

Air Quality Committee Newsletter

Vol. 20, No. 5

August 2017

MESSAGE FROM THE CO-CHAIRS

Elizabeth Hurst and Lauran Sturm

Keeping abreast of the Trump administration's proposed changes and the various state, trade association, and environmental groups' responses to the proposed changes makes for a challenging time for legal practitioners. The Air Quality Committee is here to help provide updates and analysis of the proposed changes. The feature articles in this issue cover the Trump administration's climate policy and the Paris Agreement and its view of methane regulation. In the first article, Thomas A. Utzinger, a frequent and thoughtful contributor to the newsletter, provides a good overview of the administration's climate policy and its position regarding the Paris Agreement and analysis of mitigating factors that may continue to reduce greenhouse gas emissions. The second article is written by Taylor Hoverman, who will be one of our vice chairs of Newsletters for the ABA fiscal year 2017–2018. She discusses the intricacies of the Trump administration's attempt to reconsider the Methane and Risk Management Program regulations promulgated by the Obama administration. In addition, the Regional Reports for Regions 4, 5, 6, 7, 9, and 10 provide detailed updates of regulations and litigation in those particular states.

In our committee's continuing efforts to provide information on the Trump administration's proposals with respect to air quality issues, we held on July 25, 2017, a joint webinar with the

Air & Waste Management Association entitled "Trump Administration and Greenhouse Gas Policy and Regulation," where Scott Turner, one of our vice chairs for Programs, led the esteemed speakers in a discussion on rolling back Obama-era greenhouse gas policies, the status of the applicable litigation, and the how the new policies will affect electric generation and oil and gas production. If you missed the presentation, you can listen to a recording of the presentation at ABA's On Demand CLE webpage: <https://www.americanbar.org/cle/webinars.html>.

We also encourage our members to attend the SEER 25th Fall Conference in Baltimore from October 18 to 21, 2017. Air Quality Committee members may be particularly interested in the following panels:

- "There's an App for That: Legal Implications of Emerging Pollution Sensors and Monitoring Technologies"—October 19
- "Next Generation Compliance: Better, Faster, Cheaper"—October 19
- "News from Inside the Beltway: Administration and Congressional Priorities for Environmental, Energy and Resources Law and Policy"—October 19
- "The Clean Air Act and the Trump Administration"—October 20

For more information on these and other panels at the conference, check out the link

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David Loring, Irene Hantman,
Rod Johnson, and Taylor Hoverman, Editors

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

CALENDAR OF SECTION EVENTS

August 30, 2017
**Supreme Court Year in Review: The
Environmental Cases and A Review of Justice
Gorsuch's Environmental Jurisprudence**
Non-CLE Webinar

September 6, 2017
**A Walk Through of the Superfund Task Force
Recommendations**
Committee Program Call
*Environmental Transactions and Brownfields
Committee and Superfund and Natural
Resource Damages Litigation Committee*

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

March 8, 2018
Environmental Policy Symposium
The University of Mississippi School of Law
Oxford, MS

April 16-18, 2018
36th Water Law Conference
Hilton Bonnet Creek
Orlando, FL

April 18-20, 2018
47th Spring Conference
Hilton Bonnet Creek
Orlando, FL

October 17-20, 2018
26th Fall Conference
Marriott Marquis San Diego Marina
San Diego, CA

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

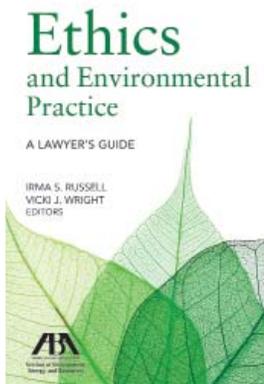
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here (shopaba.org/environfall). We hope to see you at the conference!

We also encourage you to bookmark the SEER Transition of Administrations Tracker Page at <http://ambar.org/envirotransition>, which provides the latest information on the developing changes in each of the governmental departments focusing on energy and the environment, congressional actions, and current litigation, just to name a few.

We want to thank our committee vice chairs, who do the bulk of the work in developing programs and sending out timely and informative information. In the new ABA year, Lauran will be serving on the SEER council and Elizabeth will be co-chairing the committee with Gary Steinbauer. We had a fun time working together and hope we provided you some useful information for your legal practice. If you want to become more involved in SEER or the committee, please reach out to us. Thanks for your membership and enjoy this issue!

Elizabeth Hurst and Lauran Sturm are the 2016–2017 co-chairs of the Air Quality Committee.



Ethics and Environmental Practice
A LAWYER'S GUIDE
IRMA S. RUSSELL
VICKI J. WRIGHT
EDITORS

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Irma S. Russell and Vicki J. Wright, Editors

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TRUMP ADMINISTRATION CLIMATE POLICY AND THE PARIS AGREEMENT: MITIGATING FACTORS WILL CONTINUE EMISSIONS REDUCTIONS

Thomas A. Utzinger, Esq.

On March 28, 2017, President Donald Trump signed an executive order addressing climate change and energy development policy (the Executive Order). The U.S. Environmental Protection Agency (EPA) was directed, among other things, to review and potentially suspend, revise, or rescind Clean Air Act rules for the control of power plant greenhouse gas (“GHG”) emissions. These rules include the “Clean Power Plan” for GHG emissions from existing fossil fuel-fired power plants under Clean Air Act section 111(d), and the “Carbon Pollution Standards Rule” setting GHG emissions limits for new, modified, and reconstructed fossil fuel-fired power plants under Clean Air Act section 111(b). (For simplicity, this article focuses on the Clean Power Plan.) Although the Executive Order stopped short of mentioning the Paris Agreement, the Clean Power Plan’s demise would significantly compromise President Barack Obama’s Paris-related commitment to reduce U.S. GHG emissions by 26 to 28 percent by 2025.

Subsequently, on June 1, 2017, President Trump announced that the United States would withdraw from the Paris Agreement, with the stated intention of renegotiating the agreement or entering into a new arrangement, if possible. The announcement’s language seemed to suggest that President Trump’s primary concern was not with the Paris Agreement itself, but with President Obama’s ambitious level of commitment. The Trump administration’s choice to withdraw versus to remain a participant but with a less-stringent commitment raises some concern, but the withdrawal’s long-term effects on U.S. GHG emissions reductions will be softened by several mitigating factors.

Despite commentary portraying the June 1, 2017, announcement as a major setback for U.S. and

global climate policy, the long-term net result of the Trump administration's actions may not be that severe. One reason is that collective actions taken by public and private entities will ensure continued GHG reductions, with more than 1000 governors, mayors, business leaders, and universities pledging to remain committed to goals supporting the Paris Agreement's ultimate success. A second reason is that GHG emissions from the electric power sector continue to decline due to market forces favoring cheaper natural gas as a preferred fuel source. Finally, EPA, by undergoing the notice and comment rulemaking process, could replace the Clean Power Plan with a rule that still yields some level of "inside the fence-line" GHG reductions. At the time of writing, EPA has submitted a draft proposal to the White House Office of Management and Budget ("OMB") to review the Clean Power Plan.

Renegotiation of the Paris Agreement or some other reversal is not an option, as confirmed during the G20 summit on July 8, 2017. Despite the absence of the United States from future involvement, GHG emissions reductions will continue on some meaningful level.

The Executive Order and the Clean Power Plan

President's Trump's Executive Order 13783 was issued in a series of other orders relating to federal regulation and the administrative state. Among the many Obama-era executive actions targeted, the Executive Order's broad scope includes (1) EPA's 2015 Clean Power Plan, limiting GHG emissions from existing power plants under Clean Air Act section 111(d); (2) EPA's 2015 Carbon Pollution Standards Rule, setting GHG emissions limits for new, modified, and reconstructed power plants under Clean Air Act section 111(b); (3) EPA's 2016 rule setting New Source Performance Standards for methane emissions from new, modified, and reconstructed oil and gas emissions sources; (4) several Department of Interior environmental and energy programs; and (5) a Council on Environmental Quality guidance encouraging

the consideration of GHG emission and climate change impacts during National Environmental Policy Act reviews. *See* Presidential Executive Order on Promoting Energy Independence and Economic Growth, White House (Mar. 28, 2017), available at <https://www.whitehouse.gov/the-press-office/2017/03/28/presidential-executive-order-promoting-energy-independence-and-economy-1>.

Regarding the Clean Power Plan, section 4 of the Executive Order directs the EPA administrator to "immediately take all steps necessary" to review the rule for consistency with the Executive Order's policy. That policy, outlined in section 1, affirms the national interest in "avoiding regulatory burdens that unnecessarily encumber energy production, constrain economic growth, and prevent job creation." The executive departments and agencies should review regulations "that potentially burden the development or use of domestically produced energy resources." Section 4 of the Executive Order continues by directing the EPA administrator, upon his review of the Clean Power Plan and if appropriate, to "publish for notice and comment proposed rules suspending, revising, or rescinding" the Clean Power Plan and related rules.

EPA moved forward swiftly on two fronts following issuance of the Executive Order. First, on March 28, 2017, EPA Administrator Scott Pruitt signed an announcement of review of the Clean Power Plan, later published in the *Federal Register*. *Review of the Clean Power Plan*, 82 Fed. Reg. 16,329 (Apr. 4, 2017), available at <https://www.gpo.gov/fdsys/pkg/FR-2017-04-04/pdf/2017-06522.pdf>. The notice stated that, in accordance with the Executive Order, EPA was initiating a review of the rule and providing advanced notice of forthcoming rulemaking proceedings. Should EPA determine that suspension, revision, or rescission is appropriate, the agency's review "will be followed by a rulemaking process that will be transparent, follow proper administrative procedures, include appropriate engagement with the public, employ sound science, and be firmly grounded in the law." Furthermore, Administrator Pruitt stated that the

agency is able “to revisit existing regulations” and has inherent authority to reconsider past decisions “when supported by a reasoned explanation.”

Second, EPA, acting through the U.S. Department of Justice, filed a motion with the U.S. Court of Appeals for the District of Columbia Circuit (D.C. Circuit) requesting that the ongoing Clean Power Plan litigation be held in abeyance because the rule “is under agency review and may be significantly modified or rescinded through further rulemaking in accordance with the Executive Order.” Notice of Executive Order, EPA Review of Clean Power Plan and Forthcoming Rulemaking, and Motion to Hold Case in Abeyance, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir., Mar. 28, 2017).

