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COMMITTEE CO-CHAIRS' COMMENT

Elizabeth Hurst and Gary Steinbauer

The first ten months of the Trump administration have proven to be very active time for environmental lawyers. We've seen with executive orders, rulemakings, court decisions, ongoing legal challenges, and promises to reshape the air quality legal landscape. The committee has been actively tracking these developments and will be devoting its time during the 2017–2018 American Bar Association year to the air quality-case and regulatory developments resulting from the new administration's efforts.

Our committee leaders are committed to provide you with the latest information and programming covering all the changes that are being made by Trump administration. This issue of the newsletter includes feature articles on the EPA administrator's "Back to Basics Agenda" and whether it is affecting enforcement under the Clean Air Act and EPA's review of state attainment plans and designations for the National Ambient Air Quality Standards. States like California have stated that they will move forward on greenhouse gas regulation, notwithstanding the Trump administration's desire to do away with the Obama administration's Clean Power Plan. This issue also includes a feature article analyzing California's programs to reduce GHG emissions. Finally, there are detail-rich reports from EPA Regions 2 through 10, highlighting important cases and regulatory actions that you should be aware of if you practice in these areas. We would be remiss if we did not thank our excellent team of newsletter vice chairs for another informative and practical publication!

In closing, we strive to be a resource and forum for air quality practitioners and we welcome your views, questions, and suggestions. Please e-mail us or the appropriate vice chairs with suggestions for programs or committee newsletter topics, and be social on the Section's LinkedIn page or on Twitter. As always, thank you for supporting our efforts, none of which would be possible without the hard work and dedication of the committee vice chairs.

Elizabeth Hurst *and* **Gary Steinbauer** *are co-chairs of the Air Quality Committee.*

Air Quality Committee Newsletter
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David Loring, Irene Hantman,
Rod Johnson, and Taylor Hoverman, Editors

In this issue:

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CALENDAR OF SECTION EVENTS

December 12, 2017
It's a New Day: California's Cap and Trade Extension Legislation and Its Impact on Federal and International Climate Change Programs
CLE Webinar

January 25-27, 2018
2018 Environmental & Energy, Mass Torts and Products Liability Committees' Joint CLE Seminar
Whistler, BC, Canada
Primary Sponsor: ABA Section of Litigation

March 8, 2018
Shifting Policies for a Shifting Environment: Environmental Policy Symposium
The University of Mississippi School of Law
Oxford, MS

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

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

ARTICLES

CALIFORNIA'S CURRENT LEADERSHIP ON CLIMATE CHANGE AND GREENHOUSE GAS REDUCTION

Tiffany Michou

California's cap-and-trade program, which began in 2013, is part of a suite of policy tools originally designed to achieve the goal of the California Global Warming Solutions Act of 2006 (AB 32), which is to reduce greenhouse gas emissions to 1990 levels by 2020. California is on track to achieve its 2020 goal. Last year, Governor Brown signed SB 32, which sets a goal of further reducing emissions 40 percent below 1990 levels by 2030. The program is the only one of its kind in the United States and the second largest in the world after the European Emission Trading System (EU ETS).

Cap-and-trade is a market-based regulation that is designed to reduce greenhouse gas emissions from multiple sources in the most cost-effective way possible. California cap-and-trade requires oil refineries, food processors, deliverers of electricity (in-state and imported), and large industrial facilities to buy permits to release greenhouse gas emissions into the atmosphere. A portion of the GHG emissions permits (allowances) is sold at quarterly auctions and reserve sales. The legislature and governor appropriate proceeds from the sale of state-owned allowances for projects that support the goals of AB 32.

The current California cap-and-trade program runs through 2020. Lawsuits attempted to call into question, however, whether the auction is a tax (which would have required legislative approval by a two-thirds vote in California). In April of this year, a California court of appeal held that the auction system is not a tax (*California Chamber of Commerce v. State Air Resources Board* [2017] 10 Cal. App. 5th 604). In a major win for the program, the California Supreme Court subsequently declined to consider appeals from the California Chamber of Commerce and the Pacific Legal Foundation. By declining to consider the appeal, the Supreme Court affirmed the court of appeal's decision and the essential legality of the program.

