

Air Quality Committee Newsletter

Vol. 17, No. 4

August 2014

MESSAGE FROM THE COMMITTEE CHAIR

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Welcome to the 4th issue of the Air Quality Committee Newsletter! As I step down, I thank each of you for the opportunity to serve as your committee chair, and I thank all of our committee vice chairs for their outstanding leadership and work on behalf of the Air Quality Committee. In this message, I also offer a preview of upcoming air-quality related programming.

Membership: Our committee has over 500 members. I thank Membership vice chair Phil Bower for welcoming new committee members by sending to each new member personal letters and e-mails. Phil's welcome e-mails contain hyperlinks and information on committee membership benefits, including programs, website/social media, list serve, public service, newsletters, and telephone and e-mail addresses for committee leadership. In addition to his responsibilities as Membership vice chair, Phil regularly reports on the ABA's One Million Trees Project. Phil will be stepping up to chair the Air Quality Committee for the ABA 2014–2015 Year.

Newsletter: Four newsletters in one year is a goal that many committees do not achieve, but our Newsletter vice chairs Randy Dann and Tom Echikson have done so. Congratulations to them and to our nine regional reporters on their hard work keeping us current on air quality developments on a timely and regular basis. I also thank our guest authors.

Publications: *The Year in Review* is now an electronic-only publication. The online version provides links to cases and statutory and regulatory materials. You may download the full publication or individual chapters and read them on your desktop, laptop, tablet, or smart phone. The Air Quality Chapter provides a concise summary of court decisions and rulemakings in 24 pages. I thank Jonathan S. Martel, committee vice chair for *The Year in Review*, for his work in organizing and editing the Air Quality Chapter.

You and Publications vice chair, Linda Tsang, have been busy finding writing opportunities in the Section newsletter *Trends* and the Section magazine *Natural Resources & Environment (NR&E)*.

Trends has featured one or more articles on air quality topics in every recent issue.

September/October 2013:

- “RGGI Gets Revamped: A Look at the Updated Model Rule and Implications for Its Future” by Jennifer Drust
- “Political Turmoil and the Fate of Australia’s Greenhouse Gas Pricing Scheme” by Claudia O’Brien, Aron Potash, Michele Leonelli, and Hannah Cary

November/December 2013:

- “Legal Uncertainty Continues as Supreme Court Takes Up Invalidation of EPA’s Transport Rule” by Thomas A. Lorenzen
- “Water On, Wind Off? Generator Curtailment in the Pacific Northwest” by Zori Ferkin

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Randy Dann and Thomas G. Echikson, Editors

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

CALENDAR OF SECTION EVENTS

September 9, 2014
**Environmental Compliance
Certifications: What Your Clients Need to
Know Before They Sign**
Live CLE Webinar

September 12, 2014
**Science and Environmental Law
Seminar**
Washington, DC

September 16, 2014
**Environmental Considerations in
Business Transactions**
Live CLE Webinar

September 24, 2014
**Commercial Funding of Litigation, Ethics,
and Law**
Primary Sponsor: Center for Professional
Responsibility

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

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

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- “PM2.5 Increment: Winners and Losers” by Donald R. van der Vaart and John C. Evans
March/April 2014:
- “EPA Greenhouse Gas Rules at Stake in U.S. Supreme Court” by Ann Carlson and Megan Herzog
January/February 2014:
- “President Obama Tackles Climate Change without Congress” by Michael B. Gerrard
- “D.C. Circuit Vacates GHG Tailoring Rule Deferral for Biogenic Sources” by Roger R. Martella, Jr., and Joel F. Visser
- “An Update on California’s Cap-and-Trade Climate Change Policy: Continuing Forward, Perhaps Beyond California” by Nicholas W. van Aelstyn
May/June 2014:
- “Québec’s Cap-and-Trade System: Emitters Cautiously Testing the Waters” by Charles Kazaz and Anne-Catherine Boucher”
- Threading the Needle on Gas/Electric Coordination: Who Has to Change and Who Has to Pay?” by Andrea Chambers and Katie Leesman
- “Cooperative Federalism: Is There a Trend towards Uniform National Standards under the Clean Air Act?” by Kurt G. Kastorf
- “Biofuels and the Renewable Fuels Standard Survive Public Comment and Litigation as the ‘Sustainable’ Alternative to Oil and Gas” by Thomas P. Redick

While the titles of some of the 2013–2014 issues of *NR&E* might suggest that there were not many articles of interest to the air quality practitioner, the opposite is true.

- NR&E* Summer 2013 “Science & Technology” issue:
- “Chasing Fumes: The Challenges Posed by Vapor Intrusion” by Laurent C. Levy, Ph.D., P.E.
 - “Air Dispersion Modeling in the Major Source Construction Permitting Process” by Robynn Andracsek and Robert Lambrechts
- NR&E* Fall 2013 “Food” issue:

- “On the Horizon: Expand the Ozone Transport Region?” by Gale Lea Rubrecht
- NR&E* Winter 2014 “Waste” issue:
- “Air Emissions and NHSM Waste Determinations—Certain Uncertainty” by Angela Morrison
- NR&E* Spring 2014 “Supreme Court” issue:
- “*Gabelli v. SEC*: Ramifications for EPA’s Enforcement Programs” by Sheila D. Jones
 - “*Rapanos* and the Clean Air Act: Linking Wetland and Single Source Determinations” by Lauran M. Sturm
 - “Sacketts Win Right to Pre-Enforcement Review: A Victory for ‘Ordinary Americans’” by Theodore L. Garrett
 - “Has *Auer*’s Hour Arrived?” by Ben Snowden

Social Media: Cheri Budzynski, vice chair for Social Media, regularly posts air quality developments and Section and Committee activities on LinkedIn and Twitter. We now have 77 followers on Twitter and 102 members have joined our Air Quality Subgroup on LinkedIn. We hope to see more of our members engaged in discussions and exchanging information using social media.

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

Programming: Kudos and a great big thank you to Shannon Broome, committee vice chair for

Programming! Much of the programming described below has been the result of hard work by Shannon, who also serves on the Planning Committee for the 2014 SEER Fall Conference in Miami.

