

Air Quality Committee Newsletter

Vol. 19, No. 2

April 2016

MESSAGE FROM THE CHAIR

Phillip Bower

The past few months have been an exciting time for air practitioners. We have seen many proposed and final rules and lawsuits and court decisions related to air issues such as ozone NAAQs, the Cross-State Air Pollution Rule, the Mercury and Air Toxics Standards for utilities, and methane emissions from oil and gas production. We also saw the U.S. Supreme Court, in what may have been an unprecedented move, issue a stay of the Clean Power Plan.

The Air Quality Committee strives to help its members stay on top of the issues through our programs, publications, and electronic communication. Here are a few of the ways we are working on meeting our goal.

Programs

The program vice chairs have been hard at work developing timely programs. Some of the program ideas we are actively working on include:

- Start-up, shutdown, and malfunction;
- Oil and gas;
- Debrief after the Clean Power Plan oral arguments on June 2;
- A “hot topic” committee call giving an overview of several air issues;

Watch your e-mail for announcements! Some of these will be low or no cost to members.

Conferences

The 45th Spring Conference took place in Austin from March 30 to April 1, 2016 (and was immediately preceded by the 34th Water Law Conference in the same location). Our committee helped to plan an exciting panel called “Achieving the New Ozone NAAQS—the Search for Solutions” featuring top-notch presenters from states around the country. Other panels that addressed air issues included “Hot Topics in Enforcement,” “Region 6: Permitting, Compliance, Enforcement,” “Supreme Court Roundup,” “State 111(D) Compliance Plans,” and “Obama’s Legacy on Climate Change.”

The Section is also hosting an upcoming conference “Key Environmental Issues in U.S. Environmental Protection Agency Region 5” on June 14, 2016. Among other timely topics, the conference will include a panel addressing the Midwestern states’ perspectives on the Clean Power Plan. The conference will take place at The Gwen in Chicago.

Planning is also under way for the 24th Fall Conference that will be held from October 5 to 8, 2016, in Denver. There will likely be several panels covering air issues, including one on updates to the Clean Power Plan. Make plans to attend now!

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 Gary Steinbauer, Editors

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

CALENDAR OF SECTION EVENTS

May 26, 2016
**Defending Citizen Suit Enforcement of
 Environmental Laws: Key Questions and
 Practical Strategies**
 In-House Counsel Committee Program Call

June 14, 2016
**Key Environmental Issues in U.S. EPA Region 5
 Conference**
 The Gwen
 Chicago, IL

June 14-15, 2016
**Superfund Master Class: Today’s Issues and
 Tomorrow’s Reforms**
 The Gwen
 Chicago, IL

August 4-9, 2016
ABA Annual Meeting
 San Francisco, CA

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

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 Bar Association or the Section of Environment, Energy, and
 Resources.

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Get Involved

We encourage you to participate in the exchange of information and knowledge by submitting articles for the newsletter, suggesting topics for conferences or webinars, sending us key agency and court decisions, policy documents, or briefs on air quality issues, and posting and commenting on our social media pages. If you write an air quality-related article or blog post, we can link to it on our website upon request. Also feel free to utilize our social media accounts. Post your article to our LinkedIn page or tweet it at our social media chair @snowden_enviro and tag it with #abaairquality. All of the 2015–2016 committee vice chairs are listed under the Committee Leadership link on the right side of this website. Feel free to reach out to me or the appropriate vice chair if you have any suggestions, questions, or information to share.

Changing Jobs? Promoted? Let the Section Know!

When you start a new job or position or receive prestigious promotions or appointments, please let the Section know by contacting Ellen Rothstein, the Section's publications manager, at Ellen.Rothstein@americanbar.org with the news. Your information will appear in *People on the Move* for the ABA SEER *E-News* e-mail, the *Trends* electronic newsletter, and *Section Member Update*.

As always, if you have an idea for a program or article, feel free to reach out to me. On behalf of the AQC leadership team, thank you for your membership.

Phillip Bower is the chair of the Air Quality Committee.

NORTHWEST ENVIRONMENTAL DEFENSE CENTER V. CASCADE KELLY HOLDINGS: IN OREGON AIR PERMITTING DECISION, FEDERAL COURT EMPHASIZES DEFERENCE TO STATE REGULATOR'S TECHNICAL DETERMINATIONS

Emerson Hilton

Introduction

On December 30, 2015, a federal district court in Oregon rejected claims that a crude oil trans-loading terminal unlawfully failed to obtain a federal preconstruction permit under the Clean Air Act (CAA) Prevention of Significant Deterioration (PSD) program. *Nw. Env'tl. Def. Ctr. v. Cascade Kelly Holdings, LLC*, No. 3:14-cv-01059-SI, 2015 WL 9581754, at *21 (D. Or. Dec. 30, 2015).

The decision is notable for its examination of the issues surrounding a federal citizen suit PSD challenge where a state regulator previously determined that no PSD permit was required. In particular, *Cascade Kelly Holdings* is important for the potentially dispositive deference accorded by the district court to the Oregon Department of Environmental Quality (DEQ) on the question whether an existing state permit—which restricted emissions of volatile organic compounds (VOCs) to a level below the major source PSD threshold—was “practically enforceable.” The decision is also important for its refusal to limit the availability of federal CAA citizen suits that question state-issued air quality permits limiting a source's potential to emit (PTE).

Background

In *Northwest Environmental Defense Center v. Cascade Kelly Holdings, LLC*, several citizen groups sought to enjoin construction and operation of an oil trans-loading facility on the Columbia River in Clatskanie, Oregon. The facility was originally constructed as an ethanol refinery in 2009, with the help of state tax credits, but its owner soon went bankrupt. In 2012, a new owner

began repurposing the facility to store and transport crude Bakken oil from trains to barges bound for west coast refineries.

The plaintiffs in *Cascade Kelly Holdings* argued that, in its new iteration, the facility could not realistically limit its VOC emissions below the PSD threshold of 100 tons per year, and that construction and operation of the facility were unlawful unless it obtained a preconstruction PSD permit. The defendant, on the other hand, argued that a DEQ-issued permit restricting the facility's VOC emissions to 78 tons per year was dispositive evidence that a PSD permit was unnecessary.

Court Rejects Defendant's Jurisdictional Arguments

In its December opinion, issued after a bench trial, the district court first rejected three procedural arguments advanced by the defendant that would have barred the plaintiffs' citizen suit. First, the court rejected the defendant's argument that the plaintiffs must exhaust state-law remedies prior to filing suit in federal court over the DEQ-issued permit. Although the plaintiffs could have challenged the DEQ permit in state court, they were not required to do so before bringing a citizen suit in federal court.

Second, the federal citizen suit was not prohibited by the doctrine of issue preclusion as a result of the plaintiffs having submitted comments on the permit to DEQ. Although prior state court litigation may preclude subsequent relitigation of the same issues in federal court, the district court in *Cascade Kelly Holdings* declined to find that prior state-level administrative determinations could likewise preclude subsequent federal litigation. The mere fact that the plaintiffs did not persuade DEQ to adopt their comments in the administrative process, prior to permit issuance, did not mean the plaintiffs could not later bring a federal citizen suit founded on the same issues raised in its comments to DEQ.

In a third threshold determination, the district court rejected the facility owner's argument that

the plaintiffs' suit was a collateral attack on a facially valid state permit, and, consequently, that the district court did not have jurisdiction over the suit. The district court found that such an argument applies only in the context of challenges to PSD permits issued under state programs that integrate CAA title I and title V permitting procedures, where objections to an allegedly unlawful title I permit must be presented to the EPA administrator and later to a federal court of appeals rather than a district court. Where a citizen suit is instead based upon the failure to obtain a required PSD permit under title I of the Clean Air Act, the *Cascade Kelly Holdings* court concluded that federal district courts have jurisdiction over such a claim even if a state regulator previously determined that no such permit was required.

Court Grants Deference to State Agency Technical Determinations

On the merits, the plaintiffs' arguments turned on the question of whether the state permit VOC emissions limit was "practically enforceable." A source that has a PTE above the PSD threshold in the normal course of its operations can only avoid PSD permitting requirements if it limits its PTE below the PSD threshold through physical or operational limitations. Those limitations must both be "federally enforceable," 40 C.F.R. § 51.165(a)(1)(iii), and "effective as a practical matter," *Nat'l Mining Ass'n v. U.S. Env'tl. Prot. Agency*, 59 F.3d 1351, 1363 (D.C. Cir. 1995); see also EPA Memorandum, *Guidance on Limiting Potential to Emit in New Source Permitting* (June 13, 1989), available at http://www3.epa.gov/airtoxics/pte/june13_89.pdf.

Although the facility in *Cascade Kelly Holdings* obtained a state permit limiting its PTE to 78 tons per year of VOCs, the plaintiffs presented evidence that the facility had underestimated its likely VOC emissions, and that it could not reasonably measure those emissions in the future as a means of ensuring compliance with the state permit. In fact, a key issue in the case was the inherent difficulty of measuring actual VOC emissions at

a facility whose emissions are all fugitive—i.e., a facility without discrete emission units. As a result of that challenge, the emissions limit in the DEQ permit relied solely on agency emissions estimates derived from EPA emissions factors and from an Environmental Protection Agency (EPA) emissions calculation computer program known as “TANKS.”

Given the difficulty of measuring actual VOC emissions at the facility, and the “razor thin” margin between emitting 78 tons per year of VOCs and 100 tons per year (the PSD threshold for VOCs), the plaintiffs argued that the state permit was not a practically enforceable PTE limitation. As such, the plaintiffs argued that a major source PSD permit—based upon a best available control technology (BACT) analysis—was required by the CAA.

The court’s opinion exhaustively recounted technical evidence submitted by the parties concerning VOC emissions. Although the court indicated that its decision was a close call, it ultimately concluded that the plaintiffs failed to carry their burden to show by a preponderance of the evidence that the state permit underestimated VOC emissions or was otherwise not practically enforceable. A key basis for the district court’s decision was its express deference to DEQ’s technical determinations in estimating VOC emissions at the facility.

