$33,000 penalty to settle EPA allegations that it violated federally enforceable motor vehicle idling limits in Massachusetts. Click <http://yosemite.epa.gov/opa/admpress.nsf/6d651d23f5a91b768525735900400c28/3753a7230719c83385257c1200654ab8!OpenDocument> for a link to the EPA News Release.

On December 9, 2013, the Patrick administration issued final amendments to a regulation that would reduce the existing cap on power plant emissions in the RGGI states from the current level of 165 million tons per year to 91 million tons per year starting in 2014. The cap will then be lowered by 2.5 percent each year thereafter until 2020. Click <http://www.mass.gov/eea/pr-2013/final-rggi-revisions-to-dramatically-lower-greenhouse-gas-emissions.html> for a link to the News Release.

New Hampshire

EPA approved a SIP revision submitted by New Hampshire. This revision establishes transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control measures and mitigation measures. In addition, the revision relies on the federal rule for general conformity. The intended effect of this action is to approve state criteria and procedures to govern conformity determinations. This action is being taken in accordance with the Clean Air Act. Visit <http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28533.pdf> for the *Federal Register* notice. Visit <http://www.gpo.gov/fdsys/pkg/FR-2013-11-29/pdf/2013-28530.pdf> for the proposed rule.

A New Hampshire group ranked companies on emissions reduction progress. Visit <http://nhpr.org/post/nh-group-ranks-companies-emissions-reduction-progress> for the article.

Rhode Island

EPA took direct final action to approve certain revisions to the Rhode Island SIP primarily relating to regulation of greenhouse gases under Rhode Island's PSD preconstruction permitting program. EPA is also taking direct final action to approve the state's definition of "PM_{2.5}" (fine particulate matter) specific to permitting. Visit <http://www.gpo.gov/fdsys/pkg/FR-2013-10-24/pdf/2013-24847.pdf> for the *Federal Register* notice.

On November 22, 2013, a public hearing was held on proposed changes to the RGGI cap, reducing the cap from 165 million tons of CO₂ to 91 million tons. Approval is expected in early 2014.



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EPA REGION 2

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New York

Effective January 1, 2014, a new regulation promulgated by the New York State Department of Environmental Conservation (NYSDEC) conforms the state's regulations to the new annual regional cap on CO₂ emissions from electric generation plants. In addition to New York, the states participating in the RGGI are Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, Rhode Island, and Vermont. The new RGGI cap is 91 million tons in 2014 (a 45 percent reduction in the cap) and will thereafter decline 2.5 percent a year through 2020. By 2020, the cap will be 78 million tons annually and will remain at that level. The new regulation is codified at 6 N.Y.C.R.R. part 642 and, like the previous RGGI regulations, applies to electric generation stations meeting the 25 MW applicability threshold. According to NYSDEC's regulatory impact statement, under the new regulation, CO₂ allowance prices are projected to increase from approximately \$6.02/ton (2010 dollars) in 2014 to about \$6.73/ton in 2016 and to about \$8.41/ton in 2020, resulting in an increase of approximately 1 percent in the electric utility bill of the typical residential ratepayer.



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EPA REGION 4

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Regional Update

President Obama selected Heather McTeer Toney as the regional administrator for EPA Region 4. Ms. McTeer Toney is an attorney with considerable experience in local and state politics. She has handled cases ranging from racial discrimination to medical malpractice. According to the EPA press release, Ms. McTeer Toney was the first African-American and first female to serve as the mayor of Greenville, Mississippi. She served as the president of the National Conference of Black Mayors and in 2009, was nominated by the former EPA Administrator Lisa Jackson to serve as the chairwoman of the Local Government Advisory Committee. Most recently, she served as Mississippi Valley State University executive director of the Center for Excellence in Student Learning. Heather is reported to be "active in her community and an advocate for education, women's issues, health and wellness." She is expected to begin her role as regional administrator in January.

State Updates

Alabama

For the fourteenth year, the Alabama Department of Environmental Management (ADEM) distributed complimentary compliance calendars to dry cleaners. The compliance calendar includes charts to assist with recordkeeping and document monitoring data, and monthly reminders of compliance obligations to assist small businesses with their regulatory compliance requirements.

On December 25, 2013, ADEM issued notice of its proposed consent order to Grede II, LLC, the owner/operator of Gray Iron Foundry facility in Columbiana, Alabama, for violations related to control equipment operation, permitted PM limits, and untimely reporting of said violations. Comments

may be submitted to ADEM “within 30 days of the publication date of this notice.”

Florida

In November, EPA published its proposed approval of revisions to Florida’s ozone maintenance SIP. 78 Fed. Reg. 67,090 (Nov. 8, 2013).

On January 7, 2014, the Florida Department of Environmental Protection (DEP), Division of Air Resource Management (DARM) published its *Air Regulatory Projects Update No. 2014-01*, which highlights recent actions regarding air regulatory development and reform projects in Florida. According to this update, on December 19, 2013, DEP submitted proposed SIP revisions to EPA regarding greenhouse gas new source review.

On December 20, 2013, DEP published a notice requesting comments on its proposed submission of Florida’s section 111(d) state plan to EPA. The proposed state plan would adopt the model rules in 40 C.F.R. 60, subpart DDDD, and allow Florida to enforce the emission guidelines promulgated by EPA on February 7, 2013, that set emissions limitations for commercial/industrial solid waste incinerators (CISWI).

On December 27, 2013, DEP published a notice of proposed fast-track rule adoption proposing rule amendments (OGC 13-1269) to update its adoption-by-reference of EPA air pollution regulations at 40 C.F.R. part 60. This amendment would incorporate EPA’s February 7, 2013, final amendments to part 60, subpart DDDD, that establish emission guidelines and effective dates, and provide regulatory and compliance clarifications for CISWI units.