The D.C. Circuit temporarily granted the motion on April 28, 2017, with supplemental briefing due on May 15, 2017, as to whether the court should (1) continue to hold the Clean Power Plan case in abeyance, effectively keeping enforcement of the rule frozen by a preexisting stay issued by the Supreme Court of the United States in February 2016, or (2) remand the rule to EPA. Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Apr. 28, 2017). Either option would require EPA to move forward with its next steps, although arguably the latter option, remand, would require quicker action because the Supreme Court’s stay would also be lifted. EPA requested that the D.C. Circuit continue to hold the case in abeyance in a status report filed on June 29, 2017. EPA Status Report, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir., June 29, 2017).

The Paris Agreement and the Clean Power Plan as a Means of Achieving Paris Agreement Commitments

The December 2015 Paris Agreement represents the next step of the United Nations Framework Convention on Climate Change (UNFCCC), a 1992 international treaty agreed to in Rio de Janeiro and extended by the 1997 Kyoto Protocol treaty. Finalized during the twenty-first Conference of the Parties (COP-21) in December 2015 and having entered into force on November 4, 2016,

the Paris Agreement (not a treaty) establishes a voluntary, bottom-up structure to limit average global temperature rise to below 2°C (3.6°F) above pre-industrial levels, with a preference closer to 1.5°C (2.7°F). *Paris Agreement*, United Nations (Dec. 12, 2015), available at http://unfccc.int/files/essential_background/convention/application/pdf/english_paris_agreement.pdf.

To keep temperature increases below 2°C, the ambient concentration of carbon dioxide (CO₂) should not exceed 450 parts per million (ppm), with current levels now exceeding 400 ppm up from approximately 280 ppm before the industrial revolution. Capping the concentration of CO₂ at 450 ppm could be achieved by cutting global emissions by 60 to 80 percent from 2005 levels by 2050. See *Column: Why the U.S. Should Remain in the Paris Climate Agreement*, PBS Newshour (Apr. 27, 2017), available at <http://www.pbs.org/newshour/making-sense/column-u-s-remain-paris-climate-agreement/>.

The Paris Agreement allows more than 190 parties to develop individually tailored plans for GHG emissions reductions, known as “Nationally Determined Contributions” (NDCs), which are updated every five years. Article 4(2) of the Paris Agreement requires parties to “prepare, communicate, and maintain successive Nationally Determined Contributions” and to “pursue domestic mitigation measures” to achieve those contributions. Furthermore, developed countries are encouraged to undertake “economy-wide absolute emission reduction targets” under Article 4(4). Prior to final passage of the Paris Agreement, President Obama committed to make by 2025 an “economy-wide” reduction in GHG emissions of 26 to 28 percent from 2005 levels and to make best efforts to reduce emissions by 28 percent. See FACT SHEET: U.S. Reports Its 2025 Emissions Target to the UNFCCC, White House, President Barack Obama (Mar. 31, 2015), available at <https://obamawhitehouse.archives.gov/the-press-office/2015/03/31/fact-sheet-us-reports-its-2025-emissions-target-unfccc>.

Furthermore, Article 4(11) urges each party to approach its NDC “with a view to enhancing its level of ambition.” The U.S. Department of State interprets this language as not having any legal force, meaning that a party could reduce the stringency of its NDC without formal consequences. *See Possibility of Suing Trump Administration over Revising U.S. NDC Target*, Sierra Club (May 1, 2017), available at <http://www.politico.com/f/?id=0000015b-cbbf-de92-a17b-cfff1310001>. *See also Legal Issues Related to the Paris Agreement*, C2ES (May 2017), available at <https://www.c2es.org/docUploads/legal-issues-related-paris-agreement-05-17.pdf>. Some in the Trump administration supporting withdrawal disagree with the State Department’s position, holding that the Paris Agreement only allows NDCs to be adjusted upward.

President Obama’s commitment of reducing U.S. GHGs by 2025 was supported by several sources of emissions reductions by industry sector, measured from a 2005 baseline. As of 2014, the United States had already achieved a 33 percent reduction in total GHG emissions due to fuel switching from coal to natural gas, more efficient vehicles, and other technological improvements. The Clean Power Plan would have accounted for another 15 percent in reductions from the 2005 baseline, as the rule was designed to reduce power plant-related GHG emissions by nearly a third by 2030. Reductions from other sources including refrigeration gases, methane emissions from oil and gas, building and appliance efficiency, California GHG policies, heavy-duty truck efficiency, federal buildings, and other programs would account for another 35 percent, bringing total reductions to approximately 83 percent. Absent cuts from other emissions sources, full implementation of President Obama’s climate policies would have left a gap of 17 percent toward achieving his 2025 target. With President Trump’s repeal of policies under the Executive Order, U.S. emissions would likely flatten (i.e., not rise or fall) through 2030. Emissions reductions made independently by the public and private sectors, however, would keep U.S. GHG emissions in decline, although perhaps not to the same extent. *See Trump’s Climate Cuts Could Result in Half-*

Billion Extra Tons of CO₂ in the Air, InsideClimate News (Apr. 25, 2017), available at <https://insideclimatenews.org/news/25042017/donald-trump-climate-change-clean-power-plan-paris-agreement>.

Leaving the Paris Agreement

Although the Paris Agreement had been a high-profile target during his campaign, a significant sense of shock was felt in the United States and internationally when President Trump fulfilled his campaign promise on June 1, 2017. Many would have preferred the administration to remain involved in the Paris Agreement at any cost, even if it meant revising the nation’s NDC downward. The decision was delayed several times during the first half of 2017 as it became apparent that the White House and high-level administration members fell into two camps: those firmly against U.S. participation and those seeing some value in “remaining at the table.” The former group’s view eventually dominated.

President Trump’s announcement of a withdrawal or exit from the Paris Agreement does not accomplish any major changes in the short term because the process for withdrawal takes four years from the Paris Agreement’s effective date. Article 28.1 states that a party cannot give notice of withdrawal to the United Nations Secretary General until “three years from the date on which this Agreement has entered into force,” which would be November 4, 2019. A year would follow before the notice becomes effective, on November 4, 2020, the day after the next U.S. presidential election. Since President Trump would still be president after the election, whether for a couple more months or for another four-year term, the United States will indeed exit the Paris Agreement in 2020. There is no mechanism to renegotiate the agreement in the meantime.

Mitigating Factors

Public and Private Action

Immediately following President Trump’s Paris Agreement announcement, public and private

entities joined in a coalition intended to maintain stated commitments to reduce GHG emissions. New York Attorney General Eric T. Schneiderman pledged to join forces with U.S. governors, mayors, business leaders, and universities as part of the “We Are Still In” coalition to “pursue ambitious climate goals” and “ensure that the U.S. remains a global leader in reducing emissions.” See A.G. Schneiderman—Part of Coalition of 19 Attorneys General—Joins National ‘We Are Still In’ Pledge to Maintain Commitments to the Paris Climate Agreement, New York State Office of the Attorney General (June 5, 2017), available at <https://ag.ny.gov/press-release/ag-schneiderman-part-coalition-19-attorneys-general-joins-national-we-are-still-pledge>. Within a few days of President Trump’s announcement, the number of coalition participants exceeded 1400, including states that have banded together under the U.S. Climate Alliance and cities belonging to the Mayors National Climate Action Agenda. See *Over 1,400 U.S. Cities, States and Businesses Vow to Meet Paris Climate Commitments*, InsideClimate News (June 6, 2017), available at <https://insideclimatenews.org/news/05062017/paris-climate-agreement-trump-bloomberg-cities-states-businesses>.

Other efforts are on track to maintain momentum with respect to climate policy. Several parties guided by former New York Mayor Michael Bloomberg plan to submit a plan to the United Nations, serving as a “parallel pledge” to the Paris Agreement. How the United Nations will treat this submission remains to be seen, as no mechanism exists for outside parties to participate. See *Bucking Trump, These Cities, States and Companies Commit to Paris Accord*, N.Y. TIMES, June 1, 2017, available at <https://www.nytimes.com/2017/06/01/climate/american-cities-climate-standards.html>. For many corporations, business as usual will also continue with respect to GHG emissions reductions as these companies face increased pressure from shareholders and other jurisdictions where operations are conducted. See *Despite Paris Accord Exit, Companies*

Expect Little Change, WALL ST. J., June 1, 2017, available at <https://www.wsj.com/articles/despite-paris-accord-exit-companies-expect-little-change-1496345989>.

Market Forces

The increased use of cheap natural gas as a fuel instead of coal and the continued installation of new renewable energy sources have led to a significant reduction in U.S. GHG emissions in a relatively short time. One report states that emissions of several pollutants, including CO₂, have declined despite economic growth. Specifically, CO₂ emissions from power generators are now 21 percent lower than they were in 1990. See *Sierra Club: Power Plant Emissions Drop, Despite Trump While Economy Grows*, Insider NJ (June 15, 2017), available at <https://www.insidernj.com/press-release/sierra-club-power-plant-emissions-drop-despite-trump-economy-grows/>. Furthermore, the U.S. Energy Information Administration reports that energy-related U.S. CO₂ emissions declined by 14 percent between 2005 and 2016, with a 1.7 percent drop in 2016. See *U.S. Energy-Related CO₂ Emissions Fell 1.7% in 2016*, U.S. Energy Information Administration, available at <https://www.eia.gov/todayinenergy/detail.php?id=30712#>.

Clean Power Plan Replacement

On June 8, 2017, the White House OMB acknowledged receipt of an EPA Office of Air and Radiation proposed rule titled “Review of the Clean Power Plan.” See *Pending EO 12866 Regulatory Review RIN: 2060-AT55*, Office of Information and Regulatory Affairs, Office of Management and Budget (June 8, 2017), available at <https://www.reginfo.gov/public/do/eoDetails?rriid=127400>. The review, which could take several months, will be followed by publication of the proposal in the *Federal Register* requesting public comment. See *EPA Sends Clean Power Plan Proposal to OMB for Review*, Public Power Daily (June 12, 2017), available at <http://www.publicpower.org/Media/daily/ArticleDetail.cfm?ItemNumber=48326>.

This proposal may only relate to rescinding the Clean Power Plan, with a separate replacement proposal to follow. The details remain uncertain as to how, if, or when the agency would replace the rescinded rule because there is no specific timeline by which EPA must act.

It is likely, however, that the administration will seek to replace the Clean Power Plan with an alternative but less-stringent rule for existing power plants. One option is to rein in the scope of the Clean Power Plan's reach and limit regulation to operations conducted on power plant properties (i.e., "inside the fence-line"). To repeal the Clean Power Plan without ever replacing the rule would run afoul of established precedent that EPA is obligated to regulate GHG emissions, setting the agency up for protracted litigation. *See American Electric Power Co. Inc. v. Connecticut*, 564 U.S. 410 (2011) (Congress, via the Clean Air Act, has authorized EPA to regulate GHGs.). *See also Massachusetts v. EPA*, 549 U.S. 497 (2007) (The Clean Air Act gives EPA authority to regulate GHG emissions from vehicle tailpipes.).