Federal courts commonly defer to federal agencies on their interpretation of federal statutes, e.g., *Chevron, U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837, 865–66 (1984), on their interpretation of federal agency regulations, e.g., *Decker v. Nw. Env’tl. Def. Ctr.*, 133 S. Ct. 1326, 1337–38, and on factual issues within an agency’s area of technical expertise, e.g., *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 377 (1989). Federal courts also defer to state agencies’ interpretations of state laws they are charged with enforcing. *City of Bangor v. Citizens Commc’ns Co.*, 532 F.3d 70, 94 (1st Cir. 2008). But federal courts do not defer to state agencies on their interpretation of federal law. *See id.*; *see also*

Orthopaedic Hosp. v. Belshe, 103 F.3d 1491, 1495–96 (9th Cir. 1997).

The distinct question raised in *Cascade Kelly Holdings* is the extent to which federal courts should defer to the technical expertise of state agencies when deciding questions of fact such as the veracity of emissions estimates. Other federal courts have infrequently, if ever, addressed this question squarely. The Supreme Court noted in *Alaska Department of Environmental Conservation v. United States Environmental Protection Agency*, 540 U.S. 461, 490 (2004), that EPA itself generally defers to state agency BACT determinations in the PSD permitting context. But that case did not address the question whether federal courts themselves should likewise accord such deference to a state agency’s fact-based determinations.

In Comprehensive Environmental Response, Compensation, and Liability Act actions, state agency decisions related to the entry of consent decrees may be entitled to “some deference,” but not the same level of deference that federal courts would accord EPA under similar circumstances. *See Arizona v. City of Tucson*, 761 F.3d 1005, 1013–15 (9th Cir. 2014); *City of Bangor*, 532 F.3d at 94; *see also Comm’r v. Esso Standard Oil S.A., Ltd.*, 326 F.3d 201, 205 (3d Cir. 2003) (deferring to Virgin Islands’ territorial regulator). Similarly, the Eighth Circuit has given deference to a stipulated agreement resolving a state agency enforcement action under the Clean Water Act (CWA), noting the important role of states in the CWA’s statutory scheme. *Comfort Lake Ass’n, Inc. v. Dresel Contracting, Inc.*, 138 F.3d 351, 355, 357 (8th Cir. 1998). The Supreme Court recently declined to take up the appropriateness of such deference by denying a petition for certiorari in *Arizona v. City of Tucson*.

Despite these murky precedents, the district court in *Cascade Kelly Holdings* determined that at least some deference to DEQ’s technical determinations was appropriate. The court appears to have concluded that such deference is especially appropriate in cases that involve federal statutory

schemes—like the CAA—that assign substantial authority to state regulators. Ultimately, deference to DEQ’s emissions estimates and calculations in *Cascade Kelly Holdings* was a critical factor—perhaps even the dispositive factor—in the court’s determination that a PSD permit was not required.¹

Conclusion

Cascade Kelly Holdings is an important CAA decision for two reasons. First, regulated sources that limit their PTE through state-issued permits, in order to avoid PSD permitting requirements, are not necessarily immune from citizen suits in district court alleging that a PSD permit is nonetheless required under the CAA. Second, plaintiffs in such cases may have to overcome the initial factual hurdle of federal court deference to state agency technical determinations. In order to carry their burden to demonstrate the need for a PSD permit by a preponderance of the evidence, citizen suit plaintiffs may need to assemble especially persuasive evidence that the technical determinations underpinning a state regulator’s permit are incorrect or otherwise invalid.

Emerson Hilton is an associate in the Environmental and Natural Resources Practice Group at Riddell Williams P.S. in Seattle. He focuses on environmental litigation, air quality compliance issues, and contaminated site cleanups under CERCLA and state superfund laws.

Endnote

1 In a somewhat ironic coda to the *Cascade Kelly Holdings* case, the facility owner announced in late January that it would lay off much of its workforce and that, as a result of low oil prices, the facility will once again be repurposed. By mid-2016, the facility will be used to store and trans-load ethanol—the fuel that the original refinery at the site was supposed to have produced.

SO₂ DATA REQUIREMENTS RULE

William B. Jones

Osman Environmental Solutions, LLC
Marriottsville, Maryland

Kate Graf

Geosyntec Consultants
Blue Bell, Pennsylvania

On September 21, 2015, the U.S. Environmental Protection Agency (EPA) published a final Sulfur Dioxide (SO₂) Data Requirements Rule (DRR) (80 Fed. Reg. 51,052) that requires states and other air agencies to gather and submit information to EPA to help inform attainment determinations pertaining to the 2010 SO₂ National Ambient Air Quality Standard (NAAQS). The DRR has the potential to substantially impact industries with significant SO₂ emissions. This article summarizes the DRR and addresses how it could affect industry.

DRR Overview

Although attainment determinations for other pollutants rely on ambient air quality monitoring data, in the case of the 2010 SO₂ NAAQS, EPA is allowing the use of air quality modeling to determine the attainment status. Because most states and other air agencies (collectively “states”) do not have the resources necessary to comply with the DRR, often they are reaching out to industrial sources to obtain their assistance in compiling the required information. States must inform EPA by July 1, 2016, of the approach they plan to use to determine the SO₂ attainment status for all sources applicable to the DRR.

DRR Applicability

The DRR applies to sources with actual emissions of 2000 tons per year (tpy) or greater during the most recent year for which emissions data are available. States have the option of including additional sources based on more stringent thresholds (e.g., some states are including groupings of smaller sources that collectively have

significant SO₂ emissions). Each state was required to submit a list of their targeted sources to EPA by January 15, 2016.

Courses of Action Available to Industries Subject to DRR

States have three options for providing NAAQS determination information to EPA. For each industry identified as subject to the DRR, states may use monitoring data, use the results of source-specific air quality modeling data, or establish permit limits. Each of these options is detailed below.

Monitoring Option

A source subject to the DRR may choose to conduct air quality monitoring to provide the state with the necessary information for inclusion in the state's submission to EPA. In December 2013, EPA made available the SO₂ NAAQS Designations Source-Oriented Monitoring Technical Assistance Document (<http://www3.epa.gov/airquality/sulfurdioxide/pdfs/SO2MonitoringTAD.pdf>) to provide monitoring guidance. The monitoring station or stations (multiple stations may be required) must be part of the state and local air monitoring stations network, and must meet various criteria presented in 40 C.F.R. part 58, including data certification and reporting requirements. The monitoring data will be used to calculate an SO₂ design value, which must be based on data collected during the three-year period from 2017 to 2019.

This option is generally not attractive to states or industries because it would be very difficult to site, purchase, obtain, and install a monitor (or monitors) by January 1, 2017.

Modeling Option

A source subject to the DRR may choose to conduct air quality modeling to provide the state with the necessary information for inclusion in the state's submission to EPA. The DRR puts forth a somewhat aggressive schedule for these modeling analyses, requiring sources to submit modeling

protocols to states by July 1, 2016, and for states to submit the final modeling analyses to EPA by January 13, 2017.

The proposed SO₂ NAAQS modeling analysis is different from modeling analyses typically conducted as part of traditional permitting efforts (e.g., Prevention of Significant Deterioration (PSD)). In December 2013, EPA made available the SO₂ NAAQS Designations Modeling Technical Assistance Document (<http://www3.epa.gov/airquality/sulfurdioxide/pdfs/SO2ModelingTAD.pdf>) to provide guidance on how to conduct this modeling analysis. The most substantial difference between the DRR modeling and traditional PSD modeling is that the DRR modeling allows the source to model impacts of actual emissions over the most recent three years of operation, rather than potential (allowable) emissions.

Like traditional modeling, the DRR modeling analysis must account for non-modeled SO₂ impacts through the inclusion of a background concentration. While it is always important to utilize a representative background concentration, in the case of DRR modeling, the background concentration is particularly important. For example, a facility that contributes a small impact from its operation may show an exceedance of the NAAQS when combined with the high background concentration due to large nearby SO₂ sources. Because the exceedance is likely caused by neighboring operations, the facility should examine different sources and different techniques for establishing the background concentration.

In some instances, states are pressing for sources to explicitly model other nearby sources in their analysis as opposed to using monitor data as a surrogate. This has the potential to be problematic for a source conducting modeling, in that hour-by-hour actual emissions may not be readily available for its neighboring sources, thus making it challenging for the source to include them in its modeling analysis.

It is important to note that once attainment has

been demonstrated through modeling, the state may have to continue to demonstrate to EPA that the region remains in attainment. For instance, if actual emissions are used to show attainment, the state will have to provide a report to EPA by July 1 of every year with a report of actual emissions from latest year, reasons for any increases in emissions relative to the previous year, and the state's recommendations as to whether or not additional modeling is warranted to confirm the attainment status. Although the decision to require additional modeling is on a case-by-case basis, EPA's guidance states that modeling should be conducted if the previous modeling showed a design concentration greater than or equal to 90 percent of the NAAQS, or if the previous modeling showed a design concentration between 50 percent and 90 percent of the NAAQS and emissions for that year have increased by 15 percent or more. EPA guidance also suggests that future modeling would not be required if the modeled design concentration is less than 50 percent of the NAAQS. If additional modeling is required, it would be due to EPA within 18 months from the end of a given calendar year.

This option is generally the preferred choice for responding to the DRR by both states and industry.

Permit Limit Option

A source subject to the DRR may choose to accept a permit restriction limiting its SO₂ emissions to less than 2000 tpy. The permit limit must be federally enforceable, and must be in effect by January 13, 2017.

This option is generally the preferred choice for responding to the DRR by states, but often is not a viable option for industries.