On December 31, 2013, DEP proposed clarifications to recent rule amendments in chapter 62-210, F.A.C. (rules 62-210.200, .370, and .900, F.A.C.). DEP intends to remove references to hydrochloric acid and nitric acid in the definition of acid mist because EPA test method 8 does not apply to those acids. DEP also intends to clarify the language in paragraph 62-210.370(3)(c), F.A.C., that allows a title V source to submit DEP form no.

62-210.900(5), Annual Operating Report for Air Pollutant Emitting Facility [Including Title V Source Emissions Fee Calculation], to DEP to claim that using DEP’s electronic annual operating report software creates a technical or financial hardship.

Georgia

On November 15, 2013, Georgia’s Department of Natural Resources, Environmental Protection Division (EPD) issued its *Implementation Policy on GHG “Tailoring Rule Biomass Deferral”* to provide direction for Georgia facilities potentially affected by the “legal limbo” of this regulation. In the policy, Georgia EPD, Air Protection Branch, establishes the following four guidelines on its intended implementation of the “Tailoring Rule”: (1) the “Biomass deferral” shall remain in effect until such time as the court issues a mandate officially vacating the July 20, 2011, amendments; (2) new sources of GHG that acquired non-PSD permits under the deferral are considered “grandfathered,” provided they begin actual construction (40 C.F.R. 52.21) by the date of an applicable court mandate; (3) facilities that have not commenced actual construction prior to such mandate, will be subject to the provisions of such mandate and any applicable EPA guidance (or rule change); and (4) sources considered grandfathered under (2) by Georgia EPD may be at risk of potential EPA and citizen actions.

The November 2013 EPA *Environmental Crimes Case Bulletin* reported that, on November 22, 2013, the federal district court for the Northern District of Georgia sentenced some Georgia emissions inspectors to federal prison. The defendants, several of whom were licensed emissions inspectors, participated “in a scheme to fraudulently issue emissions certificates for cars that would have failed the emissions inspection required by law.” EPA’s Criminal Investigation Division and the Georgia EPD investigated the case, and discovered that the defendants connected cars to the emissions equipment that were known to pass the test, instead of using an owner’s real car. They manually entered the make, model, and vehicle identification number, into the system to appear as if they were testing the owner’s real car. The emissions testing data were

automatically transmitted to a statewide database accessible by EPD. One of the defendants “was responsible for issuing over 4,000 fraudulent emissions certificates to car owners in Georgia from September 2011 to September 2012.”

Kentucky

On December 5, 2013, the Kentucky Division for Air Quality (DAQ) submitted its initial attainment recommendations to EPA regarding the 2012 PM_{2.5} standard. DAQ recommended that areas with certified data that demonstrated design values at all monitors below the 12 $\mu\text{g}/\text{m}^3$ standard be designated as attainment for the revised PM_{2.5} standard. The recommended designation for the remainder of the state was attainment/unclassifiable. The letter, along with the complete list of areas and their respective designations, is available on the DAQ’s Web site.

On December 6, 2013, the Kentucky DAQ submitted comments to EPA on EPA’s “Draft Guidance for 1-Hour SO₂ Nonattainment Area SIP Submissions.” Among other suggestions and concerns, DAQ stated it “adamantly opposes the use of modeling results to declare an area as nonattainment; rather, the Division finds that the proper use of modeling should be as an indicator of overall air quality and a predictive tool to determine the effectiveness of potential control strategies.” DAQ also requested that EPA “provide a comprehensive list of national and regional control measures that can be included and approved.”

Mississippi

In December, the Mississippi Commission on Environmental Quality entered into an agreed order with Kohart Surplus and Salvage for asbestos regulatory violations. The commission found that the respondent failed to comply with asbestos control requirements during its demolition and salvage operations at the site of the former Bryan Foods meat-packing facility in West Point, Mississippi. The respondent incurred a civil penalty of \$7500.

North Carolina

The N.C. Department of Environment and Natural Resources (DENR) filed a lawsuit challenging part of EPA’s PM_{2.5} increment rule. Under the rule, EPA

treats PM_{2.5} as a new pollutant, setting a baseline year of 2010 instead of retaining the 1975 baseline date used in previous particulate matter regulations. However, in January 2013, the federal court found that PM_{2.5} was not a new pollutant, but rather a continuation of PM₁₀, and struck down two EPA PM_{2.5} rules.

The N.C. Clean Smokestacks Act (2002) required the state’s largest utilities, inter alia, to reduce their nitrogen oxide emissions by 77 percent by 2009 and sulfur dioxide emissions by 73 percent by 2013. The utilities spent over \$2.8 billion on a modernization program to retrofit older plants and build cleaner new plants. North Carolina regulators raised concerns to EPA Administrator Gina McCarthy, that use of the 2010 baseline could put North Carolina at “a significant economic disadvantage simply because North Carolina required emission reductions earlier than other states.” EPA reiterated its reliance on the 2010 baseline date in October 2013. DENR took the following actions: (1) submitted a state PM_{2.5} increment rule to EPA for approval that included a 1975 baseline date consistent with the January court decision; (2) petitioned EPA to reconsider the baseline date in light of the court decision; and (3) filed suit against EPA’s continuing reliance on the 2010 baseline year regardless of the court decision. Sheila Holman, director of the N.C. Division of Air Quality stated that “[a]ll we ask the EPA to do is recognize North Carolina’s unique position and reward what we have done instead of putting us at an economic disadvantage compared to states that have done less.”