On July 17, California lawmakers approved an extension of the state's greenhouse gas emissions "cap-and-trade" program to 2030. Assembly Bill 398 (AB 398) extends the California cap-and-trade program through December 31, 2030, and provides for cap-and-trade revenue appropriations to fund specified priorities. Assembly Bill 617—the companion bill to AB 398, aims to address concerns about air quality in communities by increasing monitoring and imposing stricter penalties on polluters. In addition, senators passed another related bill, Assembly Constitutional Amendment 1 (aka the "Greenhouse Gas Reduction Reserve Fund" or ACA1). It would require a one-time supermajority approval in 2024, as opposed to the majority vote typically necessary, to spend money generated by cap-and-trade auctions as a way to ensure that Republicans have more influence in doling out those revenues. However, there is no guarantee that the amendment will be approved by California's voters when it appears on the ballot next year.

The extension of the program will allow the California Air Resources Board (ARB) to continue to work on linkage. Linkage is defined by AB 1532 as an action taken by ARB or any other state agency that will result in acceptance by the state of California of compliance instruments issued by any other governmental agency, including any state, province, or country, for purposes of demonstrating compliance with the cap-and-trade program (Dr. Steven Cliff & Mary D. Nichols, California's Climate Program and Subnational Linkage Efforts 2016). The benefits of linked programs for global pollutants such as GHGs include increased cost-effectiveness, improved market liquidity and price discovery, opportunities for partner jurisdictions' businesses to benefit from an expanded program, the potential to leverage greater GHG reductions than could be achieved by one jurisdiction acting on its own, and developing a framework for additional jurisdictions to join.

The California program is currently linked with a cap-and-trade system in Québec. In this type of linkage, all instruments issued by Québec, as well as all instruments issued by California, are fully fungible in each other's programs. ARB held joint auctions, and the programs function as a single, joint, linked program. A second potential linkage with Ontario would be of this same type. Indeed, in January 2017, the California Air Resources Board submitted a letter to Governor Brown providing notice that ARB is proposing to link its cap-and-trade program with the cap-and-trade program developed by the province of Ontario and requesting that the governor consider and make the findings necessary to support the linkage (Letter, *available at* https://www.arb.ca.gov/cc/capandtrade/linkage/sb1018_findings_ontario.pdf).

Another type of linkage contemplated by ARB would involve a one-way linkage, such as for sector-based crediting programs. In this type of linkage, ARB would seek to recognize and approve sector-based offsets issued by another jurisdiction. Offsets are tradable credits that represent greenhouse gas emissions reductions that are made in areas or sectors not covered by a cap-and-trade program. Under a greenhouse gas cap-and-trade program, covered entities could buy offset credits in lieu of buying allowances or reducing their greenhouse gas emissions on-site. California compliance entities could purchase offsets generated in another jurisdiction and use them to meet a small portion (4%) of their compliance obligation under the California cap-and-trade program. Unlike the bilateral linked California-Québec program, California-issued instruments would not be recognized by the sector-based offset-issuing jurisdiction. An example of a one-way linkage would be California's recognition and approval of emission offsets for ARB compliance that were generated by the sector-based crediting program in Acre, Brazil, without reciprocal recognition by Acre of California reductions. The Brazilian program is designed to reduce greenhouse gas emissions from the deforestation of tropical forests degradation (REDD) (Dr. Steven Cliff & Mary D. Nichols, *supra*). To date, ARB has not approved any sector-based crediting program.

In June, Governor Brown traveled to China and opened up the possibility that California could also link its cap-and-trade market to Jiangsu Province. However that remains only a possibility, as a senior member of China's National Centre for Climate Change Strategy and International Cooperation said last month that linking markets is a complex process and would "take a long time" to do. China plans to implement its own national cap-and-trade system later this year. (*California Approves Cap-and-Trade Scheme Until 2030, available at* https://arstechnica.com/tech-policy/2017/07/california-approves-cap-and-trade-scheme-until-2030/).

Attention now turns to the Northeast, where nine states (Connecticut, Delaware, Maine, Maryland, Massachusetts, New Hampshire, New York, Rhode Island, and Vermont) are part of what is known as the Regional Greenhouse Gas Initiative (RGGI), which, like California's effort, is a market-based cap-and-trade program that goes beyond state boundaries. The program is designed to reduce emissions of carbon dioxide (CO2) from electric power plants that generate 25 megawatts of electricity or more. States are now negotiating the future of the program beyond 2020. On August 23, the RGGI states announced proposed program changes that will provide an additional 30 percent cap reduction by the year 2030, relative to 2020 levels (RGGI, News & Release (8.23.17)).

California's continued success at reducing climate pollution in the context of a growing population and a growing economy is providing a compelling case for action. The program enjoys high levels of popular support, and, consequently, state leaders are likely to continue to develop laws and policies to meet the challenge of protecting the climate and to link these efforts with other jurisdictions in the United States and abroad.

