

Air Quality Committee Newsletter

Vol. 20, No. 1

November 2016

MESSAGE FROM THE PAST CHAIR

Phillip Bower

This is my last “Message from the Chair” column. After serving as the chair of the Air Quality Committee for the past two years, I am handing over the reins to two former committee vice chairs—Elizabeth Hurst and Lauran Sturm. Elizabeth and Lauran will serve as co-chairs. They are both outstanding practitioners in the air field. Between the two of them, they have experience in private practice, government, and as in-house counsel. I am confident that the Air Quality Committee is in good hands and that they, along with the vice chairs and input from committee members, will make the committee even stronger. Please welcome them and send them your ideas for content!

I would like to thank the committee vice chairs that served with me for the past two years. They are the ones that plan the programming, find quality speakers, recruit regional reporters for the newsletter and edit the content, edit *The Year in Review*, and push out content on our website and social media. The committee would not operate without them, and they often do their work behind the scenes and bring significant knowledge, experience, and contacts to the table.

As far as what to expect in the near term, the committee will continue to host outstanding teleconferences and webinars on topics of interest. These opportunities should be plentiful as major

air regulations wind through the courts and after the election in November 2016 is concluded. Also remember that the 24th Fall Conference 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. This is a great conference for networking and for learning more about how you can get involved with SEER. Most of the SEER leadership attends the conference for business meetings and training sessions. Make plans to attend now!

I 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 to our social media vice chair and tag it with #abaairquality.

On behalf of the AQC leadership team, thank you for your membership and for two great years.

Phillip Bower *is the past chair of the Air Quality Committee.*

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Vol. 20, No. 1, November 2016
Olivia Lucas, Jacob Santini, and Gary
Steinbauer, Editors

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

CALENDAR OF SECTION EVENTS

February 2-4, 2017
**Earth, Wind, Fire, and Water: Sustainable
Construction in a Changing Environment**
Palm Desert, CA
Primary Sponsor: The ABA Forum on
Construction Law

March 28-29, 2017
35th Water Law Conference
Los Angeles, CA

March 29-31, 2017
46th Spring Conference
Los Angeles, CA

October 18-21, 2017
25th Fall Conference
Baltimore, MD

**For full details, please visit
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GUEST ARTICLE

ANY POSSIBLE CONSTRUCTION: A CANON-BASED ARGUMENT FOR THE CLEAN POWER PLAN

Connor Garstka

The Clean Power Plan (CPP) is arguably the most expansive environmental regulatory program ever promulgated, and it has incited controversy equal to its ambition. Yet its survival is in doubt. It faces several challenges that the D.C. Circuit Court of Appeals consolidated into a single case, *West Virginia v. EPA*, and is scheduled for oral argument on September 27, 2016. *West Virginia v. EPA*, D.C. Circuit Court of Appeals, Docket No. 15-1363 (filed Oct. 23, 2015).

Adding to the many voices defending or criticizing the CPP, I submit that the *Charming Betsy* canon, which directs courts not to construe statutes in violation of international law, applies to the CPP, so the courts should adopt any plausible construction of the Clean Air Act (CAA) that will uphold it. See *Murray v. Schooner Charming Betsy*, 6 U.S. 64, 118 (1804). The United States has a duty under international law to reduce its greenhouse gas emissions, and the CPP represents its satisfaction of that duty. Assuming that it is plausible for the Environmental Protection Agency (EPA) to construe section 111(d) of the CAA, 42 U.S.C. § 7411(d), to provide a legal basis for the CPP—an assumption vigorously contested by the parties but outside the scope of this article—the courts should accept that construction and uphold the CPP. To do otherwise would violate the international commitment of the political branches to reduce greenhouse gas emissions, as laid out in the United Nations Framework Convention on Climate Change (UNFCCC) Treaty and the Paris Agreement.

***Charming Betsy* Applies to the Clean Power Plan**

Despite its ancient roots, *Charming Betsy* continues to inform Supreme Court jurisprudence, having

been employed by the Court 12 times in the past century. The Court itself noted, “[t]his cardinal principle . . . has for so long been applied by this Court that it is beyond debate.” *Edward J. DeBartolo Corporation v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988).

In *Charming Betsy*, Chief Justice John Marshall opined, “[a]n act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.” *Charming Betsy*, 6 U.S. at 118. Marshall utilized the uncompromising words “never” and “any,” making clear the Court’s reluctance to meddle in international affairs.

In *West Virginia v. EPA*, the D.C. Circuit will consider the validity of a regulatory program promulgated under a statute. Its ruling likely will depend on its construction of section 111(d) of the CAA and its analysis of whether that provision authorizes the CPP. Because it will interpret “an act of Congress” which implicates “the law of nations,” the doctrine of *Charming Betsy* governs its analysis.