EPA officially recognized the Charlotte metropolitan area as complying with the 1997 federal air quality standard for ozone and redesignated Charlotte as a maintenance area for the 8-hour ozone standard. 78 Fed. Reg. 72,036 (Dec. 2, 2013). In 2013, statewide ozone levels exceeded the federal standard on only one day in 2013, much improved from the average of 22 days during the previous five years. EPA redesignated Charlotte as a maintenance area for the 8-hour ozone standard, meaning that it now complies with the standard but must continue programs aimed at ensuring future compliance. The

area remains in violation of the more stringent 2008 8-hour ozone standard.

A recent DENR, Division of Air Quality report showed that the state's coal-fired power plants have cut their NOx emissions by more than 80 percent since the 2002 Clean Smokestacks Act, by installing scrubbers and other pollution controls at their largest facilities, closing some plants and converting others from coal to natural gas. Stricter federal requirements for industrial facilities as well as motor vehicles also have contributed to the emissions reductions.

DENR issued its study of the potential air quality impacts from various shale gas development and production activities. See <http://daq.state.nc.us/news/shale>.

Rebates of up to \$2500 are currently available under the N.C. 2014 Idle Reduction Devices Rebate Program. Until the funds are dispersed, or no later than September 30, 2014, the owner (company or individual) of a sleeper berth truck may be eligible for a rebate for the purchase and installation of an auxiliary power unit or other idle reduction device.

South Carolina

On December 12, 2013, the board of the S.C. Department of Health and Environmental Control (DHEC) approved two groups of amendments proposed by the DHEC Bureau of Air Quality (BAQ). First, BAQ proposed amendments of R.61–62, Air Pollution Control Regulations and Standards, and the South Carolina Air Quality Implementation Plan (SIP), State Register Document No. 4387. These proposed amendments incorporate by reference EPA regulatory amendments promulgated during the period from January 1, 2012, through December 31, 2012. Legislative review is not required, as these annual updates simply ensure consistency between the state and federal language. Second, BAQ proposed additional amendments of R.61–62 and the S.C. SIP (State Register Document No. 4388) that do require legislative review. These amendments affect the S.C. SIP and the following sections of state air quality regulations: R.61–62.1, Sections I–IV; R.61–62.5, Standards 1 and 4; and R.61–62.63.

EPA REGION 5

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Illinois

EPA has issued a proposed rule to approve a SIP revision to amend the state's vehicle inspection and maintenance program in the Chicago and Metro-East St. Louis ozone nonattainment areas in Illinois to reflect changes in the active control measures portion of the ozone SIP. 78 Fed. Reg. 68,378 (Nov. 14, 2013).

EPA has issued proposed and direct final rules to approve a SIP revision to revise the definitions for "volatile organic material" or "volatile organic compound" to add trans-1,3,3,3-tetra-fluoropropene (HFO-1234ze) to the list of compounds excluded from the definitions due to their negligible contribution to the formation of tropospheric ozone. The direct rule is scheduled to become effective January 27, 2014. 78 Fed. Reg. 70,516 (Nov. 26, 2013).

Indiana

EPA has issued proposed and direct final rules to approve a SIP revision to revise the monitoring rules used to determine whether various source categories are in compliance with the applicable emission limits. The direct rule was scheduled to become effective December 23, 2013. 78 Fed. Reg. 63,093, 63,148 (Oct. 23, 2013).

EPA has issued a proposed rule to approve SIP revisions to implement certain regulations for PM_{2.5} by establishing definitions for increment levels and setting PM_{2.5} class 1 variances. The revisions also incorporate definitions and regulations that recognize nitrogen oxides as an ozone precursor. 78 Fed. Reg. 65,590 (Nov. 1, 2013).

EPA has issued a final rule to approve SIP revisions to meet the state board requirements under section 128 of the Clean Air Act. The final rule becomes effective on January 23, 2014. 78 Fed. Reg. 77,599 (Dec. 24, 2013).

EPA has issued a final rule to approve SIP revisions to revise the volatile organic compounds (VOC) plan for industrial solvent cleaning rule for manufacturers of coatings, inks, adhesives, and resins as satisfying reasonable available control technology requirements. The final rule becomes effective on January 27, 2014. 78 Fed. Reg. 78,726 (Dec. 27, 2013).

EPA has issued a final rule to disapprove a request for a revision to its sulfur dioxide (SO₂) SIP for the ArcelorMittal Burns Harbor LLC facility in Porter County, Indiana. This revision would remove the emission limit for the blast furnace gas flare at the facility. The final rule becomes effective on January 27, 2014. 78 Fed. Reg. 78,720 (Dec. 27, 2013).

Michigan

In *Sierra Club v. Dept. of Env. Quality*, Nos. 308072 and 314152, 2013 Mich. App. LEXIS 1917 (Nov. 21, 2013), the Michigan appeals court affirmed the trial court's decision to affirm the department's issuance of a permit to install to modify stack heights at a power plant. Petitioners challenged the permit action alleging that the company failed to impose appropriate one-hour SO₂ and NO₂ limits and failed to consider PM_{2.5} impacts. The court found that the agency's emissions analysis indicated a net reduction in PM_{2.5} emissions by the power plant itself and that likewise the proposed modifications would reduce overall NO_x emissions by 75 percent and SO₂ by 90 percent.

EPA has issued a final rule to approve SIP revisions to Michigan's new source review program, including the part 1 general provisions rules and the part 19 rules for major sources in nonattainment areas. The final rule became effective on January 15, 2014. 78 Fed. Reg. 76,064 (Dec. 16, 2013).

Ohio

In *United States v. Mathis*, 6th Cir., Nos. 12-6256/6354, 2103 U.S. App. LEXIS 25592 (Dec. 23, 2013), the Sixth Circuit upheld a conviction of a site owner and demolition contractor for knowing violations of the notification and work-practice standards for handling of asbestos, as well as a number of other charges.