Conclusion

President Trump's announcement of withdrawal from the Paris Agreement was expected, yet managed to dismay many in the United States and abroad because of the uncertainty that decision imposed on an otherwise structured framework for global GHG emissions reductions. Following that decision, it became apparent that public and private coalitions will take on the responsibility of ensuring that emissions cuts continue to an extent that supports the Paris Agreement's goals. Whether or not these actions are sufficient to reach the level of commitment originally pledged by President Barack Obama remains to be seen, but initial estimates suggest that meaningful reductions are possible. In addition, continued progress will be further driven by market forces favoring the use of natural gas, and EPA's successfully promulgating a Clean Power Plan replacement that provides for "inside the fence-line" emissions reductions from existing power plants.

Thomas A. Utzinger is an environmental attorney specializing in regulatory counseling, administrative law, environmental policy, and environmental issues in business transactions. He has an LL.M. in Environmental Law from George Washington University Law School and practices in New Jersey, New York, and Washington, D.C.



EPA, TRUMP, AND THE COURTS: METHANE REGULATION UNDER SIEGE

Taylor Hoverman

Since the beginning of the Trump administration, many federal agencies have been busy reconsidering Obama-era regulations, delaying compliance dates, and generally working to reverse several of the Obama administration's policies. Unsurprisingly, interested stakeholders have also been busy taking the government to court to challenge many of these actions by the Trump administration. The initial wave of the judicial branch's reactions to these challenges is beginning to float in and with those reactions come speculation of how these judicial decisions may affect the Trump administration's past actions such as delaying or staying the effective dates and reconsidering the Methane and Risk Management Program rules, as well as any future actions.

The Methane Final Rule

On June 3, 2016, the Environmental Protection Agency (EPA) issued a final rule addressing methane emissions from new oil and gas operations, specifically new source performance standards (NSPS). *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824 (June 3, 2016) (the Final Rule or the Methane Final Rule). The Final Rule included amendments to subpart OOOO, which EPA promulgated to "improve implementation of the current NSPS." *Id.* at 35,824. The Final Rule also promulgated subpart OOOOa, which established new standards regulating sources of methane. *See* Final Rule. Specifically, subpart OOOOa applies to new, modified, or reconstructed sources commenced after September 18, 2015, that were unregulated under subpart OOOO. *Id.* Among other requirements, subpart OOOOa requires leak detection and repair (LDAR) surveys for new, modified, or reconstructed well sites and compressor stations. *Id.* The Final Rule became effective on August 2, 2016, with a June 3, 2017, deadline for regulated entities to conduct an initial LDAR survey. *Id.*

On August 2, 2016, two months after the publication of the Final Rule, industry groups filed petitions with EPA seeking reconsideration of the Final Rule pursuant to Clean Air Act (CAA) section 307(d)(7)(B). *See* American Petroleum Institute (API), Request for Administrative Reconsideration of EPA's Final Rule "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources" (Aug. 2, 2016). Eight months later, EPA Administrator Scott Pruitt announced that EPA would convene a proceeding for reconsideration of two provisions of the Final Rule and would issue a 90-day stay of the compliance date for the fugitive emissions monitoring requirements. *See* Letter from E. Scott Pruitt to Howard J. Feldman, Shannon S. Broome, James D. Elliott & Matt Hite, Convening a Proceeding for Reconsideration (Apr. 18, 2017).

Two days after the June 3, 2017, deadline for initial LDAR surveys, EPA published a notice in the *Federal Register* that EPA would reconsider four facets of the Final Rule and would stay certain provisions of the Final Rule for 90 days pending reconsideration. *See* 82 Fed. Reg. at 25,730 (June 5, 2017). Though the notice was published in the *Federal Register* on June 5, the notice stated the stay was effective beginning June 2, 2017. *Id.* Then, on June 16, EPA issued a notice of proposed rulemaking to reconsider the Final Rule in its entirety and to extend the stay of the Final Rule for two years. *See* 82 Fed. Reg. 27,645 (June 16, 2017).

Following this announcement, several environmental groups filed suit in the U.S. Court of Appeals for the District of Columbia Circuit. *Clean Air Council, et al. v. Pruitt*, No. 17-1145, 2017 U.S. App. LEXIS 11803 (D.C. Cir. July 3, 2017). The environmental groups filed an emergency motion for a stay or, in the alternative, summary vacatur, alleging that EPA's stay violated CAA section 307(d)(7)(B) because "all of the issues Administrator Pruitt identified could have been, and actually were, raised (and extensively deliberated) during the comment period." Environmental Petitioners' Motion at 5

(emphasis in original). The environmental groups argued that section 307 allows EPA to issue a stay only when a petition for reconsideration meets the requirements for mandatory, rather than discretionary, reconsideration. *See id.* Reconsideration is mandatory when (1) the objection was impracticable to raise during the public comment period and (2) such objection is of central relevance to the outcome of the rule. *Id.* at 5. Therefore, since the issues identified were raised and deliberated during the comment period, reconsideration was not mandatory and was therefore unlawful. *Id.*

On July 3, 2017, the court granted the environmental groups' motion and vacated EPA's 90-day stay of certain provisions of the Final Rule. *See Clean Air Council*, 2017 U.S. App. LEXIS 11803. The court held that the environmental groups were correct, and section 307 "expressly links EPA's power to stay a final rule to the two requirements for mandatory reconsideration." *Id.* at 10. Therefore, only when those requirements are met, the administrator has authority to stay a "lawfully promulgated final rule." *Id.* Here, the court held that the industry groups had not raised any objections that were impracticable to raise during the public comment period, and accordingly, reconsideration was not required and the stay was not authorized. *Id.* However, the court also noted that nothing in the court's decision limited EPA's distinct action of issuing a notice of proposed rulemaking to reconsider the Final Rule in its entirety and stay the requirements of the rule for two years. *Id.* On July 7, EPA moved the court to recall its mandate to provide the agency with additional time to evaluate its options for action before the court's decision became effective. On July 13, the court granted EPA's motion and recalled the mandate for 14 days.

The implications of the court's decision could have an impact beyond this case and this Final Rule. Under the Trump administration, EPA has indicated its intent to or has already taken action to issue temporary delays, reconsider rules, and stay provisions of regulations across various regulations

affecting various industries. These actions have been promulgated pursuant to CAA section 307, CAA section 112, and APA section 705, among others. Like the stay of the Methane Final Rule, another regulatory action was promulgated pursuant to CAA section 307 and is currently being challenged in court: the delay of effective date and reconsideration of the amendments to the Risk Management Program (the RMP Delay Rule).

The RMP Delay Rule

Like the Methane Final Rule, the RMP Final Rule was finalized by EPA Administrator McCarthy during the Obama administration. Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act, 82 Fed. Reg. 4594 (Jan. 13, 2017) (the RMP Final Rule). The RMP Final Rule was published in the *Federal Register* on January 13, and on February 28, industry groups filed a petition for reconsideration with EPA and shortly after filed a petition for review with the D.C. Circuit. *Id.*; RMP Coalition Petition for Reconsideration and Request for Agency Stay Pending Reconsideration and Judicial Review of EPA's Final Rule entitled "Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act," Docket No. EPA-HQ-OEM-0725 (Feb. 28, 2017); *American Chemistry Council, et al. v. EPA*, No. 17-1085 (D.C. Cir.). Following the change in administration, EPA Administrator Pruitt granted a petition for reconsideration of the RMP Final Rule and subsequently stayed the effectiveness of the rule for 90 days pursuant to CAA section 307. *See* Letter from E. Scott Pruitt to Justin Savage, Convening a Proceeding for Reconsideration (Mar. 13, 2017); 82 Fed. Reg. 13,968 (Mar. 16, 2017). On April 3, EPA issued a notice of proposed rulemaking to reconsider the RMP Final Rule and stay the rule for an additional two years. 82 Fed. Reg. 16,146 (Apr. 3, 2017) (the RMP Delay Rule). The RMP Delay Rule was finalized on June 9 pursuant to EPA's authority under CAA section 307 and section 112. 82 Fed. Reg. 27,133 (June 14, 2017). On June 15, environmental and labor groups filed suit in the D.C. Circuit challenging this action

as beyond EPA's authority. *Air Alliance Houston, et al. v. EPA*, No. 17-1155 (D.C. Cir.).

While the D.C. Circuit decision regarding the 90-day stay of the Methane Final Rule focused on EPA's authority to issue a stay pursuant to CAA section 307 and therefore could potentially affect the litigation regarding the RMP Delay Rule, the RMP Delay Rule is distinct from the 90-day stay of the Methane Final Rule in three significant ways. First, the legal challenges to the RMP Final Rule and Delay Rule were brought either immediately following EPA issuing the RMP Final Rule in January 2017 or after EPA finalized the RMP Delay Rule for reconsideration and a two-year stay of the effective dates. Part of the legal challenge of the Methane Final Rule, and the focus of the D.C. Circuit's opinion, was the 90-day stay EPA issued pursuant to CAA section 307. Though EPA also issued a 90-day stay of the RMP Final Rule under CAA section 307, that action is not challenged in the litigation surrounding the RMP rules.

Second, the delay of effective date being challenged in the litigation over the RMP Delay Rule was issued pursuant to both CAA section 307 and section 112, not solely section 307, which was the only authority for the 90-day stay of the Methane Final Rule. Lastly, had the 90-day stay of the RMP Final Rule been challenged, the industry groups who filed petitions for reconsideration would likely have been able to show that reconsideration was mandatory because their objections were impracticable to raise during the public comment period and were of central relevance to the outcome of the rule. For example, one objection raised by industry groups was that the announcement by the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) of their investigative findings of the West, Texas, fertilizer plant incident two days before the conclusion of the public comment period of the RMP Final Rule cast the incident in a new light, heightened the industries' security concerns about the rule, and did not provide for adequate time to comment on those changes in the two days that remained before the close of the comment period. Interested

stakeholders previously requested an extension of the comment period, which was not granted. The West, Texas, incident was believed to be an accident at the facility and initiated President Obama's Executive Order to revise the RMP regulations. *See* Executive Order 13650, 78 Fed. Reg. 48,029 (Aug. 7, 2013). However, the ATF's investigative findings concluded the incident was a criminal act of arson. ATF, *ATF Announces \$50,000 Reward in West, Texas Fatality Fire* (May 11, 2016). Such a revelation significantly heightened security concerns surrounding the RMP Final Rule. Therefore, industry groups would likely be able to demonstrate that reconsideration is mandatory. Regardless, such a demonstration is not required or conclusive in the context of the litigation of the RMP rules.