Recommendations for Industry

Although the DRR requires states—and not industry—to provide the SO₂ attainment determination information, sources identified as subject to the DRR need to be proactive in preparing and providing the information to their state. While the DRR is focused on determining the

attainment status of area and not with developing control strategies to bring areas into attainment (that will come after this step when state implementation plans are developed), it is prudent for sources to ensure their interests are represented at this stage. For example, if ACME Industries waits to see what will transpire, there is a risk that other nearby facilities will propose a solution to bringing an area into attainment that requires a disproportionate emissions reduction from ACME Industries.

While every situation will be different, generally sources subject to the DRR will be best served by conducting air modeling to demonstrate compliance, as modeling typically has benefits over both monitoring and permit limits. Air modeling provides flexibility in how to execute the model and interpret the results—all of which are acceptable in a regulatory context. Therefore, if a modeling analysis at first does not demonstrate compliance with the NAAQS, it may be possible to make some minor modifications to the analysis such that attainment with the SO₂ NAAQS is shown. Modeling is far more cost-effective than conducting three years of air monitoring. Moreover, there is little flexibility in interpreting monitoring results; if design values exceed the standard, negotiation potential is limited.

With regards to permit limits, adding a restriction on emissions and correspondingly on production is unlikely to be an ideal solution, except in cases where a facility already plans to take a permit limit because of other regulations. Voluntarily taking a permit limit may be a viable option for a facility that has an allowable SO₂ emission rate greater than 2000 tpy, but has historically had actual SO₂ emissions far below 2000 tpy and foresees no future scenario in which actual emissions would approach 2000 tpy. In that case, a source's best response to the DRR may be to take a permit limit reducing its allowable SO₂ emissions to below 2000 tpy.

Conclusions

The DRR may have a substantial impact on industries with sufficient SO₂ emissions (over

2000 tpy). It is likely that sources subject to the DRR will choose to conduct air quality modeling to demonstrate that their area meets the 2010 SO₂ NAAQS, and will be subject to the possibility of future reporting and/or modeling requirements.

In some cases, sources may have to make modifications to their facility or operations to demonstrate attainment. In early 2016, subject facilities need to plan an approach and begin to address the DRR to ensure that their interests are represented and protected.

William B. Jones is a Principal with Osman Environmental Solutions, LLC. He has been in the air quality field for 25 years, and has conducted air quality modeling analyses throughout the United States as well as the Middle East and Africa.

Kate Graf is a Senior Consultant with Geosyntec Consultants. She has over 20 years of experience in air quality, with a focus on permitting and compliance for industrial sources nationwide.

Nominate

The ABA Award for Excellence in Environmental, Energy, and Resources Stewardship

The Section is now accepting nominations for 2016.

This award recognizes and honors the accomplishments of a person, organization, or group that has distinguished itself in environmental, energy, and resources stewardship. Nominees must be people, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the areas of sustainable development, energy, environmental, or resources stewardship.

Nomination deadline: July 8, 2016.

For more information, visit:

www.ambar.org/EnvironAwards

CLEAN POWER PLAN UPDATE

Olivia D. Lucas

Faegre Baker Daniels, LLP
Denver, Colorado

In a very unusual move on February 9, 2016, the U.S. Supreme Court stayed the implementation of the Clean Power Plan (CPP) pending review in the D.C. Circuit Court of Appeals. The stay is in place through the ultimate Supreme Court determination on the merits, assuming the inevitable writ of certiorari from the D.C. Circuit opinion is granted. The standard for a stay is that there is substantial likelihood of success on the merits. The Court's one-page order provided no analysis of the arguments for and against the stay, however. The death of Justice Antonin Scalia on February 13, 2016, further complicates the question of how the Supreme Court might ultimately rule on full consideration of the CPP.

At a minimum, the Supreme Court stay delays states' deadline of September 2016 to submit an implementation plan or request a two-year extension of that deadline to EPA. The stay also effectively provides opportunity for the next administration to act on the rule.

The stay's effect on the timing of the D.C. Circuit Court case is unclear. Before the stay, oral argument in the D.C. Circuit had already been scheduled for June 2, and most people expected a decision by the Circuit Court prior to the state submittal deadline in September. With that September 2016 deadline now stayed, the Circuit Court may not feel as much pressure to act quickly. The upcoming presidential election may also impact the Circuit Court's timing to some degree.

States' reactions to the stay have been varied. Most states opposing the rule have embraced the opportunity to step back from developing state plans and have suspended planning. Other states supporting the rule continue planning, while another group of states plans to scale back activity but continues to assess further planning.

EPA REGIONAL REPORTS:

EPA REGION 1

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

NESCAUM

On Jan. 14, 2016, the Northeastern States for Coordinated Air Use Management (NESCAUM) submitted comments to EPA regarding the agency's proposed *Supplemental Finding That It Is Appropriate and Necessary to Regulate Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units*. NESCAUM asserts that EPA has greatly overestimated compliance costs and underestimated benefits. Visit <http://www.nescaum.org/documents/nescaum-comments-epa-supp-finding-mats-costs-20160114.pdf> to view the comments.

RGGI

At the December 2, 2015, Regional Greenhouse Gas Initiative (RGGI) auction, 15,374,274 allowances were sold at a clearing price of \$7.50 per allowance. The price of allowances has increased steadily since the December 5, 2012, auction when the clearing price was \$1.93/allowance.

Ozone Transport

EPA found that 24 states, including Maine, Massachusetts, New Hampshire, and Vermont failed to submit state implementation plans (SIPs) that adequately address the interstate transport "good neighbor" requirements in section 110(a)(2)(D)(i)(I) of the Clean Air Act for the 2008 8-hour ozone standard. EPA's July 13, 2015, announcement begins a two-year clock for the states to submit the necessary SIP revisions before EPA must promulgate a federal implementation plan (FIP) addressing the deficiencies. 80 Fed. Reg. 39,961 (July 13, 2015).

Ozone Transport Commission

On Dec. 17, 2015, the Ozone Transport Commission's Executive Director, David Foerter, submitted comments to EPA in support of EPA's proposed Cross-State Air Pollution Rule Update Rule for the 2008 Ozone NAAQS. The comments state: "[t]he timing for completing Good Neighbor SIPs is critical to ensuring timely reductions in pollutant transport contributions to enable all areas can [sic] attain and maintain the ozone standard; however, historically many states fail to submit on time even incomplete Good Neighbor SIPs, and appear to wait at least two additional years until the FIP becomes final before taking any action. As a result, the state and federal actions for the 2008 ozone standard are significantly overdue." Visit <http://www.otcair.org/document.asp?fview=correspondence> for a link to the comments.

Connecticut

EPA approved revisions to Connecticut's SIP relating to Prevention of Significant Deterioration permitting of particulate matter (PM_{2.5}). EPA also approved clarifications to the applicability section of Connecticut's Nonattainment New Source Review regulations. 80 Fed. Reg. 43,960 (July 24, 2015).

EPA approved a SIP revision submitted by Connecticut to update the requirements for controlling volatile organic compounds from large aboveground storage tanks. 80 Fed. Reg. 67,642 (Nov. 3, 2015).

The Connecticut Department of Energy and Environmental Protection (CTDEEP), in conjunction with the University of Connecticut, developed a children's book on air quality, titled *Casey's Clean Air Week*. The book advises children and adults of steps they can take to help prevent or reduce air pollution when using cars. CTDEEP also offers a *Casey's Clean Air Week* parent/guardian/teacher guide and children's activity book. Visit <http://www.ct.gov/deep/cwp/view.asp?A=2684&Q=570960> for additional information.

Maine

EPA approved a Maine SIP revision that establishes a general permit for nonmetallic mineral processing plants and concrete batch plants. 80 Fed. Reg. 61,112 (Oct. 9, 2015).

On Oct. 23, 2015, the Maine Department of Environmental Protection (MEDEP) announced the availability of a Climate Adaptation Toolkit; a Maine-focused online reference library for community leaders and the public. Visit <http://www.maine.gov/dep/news/news.html?id=660551> for the MEDEP media release.

Massachusetts

The Massachusetts Department of Environmental Protection (MassDEP) adopted the California zero emission vehicle revisions under the Low Emission Vehicle Program regulations. Visit <http://www.mass.gov/eea/docs/dep/air/laws/lev15freg.pdf> for the final document.

In the last quarter of 2015, MassDEP announced settlements with five companies totaling \$176,296 for violations of asbestos removal management requirements. Visit <http://www.mass.gov/eea/agencies/massdep/news/releases/> for the MassDEP news releases.

New Hampshire

On Sept. 1, 2015, EPA published notice that it partially granted and partially denied a Sierra Club petition to object to a title V permit issued by the New Hampshire Department of Environmental Services to Public Service of New Hampshire's Schiller Station, a fossil fuel-fired power plant located in Portsmouth, New Hampshire. 80 Fed. Reg. 52,752 (Sept. 1, 2015).

Rhode Island

EPA approved a SIP revision that allows gasoline-dispensing facilities to decommission their Stage II vapor recovery systems as of Dec. 25, 2013. 80

Fed. Reg. 32,469 (June 9, 2015).

EPA approved a SIP revision that adopts the California Low Emission Vehicle (LEV) II light-duty motor vehicle emission standards effective in model year 2008, the California LEV II medium-duty vehicle standards effective in model year 2009, and greenhouse gas emission standards for light-duty motor vehicles and medium-duty vehicles effective with model year 2009. 80 Fed. Reg. 50,203 (Aug. 19, 2015).