EPA has issued a final rule to redesignate the Canton-Massillon nonattainment area to attainment of the 1997 annual and 2006 24-hour NAAQS for PM_{2.5}. EPA is also certain other revisions including NO_x and PM_{2.5} motor vehicle emission budgets for 2015 and 2025 for the Canton area, and 2005 and 2008 emissions inventories for primary PM_{2.5}, NO_x, SO₂, VOCs, and ammonia for the area. 78 Fed. Reg. 62,459 (Oct. 22, 2013).

EPA has issued proposed and direct final rules to approve revisions to the 1997 8-hour ozone maintenance air quality SIP for the Dayton-Springfield and Toledo areas, and the Ohio portions of the Parkersburg-Marietta and Steubenville-Weirton, West Virginia-Ohio areas to replace on-road emissions inventories and motor vehicle emissions budgets. The direct rule was scheduled to become effective December 23, 2013. 78 Fed. Reg. 63,436, 63,388 (Oct. 24, 2013).

EPA has issued a final rule to redesignate the Columbus area as attainment for the 1997 annual PM_{2.5} NAAQS. EPA is also certain other revisions including NO_x and PM_{2.5} motor vehicle emission budgets for 2015 and 2022 for the Columbus area, and 2005 and 2008 emissions inventories for PM_{2.5}, NO_x, SO₂, VOCs and ammonia for the area. 78 Fed. Reg. 66,845 (Nov. 7, 2013).

EPA has issued proposed and direct final rules to redesignate the Bellefontaine nonattainment area to attainment for the 2008 lead NAAQS based upon ambient air monitoring data for the 2010–2012 design period. The direct rule was scheduled to become effective January 6, 2014. 78 Fed. Reg. 66,320, 66,280 (Nov. 5, 2013).

EPA has issued proposed and direct final rules to revise rules that allow for Ohio's Clean Air Interstate Rule NO_x Ozone Season Trading Program rules to supersede Ohio's NO_x SIP Call Budget Trading Program rules. The direct rule was scheduled to become effective January 13, 2014. 78 Fed. Reg. 68,367, 68,377 (Nov. 14, 2013).

EPA has issued proposed and direct final rules to approve revisions to Ohio's SO₂ rules. The direct rule is scheduled to become effective January 21, 2014. 78 Fed. Reg. 69,299, 69,337 (Nov. 19, 2013).

Wisconsin

EPA has issued a final rule to approve a SIP revision removing stage II vapor recovery program as a component of Wisconsin's ozone SIP for southeast Wisconsin. The final rule becomes effective on December 4, 2013. 78 Fed. Reg. 65,875 (Nov. 4, 2013).

EPA REGION 6

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I. EPA Region 6 Developments

During December 2013, the Sierra Club filed two petitions for review with EPA's Environmental Appeals Board challenging the stringency of PSD greenhouse gas permits that EPA Region 6 issued for facilities in Texas. Sierra Club filed the first petition regarding La Paloma Energy Center, LLC's permit to construct a new natural gas-fired electric generating station in Harlingen, and the second regarding ExxonMobil Chemical Company's permit authorizing the addition of an ethylene production unit to the company's existing Baytown Olefins Plant. The petitions allege flaws in EPA's best available control technology (BACT) determinations, with the latter petition questioning various aspects of EPA's analysis of carbon capture and sequestration.

On October 9, 2013, WildEarth Guardians filed a lawsuit in the U.S. District Court for the District of Colorado against EPA alleging that the agency violated the Clean Air Act by failing to make a finding by July 22, 2013, that nine states, including New Mexico and Oklahoma, had not submitted adequate state implementation plans for the 2010 nitrogen dioxide NAAQS within three years following that standard's promulgation (by January 22, 2013).

II. State Developments

A. New Mexico

On December 11, 2013, EPA published a final rule approving portions of the SIP revision New Mexico filed on January 13, 2013, allowing the state to issue PSD plantwide applicability limits to GHG sources (78 Fed. Reg. 75,253). EPA took no action on the portion of that SIP revision submittal regarding the GHG biomass deferral rule. The effective date of the final rule is January 10, 2014.

B. Oklahoma

On October 22, 2013, EPA announced its approval of assistance grants totaling \$847,097 to be issued to four Oklahoma tribes. The Cherokee Nation, Delaware Nation, Choctaw Nation of Oklahoma, and Quapaw Tribe will use these grants to monitor air quality on tribal lands.

C. Texas

On November 8, 2013, the Texas Commission on Environmental Quality (TCEQ) published proposed rules to transition PSD GHG permitting from EPA Region 6 to TCEQ, and to address title V permitting for GHG-related requirements (38 Tex. Reg. 7845). TCEQ proposed the rules to implement Texas H.B. 788, which became law in June 2013. The state of Texas had previously refused to implement any form of GHG permitting. In response, EPA instituted a federal implementation plan for Texas under the federal Clean Air Act. H.B. 788 resulted from industry concern about the time-consuming and onerous process associated with obtaining a permit from EPA, which is in addition to applying to TCEQ to authorize non-GHG emissions. TCEQ expects to

adopt and obtain EPA approval of the program before the end of 2014.

On January 6, 2014, EPA published its approval of four requested revisions to the Texas SIP that establish public participation requirements for air permit applications (79 Tex. Reg. 551). Texas submitted the SIP revisions on July 22, 1998, October 25, 1999, July 2, 2010, and March 11, 2011. EPA's December 13, 2012, proposed approval and accompanying technical support document included a summary of each of these requested SIP revisions and the portions of those submittals that EPA proposed for approval (77 Fed. Reg. 74,129). The final rule will be effective February 5, 2014.