While the litigation surrounding the RMP rules is distinguishable and any predictions of how the D.C. Circuit will rule in other challenges of the Trump administration's regulatory actions is speculative, the other potential impact of the D.C. Circuit's decision regarding the 90-day stay of the Methane Final Rule is the potential chilling effect the decision may have on EPA and other agencies utilizing provisions like CAA section 307 and others to reconsider or stay regulatory requirements. Such a chilling effect could impair EPA action moving forward, and if the past few months are reflective of the agency's plans for the future, EPA intends to be very active with time fleeting.

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EPA REGIONAL REPORTS

EPA REGION 4

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North Carolina

On January 13, 2017, the Acting Secretary of the North Carolina Department of Environmental Quality, Mr. William G. Ross Jr., sent boundary recommendations for the 2010 1-Hour Sulfur Dioxide National Ambient Air Quality Standard (“2010 SO₂ NAAQS”) to the EPA Region 4 Administrator. These recommendations were submitted in support of EPA’s Round 3 designation action which must be completed by the end of this year.

The state recommended an attainment designation for all areas evaluated under this round, with the exception of areas near four large sulfur dioxide-emitting facilities, where further monitoring will take place. Brunswick County was also exempted due to its designation in an earlier process.

The state recommendation correspondence states that monitoring is currently taking place at the PCS Phosphate, Evergreen Packaging, Asheville Steam Plant, and Roxboro Plant, and notes that information has been submitted to EPA. All of areas of Beaufort County, where the PCS Phosphate plant is located, have been recommended for an attainment designation based on source monitoring which shows the 2013–2015 design value of PCS’s site to be below the 2010 SO₂ NAAQS. With monitoring on the other three sites ongoing, North Carolina has deferred its recommendations and plans to submit these once the 2017–2019 SO₂ data is compiled.

Georgia

The Georgia Environmental Protection Division, Air Protection Branch, recently added an addendum to its 2016 Ambient Air Monitoring Plan. The addendum provides for modifications to

the ambient air monitoring network since posting of the 2016 plan, including the termination of monitoring at the Yorkville site, citing financial feasibility as the reasoning for termination. The addendum states that federal requirements in 40 C.F.R. part 58 can still be met without the Yorkville station. No public comments were received on the draft addendum posted on February 2, 2017, and the final plan was submitted to EPA Region 4. The 2016 plan can be accessed at: <http://amp.georgiaair.org/docs/2016%20Ambient%20Air%20Monitoring%20Plan.pdf>. The addendum can be accessed at: <http://amp.georgiaair.org/docs/2016%20Addendum%20to%20Annual%20Plan.pdf>

Alabama

On February 7, 2017, EPA published a final rule disapproving of a limited element of Alabama’s State Implementation Plan (“SIP”) implementing the Clean Air Act’s “infrastructure” SIP requirements for the 2008 8-Hour Ozone NAAQS. 83 Fed. Reg. 9512 (Feb. 7, 2017). In particular, EPA found that Alabama’s infrastructure SIP failed to satisfy the visibility component of the Clean Air Act’s interstate transport requirements (commonly referred to as “Prong 4”). Alabama’s SIP relied on compliance with EPA’s Cross-State Air Pollution Rule (“CSAPR”) to satisfy Prong 4. But, although EPA has proposed that compliance with CSAPR satisfies certain visibility-related regulatory requirements, EPA concluded it could not approve of Alabama’s infrastructure SIP because EPA has not made a final determination that CSAPR satisfies any visibility-related requirements and because of continued uncertainty surrounding CSAPR itself due to legal decisions that resulted in CSAPR’s remand to EPA. EPA has addressed all other elements of Alabama’s infrastructure SIP for the 2008 8-Hour Ozone NAAQS in separate rulemakings.

On January 12, 2017, EPA published a final rule approving in part and disapproving in part Alabama’s infrastructure SIP submittal for 2010 SO₂ NAAQS. 82 Fed. Reg. 3637. EPA’s final rule approves of all aspects of the SIP except state board-related requirements under section 110(a)

(2)(E)(ii) of the Clean Air Act—with respect to which EPA disapproves of the SIP submittal—and interstate transport provisions related to visibility—with respect to which EPA has not yet taken any final action.

In January 2017, the Alabama Department of Environmental Management (“ADEM”) proposed a variety of revisions to state rules in Division 335-3. This includes revisions related to implementation of CSAPR, incorporation of changes to federal standards including New Source Performance Standards and National Emissions Standards for Hazardous Air Pollutants to allow administrative enforcement by ADEM, and incorporation of EPA amendments to federal provisions addressing public notice requirements for draft permits. Further information on ADEM’s proposed rule revisions may be found at: <http://www.alabamaadministrativecode.state.al.us/jcarr.html>.

Florida

On December 6, 2016, the Florida Department of Environmental Protection (“FDEP”) published a notice of rule development affecting standards in chapter 62-296, Florida Administrative Code (stationary source—emission standards). FDEP’s proposed rule revisions address the need for alternative air emission limitations during transient operating conditions, including during periods of startup and shut-down, and revise and clarify a variety of provisions, including because they have become outdated or superseded by federal standards.

On February 1, 2017, FDEP made two SIP submittals to EPA. The first submittal includes previously promulgated revisions to chapter 62-297, Florida Administrative Code, for incorporation into Florida’s SIP. This includes amendments to rules 62-297.310 (General Emission Test Requirements), 62-297.440 (Supplementary Test Procedures), and 62-297.450 (EPA VOC Capture Efficiency Test Procedures). The second submittal addresses infrastructure SIP requirements for the 2010 Nitrogen Dioxide NAAQS. In particular, the submittal confirms that Florida’s existing SIP satisfies “Prongs 1 and 2” interstate transport requirements under Clean Air Act section 110(a)

(2)(D)(i)(I). Prongs 1 and 2 prohibit emission activities within the state from contributing significantly to nonattainment in, or interference with maintenance by, any other state with respect to the NAAQS.

On February 17, 2007, FDEP published notice of a variety of proposed rule revisions, including revision to its air permit application and annual operating report forms, air permitting exemptions, and air general permit requirements. More information on regulatory activities within FDEP’s Division of Air Resources Management is *available at* <http://www.dep.state.fl.us/air/rules/regulatory.htm>.

Mississippi

On February 23, 2017, the Mississippi Commission on Environmental Quality issued public notice that the Commission has approved a title V fee of \$47.00 per ton of applicable regulated air pollutant applicable for the period of September 1, 2017, to August 31, 2018. The title V permit fee was previously set at \$41.00 per ton.

Kentucky

On January 6, 2017, Kentucky’s Energy and Environment Cabinet submitted documentation to EPA addressing EPA’s Data Requirements Rule (“DRR”) for the 2010 SO₂ NAAQS. EPA’s DRR establishes criteria that require states to identify and characterize air quality around certain larger sources of sulfur dioxide emissions. The DRR also includes timetables by which states must characterize air quality through either ambient monitoring or air quality modeling and submit results to EPA. Kentucky’s submittal identifies 16 sources that must be evaluated under the DRR’s criteria and describes the methods the state has chosen to characterize sulfur dioxide air quality around those sources.

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EPA REGION 5

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Illinois, Indiana, and Wisconsin

EPA issued a final rule finding that 15 states (including Illinois, Indiana, and Wisconsin) and the District of Columbia failed to submit timely SIP revisions to satisfy 2008 Ozone NAAQS requirements. The rule triggers certain consequences under CAA section 179(a), including a timetable for sanctions and for imposition of a federal implementation plan (“FIP”). 82 Fed. Reg. 9158 (Feb. 3, 2017).

Indiana

EPA issued a final rule redesignating Indiana’s portion of the Cincinnati, Ohio-Kentucky-Indiana area to attainment for the 2008 Ozone NAAQS, and approving Indiana’s maintenance plan, 2020 and 2030 Motor Vehicle Emission Budgets, and 2011 base year emissions inventory. 82 Fed. Reg. 16,940 (Apr. 7, 2017).

EPA issued a final rule approving SIP revisions to extend Indiana’s emissions statements regulations to Lawrenceburg Township, Dearborn County, to comply with 2008 Ozone NAAQS requirements. 82 Fed. Reg. 16,926 (Apr. 7, 2017).

EPA issued proposed and direct-final rules approving SIP revisions that address emissions inventory requirements for the Indiana portion of the Chicago-Naperville, Illinois-Indiana-Wisconsin ozone nonattainment area under the 2008 Ozone NAAQS, and Emissions Statement Rule certification for Lake and Porter counties for the 2008 ozone standard. 82 Fed. Reg. 16,934, 16,980 (Apr. 7, 2017).

Michigan

EPA issued a direct-final rule approving SIP revision establishing transportation conformity

criteria and procedures under CAA section 176(c) relating to carbon monoxide and particulate matter less than 2.5 micrometers (“PM_{2.5}”). 82 Fed. Reg. 17,134 (Apr. 10, 2017).

Minnesota

EPA issued proposed and direct-final rules approving site-specific SIP revisions for the Saint Paul Park Refining Co. LLC facility in Washington County, addressing certain changes to ownership and operations, and updates to modeling. 82 Fed. Reg. 16,921, 16,980 (Apr. 7, 2017).

EPA issued a direct-final rule approving SIP revision for SO₂ and PM₁₀ to update the Rochester SO₂ and Olmsted County PM₁₀ maintenance plans, as well as approved removal of existing title I regulations for six facilities. 82 Fed. Reg. 13,230 (Mar. 10, 2017).

Ohio

EPA issued a final rule approving a SIP revision addressing the state’s gasoline volatility standards for the Cincinnati and Dayton areas by removing 7.8 lb/psi low Reid vapor pressure fuel requirements. 82 Fed. Reg. 16,932 (Apr. 7, 2017).

EPA issued a final rule redesignating the Ohio portion of the Cincinnati-Hamilton, Ohio-Indiana-Kentucky area to attainment for 1997 PM_{2.5} annual NAAQS, and approving reasonably available control measures and updates to the maintenance plan and emissions inventory. 82 Fed. Reg. 16,938 (Apr. 7, 2017).