The UNFCCC Treaty and the Paris Agreement Create an International Legal Obligation to Reduce Greenhouse Gas Emissions

The United States’ commitment to reduce greenhouse gas emissions represents the law of nations. The UNFCCC Treaty, ratified by the Senate in 1992, clearly falls within this broad language. The Kyoto Protocol and the Paris Agreement, which are international agreements expanding upon the treaty, do so as well.

Article 2 of the UNFCCC Treaty describes its purpose as “stabiliz[ing] [] greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.” The Kyoto Protocol clarified this goal by directing party nations to implement “[m]easures to limit and/or reduce emissions of greenhouse gases.” The

Paris Agreement further explained this objective as “[h]olding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and [] pursu[ing] efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels.”

Not only does the Paris Agreement require all parties to prepare “nationally determined contributions . . . [including] domestic mitigation measures” but it also states that “[d]eveloped countr[ies] shall continue taking the lead by undertaking economy-wide absolute emission reduction targets.” The United States submitted an intended nationally determined contribution (INDC) of 17 percent reductions below 2005 levels by 2020 and 26–28 percent reductions by 2025. The INDC stated that the United States was “moving to finalize by summer 2015 regulations to cut carbon pollution from new and existing power plants.” In short, the treaty and the agreements set clear goals for the United States to reduce its greenhouse gas emissions.

The Clean Power Plan Represents Fulfillment of the International Obligation

The EPA justified its promulgation of the CPP based in part on its international commitments. The CPP preamble contains a section on relevant international agreements that discuss the UNFCCC Treaty, the Paris Agreement, and the Kyoto Protocol. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,752 (Oct. 23, 2015). The preamble identifies the goal of the Paris Agreement as “establish[ing] a climate agreement that applies to all countries and focuses on reducing GHG emissions.” It placed the INDC in international context by referring to similar declarations by the European Union, China, Mexico, Brazil, and Russia.

The preamble states that it “demonstrate[s] to the rest of the world that the U.S. is contributing its share of the global effort that is needed to address climate change.” It describes the CPP as a model

for other nations encouraging them to reduce emissions. These statements link the CPP to international obligations to reduce emissions and indicate that the CPP represents an attempt to meet, in substantial part, these obligations.

The executive branch’s actions in international diplomacy relied on the CPP to underpin its commitments. The INDC identified the CAA as relevant domestic implementing law. It also referred to forthcoming regulations that would cut carbon pollution from new and existing power plants. Through these statements, the United States made clear to other countries that the CPP would be a major component in its greenhouse gas reduction strategy.

Furthermore, the text of the CAA supports its international application. It contains several provisions related to international affairs. It instructs the president to forge international agreements that lead to cooperative research. 42 U.S.C. § 7671p(a). If a report from an international agency leads EPA to find that domestic emissions are contributing to international pollution, it must notify the polluting state, 42 U.S.C. § 7415(a), and may require states to prevent or eliminate the endangerment. *Id.* § 7415(b). State implementation plans must ensure compliance with requirements regarding international pollution abatement. *Id.* § 7410(a)(2)(D)(ii). Taken together, these provisions indicate that the CAA contemplates, and indeed requires, executive action on air pollution in the international sphere.

Conclusion: *Charming Betsy* Directs the Courts to Uphold the Clean Power Plan

The CPP falls within the language of *Charming Betsy* and subsequent cases applying the canon. The United States, through the political branches, has made a commitment to reduce greenhouse gas emissions through the UNFCCC Treaty, the Kyoto Protocol, and the Paris Agreement. The CPP represents a critical part of the plan to achieve that commitment. The EPA has provided a plausible interpretation of section 111(d) of the CAA that

justifies its promulgation of the CPP. Because a plausible justification exists, the courts should apply *Charming Betsy*, avoid abrogating the United States' international obligations to reduce greenhouse gas emissions, and uphold the CPP.

Connor Garstka is a William & Mary Law School graduate and a post-graduate fellow with the Office of the Attorney General of Virginia. While in law school, he was a law clerk with the Virginia Coastal Policy Center and the Chesapeake Bay Foundation. Previously, he served as an intern for the Environmental Protection Agency, Region III, and the Virginia Department of Environmental Quality. He graduated from Boston College in 2011 with a B.A. in history.



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EPA REGIONAL REPORTS

EPA HEADQUARTERS

Curtis Cox
Phoenix, Arizona

Regional Haze Revisions

On May 4, 2016, the Environmental Protection Agency (EPA) published a proposal to amend the requirements for state plans for protecting visibility in mandatory Class I areas. 81 Fed. Reg. 26,942. EPA is proposing to clarify the relationship among long-term strategies, reasonable progress goals, and the long-term strategy obligation of all states. EPA is also proposing to revise the way days are selected to track progress toward neutral visibility conditions; revise aspects of the requirements for progress reports; update and extend the applicability of provisions for reasonably attributable visibility impairment; and advance the timing of Federal Land Manager consultations. EPA also proposed extending the due date for submitting a revised plan from 2018 to 2021 to allow states to coordinate regional haze planning with other programs affecting sources over the next several years. The comment period has been extended to August 10, 2016.