On December 30, 2013, EPA published a proposal to approve Texas SIP revisions regarding the control of volatile organic compound emissions at gasoline dispensing facilities (GDFs) (78 Fed. Reg. 79,340). The revisions address maintenance and removal of stage II vapor recovery equipment at GDFs, including that the absence of such equipment in the Beaumont/Port Arthur, Dallas/Fort Worth, and Houston/Galveston/Brazoria areas, and in El Paso County, would not interfere with attainment of the ozone national ambient air quality standard, reasonable further progress, or any other Clean Air Act requirement.

On December 24, 2013, EPA published a proposal to approve revisions to the Texas SIP regarding the state's standard air permit for the installation and/or modification of oil and gas facilities (78 Fed. Reg. 77,621). The proposal addresses four Texas SIP revisions submitted between 1995 and 2000. These revisions would establish the referenced standard air permit and make nonsubstantive changes regarding its applicability.

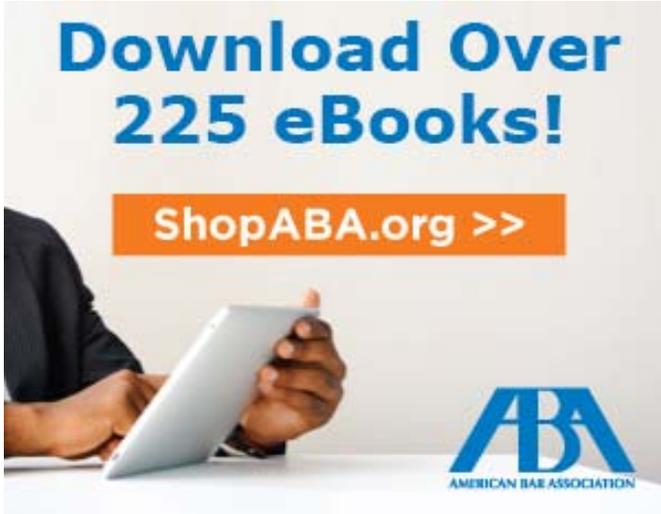
On December 11, 2013, the TCEQ commissioners approved proposal of a SIP revision regarding emissions inventory reporting requirements for the Houston/Galveston/Brazoria and Dallas/Fort Worth nonattainment areas pursuant to the 2008 8-hour ozone standard. This approval relates to the requirement that by July 20, 2014, states submit to

EPA a comprehensive and current inventory of ozone precursor emissions from all sources in nonattainment areas.

On November 6, 2013, EPA published an announcement of its withdrawal of a September 10, 2013, direct final rule (78 Fed. Reg. 55,221) that would have amended regulations regarding the state's federal operating permits program and procedures for minor permit revisions (78 Fed. Reg. 66,648). The rule withdrawal resulted from EPA's receipt of adverse comments.

On October 25, 2013, EPA published a proposed rule to approve revisions to the Texas SIP regarding grandfathered facilities permitting (78 Fed. Reg. 63,929). The revisions would require that all grandfathered facilities obtain specific permits that include emission controls or to shut down. The rule also addresses grandfathered pipeline equipment located in an ozone nonattainment area and emissions from dockside vessels resulting from grandfathered land-based facilities.

On October 23, 2013, the TCEQ commissioners approved the recommendations of the agency's executive director regarding area designations for the 2012 primary annual fine particulate matter national ambient air quality standard. To be submitted to EPA by December 13, 2013, the recommendation is that all Texas counties with applicable fine particulate matter monitoring data be designated attainment and that all other counties be designated unclassifiable/attainment.



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EPA REGION 7

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Region 7 Significant Enforcement Update

EPA's continued focus on chemical accident prevention provisions (CAPP)/risk management program compliance and enforcement was evident in a settlement with Dyno Nobel. Dyno Nobel agreed to a pay \$257,167 in response to allegations that its risk management plan (RMP) did not fully comply with applicable regulations, as well as for the Comprehensive Environmental Response, Compensation, and Liability Act and the Emergency Planning and Community Right-to-Know Act violations for failure to report a release of sulfuric acid. Dyno Nobel settled a similar CAPP case with EPA Region 8 in 2011 for \$110,900.

In another significant settlement, HBD/Thermoid agreed to pay a \$130,000 penalty, and conduct \$241,075 worth of Supplemental Environmental Projects (SEPs) to resolve a Kansas Department of Health and Environment (KDHE) investigation that revealed permit violations associated with toluene emissions at its Chanute, Kansas, facility. Because the offense was a repeat of a similar enforcement action, KDHE referred the matter to Region 7. The SEPs to be completed involve installation of an emission capture-and-control system to reduce certain hazardous air pollutant (HAP) emissions by 97 percent, and also to substitute HAP-containing solvents with no- or low-HAP containing chemicals, which are estimated to reduce emissions by 93 percent.

Iowa Establishes Rural NO₂ Background Concentrations

Until recently, background NO₂ levels for dispersion modeling purposes in Iowa were calculated based on monitoring sites located in urban areas. This resulted in very conservative

numbers for use in modeling rural areas. Iowa Department of Natural Resources (DNR) has now remedied this concern, and has established 1-hour and annual background levels for rural areas. These rural numbers are less than half of the 1-hour urban number and one-third of the annual urban number, and should result in more accurate NO₂ modeling.

Iowa NSPS and NESHAP Changes

Iowa DNR has sought public comment on a proposal to modify its NSPS and National Emissions Standards for Hazardous Air Pollutants (NESHAP) programs, specifically to adopt federal revisions to a number of standards, adopt federal standards for utility boilers, sunset mercury emissions monitoring requirements, and rescind standards for mineral and material processing. Iowa DNR is expected to issue a notice of intended action in 2014. Additionally, Iowa DNR's adoption of the reciprocating internal combustion engines NESHAP (subpart ZZZZ relating to stationary reciprocating internal combustion engines) has become effective, meaning primary authority has transferred from EPA to DNR and the Polk and Linn County air agencies. Iowa DNR has published on its Web site guidance to assist sources with this transfer of responsibility.