EPA issued a final rule redesignating the Cleveland, Ohio, area to attainment for 2008 Ozone NAAQS, and approving the maintenance plan and 2020 and 2030 Motor Vehicle Emission Budgets for the area. 82 Fed. Reg. 1603 (Jan. 6, 2017).

Wisconsin

EPA issued a final rule approving revisions to the Prevention of Significant Deterioration (“PSD”)

and ambient air quality programs to address deficiencies that were identified in EPA's previous infrastructure SIP disapprovals and Finding of Failure to Submit, as well as approving PSD infrastructure requirements under CAA section 110 for the following NAAQS: 1997, 2006, and 2012 PM_{2.5} NAAQS, 1997 and 2008 Ozone NAAQS, 2008 Lead NAAQS, 2010 Nitrogen Dioxide ("NO₂") NAAQS, and 2010 SO₂ NAAQS. 82 Fed. Reg. 9515 (Feb. 7, 2017).

Litigation Developments

On January 10, 2017, the U.S. Court of Appeals for the Sixth Circuit issued a decision in *United States v. DTE Energy Co.* (No. 14-2274/2275) that effectively reinstates an enforcement action previously remanded to the district court. At issue was whether EPA may pursue enforcement against a company for commencing construction of a major modification prior to receiving a permit. DTE notified state regulators of a "routine maintenance, repair and replacement" project the day prior to commencing and proceeded without receiving a permit. DTE believed the projects were exempt from New Source Review permitting in part based upon its emissions projections. EPA rejected DTE's projections and initiated enforcement. The district court entered summary judgment for DTE finding that enforcement was premature as an actual emissions increase was not yet realized, which the Sixth Circuit rejected. Upon remand, the district court again granted summary judgment to DTE focusing on language in the opinion that "the regulations allow operators to undertake projects without having EPA second-guess their projections" and holding that EPA is only entitled to conduct a "surface review" and "cursory examination" of an operator's preconstruction projections.

The Sixth Circuit again reversed, this time finding that the district court ignored the central holding of its earlier decision that EPA could bring a preconstruction enforcement action to challenge DTE's emissions projections, stating "[a]pparently, it is necessary to reiterate that the applicability

of NSR must be determined before construction commences and that liability can attach if an operator proceeds to construction without complying with the preconstruction requirements in the regulations." The matter is again remanded back to the district court.

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EPA REGION 6

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Louisiana

The Louisiana Department of Environmental Quality ("LDEQ") proposed substantive changes to a rulemaking that will allow creditable nitrogen oxide ("NO_x") and volatile organic compound ("VOC") reductions from certain mobile sources to qualify as Emission Reduction Credits ("ERC"). Currently, credits are limited to stationary sources. The rulemaking will allow creditable (i.e., surplus, permanent, quantifiable, and enforceable) reductions from certain mobile sources to qualify as ERC. Eligible sources will include on-road mobile sources, including cars, trucks, and motorcycles, marine vessels, locomotives, and non-road engines.

LDEQ also finalized a rule requiring certain record-keeping requirements for sources below minimum permitting thresholds. Generally, a permit is not required for a source with facility-wide potential emissions less than five tons per year for each of any regulated air pollutant, less than fifteen tons per year emitted of all such defined pollutants combined, and less than the minimum emission rate for each toxic air pollutant. No specific documentation was required for this exemption. The new rule will require that the

owner determine and maintain records of potential emissions from such source and must reassess and document any change in potential emissions from the source prior to effecting a modification.

Texas

The Houston-Galveston-Brazoria (“HGB”) nonattainment area did not reach attainment for ozone by the extended attainment date of July 20, 2016. As a result, EPA proposed in September 2016 that the HGB area be reclassified from marginal to moderate nonattainment. In addition to other SIP revisions, the Texas Commission on Environmental Quality (“TCEQ”) proposed to update reasonably available control technology (“RACT”) for VOC storage tanks in the HGB area. Rule Project No. 2016-039-115-AI. The updated RACT revisions increase the control efficiency of control devices, other than vapor recovery units or flares, from 90 percent to 95 percent. Additionally, for fixed roof crude oil and condensate storage tanks with the uncontrolled VOC emissions of more than 25 tons per year (TPY), inspection, repair, and record-keeping requirements have been enhanced. Finally, emissions from all of the fixed roof crude oil and condensate tanks at each pipeline breakout station will be considered when determining applicability to the chapter 115 VOC storage tank rule.

The City of Galena Park, located just east of I-610 near Houston, has been on the TCEQ’s Air Pollutant Watch List since 2000 because the annual average benzene concentration was 1.5 parts per billion by volume (ppbv) in 1998 and 1999. The long-term Air Monitoring Comparison Value for benzene is 1.4 ppbv and monitored levels were slightly higher than the air monitoring comparison values (“AMCV”). TCEQ placed additional monitors in Galena Park and worked with industries in the area to reduce VOCs, including benzene. As a result, benzene emissions have been significantly reduced in Galena Park. Since 2010, the annual average benzene concentrations have all been below the long-term AMCV of 1.4 ppbv. Even so, TCEQ intends to maintain the current level of ambient monitoring in the Galena Park area and will list

the area again if ambient levels of benzene, or any other contaminant, rise to levels of concern.

New Mexico

Smoke from fires burning in the Texas panhandle is causing problems for the people in eastern New Mexico. Health issues such as respiratory problems are being noticed in situations when visibility is less than five miles. As a result, the New Mexico Environment Department (“NMED”) issued a warning and health advisory for counties in eastern New Mexico.

A longtime employee of the NMED was confirmed as Secretary of that Department earlier this year. He joined NMED in 1993 and has been Deputy Secretary since 2011. He pledged to continue to hold EPA accountable for the Gold King Mine spill and take action on the Kirtland Air Force Base fuel spill.

Arkansas

Arkansas will receive \$14.6M as part of the Volkswagen settlement. It will use the money to advance projects that reduce emissions from motor vehicles. Arkansas will seek public input as it selects from the eligible mitigation actions to develop a Beneficiary Mitigation Plan for Arkansas.

The Arkansas Department of Environmental Quality (“ADEQ”) announced that it is accepting grant applications to make funds available to reduce diesel emissions. ADEQ distributes funds from the Diesel Emission Reduction Act in Arkansas to reimburse agencies, businesses, cities, counties, and schools for a percentage of expenses for projects that reduce or eliminate diesel emissions on medium and heavy-duty vehicles and equipment or for replacements of those vehicles and equipment.

Oklahoma

The Oklahoma Department of Environmental Quality (“ODEQ”) released its most recent data

relating to the NAAQS. The 2015 Air Data Report was released and it includes all the monitoring data collected at 25 monitors across the state. The report shows Oklahoma is in attainment for all the NAAQS.

ODEQ also promulgated a Permit by Rule for facilities that must obtain a permit because of installation of an emergency engine that is subject to a federal standard.

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EPA REGION 7

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Kansas

On March 17, the Kansas Supreme Court held in favor of a state environmental permit challenged by the Sierra Club. In late 2010, the Kansas Department of Health and Environment (“KDHE”) granted Sunflower Electric Power Corporation a PSD permit for construction of an 895-megawatt coal-fired plant as an expansion of an existing Sunflower power plant outside of Holcomb, Kansas. In a 2013 decision, the Kansas Supreme Court held that KDHE’s permitting requirements were not compliant with the EPA 1-hour emission limits regulations and remanded the permit back to KDHE.

KDHE issued an addendum to the original permit that addressed the 1-hour emission limit standards and imposed newer Mercury and Air Toxic Standards (“MATS”) that were issued during the initial litigation. The Sierra Club sought judicial

review of the permit and addendum arguing that it did not adequately incorporate regulations concerning greenhouse gases, 1-hour emissions limits, hazardous air pollutant limits, MATS, and new source performance standards. The Kansas Supreme Court rejected this argument and held that KDHE and Sunflower were not required to restart the permitting process, validating the addendum to the 2010 permit.

Missouri

The Eastern District issued its Opinion and Order in *United States of America v. Ameren Missouri*, Case No. 4:11 CV 77 RWS (E.D. Missouri) Jan. 23, 2017) for violations of the Clean Air Act, the Missouri SIP, and a title V permit. In this PSD enforcement action, the trial court found, among other things, permit violations and failure to install best available pollution control technology (“BACT”). Between 2007 and 2010, Ameren engaged in a number of projects updating the boilers at its Rush Island plant in Festus, Missouri. The trial court’s decision held that these projects could not be considered “routine maintenance under the law.” The opinion also asserts that Ameren expected Rush Island’s availability and emissions to increase, and, subsequently, that an emissions increase actually did occur.

Nebraska

A Nebraska man pleaded guilty to two misdemeanor criminal violations of the Clean Air Act. The company’s owner-operator allegedly used gel coats and hazardous air pollutant paints and solvents in his work creating fiberglass statues. The operator apparently failed to secure necessary permits and meet standards laid out by the Nebraska Department of Environmental Quality. In his plea agreement, the operator admitted negligent creation of a hazardous air pollutant to be released into ambient air and negligently placed, or caused a person to be placed, in danger of serious bodily injury. The operator was sentenced to six months in prison and one year of supervised release.

Iowa

As a result of a series of settlements between EPA and Volkswagen AG, Audi AG, Dr. Ing. h.c. F. Porsche AG, Volkswagen Group of America, Inc., Volkswagen Group of America Chattanooga Operations, LLC, and Porsche Cars North America, Inc. (collectively, “Volkswagen”), Iowa will receive approximately \$21 million from an environmental mitigation trust for Volkswagen’s alleged violations of the Clean Air Act. The State of Iowa is currently asking for public input on its Beneficiary Mitigation Plan and spending for eligible nitrogen oxides reduction projects. Iowa will be seeking public input through April 28, 2017.

EPA REGION 9

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Arizona

On March 9, 2017, EPA proposed to approve revisions to the Arizona SIP for portions related to the Arizona Department of Environmental Quality and Maricopa County Air Quality District. 82 Fed. Reg. 13,084 (Mar. 9, 2017). The proposed revision addresses EPA’s startup, shut-down, or malfunction SIP Call issued on June 12, 2015. 80 Fed. Reg. 33,839 (June 12, 2015) (“SSM SIP Call”). In the SSM SIP Call, EPA called on 36 states, including Arizona, to revise “substantially inadequate” provisions that granted sources an affirmative defense for excess emissions during SSM events. *Id.* at 33,840. To replace these provisions, EPA allowed states to develop alternative emission limitations that apply during SSM events so long as those limitations are “continuous” and do not otherwise violate the CAA. *Id.* at 33,913. EPA also allowed states to develop revised SSM enforcement policies so long as those policies were specific enough to assure EPA of no adverse effects, provide adequate public process, and not effectively limit the ability of EPA or the citizenry to bring an enforcement action. *Id.* at 33,923. In

response to the SSM SIP Call, Arizona proposed to remove the provisions altogether. 82 Fed. Reg. at 13,085. Comments on EPA’s proposal to approve Arizona’s revised plan closed on April 10, 2017, but EPA has not yet taken final action. *Id.* at 13,084.