EPA REGION 2

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

I. NYSDEC Proposes Rulemaking on Emissions from Distributed Generation Sources

On December 23, 2015, the New York State Department of Environmental Conservation (NYSDEC) proposed to establish nitrogen oxides (NO_x) and particulate matter (PM) emission standards and monitoring and record-keeping requirements for certain distributed generation (DG) sources. *See* 37 N.Y.S. Register Issue No. 51, pp. 4–11 (Dec. 23, 2015). The proposed rule defines a DG source as a stationary reciprocating or rotary internal combustion engine that supplies electricity to the distribution grid or produces electricity for use at the host facility or both, including emergency power generating stationary internal combustion engines. The proposed rule would apply to DG sources that (1) exceed certain horsepower (hp) thresholds (i.e., 200 hp in the New York City metropolitan area and 400 hp elsewhere in the state) and (2) have potential NO_x emissions below the major source threshold (i.e., 25 tons per year [tpy] in the New York City metropolitan area and certain adjoining areas and 100 tpy elsewhere in the state, *see* 6 N.Y.C.R.R. § 201-2.1(b)(21)). DG sources (except those used exclusively for emergency power) must

obtain a registration certificate or permit from NYSDEC and after May 1, 2016, must comply with certain specified NO_x and (in the case of diesel-fired equipment only) PM emission limits. The proposed rule authorizes NYSDEC to vary the compliance deadline and emission limits in certain circumstances. A facility that has fossil fuel-fired DG sources and a renewable generation system to generate electricity can factor in the electricity generated by the renewable generation system into the emissions calculation for the fossil fuel-fired DG sources using a formula specified in the proposed rule. Under the proposed rule, emission testing is required annually, and test reports must be submitted to NYSDEC. All DG sources must be tuned up at least once every 12 months. Maintenance and testing of emergency power generating stationary internal combustion engines would be prohibited between the hours of 1:00 p.m. and 8:00 p.m. from May 1 through September 30. The proposed rule contains a limited exemption for certain emergency generators at municipal sewage treatment plants or otherwise used by municipalities to avoid Clean Water Act violations. The proposed rule would also impose certain record-keeping requirements. The public comment period on the proposed rule closed on February 18, 2016.

II. NYSDEC Adopts Allowance Allocation Under EPA's Cross-State Air Pollution Rule

On December 2, 2015, NYSDEC promulgated a regulation (to be codified at 6 N.Y.C.R.R. pts. 243, 244, and 245) for the allocation of allowances under the Cross-State Air Pollution Rule (CSAPR) for the years 2017 and 2018. NYSDEC's allocation was based on historical emissions at the affected electric-generation units. NYSDEC set aside 10 percent of the CSAPR NO_x and SO₂ allowances for auction on the open market. Under the rule, NYSDEC has committed to reviewing allocations annually to consider adjustments needed to account for any operational changes, such as new sources, facility shutdowns, addition of pollution control systems, and fuel switching. By adjusting allocations on a periodic basis, NYSDEC's

approach is more flexible than EPA's allocation strategy in which allocations do not change over time.

III. N.Y. Governor Cuomo Issues Directive to Begin Proceeding to Require That 50 Percent of the State's Electricity Be from Renewal Sources by 2030

On December 2, 2015, Governor Andrew M. Cuomo issued a directive to the state's Department of Public Service to begin a proceeding before the state's Public Service Commission to adopt a "Clean Energy Standard" under which 50 percent of the state's electricity would be generated from renewable sources by 2030. The Clean Energy Standard would help New York meet its previously announced goal of reducing carbon emissions by 40 percent below 1990 levels by 2030. Governor Cuomo's directive also stated that support should be given to upstate nuclear facilities to prevent their closure.

IV. RGGI Carbon Allowances at Record Prices

On December 2, 2015, at the 30th auction of the RGGI, carbon allowances sold for a record \$7.50 each, raising approximately \$115 million for the nine participating states: New York, Delaware, Maryland, Connecticut, Massachusetts, Rhode Island, Vermont, New Hampshire, and Maine. The previous record price of \$6.02 per allowance had been set at RGGI's 29th auction on September 9, 2015. Each allowance authorizes the holder to emit one short ton (i.e., 2000 lbs) of carbon dioxide. Allowances are required for the operation of any unit that serves an electricity generator with a nameplate capacity equal to or greater than 25 megawatts.

If EPA's Clean Power Plan survives judicial challenge, it is expected that the participating RGGI states will make minor changes to RGGI to allow it to serve as each state's compliance strategy for the Clean Power Plan. These changes are likely to include a reduction in RGGI's cost containment

reserve (which allows additional allowances to be sold in certain circumstances to limit allowance price increases) so as to align the RGGI cap and the emissions limits required by the Clean Power Plan. Another potential factor contributing to the increase in the price of RGGI allowances is Governor Cuomo's campaign to shut down the Indian Point nuclear power plant, the closure of which would eliminate a major source of carbon-free electric generation, thereby increasing demand for electricity from generating units that require RGGI allowances to operate.

EPA REGION 5

Gary Pasheillich
Squire Patton Boggs (US), LLP
Columbus, Ohio

Illinois

EPA issued a final rule to approve a variance for the Illinois Regional Haze SIP for electrical generating units (EGUs) included in the Ameren Multi-Pollutant Standard Group. The rule became effective January 20, 2016. 80 Fed. Reg. 79,261 (Dec. 21, 2015).

Indiana

EPA issued a proposed rule authorizing temporary alternative opacity limits at the American Electric Power, Rockport facility during periods of unit start-up and shutdown. Comments were received through January 27, 2016. 80 Fed. Reg. 80,719 (Dec. 28, 2015).

Michigan and Minnesota

EPA has issued a proposed rule to revise a FIP addressing the requirements for best available retrofit technology for taconite plants in Minnesota and Michigan pursuant to a request for reconsideration. The rule revises NO_x limits for taconite furnaces owned and operated by Cliffs Natural Resources and ArcelorMittal USA LLC, as

well as SO₂ limits for two Cliffs' facilities. 80 Fed. Reg. 64,160 (Oct. 22, 2015).

Michigan

EPA issued a final rule to approve SIP infrastructure revisions for the 2008 ozone, 2010 NO_x, 2010 SO₂, and 2012 PM 2.5 NAAQS. The revisions are designed to ensure the adequacy of the structural components of the state's air quality management program. The rule became effective on November 12, 2015. 80 Fed. Reg. 61,311 (Oct. 13, 2015).

EPA issued proposed and direct-final rules to approve SIP revisions regarding state board infrastructure requirements for 2006 PM 2.5 and 2008 lead NAAQS. 80 Fed. Reg. 63,451, 63,483 (Oct. 20, 2015).

EPA issued proposed and direct-final rules to approve the state plan to control air pollutants from sewage sludge incinerators, as well as to acknowledge the receipt of a negative declaration for small municipal waste combustors. 80 Fed. Reg. 70,694, 70,727 (Nov. 16, 2015).

Minnesota

On January 21, 2016, the U.S. Court of Appeals for the Eighth Circuit issued a decision that denied a petition for review of EPA's approval of Minnesota's Regional Haze SIP. The court held that it had jurisdiction under 42 U.S.C. § 7607(b) (1) to review EPA's approval because it was a prototypical "locally or regionally applicable" action and not a nationally applicable action that could only be challenged in the District of Columbia Circuit. Further, EPA's determination that the Transport Rule was better than source-specific best available retrofit technology was supportable based on its emissions projections and was not arbitrary and capricious. *Nat'l Parks Conservation Ass'n v. McCarthy*, 8th Cir. No. 12-2910, 12-3481, 2016 U.S. App. LEXIS 977 (Jan. 21, 2016).

EPA issued a final rule to approve SIP infrastructure revisions for the 2008 ozone, 2010 NO_x, 2010 SO₂, and 2012 PM 2.5 NAAQS. The revisions are designed to ensure the adequacy of the structural components of the state's air quality management program. The rule became effective on November 12, 2015. 80 Fed. Reg. 63,436 (Oct. 20, 2015).

EPA issued a proposed rule to revise the Minnesota FIP for visibility, to establish emission limits for Northern States Power Company's Serburne County Generating Station, pursuant to a settlement agreement to resolve litigation by environmental groups for EPA to address visibility impacts to Voyageurs and Isle Royale National Parks. 80 Fed. Reg. 65,675 (Oct. 27, 2015).

EPA issued proposed and direct-final rules to approve SIP revisions that establish transportation conformity criteria and procedures related to interagency consultation and enforceability of certain transportation-related control and mitigation measures. Comments were received through January 11, 2016. 80 Fed. Reg. 76,862, 76,893 (Dec. 11, 2015).

EPA issued proposed and direct-final rules to approve a revision to the state SO₂ SIP for Northern States Power Company's Xcel Energy-Inver Hills Generating Plant, which incorporates a more stringent limit for sulfur content of the fuel used at the facility and modifies fuel analysis requirements. Comments were received through February 29, 2016. 80 Fed. Reg. 4884, 4905 (Jan. 28, 2016).

Ohio

EPA issued a proposed rule to extend the compliance date for best available retrofit technology SO₂ emission limits at the P.H. Glatfelter Company facility. The revision extends the compliance dates for boilers numbers 7 and 8 by 25 months. Comments were received through January 8, 2016. 80 Fed. Reg. 76,403 (Dec. 9, 2015).

Wisconsin

EPA issued a final rule to "narrowly" disapprove SIP infrastructure revisions for 2006 PM 2.5

NAAQS, as it relates to a failure to ensure that all program requirements were incorporated into the state's PSD permitting program. In particular, EPA found that the SIP failed to properly regulate NO_x as a precursor to ozone. The final rule became effective on January 11, 2016. 80 Fed. Reg. 76,637 (Dec. 10, 2015).

EPA issued a final rule to approve SIP revisions for state board infrastructure requirements for 1997 ozone, 1997 PM 2.5, 2006 PM 2.5, 2008 lead, 2008 ozone, 2010 NO_x, and 2010 SO₂ NAAQS. The final rule is effective on Feb. 22, 2016. 80 Fed. Reg. 3334 (Jan. 21, 2016).