Iowa Releases 2012 Greenhouse Gas Emission Numbers

Iowa has released a draft of its 2012 greenhouse gas inventory, which is "a policy-neutral calculation of Iowa greenhouse gas emissions in 2012." The report takes into account emitting sectors as well as carbon sinks. The draft report indicates that total Iowa greenhouse gas emissions in 2012 were 133.56 million MMtCO₂e, which represents a 3.27 percent decrease in emissions over 2011 levels (but still an 8.3 percent increase over 2005 levels). The report also identifies that the percentage of energy generated from coal decreased from 78 percent in 2005 to 63 percent in 2012, while wind power increased from 4 percent to 25 percent over the same period. The full report is available on Iowa DNR's Web site.

Missouri Rule and SIP Changes

Missouri DNR has proposed amendments to its rules regulating stage I and stage II gasoline dispensing facilities in the St. Louis area, which is nonattainment for ozone. The new rules would require, among other things, vapor recovery controls for stage II facilities and use of the California Air Resources Board (CARB) requirements for stage I systems. The CARB standards will result in a prohibition of Above Ground Storage Tanks (ASTs) greater than 1000 gallons, permitting requirements for stage I facilities, and revision of provisions relating to decommissioning of stage II systems.

Missouri has also proposed removing an exemption from the emission limits for hospital, medical, and infectious waste incinerators during start-up, shutdown, and malfunction events.

EPA is also proposing to adopt a revision to Missouri's SIP requirements relating to start-up, shutdown, and malfunction (SSM) conditions, specifically a change that requires written notifications of SSM activity rather than verbal notifications.

Nebraska DEQ Significant Enforcement Update

Becton Dickinson was cited for failure to comply with monitoring and record-keeping requirements of its permit, and agreed to pay \$45,000 in penalties and \$40,000 for a SEP to assist with scrap tire recycling and residential beautification. Gothenberg Feed Products was cited for opacity violations from a plant dryer in excess of regulatory limits, and paid a \$2000 fine. Ag Processing, which operated a soybean processing plant, emitted sulfuric acid and PM10 in excess of permit limitations, resulting in an \$8500 settlement.

Nebraska Makes Progress on Rulemaking Package

Nebraska DEQ has accepted public comments on a package of rulemaking changes that it intends to

propose in February 2014. The rulemaking package will address a number of issues, including updating the definition of solid waste; updating the NAAQS to include the revised PM2.5 standard; proposing language to allow "off permit" changes; updating the list of NSPS and NESHAPs; and modifying timelines for submitting test results and notices for performance testing.

EPA REGION 8

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Wyoming—EPA Issues Final Regional Haze Rule for Wyoming

On January 10, 2014, EPA issued the final regional haze rule for Wyoming, which is aimed at reducing atmospheric haze in the region as required under the Clean Air Act (CAA), 42 U.S.C. § 7470–79, and EPA's regional haze rule, 40 C.F.R. part 51, by reducing NOx emissions from coal-fired power plants in the state. The final rule partially approves and partially disapproves a proposed SIP that Wyoming submitted to EPA in January 2011, and promulgates federal implementation plan (FIP) regulations in place of elements of the state proposal disapproved by EPA. However, the final rule is less stringent than the agency's proposed rule, published on June 10, 2013, which would have required more stringent controls at a greater number of coal-fired power plants throughout the state. 78 Fed. Reg. 34,738.

The final rule approves Wyoming's NOx best available retrofit technology (BART) determinations for 10 of the state's 15 coal-fired power plants. On the other hand, the rule disapproves of Wyoming's NOx BART determinations for five of the state's coal-fired power plants—including PacifiCorp's Dave Johnston Unit 3 near Glenrock, Wyoming; PacifiCorp's Wyodak Unit 1 near Gillette, Wyoming; and Basin Electric's Laramie River Units

1, 2, and 3 near Wheatland, Wyoming—concluding that more stringent controls are needed at those facilities. Under the FIP regulations, the five facilities are required to install new low-NO_x burners with overfire air and selective catalytic reduction (SCR) controls. The Dave Johnston Unit 3 is provided with the option to shut down by 2027 if it chooses not to install SCR controls. EPA estimates that capital costs for the more stringent controls range from \$16 million (for Dave Johnston, with SCR) to \$188.8 million (for Laramie River Unit 2).

The final rule can be found on the EPA Region 8 Air Program Web site at <http://www2.epa.gov/region8/air-program>.

Utah—Utah Division of Air Quality Releases Draft General Permit for Oil and Gas Well Sites and/or Tank Batteries

In December 2013, the Utah Division of Air Quality (division) released a draft general approval order for the crude oil and natural gas well site and/or tank battery source category (draft GAO). The division is developing the draft GAO under the state's recently adopted rule 307-401-19 authorizing the use of general permits for new source review permitting, which took effect on January 2, 2014.

The general permit will cover facilities that process up to 50,000 barrels of crude oil or condensate throughput combined per year. Under the draft GAO, the following requirements and limitations, among others, apply: all produced gas must either be used as fuel on-site or routed to a gas gathering system and sent off-site; owners and operators are required to conduct biannual inspections for volatile organic compound (VOC) leaks using infrared equipment; visible emissions from any point or fugitive source may not exceed 10 percent opacity; VOC emissions from tanks, dehydrators, and pneumatic controllers must be recycled, incorporated into a product, recovered, or routed to a VOC control device; VOC control devices are required to operate at a minimum 98 percent removal/destruction efficiency. Other requirements include record keeping, annual

inventories, and construction and start-up notification.