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ENVIRONMENTAL ENFORCEMENT IN THE TRUMP ADMINISTRATION: THE NUMBERS MIGHT NOT TELL THE WHOLE STORY

Taylor Hoverman

On August 10, 2017, the Environmental Integrity Project (EIP) published a report entitled *Environmental Enforcement Under Trump: Records Show 60 Percent Drop in Civil Penalties Against Polluters During President Trump's First Six Months*, http://www.environmentalintegrity.org/wp-content/uploads/2017/08/Enforcement-Report.pdf. The report analyzes the Department of Justice's (DOJ) environmental enforcement during the first six months of the Trump administration, characterizing the administration as being "off to a very slow start." The report found that in the first six months of the Trump administration, DOJ collected 60 percent less in civil penalties as compared to the average penalties collected after the same six months of the Obama, Bush, and Clinton administrations.

The report drew this conclusion by analyzing the consent decrees lodged by DOJ since President Trump's first day in office, January 21, 2017. Specifically, the analysis compared the penalties paid, amount spent by violators on pollution controls, and expected amount of eliminated pollution, where available. Only consent decrees that were lodged in federal court for a violation of environmental law and were referred to DOJ for civil prosecution were included, excluding any Superfund cleanups.

The analysis showed the Trump administration DOJ lodged 26 civil cases, collecting $12 million total in penalties. For comparison, the Obama administration DOJ lodged 34 cases, collecting $36 million in penalties in the same time frame. In six months, the Bush administration DOJ lodged 31 cases and collected $30 million in penalties, and the Clinton administration DOJ lodged 45 cases with $25 million in penalties.

The EIP study compares other metrics including the estimated value of injunctive relief and the estimated annual pollution reductions and premature deaths avoided. The value of injunctive relief represents how much the settling defendant parties committed to spend installing and maintaining the equipment necessary to comply with environmental standards and clean up pollution. Of the 11 cases reporting the value of injunctive relief, the Trump administration estimated $197 million in injunctive relief was obtained in cases lodged in the first six months in office. The Obama administration's 22 cases that included this information totaled over $1.2 billion in injunctive relief, and the Bush administration totaled 16 cases containing this information with $710 million in injunctive relief in the first six months in office. Because the Environmental Protection Agency (EPA) did not begin collecting data on the value of injunctive relief until the late 1990s, this information was not available for the Clinton administration's first six months in office.

The last measure examined was the estimated annual pollution reductions and premature deaths avoided once the requirements of a consent decree are in effect. Again, this information was not available for the Clinton administration. The Trump administration's five cases with this information are estimated to eliminate 627 tons of sulfur dioxide, thereby avoiding 4–10 premature deaths; eliminate 4331 tons of nitrogen oxide, avoiding 3–7 premature deaths; and eliminate 264 tons of fine particulate matter, avoiding 15–34 premature deaths. By comparison, the Obama administration's eight cases containing this information estimated eliminating 39,260 tons of sulfur dioxide, avoiding 178–397 premature deaths; eliminating 9378 tons of nitrogen oxide, avoiding 6–15 premature deaths; and eliminating 1918 tons of fine particulate matter, avoiding 45–104 premature deaths. Finally, the Bush administration's four cases with this information available estimated eliminating 68,620 tons of sulfur dioxide, avoiding 528–1167 premature deaths; eliminating 28,239 tons of nitrogen oxide, avoiding 21–48 premature deaths; and eliminating 1929 tons of fine particulate

matter, avoiding 69–160 premature deaths. EIP adds a disclaimer noting that this particular measure analyzes a small number of cases and that a single case can have a significant effect on these measurements.

At the conclusion of the report, EIP suggests "the number and quality of these cases may indicate whether enforcement is on track, or whether the new Administration and his team are more directly involved in reviewing settlements and taking longer to approve." While the number and quality of cases could be indicative of the Trump administration's approach to environmental enforcement, there are several other potential explanations for the decrease in civil cases lodged, penalties paid, injunctive relief, pollution reductions, and avoided premature deaths. Likely explanations include the lengthy negotiations typically involved in reaching settlements, Next Generation technologies, improved environmental quality, increased environmental regulations, and the delay in filling the Trump administration's political appointee positions.