California

EPA has recently approved several revisions to California’s SIP. For example, on March 10, 2017, EPA approved revisions to the Ventura County Air Pollutant Control District implementation plan that granted the District authority to implement and enforce its own prevention of significant deterioration program. 82 Fed. Reg. 13,243 (Mar. 10, 2017). On April 11, 2017, EPA approved a revision to the Butte County Air Quality Management District implementation plan. 82 Fed. Reg. 17,380 (Apr. 11, 2017). The revision addresses the district’s permanent curtailment of burning rice straw and the necessary procedures to create emission reduction credits from the associated emission reductions. *Id.*

Litigation Developments

In companion cases, the Ninth Circuit denied petitions from the Hopi Tribe and various environmental groups challenging the approval of a FIP for the Navajo Generating Station, a coal-fired power plant on the Navajo Nation Reservation in Arizona. *Yazzie v. U.S. Env’tl. Prot. Agency*, 851 F.3d 960 (9th Cir. 2017); *Hopi Tribe v. U.S. Env’tl. Prot. Agency*, 851 F.3d 957 (9th Cir. 2017). EPA issued the proposed FIP in February 2013 pursuant to its authority under the Tribal Authority Rule. *Yazzie*, 851 F.3d at 967. Under the Tribal Authority Rule, EPA has the authority to issue a FIP if the tribe does not timely issue a tribal implementation plan. *Id.* at 966. Initially, EPA proposed a Best Available Retrofit Technology (“BART”) determination and BART alternative. *Id.* at 967. Under the BART determination, “the Station would reduce its NO_x emissions by nearly 80% within five years after the effective date of a final FIP, largely through the installation of both

catalytic reduction and low NOx burners/separated over-fired air technologies.” *Id.* at 967 (citing 78 Fed. Reg. at 8287–88). Under the BART alternative determination, “the FIP extended the deadlines for achieving NOx emission reductions to 2023” and gave an emission credit for early installation of low NOx burners/separated over-fired air technology. *Id.* EPA received feedback from the Technical Working Group and issued a supplemental proposal in light of the feedback. *Id.* The supplemental proposal, a better-than-BART alternative, would require the station to cease conventional coal-fired power generation by 2044, impose a cap on total NOx emissions from 2009 to 2044, reduce overall generation, and incorporate an emission credit for early reductions. *Id.* In August 2014, EPA issued the final rule which was materially the same as the supplemental proposal. *Id.*

In the Hopi Tribe’s petition, the tribe asserted that EPA violated an alleged consultation duty by not including the tribe in its technical working group. *Hope Tribe*, 851 F.3d at 960. The tribe extrapolated this duty from the general trust relationship between the United States and Indian tribes. *Id.* The Ninth Circuit doubted the enforceability of any duty to consult on EPA’s part and found that, in any event, the tribe was adequately consulted throughout the process. *Id.* The tribe also contended that EPA failed to analyze all BART factors when developing the supplemental proposal. *Id.* The court held that EPA need not consider these factors when developing BART alternatives. *Id.*

The environmental groups asserted error on four grounds. *Yazzie*, 851 F.3d at 969–75. First, the court rejected the petitioner’s complaint that EPA acted untimely, finding the CAA’s five-year BART deadline does not apply to better-than-BART alternatives. *Id.* at 969. Second, petitioners contended EPA violated 40 C.F.R. § 51.308(e)(2)(iii), which requires “all necessary emission reductions take place during the period of the first long-term strategy for regional haze.” *Id.* The court deferred to “EPA’s interpretation of its own regulation—that § 51.308(e)(2)(iii) does not

apply to tribes because tribes are not subject to the underlying deadline for long-term strategies. . . .” *Id.* at 970. Next, petitioners challenged EPA’s determination that the supplemental proposal was better than BART. *Id.* at 972. EPA determined the proposal was better than BART because “the distribution of emissions [was] not substantially different than under BART, and the alternative measure [would] result in greater emission reductions.” *Id.* at 973. EPA argued the distribution of emissions language merely referred to the “geographic distribution of emissions” and not the temporal distribution, as petitioners contended. *Id.* The court deferred to EPA’s interpretation as a reasonable construction of its regulations. *Id.* The petitioners also argued the alternative did not actually increase emission reductions over BART. *Id.* at 973–74. EPA’s position was that the emission credit alone resulted in greater emission reductions. *Id.* at 974. The court agreed, finding “it was not unreasonable for the EPA to reward the Station through a credit for its early and voluntary installation of the low NOx burners/separated over-fired air technology, which resulted in real and early emission reductions.” *Id.* Lastly, the court deferred to EPA’s judgment in concluding BART analysis for PM was unnecessary. *Id.* at 975.

Enforcement Developments

On February 8, 2017, the South Coast Air Quality Management District (“SCAQMD”) announced an \$8.5 million settlement with SoCalGas for a massive gas leak at the company’s Aliso Canyon storage facility. *SCAQMD, SCAQMD Reaches Settlement with SoCalGas for \$8.5 Million for Aliso Canyon Gas Leak*, NEWS (Feb. 8, 2017), <http://www.aqmd.gov/docs/default-source/news-archive/2017/socalgas-feb-8-2017.pdf?sfvrsn=7>. The settlement requires \$1 million to be dedicated to an agency-sponsored health study, \$5.65 million to pay for emission fees related to the leak, and \$1.85 million to reimburse the agency for air monitoring costs and legal fees. *Id.* The violation was discovered on October 23, 2015, when SoCalGas detected a leak in one of its 115 wells in the Aliso Canyon underground natural gas storage

facility. *Id.* The leak was not fixed until February 18, 2016. *Id.*

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EPA REGION 10

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Washington

Litigation Activity—Greenhouse Gas Regulation

Legal challenges to Washington's Clean Air Rule, a so-called baseline-credit program for reducing greenhouse gas ("GHG") emissions promulgated in September 2016, are continuing.

Association of Washington Business v. Department of Ecology—With federal court litigation on hold, the utilities and industry associations and Department of Ecology ("Ecology") have exchanged merits briefs on state law challenges to the Clean Air Rule in consolidated actions in Thurston County's Superior Court. No. 16-2-03923-34 (Thurston Cty. Super. Ct.).

The petitioners have marshalled a host of arguments for why the rule should be invalidated under state administrative and constitutional law. These include, for example:

- The Washington Clean Air Act ("state CAA") does not permit Ecology to regulate fuel sellers and natural gas distributors as "indirect emitters," because their products do not, without being burned by a consumer, generate emissions. Ecology can only develop "emission standards" for "direct emitters."
- The law establishing statewide GHG emission limits required Ecology to gain approval from the legislature before implementing a comprehensive regulation to achieve the reductions.
- The state CAA does not allow Ecology to regulate with emission reduction units ("ERUs") (credits, as the petitioners label them). ERUs are generated by purchasing emission allowances from other GHG emission programs, by projects that reduce emissions, or by reducing emissions at a regulated facility beyond the amount required by the rule. Fuel sellers and natural distributors can only comply with the regulation by investing in ERU projects or obtaining ERUs from third parties.
- The ERU reserve system, which sets aside ERUs to allow GHG emissions for new sources and for other purposes, is an unconstitutional "tax."
- The rule imposes certain GHG reporting requirements for transportation fuels that are prohibited by Wash. Rev. Code. 70.94.151(5)(a)(iii).
- Ecology did not comply with the State Environmental Policy Act by: failing to account for the "leakage" of GHG emissions to other countries with less stringent GHG regulations and lower manufacturing costs; by increasing GHG emissions caused by a shift in energy production to out-of-state carbon intensive power plants; and by increasing health problems stemming from greater reliance on residential wood stoves as a result of fuel switching by individuals seeking lower-cost heating options. An Environmental Impact Statement, not a determination of non-significance, was required.
- And Ecology's cost-benefit analysis was also flawed. Ecology improperly compared "state" costs with "global" benefits. Ecology also assumed artificially low compliance costs, given apparent restrictions on energy efficiency

investments available to utilities; limitations on renewable energy credits for purchase by utilities; and the unproven and potentially inefficient and costly market for ERUs, which, over time, would depend more and more on emission reduction projects in Washington.

The Washington Environmental Council, coordinating with other environmental groups, has submitted briefing as an intervenor in favor of the regulation. The youth plaintiffs in an ongoing state court climate change lawsuit, *Foster v. Department of Ecology*, have also submitted an amicus brief. Although the youth plaintiffs have asserted in their separate litigation that the rule is inadequate, they nonetheless support Ecology's authority, and putative responsibility, to issue a GHG reduction rule.

Foster v. Department of Ecology—The youth climate change lawsuit is on both appellate and a trial court tracks. Ecology filed an appeal of the trial court's decisions in November 2015 and May 2016. No. 75374-6-1 (Wash. Ct. App. Div. I). The orders collectively required Ecology to develop a GHG regulation by the end of 2016. Ecology has argued that the trial court erred in granting post-judgment relief by requiring Ecology to have completed a rulemaking by the end of 2016 to address GHG emissions and by requiring Ecology to furnish a recommendation to the state legislature in 2017 concerning appropriate GHG limits, after previously determining that Ecology was on track to meet its obligations under the state air quality statutes, state constitution, and public trust doctrine. The youth plaintiffs have argued that Ecology's appeal is moot, since Ecology already carried out the lower court's remedies. A continuing flurry of motions in the lower court has sharpened the mootness question even more. In a twist, the Association of Washington Business filed an amicus brief agreeing with Ecology's request to vacate the May 2016 trial court order. However, Ecology has responded unfavorably to the Association's purported attempt to "collaterally attack Ecology's authority to adopt the Clean Air Rule."