EPA REGION 6

John B. King
Breazeale, Sachse & Wilson
Baton Rouge, Louisiana

Arkansas

A formal request was made to EPA to redesignate Crittenden County, Arkansas, as "attainment" for federal ozone standards. In the December request, the governor noted that "ozone monitoring data for the period of 2012 through 2014 show that Crittenden County has attained and continues to attain the 2008 eight-hour ozone" standard of 75 ppb under the NAAQS. Along with the letter, a maintenance plan outlining measures to keep the area in compliance with the standard for a minimum of 10 years was submitted. The Arkansas Department of Environmental Quality (ADEQ) held a public hearing in West Memphis on the proposed removal of the nonattainment designation, which has applied to Crittenden County since 2012. ADEQ has not received any comments opposing the proposal.

Georgia-Pacific voluntarily conducted an ambient air monitoring assessment for hydrogen sulfide at its Crossett, Arkansas, facility. Georgia-Pacific hired an independent environmental consulting company to operate and maintain a 24-hour-a-day monitor for a period of six months to measure the

levels of hydrogen sulfide in the community. Data are being submitted on a bi-weekly basis. Although most readings were within expected parameters, there were several incidents in which the H₂S levels spiked above average readings. All of the information collected will be used to prepare a health consultation report that was expected to be available later in 2016. To date, a final report has not been posted.

Louisiana

The Louisiana Department of Environmental Quality (LDEQ) is proposing to amend its definition of major sources of greenhouse gases (GHGs) in wake of the Supreme Court decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427 (2014). AQ358 proposed January 20, 2016. The proposed rule will delete the major source threshold for GHGs (i.e., 100,000 tons per year of carbon dioxide equivalents, or CO₂e) from the definitions of “major source” and “major stationary source” in the air quality regulations as the Supreme Court held that a stationary source could not be considered a major source for title V or PSD purposes based solely on its emissions of GHGs. The comment deadline is March 3, 2016.

The LDEQ is proposing to amend its reportable quantity list for pollutants. OS093 proposed December 20, 2015. The proposed rule amends LDEQ’s existing reportable quantity (RQ) list to reflect the federal list, establish RQs for any material for which maintenance of a material safety data sheet (MSDS) is required under the OSHA standards, and delete, for the most part, the LDEQ-specific RQs, except for brine from solution mining, oil, produced water, and sweet pipeline gas. The proposed action will align LDEQ’s RQ list with that of the Louisiana state police.

Newly elected Governor John Bel Edwards appointed Dr. Chuck Carr Brown as the secretary of the LDEQ. Dr. Brown previously worked at LDEQ from 2004 to 2008 as the assistant secretary for the Office of Environmental Services. Dr. Brown possesses a bachelor of science

degree in chemistry, a master’s degree in public administration, and a doctorate of philosophy in public policy/environmental policy.

New Mexico

In 2015, New Mexico’s Clean Power Plan team hosted a series of meetings around the state to obtain public input and comments regarding the EPA’s Clean Power Plan. The Clean Power Plan team includes staff from the New Mexico Environment Department (NMED), the city of Albuquerque Environmental Health Department, the New Mexico Energy, Minerals, and Natural Resources Department, and the New Mexico Public Regulation Commission. Since the Supreme Court stay of the Clean Power Plan, New Mexico is assessing next steps with respect to state planning, and no further meetings have been scheduled.

The NMED also engaged in a series of public meetings regarding the revision to NMAC 20.2.7 relating to excess emissions during malfunction, start-up, shutdown, or scheduled maintenance. The revision is necessary to ensure conformity of the state implementation plan to recent court decisions concerning emissions during start-up, shutdown, or malfunction.

Although not specific to air quality, the NMED announced that it, along with the state of Colorado and the owners of the Gold King and Sunnyside Mines, will sue EPA to address the environmental impacts resulting from the 2015 massive waste spill in the Animas River, which released over three million gallons of mine waste into the Animus and San Juan Rivers. New Mexico officials continue to monitor and review the impact of the spill. Various agencies drafted a comprehensive monitoring plan, which they claim EPA is failing to support.

Oklahoma

The Oklahoma Department of Environmental Quality issued a new general permit for air curtain incinerators and an accompanying application. The general permit is available for the construction and/

or operation of air curtain destructors facilities with actual emissions less than 100 tons per year (tpy) of a regulated pollutant in an attainment area, less than 10 tpy of any single hazardous air pollutant (HAP), and less than 25 tpy of total HAP. A copy may be obtained at www.deq.state.ok.us/aqdnew/permitting/genperm.htm.

The Oklahoma Department of Environmental Quality issued a guidance memorandum (memo) regarding subpart OOOO for oil and gas facilities in the wake of EPA's amendment of that subpart. The memo provides information relating to coverage under Oklahoma's oil and gas general permit and the general permit for area source national admission standard for hazardous air pollution (NESHAP) facilities and small new source performance standards (NSPS) facilities. The memo provides information regarding the applicability of the two general permits in different factual scenarios. A copy may be obtained at www.deq.state.ok.us/aqdnew/resources/subpartoooo.pdf.

Texas

The Texas Commission on Environmental Quality (TCEQ) announced the issuance of agreed orders with approved penalties over \$970,706 against 67 entities for violations. Fourteen of the orders related to air quality. A \$100,000 fine was issued against Houston Refining LP of Harris County for air emissions violations that lasted 82 hours. Of the total, as part of a supplemental environmental project, \$50,000 will be used by the Texas City Independent School District to purchase lower emission school buses, replacing 2006 and older models with 2010 and newer propane-powered versions.

Legislation passed in 2015 (HB 942) moved the Tier II Chemical Reporting Program from the Department of State Health Services to the TCEQ. All Tier II reporting must be provided to the TCEQ as of September 1, 2015.

The TCEQ conducted a survey to obtain data to improve its area source oil and gas emissions

inventory. TCEQ requested data on volatile organic compounds (VOC) emissions from crude oil well completion flowback as well as associated emissions control equipment at crude oil sites located in the Eagle Ford Shale area and the Permian Basin. The TCEQ requested information regarding the number of oil well completions, an estimate of the percent of completions where flowback VOC emissions were controlled, and a categorization of controls as either VOC recovery systems or combustion devices (e.g., flares or vapor combustors). TCEQ has not yet announced the results of the survey.

EPA REGION 7

Richard D. Winders
Associated Electric Cooperative
Springfield, Missouri

Iowa

EPA entered into a consent decree settling alleged Clean Air Act violations with Interstate Power and Light (IPL) for coal-fired plants located in seven Iowa counties. The July 15, 2015, lodged agreement with co-plaintiffs EPA, state of Iowa, Linn County, Iowa, and the Sierra Club included plant retirement and retrofit, civil penalties, and environmental mitigation projects. Some highlights include the retirement of ten coal generation units immediately and retirement, retrofit, or refueling of ten other units over various periods of time. As for the 30-day rolling NO_x control, the rates ranged from 0.080 lb/mmBTU to 0.210 lb/mmBTU. IPL agreed to \$1.1 million of civil penalties and environmental mitigation projects of at least \$6 million dollars.

In September 2015, Cargill entered into an administrative agreement with EPA concerning alleged violations of the Clean Air Act at a vitamin factory in Eddyville, Iowa. Cargill agreed to pay a \$110,000 civil penalty, conduct an enhanced leak detection and repair project for one year and be subject to third-party auditing. Cargill's violations included lack of compliance with regulations for

the prevention of hazardous air pollutant leaks. Cargill also agreed to spend \$155,000 or more on projects for pumps that do not use seals to avoid future leaks.

Kansas

Region 7 conditionally approved the Coal Ash Management Plan promulgated by the state of Kansas on October 19, 2015, the effective date of EPA's coal combustion residual (CCR) rule. The generally stated purpose of the CCR rule, which is presently under challenge in the D.C. Circuit, is to prevent coal ash impoundment failures, groundwater contamination, and air emissions. Kansas' public statement on the plan was that it demonstrated its intent to ensure that coal ash would be properly managed in the state.

An EPA inspection of Wilbur-Ellis Company facilities resulted in a \$67,404 civil penalty under a July 16, 2015, settlement agreement for excess anhydrous ammonia in its fertilizer manufacturing processes. The company also agreed to provide \$113,121 of emergency response equipment to local government emergency responders through the performance of a supplemental environmental project. As noted by EPA, facilities processing greater than 10,000 pounds of anhydrous ammonia are subject to EPA's Risk Management Program regulations.

Missouri

No significant air quality matters to report.

Nebraska

Nebraska public schools were beneficiaries of EPA's \$7 million dollar program to upgrade diesel school buses. The targeted buses are bus diesel engines manufactured before 2006 and schools may either replace the buses and receive a rebate or more recently retrofit with a diesel oxidation catalyst and closed crankcase ventilation system. The program is part of EPA's regulations to reduce emissions from diesel engines, including older diesel school buses.

Tribal Nations

No significant air quality matters to report.

EPA REGION 8

Chelsea Grossi and Brenna Finn
Davis Graham & Stubbs
Denver, Colorado

Montana

Governor Bullock Signs Executive Order Creating Interim Montana Clean Power Plan Advisory Council and Announces 27 Council Members

On November 12, 2015, Governor Steve Bullock issued an executive order creating the Interim Montana Clean Power Plan Advisory Council. The council will respond to the U.S. Environmental Protection Agency's final Clean Power Plan rule, which, among other changes from the proposed rules, increased Montana's requirement for reduction of carbon dioxide emissions by 47 percent.

Specifically, the council will review applicable memoranda and guidance, information on rate- and mass-based compliance tools, economic and reliability modeling, and the work of other states and entities. At the conclusion of this process, the council will make recommendations to the Department of Environmental Quality regarding the filing of an initial submittal and request for an extension under EPA's Clean Air Act section 111(d) rules.

On January 5, 2016, Governor Bullock named 27 members to the council, representing varied interests such as coal-fired power plant owners and investor-owned utilities, conservation and environment, electric cooperatives and large industrial electric customers, organized labor, renewable energy, legislators, etc.