While only a brief mention, EIP acknowledges that the timeline for consent decrees may be a confounding factor in analyzing the metrics discussed above. When discussing the methodology for the report, EIP mentions that these types of settlements often take at least one year, if not longer, to negotiate; therefore, the consent decrees lodged within the first months of the presidency reflect work done by the previous administration. Thus, it's probable that the consent decrees attributed to the Trump administration in the EIP report are likely spillover from the Obama administration's negotiations. That also seems to suggest that it is too early to use these data sets to measure or speculate as to the Trump administration's present or future environmental enforcement. If, as EIP acknowledges, negotiations typically take one year or longer, relying on the number of consent decrees lodged and penalties paid to reflect the current administration's efforts is misplaced.

Alternatively, enforcement numbers decreasing over time may reflect advancements in environmental technologies like Next Generation compliance. With advanced technologies like drones for air quality monitoring and solar-powered buoys to monitor water quality, regulated entities are able to "improve their operations and stay in compliance, by allowing them to find pollution that was 'invisible' and transmit warnings to facility managers so they can fix a problem before a violation occurs." Lawrence E. Starfield & Catherine S. Tunis, *Next Generation Compliance: Using Advanced Monitoring Technology to Meet Today's Challenges and Plan for the Future*, https://www.epa.gov/sites/production/files/2016-12/documents/article-adv-mon-technolog-meeting-challenges.pdf. These advanced technologies make it easier for regulated entities to remain compliant, thereby avoiding enforcement actions.

The decreasing "value" in terms of avoided premature deaths of the consent decrees could also reflect improved overall environmental quality as a result of the countless environmental statutes and regulations that regulated entities are required to comply with, including the Clean Air Act, the Clean Water Act, the Solid Waste Disposal Act, the Endangered Species Act, the Comprehensive Environmental Response, Compensation, and Liability Act, and the Safe Drinking Water Act, among many others. The regulatory obligations under these statutes have continually increased in recent years. As of July 2016, with six months remaining in the president's term, the Obama administration had issued nearly 4000 EPA regulations. Justin Sykes, *Nearly 4,000 EPA Regulations Issued Under President Obama*, https://www.atr.org/nearly-4000-epa-regulations-issued-under-president-obama. Additionally, "U.S. greenhouse gas emissions have decreased by 7 percent" since 2005. EPA, *Climate Change Indicators: Greenhouse Gases*, https://www.epa.gov/climate-indicators/greenhouse-gases.

Lastly, the pace of finalizing consent decrees may be affected by the slower pace of Senate confirmations of President Trump's political

appointees. President Trump only had 124 presidential appointments confirmed by September 7, 2017. *Tracking How Many Key Positions Trump Has Filled So Far*, https://www.washingtonpost.com/graphics/politics/trump-administration-appointee-tracker/database/. Comparatively, President Obama had 310 presidential appointments confirmed by September 7, and George W. Bush had 294 presidential appointments confirmed by the same date. *Id.* Without more political appointees confirmed and in place at EPA, EPA staff may not have the leadership or direction needed to prioritize environmental enforcement and approve consent decrees. Political leadership aside, EPA is resource constrained due to a 2.5 percent cut in the agency's staff as of September 6, 2017, and is anticipating budget decreases, which could also impact environmental enforcement in the Trump administration. Aggie Mika, *Hundreds of EPA Workers Leave the Agency*, http://www.the-scientist.com/?articles.view/articleNo/50275/title/Hundreds-of-EPA-Workers-Leave-the-Agency/.

While there are several possible explanations for the data analyzed in the EIP report, it may just be too early to draw any conclusions about environmental enforcement during the Trump administration.

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"BACK TO BASICS": NAAQS ATTAINMENT PLANS AND DESIGNATIONS

Kurt Blase

Environmental Protection Agency (EPA) Administrator Pruitt has announced a new "Back-to-Basics Agenda" to "refocus" EPA on its mission and return power to the states. How might this affect EPA's review of state attainment plans and designations for national ambient air quality standards (NAAQS)? Let's look at three issues, with a focus on ozone since it is the "hot" standard at the moment: (1) background concentrations, (2) foreign emissions, and (3) intrastate controls.

Background Concentrations

Many states, particularly in the West, have predicted substantial nonattainment of the 2015 ozone standard as a result of growing ozone background concentrations not susceptible to localized controls. They argue that in such cases, employment of additional local control measures would provide negligible public health benefits, owing to the inability of such measures to reduce background ozone, but would impose substantial costs and resulting economic dislocation. They also point to a growing body of evidence that economic dislocation itself causes significant public health problems. Resolution of the background issue will be a key element in the development of attainment plans for these states.