The 30-day comment period for the draft GAO begins in February 2014. The division intends to issue the final GAO in March or April 2014. The draft GOA and other information can be found on the division's Web site at <http://www.deq.utah.gov/locations/uintahbasin/meetings.htm>.

Colorado—Unprecedented New Air Emissions Rules Proposed for the Oil and Gas Sector

In November 2013, the Colorado Department of Public Health and Environment's Air Quality Control Commission (commission) approved proposed regulations that would impose stringent new requirements to control air emissions from oil and gas facilities in Colorado. These new rules, which are expected to be finalized in February 2014, will require new controls, and impose additional monitoring, record-keeping, and reporting requirements for most oil and gas operators in Colorado. As part of the proposed rule package, the commission approved the direct regulation of methane (a/k/a "hydrocarbon") emissions from the Colorado oil and gas sector. While it is unclear whether these provisions will be finalized, such direct state-only regulation of methane (i.e., a greenhouse gas) from a single industry sector in the absence of comparable federal regulation or broader industry-wide state regulation is a significant and novel use of state authority. The proposed rules contain first-of-their-kind leak detection and repair (LDAR) requirements for upstream oil and gas facilities, including well-production facilities (i.e., production and separation equipment at well pads) and compressor stations. The proposed rules also contain monitoring, record-keeping, and reporting requirements in addition to what is required federally. These rules are widely acknowledged as the most stringent air emissions rules for oil and gas operations in the United States, and once promulgated, are likely to find their way to other oil and gas producing states. Rulemaking documents are available at the Colorado Air

Pollution Control Division's Web site at <http://www.colorado.gov/cs/Satellite/CDPHE-AQCC/CBON/1251647985820>.

Montana—EPA Approves Montana SIP Provision Allowing Registration in Lieu of Permitting for Certain Minor Oil and Gas Sources

EPA has approved the state of Montana Department of Environmental Quality's (DEQ) submittal of rules under section 110 of the Clean Air Act governing minor NSR. Specifically, section 110(a)(2)(C) requires each state to have legally enforceable procedures to prevent construction or modification of a minor source if such construction or modification would violate any SIP control strategies or interfere with attainment or maintenance of the NAAQS. Such minor source NSR programs are for pollutants from stationary sources that do not require PSD or nonattainment NSR permits. The new Montana rules establish a general registration system for oil and gas well facilities allowing applicable owners to register with the Montana DEQ in lieu of submitting a permit application for construction. Current rules generally require permits. EPA's approval is available at <http://www.gpo.gov/fdsys/pkg/FR-2013-11-19/html/2013-27555.htm>.

North Dakota—EPA Proposes to Approve State Authority over Anhydrous Ammonia Risk Management

EPA has proposed to approve the state of North Dakota, Department of Agriculture's (NDDA) partial delegation request under section 112 of the Clean Air Act for risk management (RM) programs for agricultural anhydrous ammonia facilities. Section 112(l) of the CAA authorizes EPA to approve state rules and programs in place of certain CAA requirements, including the section 112 RM program. If finalized, the NDDA will have primary authority and responsibility to enforce the RM program for agricultural anhydrous ammonia. The proposed approval is available at 78 Fed. Reg. 66,321 (Nov. 5, 2013).

EPA REGION 9

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Judicial Developments

Rocky Mountain Farmers Union v. Corey (9th Cir. 2013)

In *Rocky Mountain Farmers Union v. Corey*, 730 F.3d 1070 (9th Cir. 2013), the Rocky Mountain Farmers Union and the American Fuels & Petrochemical Manufacturers Association (industry) sued the California Air Resources Board (CARB), contending that CARB's adoption of the low carbon fuel standard (LCFS), 17 CCR 95480-90, violated the Dormant Commerce Clause and was preempted by section 211(o) of the Clean Air Act, 42 U.S.C. § 7545(o), which is sometimes known as the federal Renewable Fuel Standard (RFS). The Eastern District of California held that the LCFS did violate the Dormant Commerce Clause, engaged in extraterritorial regulation of ethanol, discriminated against out-of-state ethanol, and was not saved by the California preemption waiver. 843 F. Supp. 2d 1042, 1071 (E.D. Cal. 2011). The LCFS were adopted as part of a three-tier approach to reducing California GHGs from the transport sector. Other steps included tailpipe standards, vehicle mile-traveled reductions measures, and the LCFS, which sought to reduce the carbon in fuel. The LCFS established a declining annual cap on the average carbon intensity of the transportation fuel market. A fuel supplier must blend fuels to meet the cap, with fuels generating credits or debits depending on whether they have higher or lower carbon intensity than the standard. Credits are partially transferable. Credits and debits are based on a life-cycle analysis, which evaluates carbon intensity from the fuel, its extraction and processing, and its transport to California. On the petroleum side, the LCFS provided that no new petroleum source could have a carbon intensity less than the average, unless it was higher than the average, in which case the higher value was used. The net effect of both provisions is, arguably, to favor local alternative energy suppliers.

On the Dormant Commerce Clause issues, the Ninth Circuit disagreed with the district court, finding that ethanol is uniform in characteristic and that all ethanols should be considered for constitutional purposes (the district court had excluded Brazilian ethanol). The court then found that the consideration of transport emissions was legitimately related to a harm to California (GHG emissions) and was constitutionally permissible. The court similarly found that consideration of electricity sources was similarly constitutionally permissible. The Ninth Circuit thus reversed on this issue.