22nd Fall Conference: Air Quality practitioners will not want to miss the Fall Meeting at the Trump Doral Golf Resort & Spa in Miami in October. The following sessions may be of interest:

- “Environmental Accidents: Nuts and Bolts for Counsel in Times of Crisis”
- “The Supreme Court and Greenhouse Gases—What It All Means for Your Clients and Practice”
- “Next Generation of Environmental Enforcement: 2014 and Beyond”
- “Train Wreck or Long Overdue Controls? Will the Electric Power Sector Find a Way to Thrive in the Face of EPA’s Multi-Media Regulatory Push?”
- “Your Client Wants to Site a New Energy Project or Expand Its Manufacturing Plant: What the Environmental Lawyer Needs to Know to Spot All the Issues.”

The Section dinner will be on Thursday, October 9, 2014, and on Friday, October 10, 2014, there will be the Flair Reception followed by a new event called “Taste of SEER,” instead of committee dinners.

44th Spring Conference: The 44th Spring Conference, scheduled for March 25–28 2015, at The Palace Hotel in San Francisco, will include a plenary session on “The Future of Energy in a Carbon-Constrained World.” This plenary session will explore a range of relevant topics from unconventional oil and gas (hydraulic frac’ing and the Keystone pipeline) to EPA’s clean power rules for new and existing sources, nuclear energy, large-scale renewable energy, vehicle electrification, distributed generation and changes to the utility business model, and grid resiliency and security. There will also be a break-out session on “Climate Change and Roles for Existing Power Plants” that will focus on EPA’s § 111(d) proposal. Finally, there will be a Clean Air Act “Hot Topics” break-out session that will provide an overview of National Ambient Air Quality Standards (NAAQS), illustrate those provisions using EPA’s proposed revisions to the

ozone NAAQS and the Cross State Air Pollution Rule (CSAPR), and explore EPA’s legal authority to increase the stringency of the NAAQS and impose obligations on upwind states under the Clean Air Act’s good neighbor provisions. The Clean Air Act “Hot Topics” session will also explore implementation issues, such as emissions modeling and compliance with short-term standards and their effect on permitting activities. Finally the session will examine the legal and practical issues surrounding EPA’s expansion of greenhouse gas regulation to new chemical and industrial sectors, focusing on EPA’s regulation of methane emissions from the oil and gas sector.

Webinars/Committee Conference Calls: We kicked off the year with the Climate Change, Sustainable Development, and Ecosystems (CCSDE) Committee by hosting a joint committee conference call on EPA’s proposed Carbon Pollution Standards for New Power Plants. In December, we co-sponsored a program with the Environmental Law Institute (ELI) and the D.C. Bar on the oral arguments in CSAPR and MATS (Mercury and Air Toxics Standards). In February, we co-sponsored programs on the certiorari arguments and debriefing of the oral arguments in the greenhouse case cases in the U.S. Supreme Court. In April, we co-sponsored a webinar with the D.C. Bar on § 112(r) of the Clean Air Act, and in May we held a committee conference call on the D.C. Circuit’s decision in the MATS Litigation and the U.S. Supreme Court’s decision in the CSAPR Litigation. In July, we will be co-sponsor the Constitutional Law Committee’s annual conference call on this year’s Supreme Court Decisions on Environment, Energy and Resources. We are also working with the Air & Waste Management Association on a joint webinar on condensables and particulate matter.

Other Programming: In January, we co-sponsored a program with the CCSDE Committee, ELI, and Edison Electric Institute on § 111 of the Clean Air Act and EPA’s Carbon Pollution Standards for New and Existing Power Plants in Washington, D.C. We continue to collaborate with the Air & Waste Management Association on a joint conference on the NAAQS.

EPA HEADQUARTERS

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Clean Power Plan Proposal

On June 18, 2014, EPA published its proposed rule for reducing carbon dioxide (CO₂) emissions from existing power plants, “Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units,” called the “Clean Power Plan,” pursuant to President Obama’s Climate Action Plan. 79 Fed. Reg. 34,830. EPA is proposing state-specific CO₂ emissions goals and emission guidelines for state plans to address CO₂ emissions from existing fossil fuel-fired electric generating units (EGUs). The proposal would cut carbon pollution from existing fossil fuel-fired EGUs by 30 percent by 2030, and, as a co-benefit, would cut fine particulate matter (PM_{2.5}), sulfur dioxide (SO₂), and nitrogen dioxide (NO_x) emissions by over 25 percent in 2030. EPA estimates the costs to be \$7.3 billion to \$8.8 billion and public health and climate benefits to be \$55 billion to \$93 billion per year in 2030. EPA also states that the proposal would reduce electricity bills roughly 8 percent. EPA held four public hearings on the proposed rule during the week of July 28 in the following cities: Denver, Atlanta, Washington, D.C., and Pittsburgh. Comments are due October 16, 2014.

In the proposal, EPA identifies the “best system of emission reduction” (BSER) that is “adequately demonstrated” using four sets of measures or “building blocks” that are already in use by many states and utilities. The four building blocks are: (1) reducing the carbon intensity of generation at individual affected EGUs through heat rate improvements (i.e., efficiency); (2) reducing emissions from the most carbon-intensive affected EGUs in the amount that results from substituting generation at those EGUs with generation from less carbon-intensive affected EGUs, including natural gas combined cycle (NGCC) units under construction; (3) reducing emissions from affected EGUs in the amount that results from substituting

generation at those EGUs with expanded low- or zero-emitting carbon generation (i.e., renewables or nuclear); and (4) reducing emissions from affected EGUs in the amount that results from the use of demand-side energy efficiency that reduces the amount of generation required.

In applying these building blocks to determine state goals, EPA allocated the following levels of stringency: (1) block 1, improving average heat rate of coal-fired steam EGUs by 6 percent; (2) block 2, displacing coal-fired steam and oil/gas-fired steam generation in each state by increasing generation from existing NGCC capacity in that state toward a 70 percent target utilization rate; (3) block 3, including the projected amounts of generation achievable by completing all nuclear units currently under construction, avoiding retirement of about 6 percent of existing nuclear capacity, and increasing renewable electric generating capacity over time through the use of state-level renewable generation targets consistent with renewable generation portfolio standards that have been established by states in the same region; and (4) block 4, increasing state demand-side energy efficiency to 1.5 percent annual electricity savings in the 2020–2029 period. States would not be required to develop plans involving any given building block or at any particular level of stringency.