This is one area where EPA arguably has broad discretion to defer to plans developed by the states. Clean Air Act section 107(a) states, "Each state shall have the primary responsibility for ensuring air quality within the entire geographic area comprising such State. . . ." Special rules for ozone designation are provided in section 107 (d)(4)(A)(v):

> Whenever a Governor finds and demonstrates to the satisfaction of the Administrator, and the Administrator concurs in such finding, that with respect to a portion of a metropolitan

> statistical area . . . portions of the area do not contribute significantly to violation of the national ambient air quality standard, the Administrator shall approve the Governor's request to exclude such portion from the nonattainment area. *In making such finding, the Governor and Administrator shall consider factors such as population density, traffic congestion, commercial development, industrial development, meteorological conditions and pollution transport* (emphasis added).

The legislative history of the act indicates that Congress did not intend to enforce ambient standards to background levels. For example, the House Report on the 1977 amendments states:

> Some have suggested that since the standards are to protect against all known or anticipated effects and since no safe thresholds can be established, the ambient standards should (b) e set at zero or background levels. Obviously, this no-risk philosophy ignores all economic and social consequences and is impractical. This is particularly true in light of the legal requirement for mandatory attainment of the national primary standards within 3 years. H.R. Rep. No. 294, 95th Cong., 1st Sess. 127 (1977).

In light of this legislative history, sections 107(a) and (d) suggest a congressional intent to avoid application of ozone nonattainment controls in areas where they would not be effective. EPA may construe sections 107(a) and (d) broadly, giving states wide latitude to define background concentrations and related measures in their attainment designations. This includes consideration of the economic impacts of ineffective ozone controls. Some of the factors enumerated in section 107(d)(4), such as commercial and industrial development, clearly have an economic component. Further, as the Supreme Court noted in *Whitman v. American Trucking Ass'ns, Inc*, 531 U.S. 457, 470 (2001):

> It is to the States that the CAA assigns initial and primary responsibility for deciding what emissions reductions will be required from which sources. *See* 42 U.S.C. §§ 7407(a), 7410 (giving States the duty of developing implementation plans). It would be impossible to perform that task intelligently without considering which abatement technologies are most efficient, and most economically feasible—which is why we have said that "the most important forum for consideration of claims of economic and technological infeasibility is before the state agency formulating the implementation plan," *Union Elec. Co. v. EPA*, 427 U.S. at 266.

The federal courts also have acknowledged that the Clean Air Act does not require EPA to impose ineffective NAAQS controls. The D.C. Circuit has held that "a rule likely to cause more harm to health than it prevents is not a rule that is 'requisite to protect the public health,'" noting that the act permits EPA to "consider whether a proposed rule promotes safety *overall*" and "to promote development of more effective [pollution] control programs." *American Trucking Associations v. EPA*, 283 F.3d 355, 375 (D.C. Cir. 2002). This approach was confirmed by the Supreme Court in the mercury and air toxic standards decision, where the Court stated:

> One would not say that it is even rational, never mind "appropriate," to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits. In addition, "cost" includes more than the expense of complying with regulations; any disadvantage could be termed a cost. EPA's interpretation precludes the Agency from considering *any* type of cost—including, for instance, harms that regulation might do to human health or the environment. The Government concedes that if the Agency were to find that emissions from power plants do damage to human health, but that the technologies needed to eliminate these emissions do even more damage to human health, it would *still* deem regulation appropriate. See Tr. of Oral Arg.

> 70. No regulation is "appropriate" if it does significantly more harm than good. *Michigan v. EPA*, 135 S. Ct. 2699, 2707 (2015) (emphasis added).

These and other provisions can be interpreted by EPA, in reviewing state plans and designations, to give states wide latitude to consider all of the relevant factors provided in section 107(d), as well as the costs of nonattainment controls likely to be ineffective, and to use any reasonable scientific method to calculate and exclude ozone background concentrations.

Foreign Emissions

CAA section 179B allows EPA to approve nonattainment plans that do not require actual attainment in areas that would be in attainment "but for" emissions emanating from outside the United States. In the ozone implementation rule proposed by the Obama administration, EPA requested comments on whether this relief is limited to emissions emanating from Canada and Mexico. *See* 81 Fed. Reg. 81,304 (Nov. 17, 2016). As EPA noted, contributions to U.S. ozone concentrations from sources outside the United States can be from nearby sources in a bordering country or from sources many thousands of miles away. For example, various studies have documented an impact from Chinese emissions on portions of the Intermountain West.