Turning to the petroleum question, the Ninth Circuit considered the challenge that the LCFS was a protectionist measure for certain California products, most notably, California technically enhanced oil recovery (TEOR) fuels, which were assessed at roughly half of their carbon intensity because they were classified as an “existing” fuel. Similarly, other out-of-state non-carbon intensive fuels were penalized. The court found no Dormant Commerce Clause violation because a major California fuel, California primary, was penalized relatively more than the out-of-state producers. Accordingly, the Ninth Circuit reversed and remanded to the district court to determine whether the “particularly high burden” of actual discriminatory effect was demonstrated. The court then found that the LCFS imposed no regulatory burden on producers outside of California that did not seek to sell in California, and hence did not operate extraterritorially.

The Ninth Circuit then turned to CARB’s claims that CAA section 211(c)(4)(b) authorized the fuel standards. It rejected this claim based on its prior decision in *Davis v. EPA*, 348 F.3d 772 (9th Cir. 2003). Thus, on remand, the district court was required to evaluate whether the Dormant Commerce Clause was triggered by the remaining issues. The Ninth Circuit also declined to rule on the plaintiffs’ claims that the LCFS were preempted by the federal RFS and CARB’s counter that the Energy Independence and Security Act of 2007 precluded such preemption.

Dine’ Care v. U.S. EPA (N.D. Cal. 2013)

In *Dine’ Care v. U.S. EPA*, 2013 WL 6327530 (N.D. Cal. Dec. 3, 2013), *Dine’ Care* and the National Parks Conservation Association brought an unreasonable delay action to compel EPA to issue best available retrofit technology for the Navajo Generating Station. The court found no subject matter jurisdiction because there was no nondiscretionary duty on the tribe to act.

EPA REGION 10

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State Updates

Washington

On December 26, 2013, EPA proposed to approve a 10-year limited maintenance plan submitted by the state of Washington for the Kent, Seattle, and Tacoma maintenance areas for PM10. Maintenance plans are used to meet Clean Air Act requirements for areas that previously did not comply with NAAQS. Although the three maintenance areas covered under the proposal were previously designated as nonattainment areas for PM10, they currently have monitored PM10 levels that are roughly one third of the PM10 NAAQS, and have had steady declines in PM10 since 1987. 78 Fed. Reg. 78,311.

On December 30, 2013, EPA proposed to partially disapprove an element of Washington’s regional haze state implementation plan that exempted an aluminum smelter in Wenatchee from the Clean Air Act’s BART requirements. In 2012, EPA proposed to approve the state’s determination that the facility was exempt from BART requirements, but revised its decision in light of concerns about the dispersion modeling underlying the proposed exemption. EPA also proposed a BART determination for the facility through a FIP. 78 Fed. Reg. 79,344.

On December 31, 2013, EPA proposed to approve revisions to Washington’s SIP, which updates

ambient air quality standards for carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. 78 Fed. Reg. 79,652.

The Ninth Circuit has declined en banc review of a 2013 opinion that sharply limits the ability of environmental groups to use the Clean Air Act's citizen suit provisions to address greenhouse gas emissions. *Wash. Envtl. Council v. Bellon*, ___ F.3d ___, 2014 WL 352674 (9th Cir. Feb. 3, 2014). In its 2013 opinion, the Ninth Circuit held that environmental groups lacked standing to bring a citizen suit seeking to compel the Washington Department of Ecology and two local air permitting agencies to regulate greenhouse gas emissions from five petroleum refineries. The court held that groups could not satisfy the causation and redressability elements of the standing test because the refineries' emissions did not meaningfully contribute to global greenhouse gas concentrations.

Idaho

On December 26, 2013, EPA proposed to approve limited PM2.5 control measures contained in a revised SIP submitted by the Idaho Department of Environmental Quality (IDEQ) for the cross-border Logan Utah-Idaho nonattainment area. EPA, however, did not propose to approve the full SIP revision on grounds that it needs to evaluate IDEQ's submission in conjunction with the SIP submission

for the Utah portion of the Logan UT-ID nonattainment area. 78 Fed. Reg. 78,315.

On January 10, 2014, EPA proposed to partially approve a SIP submittal from Idaho that would update the SIP by incorporating by reference certain federal nonattainment NSR requirements. The nonattainment NSR requirements were recently remanded to EPA in *Natural Resources Defense Council v. EPA*, 706 F.3d 428 (D.C. Cir. 2013). EPA proposed to partially disapprove Idaho's incorporation by reference of two provisions of the federal PSD permitting rules that were vacated in *Sierra Club v. EPA*, 703 F.3d 458 (D.C. Cir. 2013). 79 Fed. Reg. 1795.

Oregon

The Oregon Department of Environmental Quality (ODEQ) has initiated a rulemaking to, among other things, adopt federal air quality regulations, including: (1) new NESHAP for commercial, industrial, and institutional boilers; (2) new NESHAP for stationary internal combustion engines; and (3) new NESHAP for commercial, industrial, and institutional boilers and process heaters.

ODEQ also proposes to incorporate new federal NSPS for stationary internal combustion engines, nitric acid plants, and crude oil and natural gas production, transmission, and distribution systems.



2014 CALL FOR NOMINATIONS

THE SECTION INVITES NOMINATIONS FOR THE FOLLOWING AWARDS:

Environment, Energy, and Resources Dedication to Diversity and Justice Award

The Environment, Energy, and Resources Dedication to Diversity and Justice Award will recognize people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of environmental justice and/or a commitment to gender, racial, and ethnic diversity in the environment, energy, and natural resources legal area. Accomplishments in promoting access to environment/energy/resources rule of law and to justice can also be recognized via this award.

ABA Award for Distinguished Achievement in Environmental Law and Policy

This award recognizes individuals and organizations who have distinguished themselves in environmental law and policy, contributing significant leadership in improving the substance, process or understanding of environmental protection and sustainable development.

Nomination deadlines: May 5, 2014.

These awards will be presented at the ABA Annual Meeting in Boston in August 2014.

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