Methane Standards of Performance— Landfills

On July 14, 2016, the EPA administrator signed a notice of final rulemaking, which is being submitted to the *Federal Register* for publication. The rule revises the standards of performance for methane gases for new and existing municipal solid waste landfills under section 111 of the Clean Air Act. EPA reduced the nonmethane organic compounds emission threshold for installing a gas collection and control system from 50 to 34 megagrams per year (Mg/yr). EPA determined that a well-designed and well-operated landfill gas collection and control system (GCCS) remains the best system of emission reduction for controlling landfill gas. Landfill owners and

operators may control gas by combusting it in an enclosed combustion device for energy generation, by using a treatment system that processes it for sale or beneficial use, or by flaring it. Landfills must install and start up a GCCS within 30 months after exceeding an NMOC level of 34 Mg/yr. The rule applies to landfills constructed, modified, or reconstructed after July 17, 2014, if they have a design capacity of 2.5 million metric tons and 2.5 million cubic meters of waste or more. This is the same as existing capacity thresholds.

Final Rule for Source Determination for Certain Emission Units in the Oil and Natural Gas Sector

On June 3, 2016, EPA published a final CAA rule amending the regulations applicable to permitting of stationary sources of air pollution in the oil and natural gas sector under the New Source Review (NSR) and title V programs. 81 Fed. Reg. 35,622. The rule clarifies the meaning of the term “adjacent” used to determine the scope of a stationary source. Emitting equipment located on separate surface sites within one-fourth mile of each other will be aggregated as a single stationary source if the emitting equipment has a relationship that meets the “common sense notion of a plant.” The use of shared equipment necessary to process or store oil and natural gas meets the commonsense notion of a plant, but separate surface sites that do not include shared emitting equipment, even if within one-fourth mile, will not be aggregated. EPA is adopting this change in its permitting rules, but is not requiring state, local, and tribal permitting authorities to adopt the change unless they choose to do so.

Methane Standards of Performance—Oil and Gas Industry

On June 3, 2016, EPA published a final rule regulating methane emissions for new, reconstructed, and modified sources in the oil and natural gas sector. 81 Fed. Reg. 35,824. The rule sets emissions for methane and applies to hydraulically fractured oil wells and other activities in oil and gas production, processing, transmission,

and storage. The rule requires owners and operators to implement fixed schedules for finding and repairing leaks to eliminate fugitive emissions and offers opportunities to use emerging innovative technologies for monitoring leaks.

EPA REGION 6

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

Arkansas

EPA Region 6 took final action on April 13, 2016, to designate Crittenden County, Arkansas, as attaining the federal 2008 ozone standard. Crittenden County is within the greater Memphis area nonattainment area and had been designated as marginal nonattainment. The designation of attainment is based on ozone monitoring data for 2012 through 2014. EPA’s action was proposed in February 2016.

The Arkansas Department of Environmental Quality announced that it will not renew the statewide general permit for concentrated animal feeding operations (CAFOs). The ADEQ determined that a renewal of the CAFO general permit was not warranted based on the limited use of this particular permitting option. It will expire in October 2016.

Louisiana

The Louisiana legislature defeated an attempt to require all facilities to “install and continuously operate a fence-line air monitoring system at both the property boundary of the facility closest to the nearest residential community and the downwind property boundary of the facility.” House Bill 496, 2016 Regular Session. It would have applied to major sources and any facility emitting a half ton or more of hydrogen sulfide. The bill would have required real-time data dissemination to the public including a text message or telephone call sent to a community alert system in the event of

an exceedance of air quality standards or a public health threat.

New Mexico

The New Mexico Environment Department (NMED) filed suit against EPA and the Colorado owners of the Gold King and Sunnyside mines to address the impacts resulting from the 2015 waste spill in the Animas River. In August 2015, three million gallons of toxic mine wastewater with 880,000 pounds of metals were released into the Animas and San Juan Rivers, depositing toxins downstream on the riverbed, agricultural lands, and elsewhere in New Mexico, Colorado, and Utah. According to NMED, it provided EPA with a wealth of data showing continuing high levels of metals, turbidity, and suspended solids in New Mexico's rivers and sediment, but the EPA has not properly acted upon the data.

Oklahoma

The Oklahoma Department of Environmental Quality has published a guide for applicability determinations. Request for Applicability Determinations (Form #100-115) may be submitted to seek information about whether a particular rule or regulation affects the facility in question and whether a facility is a part 70 (major) source or a minor facility. General facility information must be submitted, along with process description, emission information, a facility ploy plan, and process flow diagram. Specific forms are available to submit information regarding, among others, stationary internal combustion engines/turbines, storage and unloading of organic materials, fuel-burning equipment, and asphalt plant equipment.