South Dakota

DENR Cancels Public Input Sessions and Suspends Work on Clean Power Plan for South Dakota

In December 2015, the South Dakota Department of Environment and Natural Resources (DENR) announced a two-pronged approach to the federal Clean Power Plan, which would have impacted the Big Stone coal-fired power plant near Big Stone City and the natural gas-fired combined cycle combustion turbine at the Deer Creek Station near White. Specifically, the plan would have required that DENR reduce carbon dioxide emissions from these plants starting in 2030, either on a sub-category rate-based limit as between the two locations; a statewide rate-based limit; or a mass-based limit in units of short tons.

Under the first prong of the plan, the South Dakota attorney general joined a lawsuit with 24 states opposing the Clean Power Plan. The second phase saw DENR developing a proposal for putting the new Clean Power Plan rules into effect in South Dakota. To that end, DENR had begun accepting stakeholder input on the state plan and scheduling public meetings on the same.

However, on February 9, 2016, the U. S. Supreme Court issued a stay in EPA's Clean Power Plan that halts or postpones the effectiveness of EPA's plan to reduce carbon dioxide emissions from fossil fuel power plants. In response, DENR cancelled all public information sessions and has suspended its work on the state plan.

Wyoming

Air Quality Study of Large Produced Water Disposal Ponds Begins

In late August 2015, the Wyoming Department of Environmental Quality Air Quality Division (AQD) began a study of commercial oilfield waste disposal ponds in the Upper Green River Basin (UGRB). The goal of the study is to develop a method for accurately characterizing disposal pond air emissions. AQD and a team of contractors from GSI Environmental Inc., Kassay, Utah State University, and Texas A&M University are measuring air emissions from oilfield waste disposal facilities operated by Calpet, LLC, and

Anticline Disposal, Inc., in LaBarge and Pinedale, Wyoming. AQD and its contractors are using three methods to monitor air concentrations coming off the disposal ponds: (1) open path spectrometer readings that measure compounds over long distances; (2) summa canisters that collect air samples; and (3) flux chambers that collect additional air samples from the pond surface. Samples are taken in conjunction with water quality samples from the ponds and will be used by AQD to develop a model to quantify emission rates from the ponds. Additional samples will be collected from the UGRB in winter 2016.

North Dakota and Utah

Western States Air Resources Council (WESTAR) Pushes EPA to Apply Exceptional Events Air Rule Across the Board

When an “exceptional event” results in an air quality violation, current regulations permit states to exclude that data from its NAAQS calculations to determine attainment. When these events occur, state air agencies must demonstrate that “but for” the exceptional event—such as a wildfire—the air quality violation would not have occurred. According to EPA's proposed rule revisions for exception events, this documentation demonstration has been onerous on various state air agencies. The proposed rule would streamline that process. WESTAR, on behalf of western states, including North Dakota, Utah, and other Region 8 states, provided comment urging EPA to apply the streamlined process to both attainment and nonattainment areas (currently the changes only apply in nonattainment areas). Specifically, WESTAR commented that it “supports EPA's proposal to consider relevant control measures included in recent non-attainment or maintenance SIPs as sufficient to meet this criterion.” But WESTAR also urged EPA to apply the concept fairly, stating “[w]e believe that this same concept should apply in attainment areas as well. In an area that is currently in compliance with air quality standards except on days impacted by uncontrollable events, EPA's proposal would

require a state to implement some undefined set of emission control measures in anticipation of future uncontrollable events in order to be eligible to exclude the event-impacted data.” To the extent the process for proving an exceptional event is streamlined for both attainment and nonattainment areas, the North Dakota Division of Air Quality and the Utah Division of Air Quality will see a reduction in time required to calculate its compliance status with relevant NAAQS.

Colorado

Colorado Forges Ahead with Clean Power Plan

Though the Supreme Court of the United States stayed implementation of the Obama Administration’s Clean Power Plan on February 9, 2016, the Colorado Department of Public Health and Environment (CDPHE) announced it would stay the course and continue its Clean Power Plan rulemaking process regardless. According to the *Denver Post*, a department official stated “[i]t is prudent for Colorado to move forward during the litigation to ensure that the state is not left at a disadvantage if the courts uphold all or part of the Clean Power Plan.” As noted above, other states have stayed their rulemaking efforts, pending resolution of the matter.

EPA REGION 9

Eric Hiser and Brandon J. Curtis
Jorden Bischoff & Hiser, PLC
Scottsdale, Arizona

Region 9 Regulatory Developments

In the past few months, EPA has taken action to reclassify various areas within Region 9. On January 1, 2016, EPA reclassified the San Joaquin Valley from a moderate nonattainment area to a serious nonattainment area for the 2006 24-hour PM_{2.5} NAAQS, citing the valley’s inability to meet the standard by the end-of-year deadline. 81 Fed. Reg. 2993 (Jan. 1, 2016). Similarly, EPA reclassified the Los Angeles-South Coast Air Basin

as a serious nonattainment area for the 2006 PM_{2.5} NAAQS. 81 Fed. Reg. 1514 (Jan. 13, 2016). In both actions, state regulators are required to submit a serious area attainment plan and a nonattainment new source review plan providing for attainment by December 31, 2019.

On November 2, 2015, EPA also approved and disapproved portions of Arizona Department of Environmental Quality’s state implementation plan, which replaced existing new source review provisions for major and minor stationary sources. 80 Fed. Reg. 67,319 (Dec. 2, 2015). The revision is comprehensive and intended to bring Arizona regulations more in line with EPA’s PSD and nonattainment new source review requirements. *Id.* Although EPA’s disapproval of portions of the SIP are minor, Arizona must resolve the identified deficiencies within two years to avoid promulgation of a federal implementation plan. *Id.* at 67,328.

Region 9 Litigation

In *Wild Equity Institute v. EPA*, Wild Equity brought suit against EPA, alleging that the agency violated the consultation provisions under the Endangered Species Act at 16 U.S.C. § 1536(a)(2). No. 15-CV-2461-PJH, 2015 WL 7351400 (N.D. Cal. Nov. 20, 2015). Section 1536(a)(2) requires a federal agency to consult with the Fish and Wildlife Service whenever an agency’s actions “may affect” a listed species or critical habitat to ensure the action will not jeopardize those resources.

On July 24, 2001, the Bay Area Air Quality Management District (BAAQMD), under its delegation agreement with EPA, issued a PSD permit and an authority to construct (ATC) permit, which authorized Mirant to construct a natural gas-fired power plant. *Id.* at *3. The plant was within one mile of the Antioch Dunes National Wildlife Refuge where various endangered species reside. *Id.* Because the PSD permit was a federal permit, EPA consulted with FWS to determine if the action could jeopardize listed species or their habitat. *Id.*

Prior to the issuance of the permit, both agencies determined that no listed species or critical habitats were likely to be adversely affected. *Id.* at *4. BAAQMD subsequently issued a PSD and ATC permit. *Id.* The ATC provision stated the permit expired in two years unless substantial use of the authority had begun. *Id.* In 2003, BAAQMD could no longer adequately administer the PSD program and EPA took over. *Id.* Later that year, the PSD permit expired. *Id.* Although BAAQMD no longer had authority over the PSD matter, it nevertheless informed Mirant that it could continue construction pursuant to the ATC. *Id.* BAAQMD did not address the PSD permit expiration. *Id.*

In 2004, EPA redelegated PSD authority to BAAQMD, authorizing the district to make administrative and minor modifications to existing PSD permits. *Id.* Under this authority, the district extended Mirant's ATC permit, without addressing the issue of the PSD expiration. *Id.*

In 2006, Pacific Gas & Electric (PG&E) acquired the project from Mirant. *Id.* In 2007, the California Energy Commission authorized PG&E to restart construction of the plant, and later that year PG&E applied for an amended ATC permit due to a change in its construction plans. *Id.* PG&E continued construction throughout this period until the plant was completed in November 2008. *Id.*

In 2009, EPA and PG&E entered into negotiations to resolve claims that PG&E had violated the PSD regulations. *Id.* The resulting consent decree required PG&E to comply with more stringent emission limitations and requirements, but did not require the plant to undergo a new PSD permitting process. *Id.* at *4–5.

Several weeks before the court was to consider approval of the consent decree, Wild Equity sought to intervene and alleged that EPA's settlement constituted an agency action, requiring EPA to consult anew with FWS to determine whether the action could affect a listed species or critical habitat. *Id.* at *5. The court denied Wild Equity's motion to intervene and approved the settlement. *Id.*

PG&E subsequently submitted an application to BAAQMD to include the requirements of the settlement in its permit to operate. *Id.* at *6. BAAQMD authorized the revision pursuant to its state authority. *Id.*

On June 3, 2015, Wild Equity filed a complaint asserting that EPA had violated the ESA by failing to reinitiate consultation with FWS over the extension of the 2001 PSD permit and the new PSD requirements incorporated as a result of the settlement. *Id.* The allegations arose, in part, out of a 2011 letter from FWS to BAAQMD wherein FWS expressed concern that the terms of the settlement agreement would adversely affect listed species and that consultation should be reinitiated. *Id.*

EPA moved to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim. *Id.* Ultimately, the court granted EPA's motion to dismiss. *Id.* at *12. It found that EPA did not engage in any new agency action because the authority to reinitiate construction was a state action performed by the BAAQMD pursuant to state authority, not authority delegated under the Clean Air Act. *Id.* at *10. EPA never authorized continued construction, but instead took the position that the PSD permit had expired in 2003. *Id.* The court further explained that, although the consent decree requirements premised on PSD standards were incorporated into the local and state permits, the standards were incorporated and the permit was approved by a local agency acting under state authority. *Id.* This did not mean the 2001 PSD permit had been resurrected. *Id.* In sum, EPA never engaged in "agency action" to trigger the obligation to reinitiate consultation.

Wild Equity has appealed the decision to the Ninth Circuit Court of Appeals.