For fossil fuel-fired EGUs, EPA is proposing two alternative BSER. The first alternative would identify the combination of the above-described four building blocks as the BSER. The second alternative would identify the “system of emission reductions” as building block 1 and in addition the reduction of mass emissions achievable through reductions in generation of specified amounts from affected fossil fuel-fired EGUs. The measures in building blocks 2, 3, and 4 would serve as the bases for quantifying the reduction in emissions resulting from the reduction in generation at affected EGUs.

States could take a “portfolio” approach and include in their plans measures and policies, such as demand-side energy efficiency programs and renewable portfolio standards, for which the state is responsible, or states could choose to structure their program so that full

responsibility for achieving the entire amount of the emission performance level is imposed on affected EGUs, such as allowance-trading programs. States would be allowed to rely on and extend existing programs to address CO₂ emissions from fossil fuel-fired EGUs, including renewable energy standards and demand-side energy efficiency programs. Mass-based programs being implemented in California and the Regional Greenhouse Gas Initiative (RGGI) states in the Northeast would be approvable if they achieve emission reductions over the appropriate timeframes and meet other key requirements.

EPA is proposing state-specific, rate-based emissions goals for CO₂ emissions from the power sector. The equation that EPA is proposing for determining the state goal is CO₂ emissions from fossil fuel-fired power plants in pounds (lbs) divided by state electricity generation from fossil fuel-fired power plants and certain low- or zero-emitting power sources in megawatt hours (MWh). The lowest proposed CO₂ emission rate is for the state of Washington, at 215 lb/MWh, while the highest is for North Dakota, at 1783 lb/MWh. Under the proposal, states would have the option of converting the rate-based goal to a mass-based goal. EPA is also proposing that states meet their goals in two phases: an “interim goal” that a state must meet on average over the ten-year period from 2020–2029, and a “final goal” that a state must meet at the end of that period in 2030 and thereafter.

The proposed goals only apply in states with fossil fuel-fired power plants. Because Vermont and Washington, D.C., do not have fossil fuel-fired power plants, they are not included in the proposal, nor is EPA proposing goals or emission guidelines for the four affected sources in Indian country at this time.

Under the proposal, states would have up to two or three years to submit final plans and an option of submitting individual plans or multistate plans. EPA states in the proposal it plans to finalize the rule by June 2015. Under this timeline, plans would be due June 30, 2016. If a state is eligible for a one-year extension, complete individual plans would be due June 30, 2017. If a state is eligible for a two-year extension, a progress report would be due June 30, 2017, and a

complete multistate plan would be due June 30, 2018. States needing additional time to submit a plan beyond June 30, 2016, must notify EPA by letter of intent no later than April 1, 2016. The proposal would require that state plans include the following twelve elements: (1) identification of affected entities; (2) description of plan approach and geographic scope; (3) identification of state emission performance level; (4) demonstration that plan is projected to achieve emission performance level; (5) identification of emission standards; (6) demonstration that each emissions standard is quantifiable, nonduplicative, permanent, verifiable, and enforceable; (7) identification of monitoring, reporting, and recordkeeping requirements; (8) description of state reporting; (9) identification of milestones; (10) identification of backstop measures; (11) certification of hearing on state plan; and (12) supporting material. Examples of measures that states can choose to rely on in their plans include, but are not limited to, demand-side energy efficiency programs; renewable energy standards; efficiency improvements at plants; co-firing or switching to natural gas; transmission efficiency improvements; energy storage technology; retirements; expanding renewables or nuclear; market-based trading programs; and energy conservation programs.

Under the proposal, EPA would have 12 months to approve or disapprove the states’ plans. This proposed deadline is longer than the four-month deadline for EPA action on state plan submittals in EPA’s 1975 regulations that provide the framework for agency review, and EPA is proposing to revise that provision in its regulations. EPA is also proposing the criteria that state plans must meet for the agency to determine that they are “satisfactory.” Specifically, EPA is proposing to approve state plans based upon the following four criteria: (1) enforceable measures that reduce EGU CO₂ emissions; (2) projected achievement of emission performance equivalent to the goals established by EPA, on a timeline equivalent to that in the emission guidelines; (3) quantifiable and verifiable emission reductions; and (4) a process for biennial reporting on plan implementation, progress toward achieving CO₂ goals, and implementation of corrective actions, if necessary. Additionally, states would be required to follow the framework regulations

in their plans. If EPA disapproves a state plan or a state fails to submit a plan, the proposal would require EPA to establish a federal plan for that state. EPA is proposing that states without any affected EGUs submit a formal letter to that effect to the agency by June 30, 2016.

After the proposed rule becomes final, which EPA anticipates will be in June 2015, states would have up to 15 years for full implementation of all emission reduction measures. EPA is proposing an initial, phase-in compliance period of up to 10 years, from 2020 up to 2029, and a final compliance deadline of 2030 for a state to meet its interim and final CO₂ emission performance levels in the state plan. Beginning January 1, 2022, and no less than every two years thereafter, states would be required to submit a progress report to EPA comparing emission performance achieved by affected EGUs in the state with the emissions performance projected in the state plan.