The statute is not limited to bordering countries. While it is titled "International Border Areas," both the ozone-specific provision (subsection (b)) and the more general provision (subsection (a)) apply to all "emissions emanating from outside of the United States." Accordingly, the statute does not impose any limitation of section 179B relief to emissions from specific foreign countries.

EPA's proposal also sought comment on a requirement that all demonstrations under section 179B must include a showing that the air agency has adopted all "reasonably available control measures" (RACM), including "reasonably available control technology" (RACT), for the area in question. *See* 81 Fed. Reg. 81,304 (Nov. 17, 2016). Although the act includes many provisions expressly requiring RACT and/or RACM, section 179B is not one of them. In cases where emissions are beyond state jurisdiction and international contributions are substantial, section 179B gives EPA flexibility to approve state plans that do not require actual attainment or impose ineffective controls.

Intrastate Controls

The Obama administration's ozone implementation proposal would require intrastate sources outside of a nonattainment area to employ RACM if the standard is not attained in the nonattainment area. *See* 81 Fed. Reg. 81,295 (Nov. 17, 2016). This proposal was based on a new interpretation of CAA section 172(c)(6), which provides EPA with authority to require "other measures" of emission control, beyond those listed specifically in the statute, where necessary or appropriate to provide for attainment of the standard. Again, the statute can be interpreted to allow states greater flexibility. Section 172(c)(6) arguably is a "catch all" provision that simply allows "other measures," beyond those specifically enumerated in the statute, to be required where they may be necessary in a particular area. Nothing in the statute provides authority for regulation of sources outside the area. To the contrary, section 172(c)(1) expressly limits RACT and RACM to "reductions in emissions from existing sources in the area . . ." The federal courts have recognized that section 172(c)(6) merely authorizes EPA to approve market-based measures in addition to the other controls listed in section 172(c). *See NRDC v. EPA*, 571 F.3d 1245 (D.C. Cir. 2009).

The Obama administration's proposal also is inconsistent with the agency's long-standing practice under section 172(c). Historically, the procedure for identifying sources that impact a nonattainment area and are thus subject to RACM is the boundary recommendation process. If a state determines that a source outside the recommended

boundary may contribute, it can require any necessary controls pursuant to section 110(a)(2)(A) and (C), which require state plans to include control measures as necessary to assure attainment within the state. As with the issues discussed above, the RACM requirement that EPA proposed runs the risk of imposing significant costs for additional controls that may have little or no effect in reducing nonattainment.

While these issues are a focus of the current ozone debate, they are not limited to the ozone NAAQS. The statutory emphasis on state responsibility for developing attainment plans and designations applies to all NAAQS. Background concentrations and foreign emissions (e.g., sub-Saharan dust) have been issues in past reviews of the particulate matter (PM) NAAQS, and are likely to be addressed again in the first draft of the revised PM Integrated Science Assessment, which is expected soon. The intrastate control issue likewise could arise with any standard. With respect to NAAQS attainment plans and designations, "back to basics" is real: the statute gives EPA ample flexibility to defer to state choices provided a rational basis consistent with statutory requirements is employed.

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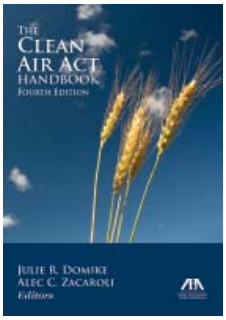

The Clean Air Act Handbook, 4th Edition

Julie R Domike and Alec Chatham Zacaroli, Editors

Covering the entire Clean Air Act statute, this handbook brings together the experience of more than 30 private and public sector practitioners to explain how the CAA is both implemented and practiced. The book addresses all essential topics, from government programs to civil and criminal enforcement and judicial review, making it an ideal reference for the experienced as well as the more general environmental lawyer.

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BACK TO BASICS—ENFORCEMENT

Krista McIntyre

I have been an enforcement professional my whole career, first as a government enforcement attorney, and now (for almost 25 years) as an enforcement defense lawyer. Some of the things that once made me a proud government enforcement lawyer are now a source of frustration, but not just because I am on the other side. Administrator Pruitt foreshadows a Back to Basics agenda for the agency. Following are a few basics that I wish EPA would restore in its enforcement agenda.

In the 1990s EPA/Department of Justice (DOJ) imposed environmental management and pollution prevention obligations on defendants in consent decrees. Back in the day, I was one member of a team that earned EPA's gold medal for work on developing the first consent decree to require a defendant to implement an environmental management system. Those obligations were designed to accelerate development of corporate compliance functions, to reduce pollution, and ostensibly drive toward less regulation. It was easy to press defendants for investment in these types of basic compliance tools. Those obligations, like internal auditing and compliance tracking systems, sparked a field of environmental services that continue to benefit the regulated community, with the help of environmental professionals and electronic tools.