Texas

The federal District Court for the District of Columbia ordered EPA, on June 14, 2016, to set a schedule to issue a valid federal implementation plan (FIP) limiting interstate emissions of fine particulate matter (PM_{2.5}) from Texas. The Sierra Club sued to force EPA to promulgate the FIP, even

though EPA had done so as part of the Cross-State Air Pollution Rule. However, the D.C. Circuit had held that the sulfur dioxide (SO₂) emissions budgets in CSAPR that EPA had established for Texas were unlawful because they required Texas to reduce emissions by more than the amount necessary to achieve attainment in downwind states. Despite EPA's arguments to the contrary, the district court found that the D.C. Circuit's invalidation of the budget necessitated the issuance of a new FIP to properly address PM_{2.5}. EPA must file a schedule, no later than July 29, 2016, for proposing and completing the required actions.

EPA REGION 7

Richard D. Winders
Associated Electric Cooperative
Springfield, Missouri

Iowa

Muscatine Power & Water, Monsanto Company, and Grain Processing Corporation, three Muscatine County, Iowa, companies, will implement reductions of sulfur dioxide emissions under a May 2016 plan approved by the Iowa Department of Natural Resources' Environmental Protection Committee. The emission reduction plan resulted from a 2013 EPA determination that Muscatine County's sulfur dioxide levels were in excess of the 75 parts per billion limit and attributable at least in part to the three companies. The remedial plan includes more stringent sulfur dioxide limits and installation of control equipment. In July 2015, Grain Processing Corporation had converted its fuel source to natural gas from coal in an effort to reduce sulfur dioxide emissions. Currently, the companies are under a federal plan approved by EPA in 2014 to reduce particulate emissions and the Iowa Department of Natural Resources plan to reduce sulfur dioxide is now subject to similar approval.

Kansas

The EPA's People, Prosperity and the Planet Program awarded \$15,000 to three Region

7 student teams for sustainable products and strategy proposals. The Kansas teams included the University of Kansas at Lawrence for “Harvesting the Otherwise Wasted Heat of LED Lights in Green Buildings.” The Kansas State University at Manhattan team proposed “Net Zero Energy Air Filtration: Innovative Filter Media Applications for Improved Indoor Air Quality and Energy Efficiency.” The first phase is the \$15,000 grant for initial development of the teams’ initial plan, and then the plan will be presented at the National Sustainable Design Expo. The next stage of the competition features awards up to \$75,000 for funding efforts to bring the projects to marketplace. In addition to the Kansas teams, another Region 7 recipient was the University of Missouri, Columbia, for its proposal “Water Quality Monitoring at Hydraulic Fracturing Sites Using Molecularly Imprinted Porous Hydrogels.” EPA noted that the program affords the student teams the chance to bring innovation in sustainability beyond the classroom.

Missouri

On May 24, 2016, U.S. Senator Roy Blunt (R-Mo.) introduced a resolution opposing a tax on carbon emitted from the burning of fossil fuels., based on, among other things, the position that a federally imposed carbon tax would be detrimental to the nation’s economy by increasing the cost of goods and discouraging economic development. Twenty-four senators joined the resolution, in addition to 25 supporting groups, to avoid among other things the loss of between 3.7 and 20 million jobs by 2053. Additional information may be found at www.blunt.senate.gov/public/index.cfm/2016/5/washington-examiner.

Nebraska

On May 10, 2016, EPA entered into an expedited settlement agreement with Frenchman Valley Cooperative concerning allegations of violations of section 112(r) of the Clean Air Act. After an EPA compliance inspection at Frenchman Valley’s facility, EPA found that the respondent had violated

section 112(r) by failing to comply with the risk management plan (RMP) regulations. While a complaint was never filed, EPA and Frenchman Valley entered into a settlement where Frenchman Valley agreed to pay a penalty of \$4500.

Among the alleged violations cited by EPA for the imposition of the penalty were (1) failure to review and update the off-site consequence analyses at least once every five years, (2) failure to ensure the process is designed in compliance with recognized and generally accepted and good engineering practices, (3) failure to determine by inspecting all equipment that the process is designed, fabricated, and operated in accordance with applicable standards or rules, if designed to meet industry standards or federal or state design rules, and document the results of the review, and (4) failure to certify that Frenchman Valley had evaluated compliance with the provisions of the regulation at least every three years to verify that the procedures and practices developed under the rule are adequate and being followed.

Additional alleged violations for which no penalty was assessed included (1) failure to accurately report, for each covered process, the maximum quantity of each regulated substance or mixture in the process, (2) failure to submit a RMP that correctly included the information required regarding the emergency response program, and (3) failure to estimate in the RMP the population within a circle with its center at the point of the release and a radius determined by the distance to the end point defined in the regulation.

Frenchman Valley estimated that the approximate cost to correct the violations totaled \$19,000.

Tribal Nations

On June 14, 2016, the EPA’s Office of Transportation and Air Quality issued a request for proposals to eligible tribal applicants of up to \$1 million as part of the diesel emission reduction program. The Tribal Clean Diesel Funding Assistance Program will prioritize areas with

existing poor air quality and potential projects that are likely to significantly reduce diesel emission from legacy diesel fleets in those areas. Projects with the ability to reduce emissions after completion of the project and addressing the needs of local communities may also receive priority funding. The deadline for applications is August 23, 2016, and supporting documents with further information are available at www.epa.gov/cleandiesel/clean-diesel-tribal-grants#eligible.