EPA REGIONAL REPORTS

EPA REGION 1

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

Clean Air Interstate Rule

EPA is proposing for the 1997 8-hour ozone national ambient air quality standard (NAAQS) and the 1997 fine particle (PM_{2.5}) NAAQS to withdraw any prior determination or presumption that compliance with the Clean Air Interstate Rule or the NO_x SIP call automatically constitutes reasonably available control technology or reasonably available control measures for nitrogen oxides (NO_x) or sulfur dioxide emissions from electric generating unit sources participating in these regional cap-and-trade programs. *See the Federal Register proposal at www.gpo.gov/fdsys/pkg/FR-2014-06-09/pdf/2014-13415.pdf.*

Connecticut, Massachusetts, Rhode Island, and Vermont

In May, Governor Chafee announced that Rhode Island is one of eight states to sign a collaborative action plan to put 3.3 million zero emission vehicles (ZEV) on the road by 2025. The other states signing the Memorandum of Understanding are California, Connecticut, Maryland, Massachusetts, New York, Oregon, and Vermont. The states have set a target of ZEV to comprise 15 percent of new car sales by 2024. *See ZEV Program Implementation Task Force, Multi-State ZEV Action Plan (May 2014) at www.dem.ri.gov/zevplanmou.pdf.*

Connecticut

EPA is proposing to rescind its determination of attainment (Clean Data Determination) for the 1997 8-hour ozone standard for the NY-NJ-CT ozone nonattainment area because recent complete, quality-assured monitoring data show that the area has subsequently violated the 1997 8-hour NAAQS. In addition, EPA is proposing to call for revisions to the State Implementation Plans (SIPs) for New York,

New Jersey, and Connecticut. If finalized, this SIP call will require each of these states to submit a revised attainment SIP for the 1997 8-hour ozone NAAQS for its portion of the NY-NJ-CT moderate nonattainment area within 18 months of final action on this SIP call. *See the Federal Register proposal at www.gpo.gov/fdsys/pkg/FR-2014-05-15/pdf/2014-10827.pdf.*

Maine

EPA is approving SIP revisions submitted by Maine that primarily update state regulations containing ambient air quality standards (AAQS) consistent with EPA NAAQS. *See the Federal Register approval at www.gpo.gov/fdsys/pkg/FR-2014-06-24/pdf/2014-14531.pdf.*

Governor LePage's Environmental and Energy Resources Working Group is convening three listening sessions to solicit suggestions on specific actions that will assist the state in identifying and adopting climate adaptation practices or policies. *See Press Release, Maine Department of Environmental Protection, "Governor's Environmental and Energy Resources Working Group to Solicit Climate Adaptation Suggestions" (May 9, 2014) at www.maine.gov/dep/news/news.html?id=620089.*

Massachusetts

EPA has approved several SIP revisions submitted by Massachusetts. The revisions add new monitoring, inspection, maintenance, and testing requirements for certain fossil-fuel utilization facilities, rename and clarify stationary source emission reporting requirements, and establish compliance and certification standards for new boilers. The intent is to approve Massachusetts' revised "Fossil Fuel Utilization Facility" regulation, "Source Registration" regulation, and new "Industrial Performance Standards for Boilers." *See the Federal Register approval at www.gpo.gov/fdsys/pkg/FR-2014-04-24/pdf/2014-08610.pdf.*

EPA has also approved SIP revisions submitted by Massachusetts consisting of updates and amendments to existing air-pollution control requirements for stationary sources of volatile organic compounds (VOCs) and NO_x. *See the Federal Register approval*

at www.gpo.gov/fdsys/pkg/FR-2014-05-29/pdf/2014-11687.pdf.

A Walpole company that operates 300 school buses in 15 Massachusetts communities will implement idling reduction measures in addition to paying a \$33,000 penalty to settle EPA allegations that it violated federally enforceable motor vehicle idling limits in Massachusetts. *See EPA Region 1 News Release, "Walpole, Mass. School Bus Company Reduces Diesel Idling under Settlement" (May 27, 2014) at <http://yosemite.epa.gov/opa/admpress.nsf/6d651d23f5a91b768525735900400c28/a3c6e44e1dcb3f5285257ce50052ef57!OpenDocument>.*

The Massachusetts Department of Environmental Protection (MassDEP) announced an agreement with a cabinetry making business in Easton of an \$18,172 penalty for air quality and hazardous waste management violations. MassDEP penalized the facility for, among other things, allegedly failing to seek approval for three manual spray booths and one automated spray booth that use acetone for cleaning purposes. *See Massachusetts Executive Office of Energy and Environmental Affairs News Release, "Sunco, Inc. in Easton Penalized \$18,172 for Air Quality and Hazardous Waste Management Violations" (June 25, 2014) at www.mass.gov/eea/agencies/massdep/news/releases/sunco-inc-in-easton-penalized-18172.html.*

In May, MassDEP announced agreements with four analytical laboratories to pay a total of \$1.75 million in penalties for allegedly failing to obtain required state air emission permits and to control their hazardous air pollutant emissions. Under the consent agreement, the laboratories agree to pay the penalties, obtain air permits, and install emission-control equipment for emissions from sample analyses that will reduce hazardous air pollutant emissions by up to 95 percent. *See Press Release at www.mass.gov/ago/news-and-updates/press-releases/2014/2014-05-27-alpha-accutest-spectrum.*

New Hampshire

EPA is approving a SIP revision including regulatory amendments that require the decommissioning of Stage

II vapor recovery systems at gasoline dispensing facilities by December 22, 2015, and a demonstration that such removal is consistent with the Clean Air Act and EPA guidance. The intent is to approve New Hampshire's revised vapor recovery regulation. The *Federal Register* approval is available at www.gpo.gov/fdsys/pkg/FR-2014-05-29/pdf/2014-12338.pdf.

EPA is approving SIP revisions submitted by New Hampshire that primarily update state regulations containing AAQS consistent with EPA NAAQS. See the *Federal Register* approval at www.gpo.gov/fdsys/pkg/FR-2014-06-24/pdf/2014-14531.pdf.

NHDES repealed Env-A 3700, NO_x Emissions Reduction Fund for NO_x-Emitting Generation Sources. These rules required NO_x-emitting generation sources to report power generation and NO_x emission information and to either acquire emissions reduction mechanisms or make direct payment of fees to the NO_x emissions reduction fund.

EPA REGION 2

Philip E. Karmel
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New York, New York

New York City Adopts New Boiler Rules

On February 17, 2014, the New York City Department of Environmental Protection (DEP) adopted new rules for boilers in New York City. The new rules are codified at Chapter 2 of Title 15 of the Rules of the City of New York. Among the new requirements are those pertaining to the combustion efficiency of oil-fired and gas-fired boilers (set at 83 percent and 80 percent, respectively) and a new requirement for annual boiler tune-ups and combustion efficiency tests conducted by a qualified combustion tester using a calibrated combustion analyzer. The new rules, unlike the previous boiler rules, apply to gas-fired, as well as oil-fired, boilers.