At the trial court level, the youth plaintiffs filed a motion in October 2016 asking the court to require Ecology to show why Ecology is not in contempt of the court's November 2015 and May 2016 orders. *Foster v. Dep't of Ecology*, No. 14-2-25295-1 SEA (King Cty. Super. Ct.). The plaintiffs argued the orders required a regulation stringent enough to meet the state's GHG reduction targets and, in the words of the plaintiffs, to "protect our children in the face of life-threatening climate pollution" based on "best available science," a standard that allegedly had not been met by the Clean Air Rule. On December 16, 2016, plaintiffs also requested leave to file an amended petition for review. Three days later, the judge denied the motion for order of contempt and sua sponte granted plaintiffs leave to file amended pleadings. This was followed by a couple rounds of motions for reconsideration and court orders. As of this writing, the court was seeking input from the parties as to when permission from the court of appeals must be obtained before allowing plaintiffs to amend the pleadings to name the State of Washington and Governor Jay Inslee as additional defendants and to expand the claims to allege specific violations of the state constitution and public trust doctrine.

Holmquist v. United States—On January 31, 2017, several citizens brought a federal declaratory judgment action alleging that the preemption provisions in the 1995 Interstate Commerce Commission Termination Act of 1995 ("ICCTA") are unconstitutional. No. 2:17-cv-00046 (E.D. Wash. filed Jan. 31, 2017). The case stems from decisions by the Spokane city council to rescind multiple initiatives and one council resolution that would have restricted fossil fuel transportation by rail in the city based on federal preemption law. The plaintiffs assert two primary constitutional theories based (1) on the "right to a liveable [sic] climate" and (2) to the "right of local community self-government." The constitutional right to a healthy climate was informed by the decision in *Juliana v. United States*, No. 6:15-cv-01517 (D. Or. Nov. 10, 2016), recognizing a "constitutional right to 'a climate system capable of sustaining human life,'" which was reported on in the prior issue of

this newsletter. The United States filed a motion to dismiss the lawsuit for lack of jurisdiction and failure to state a claim on April 4, 2017. The response brief is due in May, and oral arguments are currently scheduled for July 12, 2017.

Enforcement Activity

On March 16, 2017, an individual living near the U.S. Department of Energy Hanford Site filed a citizen suit against asking the EPA administrator to act on a petition filed with EPA in opposition to proposed title V operating permits for the site. *Green v. Pruitt*, No. 4:17-cv-05034-SMJ (E.D. Wash. Mar. 16, 2017).

On February 21, 2017, the Pollution Control Hearings Board (“PCHB”) issued an opinion addressing lengthy challenges to a Reasonably Available Control Technology determination that established new furnace emission limits at a glass container-manufacturing plant in Seattle. *Ardagh Glass, Inc. v. Puget Sound Clean Air Agency*, PCHB No. 15-120 (Feb. 21, 2017). The new emission limits would have required application of add-on control technology. A RACT analysis includes technical and economic feasibility components. The PCHB agreed with much of Ecology’s analysis, including use of a “combined pollutant cost-effectiveness” evaluation; use of an almost zero percent discount rate; the decision not to identify a maximum cost for feasible pollutant reductions; and use of a fabric baghouse and scrubber technology at a single glass container furnace in the country as evidence of technological feasibility. But the PCHB roundly rejected parts of the analysis, such as an actual emissions baseline using data from a period before the facility had more recently reduced its emissions, which overestimated predicted emissions reductions; an estimate of demolition costs from an online calculator in the face of facility-specific evidence that demolition costs would be 200 times greater; and the failure to explain how specific calculations and cost reduction scenarios supported the determination. Importantly, the PCHB noted that the agency could consider factors such as the public health impacts of add-on controls as part

of the economic feasibility analysis, but did not take a position as to whether the cost-effectiveness assessment should take into account potential-to-potential, actual-to-actual, or actual-to-potential reductions.

Legislative and Rulemaking Activity

A couple of climate change bills have been proposed in the Washington legislature. S.B. 5127 is a carbon tax bill. As initially proposed, tax revenue would be used to fund investments in clean energy, infrastructure, and education. H.B. 1144 would ratchet down the state’s GHG reduction limits in Wash. Rev. Code 70.235.020 for 2035 and 2050.

In addition, on February 7, 2017, Ecology announced a rulemaking to establish GHG emissions performance standards for power plants based on the 970 pounds of GHGs per megawatt hour standard identified by the Washington Department of Commerce as required by Wash. Rev. Code 80.80.050. In the preproposal statement of inquiry, Ecology indicated that this action “meets the intent of the state law to periodically update the standard if necessary.” The “changes will also simplify future updates to the standard” and will “align” the rule with “updates to Chapter 80.70 Carbon Dioxide Mitigation and Chapter 80.80 [of the Wash. Rev. Code] Greenhouse Gas Emissions—Baseload Electric Generation Facilities.”

The rule would apply to “new power plants, existing power plants that change ownership or undergo modification to increase power output, and power plants making new long-term financial commitments.” Ecology, ch. 173-407 Wash. Admin. Code, Carbon Dioxide Mitigation Program, Greenhouse Gases Emissions Performance Std. & Sequestration Plans & Programs for Thermal Electric Generating Facilities—Overview of Rulemaking, <http://www.ecy.wa.gov/programs/air/rules/wac173407/1612ov.htm> (last accessed on Mar. 24, 2017). Stakeholder meetings are planned for April-June 2017 with a proposed rule anticipated for Fall 2017.

SSM Rulemaking

In response to EPA's 2015 SIP Call asking states to update their SIPs to eliminate emission limitation exemptions during startup, shutdown and malfunction ("SSM") events, Ecology started working with stakeholders in November 2016 to develop a proposed rule to address the SSM event exemptions in Ecology's current regulations. Ecology expects to issue a proposed rule sometime this spring.

The latest preproposal draft amendments, which also include revisions to opacity and source category regulations, create a detailed process for establishing case-by-case "alternate emission limits" for opacity, SO₂, and PM emissions, and certain SIP approved emissions standards for "specific emission unit(s) during a clearly defined mode of operation" if requested by a facility. *See* Draft Preproposal Revisions to Wash. Admin. Code 173-400-082(1)(a), (a)(3). The alternate emission limits, if approved after an agency review and public comment process, would be included in a regulatory order. *Id.* at (a)(4)-(6). The draft amendments also contain revisions to state-only excess emissions reporting requirements and defenses and to public notice requirements for permitting activity. *See* Draft Preproposal Revisions to Wash. Admin. Code 173-400-108, -109, -171.

Air Quality Fee, Ch. 173-455 Wash Admin. Code, and General Regulations, Ch. 174-400, Rulemaking

On February 6, 2017, Ecology formally announced that it is also undertaking revisions to its air quality fee scheme to "better align fees with costs" and to more "equitably distribute fees across all registered sources." *See* Preproposal Statement of Inquiry (Feb. 6, 2017). Ecology expects to hold stakeholder meetings this spring and to propose a rule in August 2017. Ecology, ch. 173-455 Wash. Admin. Code, Air Quality Fee Rule, ch. 173-400 Wash. Admin. Code, Gen. Regs. for Air Pollution Sources—Timeline for Rulemaking (last accessed Mar. 24, 2017).

EPA Regulatory Approvals

On January 19, 2017, EPA proposed to approve SIP revisions incorporating a range of updated air quality regulations from the Southwest Clean Air Agency ("SWCAA"). *See* 82 Fed. Reg. 6413 (Jan. 19, 2017). SWCAA implements Ecology's air regulations "except where the Agency has adopted corresponding provisions" which "apply in lieu of the corresponding WAC provisions." *Id.* at 6414. The comment period for the proposed approvals closed on February 21, 2017. *Id.* at 6413.

On March 22, 2017, EPA proposed to approve SIP revisions related to updated air quality regulations administered by the Energy Facility Site Evaluation Council ("EFSEC"), which has jurisdiction over "major energy facilities" in the state. *See* 82 Fed. Reg. 14,648-49 (Mar. 22, 2017). EFSEC has, for the most part, just adopted Ecology's regulations by reference. *Id.* Some EFSEC regulations will not be approved in this SIP revision because they are inconsistent with federal court decisions made after the regulations were updated. *Id.* at 14,650. In addition, EPA proposes to grant EFSEC authority to administer the PSD program for facilities with "existing PSD permits issued by the EPA." *Id.* at 14,653. EPA will retain a federal implementation plan to "issue partial PSD permits to ensure that major sources . . . have a means to satisfy the CAA construction permit requirements for GHG . . . emissions from . . . combustion of biomass," which EFSEC does not regulate except for reporting purposes. *Id.*

Oregon

Legislative Activity—Regulating Emissions from CAFOs

Proposed Senate Bill 197 (SB 197) is working its way through the Oregon state legislature. It would enact requirements for regulating air contaminant emissions from dairy concentrated animal feeding operations ("CAFOs"). SB 197 is backed by environmental interests, and opposed by the Oregon Farm Bureau and the Oregon Dairy Farmers Association. SB 197 would direct

the Oregon Environmental Quality Commission (“EQC”) to adopt by rule a program for regulating air emissions from dairy CAFOs.

Until 2007, Oregon law exempted agricultural operations from air quality regulations with the exception of field burning in the Willamette Valley. In 2005, environmental groups petitioned EPA to revoke its approval of Oregon’s SIP. The groups asserted that the SIP was deficient because state law exempted from regulation emissions from major agricultural sources, including CAFOs. In response to the petition, Senate Bill 235 (SB 235) was adopted to direct Oregon Department of Environmental Quality (“DEQ”) and the Oregon Department of Agriculture (“ODA”) to enter into a memorandum of understanding in order to evaluate federal CAA requirements applicable to agriculture. *See* Or. Rev. Stat. § 468A.790. SB 235 also established a Task Force on Dairy Air Quality, and directed it to study the emissions from CAFOs. The Task Force delivered its report in July 2008, recommending that the state’s EQC work with Oregon DEQ and ODA to adopt rules to implement a proposed “Oregon Dairy Air Emissions Program” based upon a set of guiding principles and starting as a voluntary program.

Proposed SB 197 would authorize Oregon EQC and ODA to enter into a memorandum of understanding providing for ODA to operate a program regulating air contaminant emissions from dairy CAFOs. ODA would be authorized to perform the functions of the Oregon EQC or DEQ, including inspections of CAFOs for purposes of investigating sources of emissions. SB 197 would provide ODA with the ability to access to pertinent records of CAFOs, including but not limited to blueprints or operating plans. Provisions authorizing the program would become operative on January 1, 2019.

Regulatory Activity —Oregon Draft Air Toxics Rulemaking Framework

On March 21, 2017, Oregon DEQ and the Oregon Health Authority (“OHA”) published a draft

“Proposed Framework for Cleaner Air Oregon.” The framework outlines proposed options for regulating air toxics in Oregon through the creation of a health-risk based permitting program. The proposed framework will be used to draft new regulations, which will be released for public comment later this summer.