EPA REGION 10

Emerson Hilton, David Weber, and Gus Winkes

*Riddell Williams P.S.
Seattle, Washington*

Washington

Greenhouse Gas Reduction

On June 1, 2016, Washington joined Oregon, California, six U.S. cities, and the Canadian province of British Columbia in signing the Pacific North America Climate Leadership Agreement. The agreement, which includes no funding commitments and has no binding legal effect, will support collaboration across jurisdictions to lower the greenhouse gas (GHG) emissions associated with the built environment, the transportation sector, the energy sector, and the food waste stream.

In January 2016, the Department of Ecology (Ecology) proposed a carbon emissions regulation called the Clean Air Rule (CAR), only to withdraw it less than two months later. Ecology returned to the drawing board, releasing a new proposed CAR on June 1 (proposed chapter 173-442 Washington Administrative Code (WAC)). The new rule incorporates many concepts from the earlier version. Modifications are supposed to address the concerns raised in public comments. The newly proposed CAR is accompanied by proposed amendments to the state's GHG reporting rule at chapter 173-441 WAC.

The newly proposed CAR applies to petroleum product importers and producers, to natural gas

distributors, and to stationary sources listed in the source categories in WAC 173-441-120. Starting in 2017, covered parties with baseline GHG emissions of 100,000 or more metric tons (MT) carbon dioxide equivalent (CO₂e) emissions per year must meet emission reduction requirements that reduce annual emissions by about 5 percent of baseline emissions every three-year compliance period. In later years, covered parties with lower baselines must also reduce emissions.

Covered parties can meet compliance obligations by reducing their own emissions or by using a form of credits called emission reduction units (ERUs). ERUs are generated when a covered party reduces emissions by more than its reduction requirement; by qualifying projects or programs that reduce emissions in Washington; and by obtaining allowances from certain external GHG regulatory programs. ERUs can be banked for future use and exchanged among covered parties. Third-party verifiers must certify emission reduction projects and programs that generate ERUs, as well as covered parties' compliance with emission reduction requirements.

Key changes in the newly proposed CAR include:

- Energy-intensive and trade-exposed (EITE) covered parties will have output-based compliance obligations instead of mass-based requirements, which are described above. Depending on whether EITE covered parties are more or less efficient than industry norms, compliance obligations may be set at levels higher or lower than requirements for non-EITE covered parties. EITE covered parties do not enter the program until 2020 with the first compliance obligations due in 2023.
- Ecology will develop a registry to track ERUs.
- The number of allowances that a covered party can obtain from external GHG regulatory programs will decline over time.
- Ecology will establish an ERU reserve consisting of ERUs from prior emission

reductions to ensure that an overall emissions cap is maintained. Retiring ERUs from the reserve would allow expanded GHG emissions from new and modified sources. ERUs may also be assigned (or withdrawn) from the reserve for curtailed stationary sources that restart operations and for an environmental justice committee that would distribute ERUs from the reserve to covered parties that implement emission reduction projects consistent with criteria developed by the committee.

- Covered parties may leave the program after three years of reporting less than 50,000 MT CO₂e; previously, the threshold was 70,000 MT CO₂e. Covered parties with between 50,000 and 70,000 MT CO₂e may not have additional emission reduction requirements.

On September 15, 2016, after this update was submitted for publication, Ecology issued the final CAR. Details on the final rule will be included in the next issue

Ecology has been under a judicial order to complete its CAR rulemaking by the end of this year. On May 16, the King County Superior Court ruled in *Foster v. Wash. Dep't of Ecology* that Ecology has a “duty to engage in rulemaking to reduce greenhouse gas emissions in Washington.” *Foster*, No. 14-2-225295-1, slip op. at 3 (King Co. Super. Ct. May 16, 2016). “Ecology . . . shall issue the rule by the end of calendar year 2016.” *Id.* The ruling followed a motion filed by the plaintiffs after Ecology withdrew the first proposed CAR. On June 15, Ecology filed a notice of appeal.

Washington voters will be presented with a carbon tax initiative on their ballots this fall. If Ballot Initiative No. 732 passes, the measure would impose a tax of \$15/MT CO₂ as of July 1, 2017, increasing to \$25/MT CO₂ on July 1, 2018, and by 3.5 percent plus inflation each subsequent year. The tax would apply to fossil fuels sold or used in the state and to electricity consumed within the state, including imported electricity. In an attempt

to ensure that state tax revenue remains neutral and to offset impacts to certain interest groups, the measure would also reduce certain business and occupations taxes, reduce the retail sales tax, and expand the working families’ tax exemption. There are competing claims about how changes to the state tax code would affect revenue. The state Office of Fiscal Management estimated that the measure would create a shortfall of about \$900 million through 2021, a finding that ballot initiative backers dispute.