City Council Introduces New Bill to Control Air Pollution in New York City

On April 10, 2014, a new bill to overhaul the New York City Air Pollution Code was introduced in the City Council. Int. 0271-2014. On April 23, 2014, a hearing on the bill was held before the City Council's Committee on Environmental Protection. Among the new provisions of the bill are those relating to emissions from outdoor wood boilers, fireplaces, wood-burning heaters, commercial char boilers, cook stoves, and stationary generators. The bill also includes a provision allowing the commissioner of the city's Department of Environmental Protection to issue a stop work order for any violation related to airborne dust.

EPA Proposes to Rescind Its Prior Determination as to NY-NJ-CT Attainment with the 1997 8-Hour Ozone Standard

On May 15, 2014, the U.S. Environmental Protection Agency (EPA) issued a proposed rule that would repeal EPA's prior determination that the New York-North New Jersey-Long Island (NY-NJ-CT) area is in attainment with the 1997 8-hour ozone standard. 79 Fed. Reg. 27,830 (May 15, 2014). The proposed rule is based on data for the 2010–2012 period and data for the 2011–2013 period, both of which show the area to be slightly over the 0.085 parts per million (ppm) 8-hour ozone standard that EPA promulgated in 1997. This proposed rule, when finalized, will result in a "SIP call" to New York, New Jersey, and Connecticut to revise their State Implementation Plans (SIPs) to achieve compliance with the 8-hour ozone National Ambient Air Quality Standards (NAAQS). These SIP measures would likely be required in any event to comply with the 8-hour ozone NAAQS of 0.075 ppm that EPA promulgated in 2008.

EPA Proposes to Approve New York's Infrastructure SIP for the 1-Hour NO₂ NAAQS

On May 2, 2014, EPA proposed to approve New York's SIP submittal for the 1-hour nitrogen dioxide (NO₂) NAAQS. 85 Fed. Reg. 25,066 (May 2,

2014). Among EPA's proposed determinations are that New York's regulatory program for NO_x emissions is adequate to meeting the infrastructure requirements for the 1-hour NO₂ NAAQS and that New York emissions are not contributing to noncompliance with the NAAQS in other states.

New York State Department of Environmental Conservation Proposes to Modify Definition of "Nonattainment Area" in State Air Regulations to Reflect EPA Reclassification

On May 28, 2014, the New York State Department of Environmental Conservation (NYSDEC) published a propose rule in the *State Register* to change the definition of nonattainment area codified at 6 N.Y.C.R.R. § 200.1(av) to remove the five counties comprising New York City and Nassau, Orange, Rockland, Suffolk, and Westchester Counties from the definition of nonattainment areas for PM_{2.5} to reflect EPA's redesignation of the nonattainment status of this area. If enacted as proposed, the rule would relieve major new or modified sources from nonattainment requirements such as Lowest Achievable Emission Rate (LAER) and the need to acquire emission offsets for PM_{2.5} (which have been difficult or impossible to acquire for new projects).

NYSDEC Proposes to Repeal Its Cap and Trade Program to Reduce Acid Deposition

On May 28, 2014, NYSDEC published a propose rule in the *State Register* to repeal 6 N.Y.C.R.R. Part 227-3, Nitrogen Oxide Emissions Budget and Allowance Program; to repeal Part 237, Acid Deposition Reduction NO_x Budget Trading Program; to repeal Part 238, Acid Deposition Reduction Budget Trading Program; and to revise Part 200, General Provisions by removing all references to Parts 227-3, 237 and 238. According to its rulemaking notice, these regulations have become obsolete and have been superseded by other state and federal regulations, most notably 6 N.Y.C.R.R. Part 243, CAIR NO_x Ozone Season Trading Program; Part 244, CAIR NO_x Annual Trading Program; Part 245, CAIR Trading Program; and 40 CFR Part 96.101- 96.388, NO_x

Budget Trading Program; and CAIR NO_x and Trading Programs for State Implementation Plans. Part 227-3, promulgated in 1999, established a NO_x emissions budget in New York State for fossil-fuel fired boilers or indirect heat exchangers with a maximum heat input capacity equal to or greater than 250 MMBtu/hr, and any electric generating devices with a rated output equal to or greater than 15 MW.

EPA REGION 5

Gary Pasheilich
Squire Sanders (US), LLP
Columbus, Ohio

Multiple States

EPA issued a proposed rule to approve Statement Implementation Plan (SIP) submissions from Michigan and Wisconsin, as well as a partial approval of submissions from Illinois and Minnesota regarding 2008 lead National Ambient Air Quality Standards (NAAQS) infrastructure requirements. These requirements are designed to ensure that the structural components of each state's air-quality management program are adequate to meet the state's responsibilities under the Clean Air Act. 79 Fed. Reg. 27,241 (May 13, 2014).

Illinois

EPA issued proposed and direct-final rules to approve Illinois' rule revision to extend the term for an initial permit or renewal of a Federally Enforceable State Operating Permit (FESOP) from five years to ten years. EPA states that this rule revision is expected to reduce the administrative costs of the permitting process and will allow Illinois to devote more resources to major source Title V permitting actions and permit modifications for Title V and FESOP sources. 79 Fed. Reg. 18,997 and 19,036 (Apr. 7, 2014).

In *Sierra Club v. Futuregen Industrial Alliance*, C.D. Ill. No. 13-CV-3408, 2014 U.S. Dist. LEXIS 77902 (June 9, 2014), the court dismissed a challenge

that the defendants were constructing a major modification without a Prevention of Significant Deterioration (PSD). The court found that dismissal was appropriate under the two-prong *Burford* abstention doctrine since the challenge asserts a collateral attack on the state agency's permitting decision under state regulatory laws.

EPA withdrew the direct-final rule to approve Illinois' SIP revision to the Chicago area's 1997 8-hour ozone maintenance plan due to receipt of an adverse comment. *See* 79 Fed. Reg. 29,324 (May 22, 2014). EPA states that it will address the comment in a subsequent final action based upon the proposed rulemaking action, 79 Fed. Reg. 29,395 (May 22, 2014), but will not institute a second comment period on this action. 79 Fed. Reg. 36,220 (June 26, 2014).