Region 9 Enforcement

In September 2015, EPA announced a settlement with Guardian Industries Corp. (Guardian) resolving an enforcement action arising out of allegations that Guardian made major

modifications to its flat glass furnaces without a permit. Under the settlement, Guardian must invest more than \$70 million in air pollution control equipment. EPA believes these additional controls will reduce nitrogen oxide emissions in San Joaquin Valley, California, by approximately 35,000 pounds annually. Nationwide, EPA expects the additional controls will reduce harmful emissions by more than 7300 tons per year. Guardian is also required to pay a \$312,000 civil penalty and fund a mitigation project in San Joaquin Valley valued at \$150,000. The settlement is part of EPA's National Enforcement Initiative, an ongoing, broader effort to address new source review and PSD violations, among other things.

In October 2015, the Arizona Department of Environmental Quality announced a settlement with Apache Nitrogen Products, Inc. (ANPI), a manufacturer of nitric acid and ammonium nitrate-based products. The settlement arose out of allegations that ANPI failed various emission tests for ammonia and ammonium nitrate, that ANPI failed to maintain continuous emission monitoring systems for nitrogen oxides capable of passing accuracy tests, and that ANPI failed to calibrate, maintain, and operate a continuous opacity monitor. ANPI must pay a \$500,000 civil penalty and may be subject to an additional suspended penalty of \$750,000 if additional significant violations are detected in the next three years.

On October 29, 2015, the Bay Area Air Quality Management District announced a settlement with Valero Oil Co. resulting in a \$196,000 civil penalty. In 2012, the district identified 23 violations, including missed leak inspections for valves, brief emission limit violations, hydrocarbon vapor leaks, and other minor administrative violations, such as untimely reports. The settlement comes as the district is in the proposal process for four new rules that will impose even stricter emission limits, additional monitoring, and equipment repair and upgrade requirements for refineries.

EPA REGION 10

Emerson Hilton, David Weber, and Gus Winkes

Riddell Williams P.S.

Seattle, Washington

Washington

Revisions to Start-up, Shutdown, and Malfunction Regulations

On July 22, 2015, the Washington Department of Ecology (Ecology) announced that it would amend its General Regulations for Air Pollution Sources, chapter 173-400 of the Washington Administrative Code (WAC), to comply with EPA's SIP call related to treatment of excess emissions during start-up, shutdown, and malfunction (SSM) periods, 80 Fed. Reg. 33,839. See <http://www.ecy.wa.gov/laws-rules/wac173400/d1507.pdf>. The SIP call is based on EPA's SSM policy applicable to SIPs, which was revised after the D.C. Circuit vacated an affirmative defense for unavoidable malfunctions in the Portland Cement NESHAP. *Natural Res. Def. Council v. Envtl. Prot. Agency*, 749 F.3d 1055 (D.C. Cir. 2014). Ecology expects to propose a rule in the spring and to finalize amendments in the summer or fall to meet EPA's November 22, 2016, deadline. In the SIP call, EPA deemed the affirmative defense provisions in WAC 173-400-107 for excess emissions during SSM events inadequate to meet Clean Air Act (CAA) requirements. EPA identified similar deficiencies in rules related to the Energy Facility Site Evaluation Council, specifically WAC 463-39-005, which has been recodified as WAC 463-78-005. 80 Fed. Reg. at 33,973–74. In addition, EPA identified deficiencies in rules administered by the Southwest Clean Air Agency/formerly the Southwest Air Pollution Control Authority (SWAPCA), SWAPCA 400-107. *Id.*

Greenhouse Gas Regulations

Clean Air Rule—On February 26, 2016, Ecology withdrew its proposed Clean Air Rule. See <http://www.ecy.wa.gov/programs/air/rules/wac173442/1510docs.html>. According to the

withdrawal notice, Ecology “intends to continue working with stakeholders and updating the proposed rule language.” Ecology expects to issue a new proposed rule this spring and a final rule this summer. On January 5, Ecology proposed a Clean Air Rule that would regulate greenhouse gas emissions from specific listed stationary sources, as well as those emissions attributed to petroleum fuel producers and importers, and to natural gas distributors. *See* <http://www.ecy.wa.gov/laws-rules/WAC173442/p1510b.pdf>. The agency intends to finalize the rule on June 1. Ecology’s rulemaking also includes proposed amendments to the state’s greenhouse gas reporting regulations. *See* <http://www.ecy.wa.gov/laws-rules/WAC173442/p1510a.pdf>. Beginning in 2017, covered parties with at least 100,000 metric tons of annual CO₂ equivalent (CO₂e) emissions must demonstrate compliance with an emissions reduction pathway. As measured from baseline emissions, this would require a 5 percent decrease in emissions every three-year compliance period. The individual emissions threshold for covered parties will drop incrementally until it reaches 70,000 metric tons of CO₂e in 2035. If a covered party’s emissions drop below the 70,000 metric ton/CO₂e threshold for three consecutive years, that party may exit the program.

A covered party can achieve compliance by reducing its own emissions or obtaining emission reduction units (credits) from qualifying emission reduction projects or with instruments from external, specified greenhouse gas regulatory programs in the United States and Canada. Emissions credits may be traded and/or banked for future use.

An “energy intense and trade exposed facility” does not have to comply with emissions limits until 2020, and, if it is “experiencing unusual economic hardship,” it may petition Ecology to exempt it from or modify its “compliance progress determination” for specific years.

Clean Power Plan—As required by EPA’s Clean Power Plan, 80 Fed. Reg. 64,662, Ecology, the

Department of Commerce, and the Utilities and Transportation Commission are working on a state implementation plan that would regulate CO₂ emissions from 11 existing power plants. All but one of the plants are natural gas combined cycle electric generating units. *See* http://www.ecy.wa.gov/programs/air/permit_register/clean_power/clean_power.htm. Like other states, Washington may choose statewide rate-based or mass-based emissions goals, develop emissions trading schemes and emissions reduction credit programs, and explore collaborative compliance methods with other jurisdictions. Meeting EPA’s CO₂ emissions goals in Washington will be aided by the planned retirement of the state’s only coal-fired power plant. The state announced that it would complete a draft implementation plan by June in order to respond to comments by August and submit an initial plan to EPA by September of this year. To date, however, the state has provided limited public information about the plan’s probable content. The proposed Clean Air Rule, discussed above, states that power plant CO₂ emission reductions under the Clean Power Plan would count toward compliance with the Clean Air Rule.

EPA SIP Approvals

In December 2015, EPA approved Washington’s SIP submittal from May 11, 2015, concluding that Washington does not significantly contribute to nonattainment or interfere with the maintenance of the 2008 ozone NAAQS in neighboring states. 80 Fed. Reg. 77,578. Similarly, in July 2015, EPA agreed that Washington does not significantly contribute to nonattainment or interfere with the maintenance of the 2006 24-hour PM_{2.5} NAAQS, the 2008 lead NAAQS, or the 2010 nitrogen oxide NAAQS. 80 Fed. Reg. 45,429; 80 Fed. Reg. 42,042. As such, EPA determined that Washington’s SIP meets the “good neighbor” or “interstate transport” requirements of the CAA for those standards.

Oregon

EPA SIP Approvals

As in Washington, EPA in December approved

Oregon's June 28, 2010, SIP submittal as meeting the "good neighbor" or "interstate transport" requirements of CAA section 110(a)(2)(D)(i)(I) for the 2008 ozone NAAQS. 80 Fed. Reg. 79,266. According to EPA's earlier proposal to approve the Oregon SIP revision, published in October, the Oregon Department of Environmental Quality (DEQ) had consulted with air agencies in Washington, Idaho, Nevada, and California to evaluate case-specific air quality problems involving regional transport of air pollution. 80 Fed. Reg. 65,680. "These staff-level communications indicated no impacts on ozone concentrations in other states caused by transport from Oregon, and the submittal stated that this provided additional support for Oregon's assertion that emissions from Oregon sources do not significantly contribute to nonattainment in or interfere with maintenance of the 2008 ozone NAAQS in any other states." *Id.* at 65,682. EPA received no comments on the proposed rule before approving the Oregon SIP submittal. The docket for the proposed and final EPA rules can be viewed at <http://www.regulations.gov/#!docketDetail;D=EPA-R10-OAR-2015-0259>.

Intel Corporation Settlement Agreements

Intel Corporation (Intel) owns and operates two semiconductor manufacturing facilities in Oregon. In 2014, Oregon DEQ signed a mutual agreement and order (order) with Intel to resolve allegations regarding Intel's undisclosed and unpermitted emissions of certain fluorides from its semiconductor manufacturing facilities. The order required Intel to pay a \$143,000 civil penalty. The order can be viewed at <http://www.oregon.gov/deq/NWR/Documents/MAOintel.pdf>.

Also in 2014, Intel, Neighbors for Clean Air (NCA), and the Northwest Environmental Defense Center (NEDC) signed a settlement with Intel to resolve similar allegations regarding Intel's emissions of certain fluorides. *See* settlement at <http://static1.squarespace.com/static/54b6c246e4b0ff956979a706/t/55b03f2ee4b01dc9e286264e/1437613870230/Settlement+Agreement--FINAL+%283%29.pdf>.

Under the settlement, Intel agreed to prepare an inventory of Intel's emissions; conduct a human health risk assessment utilizing the procedures referenced in California's South Coast Air Quality Management District Rule 14023; enhance Intel's stack emissions monitoring program; and provide resources to fund ambient air quality monitoring.

In December 2015, Intel, NCA, and NEDC entered into a "Good Neighbor Agreement" under which:

- Intel will provide up to \$150,000 to fund community ambient air monitoring to be conducted according to a mutually approved monitoring plan;
- Intel will employ reasonable efforts to achieve reductions of toxic air contaminants (TACs);
- Intel will perform periodic testing on the scrubbers and rotary concentrator thermal oxidizers for TACs;
- Intel will allow representatives of the NCA and NEDC a reasonable opportunity to observe emissions tests that are undertaken pursuant to the Good Neighbor Agreement; and
- Intel will install equipment, as needed, to meet any continuous monitoring obligations identified in the Good Neighbor Agreement.