Prescribed Burning Legislation

On March 31, 2016, Governor Jay Inslee signed a bill into law that created a prescribed fire pilot project administered by the Department of Natural Resources (DNR). Engrossed Substitute House Bill 2928. The law requires fires managed under this program to comply with air quality standards in chapter 70.94 Revised Code of Washington and to be of limited scale to avoid required revisions to the state implementation plan (SIP). In 2018, DNR will submit a report to the legislature that includes an evaluation of the “quantity and severity of air quality exceedances by pollutant type,” if any, as a result of the fires authorized under the program.

Amendments to Air Operating Permit (AOP) Rule

On February 3, Ecology amended its AOP Rule, chapter 173-401 WAC, applicable to facilities that require Clean Air Act (CAA) title V permits. Revisions address the applicability of the AOP Rule to nonmajor sources, the determination of fees for AOP sources, audits of the AOP Program, and consistency with federal regulations.

EPA Regulatory Approvals

On May 20, 2016, due to “a shift in the Air Quality Program’s priorities and limited staff resources,” Ecology announced that it was halting its rulemaking to amend its General Regulations for Air Pollution Sources, chapter 173-400 WAC, to comply with EPA’s SIP call deeming that affirmative defenses for excess emissions during start-up, shutdown, and malfunction (SSM) periods did not meet CAA requirements. Ecology stated

that it “will not submit a corrective SSM plan to EPA by the November 22, 2016 deadline.”

On April 12, 2016, EPA approved the second 10-year limited maintenance plan developed by the Spokane Regional Clean Air Agency (SRCAA) for the coarse particulate matter (PM₁₀) NAAQS in the Spokane area. 81 Fed. Reg. 21,470, 21,471 (Apr. 12, 2016). The Spokane area was re-designated as an attainment area in 2005. 81 Fed. Reg. 9793, 9794 (Feb. 26, 2016).

On May 27, 2016, EPA proposed to approve the second 10-year limited maintenance plan developed by SRCAA for the carbon monoxide (CO) NAAQS in the Spokane carbon monoxide maintenance area. 81 Fed. Reg. 33,632 (May 27, 2016). With the exception of a cancelled air permit for a former aluminum reduction plant, SRCAA would rely on existing control measures to assure maintenance of the NAAQS. *Id.* at 33,640. The state has also requested approval of an “alternative monitoring strategy,” given the low and declining levels of ambient CO. *Id.* The strategy would focus on on-road mobile, nonroad mobile, and residential wood combustion sources, which make up 97 percent of CO emissions in the area. *Id.*

On February 16, 2016, EPA approved a best available retrofit technology (BART) alternative measure submitted by the state for nitrogen emissions from the BP Cherry Point Refinery. 81 Fed. Reg. 7710 (Feb. 16, 2016).

Enforcement Actions

Ecology stated on May 26, 2016, that it will issue orders to the Intalco aluminum smelter in Ferndale and the Alcoa Inc. aluminum smelter in Wenatchee that require the facilities to perform additional monitoring for sulfur dioxide (SO₂) air pollution to determine whether surrounding areas meet the 2010 1-hour SO₂ NAAQS. The orders, which have yet to be finalized, are not publicly available. The orders result from EPA’s SO₂ Data Requirements Rule, which mandates that states model or monitor air quality around sources that emit at least 2000 tons per year of SO₂, or adopt federally enforceable

emission limits to ensure that the sources will emit less than 2000 tons of SO₂ annually. 80 Fed. Reg. 51,052, 51,054 (Aug. 21, 2015).

Oregon

EPA Regulatory Approvals

On June 6, 2016, EPA approved Oregon’s December 12, 2012, SIP submission regarding the Klamath Falls nonattainment plan for the 2006 24-hour particulate matter (PM_{2.5}) NAAQS. 81 Fed. Reg. 36,176 (June 6, 2016). EPA concluded that based upon available ambient air monitoring data, the area has shown attainment with the NAAQS. The attainment plan’s strategy for controlling direct and precursor PM_{2.5} emissions relied primarily on an episodic woodstove curtailment program and a program to change out uncertified woodstoves.

In the same action, EPA also approved Oregon’s exceptional events requests related to the Bagley Complex and Douglas Complex wildfires in 2012 and 2013. 81 Fed. Reg. 36,176, 36,177. Under the Exceptional Events Rule, EPA may exclude data from use in determinations of NAAQS exceedances and violations if a state demonstrates that an “exceptional event” caused the exceedances. *See* 40 C.F.R. 50.14. In 2012 and 2013, wildfires burned over 1.2 million acres and 350,786 acres in Oregon, respectively. The exclusion of data influenced by the 2012 and 2013 wildfires was critical to EPA’s conclusion that the area has shown attainment with the 2006 24-hour PM_{2.5} NAAQS. *See* 81 Fed. Reg. 21,814, 21,829 (proposed Apr. 13, 2016).