The proposed draft framework would apply to permitted and unpermitted new, modified, and existing sources. Under the program, DEQ would set limits on whole-facility emissions as well as emissions from new emissions units. DEQ is seeking comment on proposed categorical exemptions from the program. Such exemptions would be based on a determination of whether toxic air pollutants are emitted from a piece of equipment or process. Oregon DEQ and OHA intend to evaluate whether DEQ’s title V categorically insignificant activities list is appropriate to use for toxic air pollutants. Examples of categorical exemptions could include small natural gas boilers, spray coating and associated drying equipment used exclusively for educational purposes in educational institutions, office activities, and food service activities. Under the program, Oregon DEQ and OHA would seek to incorporate requirements based on the air toxics regulatory programs in California and Washington.

EPA Regulatory Approval

On March 22, 2017, EPA issued a proposed rule partially approving and partially disapproving changes to Oregon’s SIP submitted on April 22, 2015. 82 Fed. Reg. 14,654 (Mar. 22, 2017). The changes relate to the criteria pollutants for which EPA has established NAAQS (CO, lead, NO₂, ozone, PM, and SO₂).

On April 22, 2015, the Oregon DEQ submitted significant revisions to the Oregon SIP. Oregon made changes to 26 Oregon Administrative Rule (OAR) divisions within chapter 340, and two source sampling and monitoring manuals related to the rules. Notable aspects of Oregon’s SIP revision proposed to be approved by EPA include:

Oregon DEQ made substantive changes to the definition of “adjacent” at OAR 340-200-0020(4). The definition was narrowed by limiting the use of the defined term, “interdependent facilities that are nearby to each other,” to its use in the “major source” definition at OAR 340-200-0020(91), and in the air contaminant discharge permit program at OAR 340-216-0070. In other places where the term “adjacent” is used, Oregon DEQ’s response to comments document indicates that DEQ intends to use the dictionary definition.

Oregon DEQ revised the term “categorically insignificant activities” at OAR 340-200-0020(23) in several respects. One key revision provides that insignificant activity emissions must be included in determining whether a source is a “federal major source” (OAR 340-200-0020(66)) or a “major modification” (OAR 340-224-0025(2)(a)(B)) subject to federal major New Source Review.

In its notice, EPA is not proposing to approve certain revised provisions submitted by Oregon DEQ, “because they are inconsistent with [Clean Air Act] requirements, or because they are inappropriate for SIP approval under section 110, title I of the CAA.” 82 Fed. Reg. at 14,670. Revisions not approved by EPA include provisions related to compliance schedules; Stationary Source Plant Site Emission Limits (hazardous air pollutants); NSR (PM_{2.5} inter-pollutant offset ratios); and Emission Standards for Wood Products Industries (total reduced sulfur and odor).

Idaho

Regulatory Activity—Crop Residue Burning

The State of Idaho recently approved significant changes to the air quality components of its Crop Residue Burning (“CRB”) program. Idaho crop growers burn between 35,000 and 50,000 acres between March and September every year. Under the CRB program, growers must register with the Idaho Department of Environmental Quality (“DEQ”) and pay a per-acre fee prior to burning croplands after harvest.

Historically, Idaho prohibited crop residue burning if any Clean Air Act criteria pollutant was projected by DEQ to exceed 75 percent of its respective NAAQS. Crop residue burning principally implicates the NAAQS for ozone and PM_{2.5}. After EPA revised the primary and secondary NAAQS for ozone in 2015, Idaho DEQ estimated that available crop residue burn days would be reduced by 33–50 percent.

In March 2017, with support from the state legislature, Idaho DEQ issued a regulation that temporarily allows the agency to continue using the 2008 Ozone NAAQS for purposes of CRB approvals. That rule is designed to avoid economic hardship for growers during the 2017 crop residue burning season, and it will be effective until February 28, 2018. Idaho DEQ also finalized a separate regulation that, beginning in the 2018 burn season, will allow crop residue burning as long as ozone is not projected to exceed 90 percent of the current ozone NAAQS. Idaho DEQ has submitted this regulation to EPA as a SIP revision, and it expects approval prior to the 2018 burn season.

Crop residue burning in Idaho has been the source of significant litigation in the past. *See Safe Air for Everyone v. U.S. Env’tl. Prot. Agency*, 488 F.3d 1088 (9th Cir. 2007). The CRB program grew out of a settlement agreement resulting from this past litigation. It remains to be seen whether environmental and health advocacy organizations will file legal challenges to the recent program modifications.

Regulatory Activity—Cache Valley PM_{2.5} Regulation

On January 4, 2017, EPA announced final action on its previously proposed rule partially approving and partially disapproving Idaho’s attainment plan for the Cache Valley PM_{2.5} nonattainment area. 82 Fed. Reg. 729 (Jan. 4, 2017) (see prior discussion in vol. 20, no. 2 of this publication). The final rule was to take effect on February 3. *Id.*

On January 26, however, EPA delayed the effective date of its final Cache Valley action until March

21, 2017. 82 Fed. Reg. 8499 (Jan. 26, 2017). This delay was prompted by a January 20 regulatory freeze initiated by the Trump administration. *Id.* EPA later extended its delay of final action on the Cache Valley nonattainment area until April 20. 82 Fed. Reg. 14,463 (Mar. 21, 2017).

On March 30, EPA again proposed to delay the effective date of this action “for up to 90 days.” 92 Fed. Reg. 15,683 (Mar. 30, 2017). The agency is still considering whether to conduct a substantive review of its prior action regarding Idaho’s attainment plan. *See id.* If no substantive review is undertaken, the prior action “will become effective no later than July 19, 2017.” *Id.* EPA is obligated to take some final action on Idaho’s attainment plan for its portion of the Cache Valley area under the terms of a consent decree entered on June 2, 2016, by a federal judge in California. *See* N.D. Cal. Dkt. No. 4:15-cv-4663-SBA. The original deadline for final action by EPA, under the consent decree, was December 8, 2016. On November 22, 2016, that deadline was extended by stipulation to January 3, 2017. EPA’s obligations under the same consent decree have since been extended further, also by stipulation, to September 1, 2017.

Separately, EPA has not yet taken action on its December 16, 2016, proposal to find that Idaho failed to attain compliance with the 2006 24-Hour PM_{2.5} NAAQS for the Cache Valley nonattainment area by the attainment date of December 31, 2015. *See* 81 Fed. Reg. 91,088 (Dec. 16, 2016). If finalized, EPA’s proposed finding of nonattainment would result in reclassification of the nonattainment area, by operation of law, from “moderate” to “serious” nonattainment. Given the recent change in administration and EPA leadership, however, it remains to be seen whether (or when) EPA’s proposed finding will be finalized as written.

On March 13, 2017, EPA announced the award of a \$2.5 million Clean Air Act Targeted Airshed grant to Idaho DEQ. These grant funds will be used to

reduce air pollution and increase air quality in the Cache Valley region.

Alaska

Fairbanks North Star Borough Nonattainment Area

On January 3, 2017, EPA published notice of a proposed consent decree to resolve an October 11, 2016, lawsuit filed against the agency by Citizens for Clean Air and the Sierra Club. 82 Fed. Reg. 116 (Jan. 3, 2017). The plaintiffs in that suit requested an order requiring EPA to determine whether the Fairbanks North Star Borough (“FNSB”) is in attainment of the 2006 24-Hour NAAQS for PM_{2.5}. *See* W.D. Wash. Dkt. No. 2:16-cv-01594-RAJ.

Presumably prompted by the October 11 lawsuit, EPA proposed on December 16, 2016, to find that the FNSB has not achieved compliance with the NAAQS. 81 Fed. Reg. 91,088 (Dec. 16, 2016). Under the proposed consent decree announced on January 3, EPA would be required to finalize its determination by April 28, 2017. A final EPA determination that the FNSB has not attained compliance with the NAAQS would, by operation of law, require designation of the borough as a “serious” nonattainment area for fine particulate matter. As of this writing, EPA has not finalized its determination, and the District Court for the Western District of Washington has not signed and entered the proposed consent decree. But Alaska regulators have already proposed tighter wood-burning restrictions to take effect upon redesignation of the FNSB to “serious” nonattainment for PM_{2.5}, including a mandatory point-of-sale woodstove change-out requirement for real estate transactions.

Meanwhile, on February 2, 2017, EPA proposed to approve SIP revisions submitted by the State of Alaska to address compliance with the 2006 NAAQS for PM_{2.5} in the FNSB. 82 Fed. Reg. 9035 (Feb. 2, 2017). EPA’s proposed action on the Alaska SIP submission was required under a consent decree that resolved a separate lawsuit

filed in 2016 by Citizens for Clean Air and the Sierra Club. The primary strategy of Alaska's SIP revisions is to reduce particulate emissions from residential wood combustion for home heating. *Id.* at 9037. These SIP submissions do not address additional requirements that may be imposed upon EPA's pending redesignation of the FNSB from "moderate" to "serious" nonattainment. However, the approved SIP submissions do include contingency measures that are already expected to be implemented upon that re-designation.

On March 13, EPA announced the award of a \$2.5 million grant to the Alaska Department of Environmental Conservation for purposes of improving air quality in the FNSB. The Clean Air Act Targeted Airshed grant will be used for a woodstove change-out program designed to reduce fine particulate pollution in the borough.

Potential Nonattainment Designation for Butte

Outside the FNSB, the Butte area of the Matanuska-Susitna Borough, northeast of Anchorage, has also experienced high levels of fine particulate pollution in recent years. Data from 2014 and 2015 exceeded the 2006 24-Hour NAAQS for PM_{2.5}, leading to concern that this area would require a nonattainment designation by EPA. Preliminary data for 2016, however, shows a drop in PM_{2.5} below the NAAQS.

Dutch Harbor Settlement

On April 20, 2017, EPA announced a significant settlement with a Dutch Harbor seafood processor for Clean Air Act violations related to three large diesel generators. The processor voluntarily reported to EPA that several of its employees had disengaged required pollution control technology, and falsified records to conceal their actions, for a two-year period beginning in 2009. The employees pled guilty to criminal charges for these actions in 2014. Operation of the generators without required controls for NOx emissions violated the processor's existing title I and title V permits. These operations also violated a prior consent decree between the processor and EPA for earlier Clean Air Act violations involving the same equipment. Under the new consent decree, the processor agreed to pay \$730,000 for violations of the prior consent decree, as well as \$570,000 for new Clean Air Act violations. Of civil penalties totaling \$1.3 million, the processor is to pay \$228,000 to the State of Alaska. The processor also agreed to spend nearly \$2 million more on air pollution reduction and environmental mitigation projects.

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