See Good Neighbor Agreement

at <http://static1.squarespace.com/static/54b6c246e4b0ff956979a706/t/569eb1e6a128e6f9904bf232/1453240809230/2015++12-18+Master+Intel+GNA+w+sig+pages.pdf>.

Alaska

In November 2015, Alaska asked EPA to divide the Fairbanks North Star Borough (FNSB) PM_{2.5} nonattainment area into two separate nonattainment areas. *See* request at <https://dec.alaska.gov/air/anpms/comm/docs/fbxSIPpm2-5/area-separation-request-letter-11.20.15.pdf>. EPA first designated the area as nonattainment for the 24-hour PM_{2.5} NAAQS in 2009. As a result of a delay caused by the litigation in *Natural Resources Defense Council v. Environmental Protection Agency*, 706 F.3d

428 (D.C. Cir. 2013)—in which the D.C. Circuit remanded EPA’s 2007 24-hour PM_{2.5} NAAQS for repromulgation under a different subpart of the CAA—Alaska adopted a SIP amendment to include an air quality plan for the FNSB in late 2014.

Alaska’s request to divide the FNSB PM_{2.5} nonattainment area stems from data showing that the western half of the area, encompassing downtown Fairbanks, has recently recorded much lower levels of ambient fine particulate matter than the eastern half of the nonattainment area, which encompasses the city of North Pole. Alaska’s request comes as the state expects EPA to downgrade the FNSB area from moderate to serious nonattainment in June of 2016. Although EPA is not required to decide the state’s request to divide the FNSB for 18 months, Alaska’s proposed division could allow current air quality improvement measures to continue in the Fairbanks area while limiting the need for a serious nonattainment air quality plan to the North Pole area. The FNSB area experiences high levels of PM_{2.5} in part due to residential wood burning, and, according to the state, the Fairbanks area has seen recent air quality improvements as lower fuel oil prices have resulted in less wood burning.

Idaho

In December 2015, EPA and the J.R. Simplot Company (Simplot) reached a significant settlement to resolve alleged CAA violations at five sulfuric acid plants owned by Simplot. See consent decree at <http://www.epa.gov/sites/production/files/2015-12/documents/simplot-cd.pdf>. Two of the plants are located in Pocatello, Idaho. According to a complaint filed by EPA concurrently with the parties’ proposed consent decree, EPA alleged in 2009 that Simplot improperly failed to obtain preconstruction PSD permits before making major modifications at its Pocatello plants.

Under the consent decree—which at this writing has yet to be entered by the district court in

Idaho—Simplot will pay a civil penalty of \$899,000 and upgrade emissions controls and emissions monitoring systems at the plants. EPA estimates that Simplot will spend \$42 million to comply with the requirements of the consent decree and that the new controls will reduce SO₂ emissions at Simplot’s five plants by more than 50 percent. EPA says that the consent decree will also reduce emissions of sulfuric acid mist and PM_{2.5} at one of the Idaho plants.

EPA’s focus on the Simplot sulfuric acid plants began as part of the agency’s National Enforcement Initiative aimed at acid plants. See <http://www.epa.gov/enforcement/acid-plant-new-source-review-enforcement-initiative>. The Simplot settlement, according to EPA, is the thirteenth acid settlement and ninth sulfuric acid settlement under the National Enforcement Initiative. EPA’s press release regarding the Simplot settlement can be viewed here: <http://yosemite.epa.gov/opa/admpress.nsf/0/8DC9BA6F7F64CD9385257F10005B88D0>.

EPA HEADQUARTERS

Curtis Cox
Phoenix, Arizona

Regional Consistency Regulations

On August 19, 2015, EPA published a proposal to revise the regional consistency regulations. 80 Fed. Reg. 50,250. Under CAA section 301(a)(2), EPA is required to promulgate regulations that establish general applicable procedures and policies by EPA regional offices. These regulations should assure fairness and uniformity in the criteria, procedures, and policies applied by the regional offices. In 1980, the regional consistency regulations, 40 C.F.R. part 56, were adopted for this purpose. The EPA proposes to revise the regulations as a result of the decision in *National Environmental Development Association’s Clean Air Project v. EPA*, 752 F.3d 999 (D.C. Cir. 2014) (*NEDACAP*).

In *NEDACAP*, The D.C. Circuit vacated the so-

called *Summit* directive, an EPA memorandum that applied “intercircuit nonacquiescence” with respect to how to determine adjacency for purposes of aggregation of single sources in the Sixth Circuit. Intercircuit nonacquiescence is EPA’s practice of only applying a decision by a federal circuit court in those areas subject to the direct jurisdiction of the ruling court. The D.C. Circuit Court vacated EPA’s decision because the court found that the regional consistency regulations “strongly articulate EPA’s firm commitment to national uniformity in the application of its permitting rules,” and the court did not find an exception in the rule for judicial decisions. *Id.* at 1010.

EPA proposes to revise its regulations in response to the court’s decision. First, EPA proposes to create an exception to regional consistency for federal court decisions that arise from locally or regionally applicable actions. Under the proposal, only decisions of the U.S. Supreme Court and decisions of the D.C. Circuit Court that arise from challenges to nationally applicable regulations or final action will apply uniformly nationwide. Further, EPA would not have to rely on developed mechanisms or obtain concurrence (between regional offices and headquarters) to address locally or regionally applicable federal court decisions and to act inconsistently with nationwide positions in order to act consistently with a federal court decision.

Exceptional Events Rule

On November 20, 2015, EPA published a proposal to revise the Exceptional Events Rule and noticed the availability of a draft version of a nonbinding guidance document, *Draft Guidance on the Preparation of Exceptional Events That May Influence Ozone Concentrations*, 80 Fed. Reg. 72,840. The Exceptional Events Rule, 40 C.F.R. parts 50 and 51, was originally adopted in 2007. The rule is based on CAA section 319(b), which authorizes the exclusion of data from specific situations. Section 319(b) defines an exceptional event as an event that affects air quality, is not reasonably controllable or preventable, and is an

event caused by human activity that is unlikely to recur at a particular location or is a natural event. The purpose of the Exceptional Events Rule, therefore, is to exclude event-affected air quality data from the data used by air agencies to take appropriate and reasonable actions to protect public health from exceedances or violations of the NAAQS.

Air agencies have relied on the rule to exclude air quality data that resulted from volcanic activity, stratospheric ozone intrusions, wildfires, and other natural events. However, air agencies and EPA have had difficulty applying and interpreting the current version of the rule. Under the current rule, a demonstration requires evidence that the event is associated with a measured concentration in excess of normal historical fluctuations, including background, and evidence that there would be no exceedance or violation *but for* the event. EPA proposes to remove the “but for” causation standard—that a state prove there would have been no exceedance but for the event—because it is often not possible to separately quantify the impact of emissions from events and other sources. Instead, EPA proposes to rely on a “clear causal relationship” standard that more directly reflects the statutory language in the CAA. In determining if a clear causal relationship is present, air agencies should demonstrate by the weight of the evidence in the record that the event caused the specific air pollution concentration at issue.

Air agencies will not always have to provide quantitative analyses or estimates to meet the weight of evidence standard. In determining if an event is “not reasonably controllable or preventable,” EPA proposes that control measures implemented under a SIP that address an event-related pollutant will satisfy the “not reasonably controllable or preventable” criterion if the SIP was approved within the last five years. Further, air agencies have no obligation to address controls if the event was natural or due to emissions originating outside their jurisdictional borders. EPA also proposes other changes including clarifying fire-related definitions and clarifying the

analyses and organization for exceptional events demonstrations.

Cross-boundary Air Pollution

On December 3, 2015, EPA published a proposed rule to update to the Cross-State Air Pollution Rule (CSAPR). 80 Fed. Reg. 75,706. CSAPR was originally adopted in 2011 to address the interstate transport of ozone under the 1997 ozone NAAQS and the 1997 and 2006 fine particulate matter NAAQS. The rule is based on the good neighbor provision of CAA section 110(a)(2)(D)(i)(I), which “requires states to prohibit emissions that will contribute significantly to nonattainment in, or interfere with maintenance by, any other state with respect to any primary or secondary NAAQS.”

CSAPR has a four-step process. First, identify downwind receptors that are expected to have problems attaining or maintaining clean air standards. Second, determine which upwind states contribute to these identified problems. Third, in the upwind contributor states, identify emissions that significantly contribute to the downwind nonattainment or maintenance problem. Fourth, for upwind contributor states with identified emissions significantly contributing to the problem areas, reduce the identified upwind emissions through regional emissions allowance trading programs.

EPA primarily proposes to update the rule to reduce interstate air quality impacts with respect to the 2008 ozone NAAQS (an 8-hour standard set at 75 ppb) in 23 eastern United States (AL, AR, IL, IN, IA, KS, KY, LA, MD, MI, MS, MO, NJ, NY, NC, OH, OK, PA, TN, TX, VA, WV, and WI). The rule does not address contributions in the 11 western contiguous states (AZ, CA, CO, ID, MT, NM, NV, OR, UT, WA, and WY), which will continue to be evaluated on a case-by-case basis to meet interstate transport obligations under the CAA.

In the proposal, EPA found that summertime ozone season emissions of nitrogen oxides (NO_x) in the 23 eastern states affect the ability of downwind states to attain and maintain their 2008 NAAQS

for ozone. EPA proposes to limit NO_x emissions from electric generating units in these states during ozone season. Other proposed changes include a finding by EPA that the original CSAPR federal implementation plans for 11 states (AL, AR, GA, IL, IN, KY, LA, MS, MO, TN, and TX) fully satisfy the good neighbor CAA obligations regarding the 1997 ozone NAAQS, which remained outstanding under the current rule.



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