Indiana

The Indiana Department of Environmental Management (IDEM) has released *The States' View of the Air (2014)* report, which highlights the air quality in counties and cities across the United States. IDEM has graded areas on the state of their air quality under the federal standards for ozone and fine particles. The report can be accessed from IDEM's website, www.in.gov/idem/airquality/files/monitoring_states_view.pdf.

In *United States v. U.S. Steel Corp.*, N.D.Ind. No. 2:12-cv-00304, 2014 U.S. Dist. LEXIS 54671 (Apr. 18, 2014), the court dismissed a claim for injunctive relief as violative of the five-year statute of limitations period. The claim related to alleged major modifications without a permit performed in 1990 at a steel plant in Gary, Indiana for which EPA argued were a "continuing violation." The court found that, in reevaluating its *Midwest Generation* decision, that "a construction permit only relates to construction" and so continued operation does not violate the construction permit requirements.

EPA issued proposed and final rules to approve a SIP revision for rules containing emission-control requirements for coating operations, as well as exemptions from coating operations that produce

minimal particulate matter emissions. 79 Fed. Reg. 21,421 (Apr. 16, 2014) and 34,435 (June 17, 2014).

EPA proposed to disapprove a December 5, 2012 redesignate request for Lake and Porter Counties' attainment of the 2008 eight-hour ozone NAAQS. EPA concluded that Indiana did not demonstrate that the Chicago-Naperville, Illinois-Indiana-Wisconsin ozone nonattainment area, which includes Lake and Porter Counties, has attained the standard. 79 Fed. Reg. 36,692 (June 30, 2014).

EPA issued a final rule to approve portions of Indiana's submissions to address EPA's requirements for its New Source Review and PSD program for PM_{2.5} and ozone precursors. The final rule is effective August 1, 2014. 79 Fed. Reg. 37,647 (July 2, 2014).

Michigan

EPA issued proposed and final rules to approve revisions to Michigan's PSD Program rules and definitions. The revised rules address the federal requirements for significant emission levels and definitions for PM_{2.5}. 79 Fed. Reg. 18,802 and 18,868 (Apr. 4, 2014).

Ohio

Ohio Environmental Protection Agency (Ohio EPA) is soliciting public comment on potential amendments to Ohio's Title V Permitting Program governing major sources. Ohio EPA is seeking input on these rules from potentially affected parties through Wednesday, July 30, 2014. Additional information can be found on Ohio EPA's website, www.epa.state.oh.us/dapc/whatsnew.aspx.

EPA is soliciting supplemental public comment on its June 27, 2005 proposed disapproval of Ohio's particulate matter rule revisions, originally submitted on June 4, 2003. Given the passage of time, EPA is soliciting supplemental comment regarding whether events following the prior comment period should alter EPA's proposed disapproval. EPA states that it is not soliciting comments on Ohio's submission or EPA's proposed action, except to the extent that subsequent events are relevant. EPA is receiving public comments through July 28, 2014.

Wisconsin

EPA issued a final rule to approve Wisconsin's request to redesignate the Milwaukee-Racine nonattainment area to attainment for the 2006 24-hour PM_{2.5} NAAQS. EPA is also approving the state's plan for maintaining the standard through 2025, the comprehensive emissions inventories for several pollutants, as well as Wisconsin's Motor Vehicle Emission Budgets for 2020 and 2025. 79 Fed Reg. 22,415 (Apr. 22, 2014).

EPA issued a proposed rule to approve a SIP revision that modifies the "major modification" definition in Wisconsin's PSD and Nonattainment New Source Review programs. The changes remove an exemption for fuel changes where the source was capable of accommodating the change before January 6, 1975, as well as modify Wisconsin's PSD program to identify precursors for ozone. 79 Fed. Reg. 25,063 (May 2, 2014).

EPA withdrew the April 30, 2014, direct final rule to approve a SIP revision due to the receipt of an adverse comment. EPA states that it will address the comment in a subsequent final action based upon the proposed rulemaking action, also published on April 30, 2014. 79 Fed. Reg. 35,956 (June 25, 2014).

EPA issued a proposed rule to approve a SIP revision that modifies Wisconsin's PSD program to identify precursors for PM_{2.5} and revises its definitions for PM_{2.5} and PM₁₀. EPA is receiving public comments through July 30, 2014. 79 Fed. Reg. 36,689 (June 30, 2014).

EPA REGION 7

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Iowa NSPS and NESHAP Update

The Iowa Department of Natural Resources (DNR) has issued a Notice of Intended Action detailing proposed modifications to its

New Source Performance Standards (NSPS) and National Emissions Standards for Hazardous Air Pollutants (NESHAP) programs. The proposal affects several industries, including utility, industrial, commercial and institutional boilers; solid waste incinerators; cement plants; and stationary engines, shaping standards to accord with federal time lines. Additionally, the Iowa Environmental Protection Commission (EPC) seeks to adopt federal regulations by implementing revised federal test methods and removing certain compounds with negligible contribution to tropospheric ozone formation from the definition of volatile organic compounds (VOC). The full notice is available on the DNR website.

Nebraska DEQ Significant Enforcement Update

Abengoa Bioengery of Nebraska, LLC entered a consent decree with NDEQ after its carbon monoxide emissions and dryer/thermal oxidation system operation temperature was alleged to be in violation of Nebraska statutes. Abengoa agreed to pay a civil penalty of \$30,000 in addition to paying \$30,000 to complete construction of a wind turbine power generator at Ravenna Public Schools as a voluntary supplemental environmental project.

Archer Daniels Midland Company (ADM) further entered a consent decree with NDEQ to satisfy claims that ADM's air emission management procedures violated Nebraska's Air Quality Regulations. ADM agreed to pay a civil penalty in the amount of \$20,000.