Now in consent decrees, EPA/DOJ demand NextGen monitoring and environmental mitigation from defendants. These programs reflect two worthy policy objectives: (1) to increase self-policing and (2) to achieve environmental justice. However, both programs stretch EPA's authorities to assure compliance with applicable requirements or to assess penalties. The reasonable negotiation approaches once used in consent decree negotiations to encourage the regulated community to invest in basic compliance assurance and to design processes that reduce pollution are now tactics to obtain from each defendant

more investment in well-intended but unrequired monitoring and environmental justice programs. EPA/DOJ demand these concessions in settlement when there is no legal basis for the government to obtain such relief in litigation. It is very difficult to explain this to clients.

In another example, enforcement attorneys at EPA previously used their authority to address significant environmental impacts, to capture economic benefit from noncompliance, and to level the playing field—laudable goals. The outcomes achieved real improvements. EPA's enforcement achieved upgraded municipal sewage treatment systems, hazardous waste reduction, and air pollution control that steadily and measurably reduced national emissions. We were very proud of our work.

Today, agency lawyers struggle to articulate the environmental benefits of their cases. Despite the press release content, settlements result in environmental improvements on the margins. Reported reductions often reflect decreases in *allowable* emissions/discharges, not *actual* emissions reductions. Enforcement actions are often initiated based on an agency employee's refreshed interpretations of long-standing and well-understood rules. In other words, the basic enforcement discretion once used to refer cases with real environmental costs and select defendants with a real economic advantage over competitors, is now misapplied to pursue defendants who acted appropriately, who followed industry practice often with EPA's acknowledgment, and who relied upon historic understandings to comply. It is hard to explain this to clients, too.

Another basic that Administrator Pruitt might address relates to EPA's penalty policies. They are stale. Negotiators contort to apply them to current day facts and to increasingly complex regulatory requirements. Defendants cringe at the inflation factor automatically applied to penalty assessments. When EPA first developed and deployed its penalty policies both the agency and the regulated community had reasonable frameworks and comprehensible factors to apply to devise a fair result. Although we disagreed, all parties understood the reasons, the matrices, and the adjustments. All parties worked within a common paradigm to achieve an acceptable result.

Now, EPA's penalty policies are unworkable. Initial proposals are often extreme and hard to unpack and, as a result, penalty negotiations begin under strained communication. In the course of each settlement discussion, defense lawyers inevitably urge EPA to consider that our clients are businesspeople and business negotiations require rationale to succeed. Decision makers in the regulated community require clarity, value, and certainty to act. The basic construct once used to establish the logical basis for a civil penalty is broken and, absent a coherent approach, EPA's credibility with the regulated community is eroding.

Here are some simple truths: (1) environmental enforcement works; (2) deterrence and a level playing field are essential elements of a working regulatory scheme; and (3) penalties are part of the bargain. EPA's enforcement agenda has moved beyond these basics, however, and outgrown the basic tools of the trade.

Settlements push individual defendants beyond the recognizable boundaries of compliance assurance to address legislative and social gaps. EPA summons its authorities against individual defendants to press updated interpretations of long-standing rules, in lieu of rulemaking negotiations with the larger relevant, regulated community. And, civil penalty negotiations are tethered to outdated policies. Perhaps Administrator Pruitt's Back to Basics agenda could start with a review of current enforcement case selection criteria and settlement policies. Bringing a few old basics back to the enforcement agenda could be a refreshing new twist.

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BACKYARD COMPRESSOR STATIONS PENNSYLVANIA'S PROPOSED GENERAL PERMITS FOR OIL AND GAS OPERATIONS MAY LEAVE THE PUBLIC BEHIND

Alexandria Pierce

On the Fort Cherry School District website, one will find the typical school announcements—science fair results, athletic events, and information for the pending first day back to school. But, what stands out are the links to a "Gas Drilling Letter" and "Air Quality Test Results 2016-2017." This is because this Washington County, Pennsylvania, school district lies on top of Marcellus Shale. Several natural gas facilities—including compressor stations, processing plants, and pigging operations—are within five miles of Fort Cherry schools. More development in the area has been proposed, and both school district officials and parents are concerned. The natural gas industry in Pennsylvania has provided a boost in jobs and further development of the natural gas industry is welcomed by many. Despite these economic benefits, there are rising concerns about the adverse effects on the environment.