Industrial Air Toxics Regulation

Recent analysis of moss data collected by the U.S. Forest Service (USFS) Pacific Northwest Research Station in 2013 revealed cadmium hot spots around two art glass manufacturing facilities located in residential neighborhoods in Portland. In 2015, in response to the USFS study, the Oregon Department of Environmental Quality (DEQ) placed an instrumental monitor near one of the glass manufacturing facilities. DEQ’s monitoring information showed monthly average

atmospheric cadmium concentrations 49 times higher than Oregon’s benchmark of 0.6 ng/m³. After both glass companies suspended cadmium use, atmospheric levels of cadmium in Portland declined precipitously.

Since release of the findings from the 2013 moss study, air quality and environmental health issues regarding the discharge of toxic pollutants from heavy metals have taken center stage in Oregon. *See, e.g.,* Kirk Johnson, *Toxic Moss in Portland, Ore., Shakes City’s Green Ideals*, N.Y. TIMES, Mar. 2, 2016, at A9. In April 2016, DEQ announced plans to conduct inspections of hundreds of industrial facilities that emit chromium, arsenic, cadmium, cobalt, lead, manganese, nickel, and selenium. It is among the first steps in Governor Kate Brown’s new “Cleaner Air Oregon” initiative, which aims to regulate pollution from a public health standpoint.

Under the Cleaner Air Oregon initiative, DEQ will work in conjunction with the Oregon Health Authority (OHA) to overhaul Oregon’s industrial air toxics regulations in order to align them with human health standards. Such work will involve the development of new regulations that will impose limits on air emissions for industrial sources based on risks to human health. Establishing new emissions limitations will require OHA and DEQ to define exposure levels that are considered protective of human health and to assess facility emissions based on human health safety standards. The new regulations are expected to apply to a comprehensive range of industrial facilities across the state. Information regarding the state’s Cleaner Air Oregon program can be found at <http://cleanerair.oregon.gov/>.

On June 15, 2016, DEQ issued proposed rule amendments to chapter 340 of the Oregon Administrative Rules, division number 244, to control metals emissions from colored art glass manufacturing (CAGM) facilities in the Portland area. Based on sampling, DEQ concluded that uncontrolled furnaces used in colored art glass manufacturing are more likely than not to emit

potentially unsafe levels of certain metals, including arsenic, cadmium, hexavalent chromium, and nickel. The proposed rules would require smaller CAGM facilities to apply for and maintain air contaminant discharge permits, which these businesses would not otherwise be required to have. Larger CAGM facilities subject to the substantive NESHAP requirements under 40 C.F.R. part 63 subpart SSSSSS, for air pollutants for glass manufacturing area sources, will be required to obtain title V operating permits.

Greenhouse Gas Reduction

On March 11, 2016, Governor Brown signed into law an unprecedented bill to phase out Oregon’s reliance on coal-fired electric power by 2035. The legislation is designed to support the state’s greenhouse gas reduction goals, which call for reducing carbon emissions 75 percent below 1990 levels by 2050. The bill is known as the Clean Electricity and Coal Transition Act—or Senate Bill (SB) 1547. It requires the state’s investor-owned electric utilities to provide their Oregon retail customers with electricity that is coal free by 2030, and to completely phase out reliance on coal-fired power by 2035. SB 1547 also increases the state’s renewable portfolio standard (RPS) to 50 percent in 2040. This increase is staged at 27 percent at 2025, 35 percent at 2030, 45 percent at 2035, and 50 percent at 2040. There is a safety valve that allows the Oregon Public Utility Commission to temporarily suspend the requirement for a utility if meeting the RPS would conflict with grid reliability. SB 1547 received strong support from the state’s investor-owned electric utilities, along with national and regional environmental advocacy groups.

Idaho

EPA Regulatory Approvals

On May 5, 2016, EPA approved Idaho’s May 21, 2015, SIP submission regarding the CAA interstate transport requirements. 81 Fed. Reg. 27,017 (May 5, 2016). EPA concluded that sources in Idaho do not significantly contribute to nonattainment or interfere with maintenance of the 2010 nitrogen dioxide (NO₂) NAAQS in neighboring states. *Id.*

Idaho's SIP submission also addressed interstate transport requirements for the 2010 SO₂ NAAQS, but EPA intends to address that portion of the submission in a separate future action. *See* 81 Fed. Reg. 7489, 7490 (proposed Feb. 12, 2016).

On June 9, 2016, EPA proposed to approve various SIP revisions also included in Idaho's May 21, 2015, submission. 81 Fed. Reg. 37,170 (proposed June 9, 2016). Among other things, EPA's approval would authorize Idaho to establish annual facility-wide emissions caps for minor sources. *Id.* at 37,171. These caps would be folded into permits to construct or Tier II operating permits. *Id.* The caps are intended to provide operational flexibility for facilities such as "semiconductor manufacturing facilities [that] make many equipment and process changes as they develop new products and technologies." *Id.* Other Idaho SIP revisions that EPA proposed to approve include modifications to permitting for nonmetallic mineral process plants such as rock crushers and asphalt plants, and new flexibility for stationary sources that combust sulfur-containing fuels. *Id.* at 31,171–72.