Ag Processing Inc. entered a consent decree with NDEQ after NDEQ alleged that AGP's H₂SO₄ and PM/PM₁₀ emissions exceeded permitted limits. AGP agreed to pay a civil penalty in the amount of \$8,500, as well as \$8,500 to the Attorney General's Environmental Protection Fund for the Wind for Schools Project in Adams County as a voluntary supplemental environmental project.

Missouri Rule Changes

The Missouri DNR has updated its proposed amendment to its rules regulating Stage II gasoline dispensing facilities in the St. Louis area by restricting

VOC emissions from the handling of petroleum liquids. The amendment seeks to reduce hydrocarbon emissions that contribute to the formation of ozone by removing requirements for Stage II vapor recovery systems for gasoline dispensing facilities, using California Air Resources Board to certify vapor recovery equipment in place of Missouri Performance Evaluation Test Procedure and updating the permitting provisions for vapor recovery systems.

EPA REGION 8

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Colorado—APCD Proposes Rule Changes to Stationary Source Regulations

The Colorado Department of Public Health and the Environment, Air Pollution Control Division (Division) is proposing revisions to Regulation Number 3, which applies to the permitting and submittal of Air Pollutant Emission Notices (APENs) for stationary sources throughout the state. Specifically, the Division is proposing to make 10 revisions to Regulation Number 3, including updating the assigned global warming potential for GHGs, revising the regulated New Source Review (NSR) pollutant definition to include condensable Particulate Matter (PM), revising the definition of a regulated NSR pollutant to clarify that GHG emissions would not trigger PSD permitting at 100 or 250 tons per year if proposed federal NSPS are adopted for electric utilities, incorporation of EPA's revisions establishing plant wide applicability limitations for GHG emissions, revise the PM-2.5 significant impact level (SIL) and significant monitoring concentrations (SMC) (*see* update Montana section in this newsletter), as well as other revisions. With respect to the GHG-specific proposed revisions, the Division has acknowledged that the recent U.S. Supreme Court opinion in *UARG v. EPA* will have an impact on how the Division seeks to regulate GHGs. The Division's preferred approach, however, is to continue with the proposed revisions to the GHG regulations and, if

necessary, utilize a rescission clause located in Colorado's GHG regulations that allows the state to rescind regulations in the event the federal law is changed or overturned. The proposed rule changes are set for hearing on August 21, 2014.

Montana – DEQ Proposes Revisions to Certain PM-2.5 Standards and Application Fees for Certain Air Quality Permits

On July 16, 2014, the Montana Department of Environmental Quality (Montana DEQ) Air Resources Management Bureau held a public hearing to consider several revisions to its Administrative Rules. The first proposal would increase certain application fees for Montana air quality permits for facilities that require major NSR permits or Title V operating permits. The second proposal would update Montana's air quality rules to incorporate requirements for major source permitting of airborne emissions of PM-2.5. According to DEQ, the second proposal is needed to ensure that the state's rules are at least as stringent as corresponding federal rules so that Montana can retain primacy and authority for the major NSR permitting program. With respect to the proposed PM-2.5 revisions, Montana is proposing to amend its Administrative Rules to reflect changes in EPA's PM-2.5 rules following a Sierra Club petition. The new EPA PM-2.5 rules essentially conclude 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. As a result, Montana is proposing to amend its rules to move the significant monitoring concentration (SMC) for PM-2.5 from 4 ug/m³ to zero and to delete provisions that allow the state and regulated entities to use certain significant impact levels (SILs) of PM-2.5 as a screening tool to demonstrate that the proposed source's allowable emissions will not cause or contribute to a violation of the National Ambient Air Quality Standards (NAAQS).

North Dakota—North Dakota Industrial Commission Adopts Policy to Reduce Flaring

On July 1, 2014, the North Dakota Industrial Commission (NDIC) adopted a policy aimed at

reducing the amount of natural gas flaring from the Bakken and Three Forks Formations. The policy establishes oil production limits that will take effect if producers fail to meet requirements to capture natural gas at well sites. This new policy is intended to help meet NDIC's goals to reduce flaring to 26 percent by October 1, 2014; 23 percent by January 1, 2015; 15 percent by January 1, 2016; and 10 percent with the potential for 5 percent by October 1, 2020.

Under the new policy—which goes into effect on October 1, 2014, with the 74 percent gas capture requirement—well operators that fail to meet NDIC's flaring reduction targets will be subject to production restrictions. The policy allows infill horizontal wells to produce at a maximum efficient rate for 90 days and allows operators to remove the first 14 days of flowback gas from the total monthly volume calculation. It leaves another 76 days for an operator to get connected to a gathering facility or utilize capture processes in order to hit the gas capture target. If a gas capture percentage is not met following the 90-day period, oil production at a well will be restricted to 200 barrels of oil per day, “if at least 60 percent of the monthly volume of associated gas produced from the well is captured, otherwise oil production from such wells shall not exceed 100 barrels of oil per day.” NDIC has provided some additional flexibility by permitting operators to meet the reduction targets on a well, field, county, or statewide basis. Production restrictions may also be imposed if NDIC determines that natural gas flaring at a well is causing a violation of the North Dakota Air Pollution Control Rules, N.D. Admin. Code, art. 33-15.

This new flaring policy is the latest step in NDIC's overall efforts to reduce flaring in the state, where it has been estimated that operators are flaring up to and over 30 percent of produced gas. The July 1 order comes on the heels of a June order from NDIC that requires operators to submit gas capture plans in connection with drilling permits. Among other things, gas capture plans must outline how much natural gas an operator anticipates producing from a well, the method that will be used to deliver the natural gas to a processor, and where the natural gas will be processed.

Wyoming—Air Quality Division Announces Proposed Rulemaking for Existing Oil and Gas Facilities in Upper Green River Basin

On June 13, 2014, the Wyoming Department of Environmental Quality, Air Quality Division (AQD) announced a proposed rulemaking for the Upper Green River Basin (UGRB) ozone nonattainment area. The UGRB area was designated by the EPA as “Marginal” nonattainment for the 8-hour ozone National Ambient Air Quality Standards (NAAQS) of 0.075 ppm on July 20, 2012. The proposed rule—which is part of AQD's UGRB Ozone Strategy—will establish regulatory requirements for oil and gas production facilities located in the UGRB ozone nonattainment area that are existing as of January 1, 2014.

In announcing the proposed rule, AQD stated it was proceeding under a phased approach to regulating emissions from existing oil and gas facilities in the UGRB. AQD concluded that the best approach would be to implement a technology-based rule in Phase I. The technology-based rule will address a wide range of oil and gas production equipment, including storage tanks, dehydration units, and pneumatic pumps and controllers. For example, under the proposed rule, existing storage tanks and separation vessels with total uncontrolled VOC emissions from flashing emissions greater than or equal to 4 tons per year (tpy) would be required to control VOC and HAP flashing emissions to at least 98 percent by January 1, 2016. Dehydration units with VOC emissions greater than or equal to the 4 tpy threshold would likewise be required to control VOC and HAP flashing emissions to at least 98% by January 1, 2016. The proposal also would require operators to implement a Leak Detection and Repair (“LDAR”) Protocol at facilities with fugitive emissions greater than or equal to 4 tpy of VOCs.

The proposed rule and other information regarding the rulemaking can be found at the AQD's website at <http://deq.state.wy.us/aqd/index.asp>.

South Dakota – EPA Issues Partial Approval and Partial Disapproval of Several South Dakota SIP Revisions, Including Construction and Operating Permit Requirements for Minor Sources

On June 27, 2014, EPA took final action to partially approve and partially disapprove three revisions to South Dakota’s State Implementation Plan (SIP). 79 Fed. Reg. 36,419 (June 27, 2014). In 2010 and 2011, South Dakota submitted for EPA approval three proposed revisions to its SIP, which would revise portions of the Administrative Rules of South Dakota pertaining to the issuance of air quality permits in that state. As noted in the April edition of this newsletter, on April 18, 2014, EPA issued a final rule partially approving and partially disapproving revisions to South Dakota’s SIP regarding greenhouse gases and EPA’s Tailoring Rule. This current EPA final action is in addition to that April 18th action. Part of the current final action, however, approves revisions to the South Dakota SIP regarding GHGs and the State’s Prevention of Significant Deterioration (PSD) program that were not acted upon in the April 18, 2014 Agency action. The final rule is effective July 28, 2014.

Perhaps, most significantly, South Dakota proposed to revise its construction permit program for new minor sources and minor modifications to existing sources and to revise the minor source operating permit program to incorporate the changes associated with the new proposed construction permit program. EPA Approved the revisions to the operating permit program for minor sources and to the construction permit program for new sources or modifications, but disapproved the revisions regarding initiating construction prior to permit issuance. 79 Fed. Reg. at 36,424. EPA did not take action on a number of suggested revisions, including revisions to New Source Performance Standards (NSPS), National Emission Standards for Hazardous Air Pollutants (NESHAP), PSD, the Acid Rain program, and the Mercury Budget Trading program. A full discussion of the Agency’s action is beyond the scope of this newsletter, but additional information in the form of an instructive cross-walk table detailing EPA’s actions is available in the docket at EPA-R08-OAR-2014-0241.

Utah—Utah Division of Air Quality Issues Final General Approval Order for Crude Oil and Natural Gas Well Site and/or Tank Battery

On June 5, 2014, the Utah Department of Environmental Quality, Division of Air Quality (DAQ) issued the General Approval Order for a Crude Oil and Natural Gas Well Site and/or Tank Battery (GAO). The GAO covers facilities that process up to 50,000 barrels of crude oil and condensate combined over a rolling 12-month period. The final GAO, supporting documents, and other information can found at DAQ’s website at www.deq.utah.gov/Permits/GAOs/oilgas/oilgasinfo.htm.

EPA REGION 9

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I. Regulatory Actions

Hawaii

On Mar 19, 2014, EPA proposed to approve Hawaii’s revision of its State Implementation Plan (SIP) submitted pursuant to the 2008 eight-hour ozone and the 2010 nitrogen dioxide national ambient air quality standards (NAAQS) under the Clean Air Act (CAA). Hawaii’s revision relates to the infrastructure SIP requirements of CAA section 110(a)(2) and the related regulations in 40 CFR part 51.

Arizona

On May 25, 2012, Arizona submitted a SIP revision to meet CAA requirements in the Maricopa County PM-10 Nonattainment Area, which is designated as a serious nonattainment area for the NAAQS for particulate matter of 10 microns or less. On February 6, 2014, EPA proposed to approve the plan, and on June 10, 2014, the EPA finalized its proposal, approving and promulgating the plan. A notable feature of the approval is EPA’s agreement that over 25 dust storms constituted “exceptional events” under EPA

policy. The state plans to request re-designation to attainment.

II. Enforcement Actions

California

On March 28, 2014, the Bay Area Quality Management District announced a settlement between it and Valero Refining Company. Valero agreed to pay an \$183,000 civil penalty for its air quality violations at its refinery in Benicia, California. The settlement covers seven different violations that occurred during an incident in December 2010 involving Valero's fluid catalytic cracking unit, which is responsible for transforming heavy gas oils into gasoline and other compounds. The upset in the fluid catalytic cracking unit occurred when a valve failed while certain electrostatic precipitators controlling particulate emissions were working at reduced efficiency. This upset, in turn, caused violations of opacity and particulate standards at Valero's main stack and violations of carbon monoxide and sulfur standards in other affected equipment.

On April 11, 2014, the Bay Area Air Quality Management District issued another press release detailing its agreement with Tesoro Refining & Marketing Co. regarding an isolated air quality violation at Tesoro's Golden Eagle Refinery in Martinez, California. Tesoro agreed to pay a \$285,000 civil penalty to settle all claims against it for a water vapor leak discovered at a cooling tower in September 2010. The leak released an estimated 52 tons of hydrocarbon emissions over the course of at least 13 days. Due to corroded tubing, organic compounds entered the cooling system water and emitted from the cooling tower. Tesoro failed to detect indications of the leak but subsequently conducted an investigation. The investigation culminated with Tesoro repairing the leak, implementing additional measures to increase oversight of its cooling water system contractors, and drafting a new cooling water system operating procedure plan.

Thanks to our intern, Brandon Curtis, for his assistance.

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