Regional Haze

On June 2, 2016, a U.S. district judge in California approved a consent decree under which EPA agreed to take final action on a number of state SIP submissions related to fine particulate matter and regional haze. N.D. Cal. Dkt. No. 4:15-cv-4663-SBA. The consent decree resolves a lawsuit brought by environmental organizations that alleged EPA Administrator Gina McCarthy had failed to comply with a non-discretionary duty under the CAA to approve or disapprove 2012 and 2013 SIP submissions for nonattainment areas under the 2006 PM_{2.5} NAAQS. Under the terms of the consent decree, EPA will take final action by December 8, 2016, on Idaho's December 2012 SIP submission for the Cache Valley PM_{2.5} nonattainment area. EPA must also take final action in 2016 on plans for the PM_{2.5} nonattainment areas in Klamath Falls and Oakridge, Oregon.

Alaska

EPA Regulatory Approvals

On May 19, 2016, EPA approved Alaska's May

12, 2015, annual SIP revision. 81 Fed. Reg. 31,511 (May 19, 2016). The annual revision included a number of minor updates designed to ensure the consistency of Alaska's SIP with federal regulations. *Id.* A description of these updates was provided in EPA's March 4 proposal to approve the SIP revision. *See* 81 Fed. Reg. 11,497 (Mar. 4, 2016).

Fairbanks North Star Borough—Fine Particulates

On June 9, 2016, environmental groups filed a federal citizen suit seeking to force EPA to take action on fine particulate matter pollution in Alaska's Fairbanks North Star Borough (FNSB). W.D. Wash. Dkt. No. 2:16-cv-00857. FNSB suffers from the worst PM_{2.5} pollution in the country.

The plaintiffs allege that EPA Administrator McCarthy and Region 10 Administrator Dennis McLerran have failed to comply with their non-discretionary duty to approve or disapprove Alaska's 2015 FNSB nonattainment SIP submission within one year, as required by the CAA. *See* 42 U.S.C. 7410(k).

Alaska submitted a request to EPA in November 2015 to bifurcate the FNSB into two separate areas for purposes of nonattainment designation. EPA has yet to act on that request, which is not mentioned in plaintiffs' June 9 complaint.

Relatedly, on June 2 the Alaska Department of Environmental Conservation (ADEC) announced several proposed rule changes aimed at improving fine particulate pollution in the FNSB. Among other things, the proposed rules would create three separate "air quality control zones" within the FNSB nonattainment area and create a number of new restrictions on the installation, use, and emissions of solid fuel-fired home heating devices.

Bureau of Energy Management—Offshore Air Quality Rule

On April 5, 2016, the federal Bureau of Offshore Energy Management (BOEM) issued proposed new air emissions regulations for oil and gas operations conducted on the Outer Continental Shelf (OCS) in

the Gulf of Mexico and areas offshore of Alaska's North Slope Borough. BOEM regulates air emissions from activities in these OCS areas under the Outer Continental Shelf Lands Act (OCSLA). EPA regulates air emissions at other OCS areas under the CAA. OCS areas offshore of northern Alaska were removed from EPA jurisdiction and added to BOEM jurisdiction only recently, in 2012.

OCSLA requires BOEM to ensure that OCS development is "subject to environmental safeguards." 43 U.S.C. § 1332(3). According to the proposed rule, BOEM's existing OCS air quality regulations have not changed significantly in 35 years. Whereas the current rule addresses only CO, SO₂, nitrogen oxides (NO_x), volatile organic compounds, and "total suspended particulates," the proposed rule would address and incorporate by reference all of EPA's primary and secondary NAAQS, precursor pollutants, significant impact levels, and ambient air increments. The proposed rule would also apply to a greater number of vessels whose emissions are attributed to any particular facility, and it would require air emissions impacts to be measured at a point farther off of shore and

closer to the point of emissions. BOEM estimates that the new rule would result in combined costs of \$302 million over 10 years for industry and the government. On the other hand, BOEM estimates that the proposed rule will provide \$217.5 million in NO_x reduction benefits by 2024, together with a number of other benefits and co-benefits that the agency did not quantify in monetary terms.

Indian Tribes

On March 11, 2016, EPA finalized an October 2015 agreement to delegate certain administrative authority under the CAA to the Confederated Tribes of the Colville Reservation in Washington State. 81 Fed. Reg. 12,825 (Mar. 11, 2016). Under the delegation, which the Colville tribes requested, the tribes will have authority to administer portions of the Colville federal implementation plan addressing visible emissions limitations, open burning, and excessive buildup of certain air pollutants during periods of stagnant air. The Colville tribes also received authority to investigate complaints and assist EPA in inspections.