The Pennsylvania Department of Environmental Protection (DEP) is authorized to issue air pollution permits under the Pennsylvania Air Pollution Control Act (APCA), which establishes regulations for air contamination sources to protect the public welfare. DEP is also authorized to implement federal Clean Air Act (CAA) requirements and ensure compliance with its State Implementation Plan to attain or maintain National Ambient Air Quality Standards. All emissions sources are required to obtain plan approvals (also known as "permits to construct") and operating permits from the DEP. For sources that are not "major" sources of emissions under the CAA (known as "area sources"), DEP can issue general permits for classes of sources that can be adequately regulated using standardized conditions.

DEP has proposed changes to the GP5 general permit and proposed a new general permit, GP5A (collectively, "GP5/5A"). These general permits are both general plan approvals and general operating permits. The current GP5 only provides pre-construction authorization for conventional natural gas production wells. However, the changes DEP proposes will greatly expand the scope of GP5. The changed GP5 will apply to natural gas compressor stations, transmission stations, and processing plants, while the proposed GP5A will apply to unconventional natural gas production wells and site operations, such as hydraulic fracturing and remote pipeline inspection stations—or, "pigging stations"—which use devices to clean and inspect the pipeline without stopping the flow of product. Many in Washington County fear that these changes to DEP's permitting program will not adequately control air pollution as the natural gas industry further develops operations in the area.

The Environmental Integrity Project (EIP) reflected several of these environmental concerns in its comments to DEP on the proposals. EIP is especially concerned that the permits may be too broad in that all the sources they may authorize will be too varied to be adequately regulated via a standardized process and permit conditions. Additionally, industry is provided little direction on identifying the necessary permits for unconventional operations, like pigging. Because the general permits do not currently apply to unconventional operations, industry is unsure whether to wait until the proposed changes have been made or to continue development as planned without GP5A coverage. This could lead to future compliance disputes. Further, industry should be concerned that relaxed permit requirements informally granted by DEP officials today could subsequently be revoked by rulemaking or enforcement action.

One of the most concerning issues raised by the proposed permit changes is the lack of a public comment period for a facility's application or DEP's intent to grant a general permit to emit under GP-5/GP-5A. Both the CAA and APCA have foundational requirements of public notice and comment for individual source permitting.

This requires DEP to allow industry and public interest groups to prepare comments for the DEP to consider when determining whether and under what conditions to approve a permit to emit pollutants. Where a general permit is used, a community is provided no opportunity to be heard before the DEP on whether a specific facility is going to be subject to emissions controls that are adequately protective of the environment.

By contrast, the Washington County community is allowed public comment on other proposed operations in the area. The Beech Hollow Project, a proposed natural gas power plant, has a planned site just over four miles from the Fort Cherry School District. A hearing on the power plant took place at Fort Cherry High School on July 14, 2017, where community members were provided a forum to comment on the proposed project. Some are concerned about the plant worsening air quality at Fort Cherry, especially when compounded with the other nearby air pollution sources. Fort Cherry School District, in a letter to its local township supervisors and planning commission, noted that there are also industry plans to develop natural gas drill pads, wastewater/freshwater impoundments, and a gas well pad near school district lines. Although community members can submit comments on the Beech Hollow Project, the proposed GP-5/GP-5A will not provide a forum for residents to voice their concerns on a wide variety of these new minor sources. So far, there are nearly 650 facilities already authorized under GP-5 and if proposed changes are made, far more will be granted without community input.

For more information on the proposed changes to GP-5 and GP-5A: http://www.media.pa.gov/pages/DEP_details.aspx?newsid=753

For the GP-5 and GP-5A drafts and supporting documents: http://www.elibrary.dep.state.pa.us/dsweb/View/Collection-13330

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REGIONAL REPORTS

REGION 1

Dixon Pike and Brian Rayback
Pierce Atwood LLP

I. EPA Regional Office Issues

A. Generally Applicable Air Program Implementation

August 2017 – The Regional Greenhouse Gas Initiative ("RGGI") released a report titled "Report On The Secondary Market for RGGI CO2 Allowances: Second Quarter 2017." The Report indicates that CO2 allowance future prices averaged $2.78, down 46% from second quarter of 2016. The Report is available at https://www.rggi.org/docs/Market/MM_Secondary_Market_Report_2017_Q2.pdf.

August 23, 2017 – RGGI states announced a proposed additional 30% cap reduction by 2030, relative to 2020 levels. A public meeting will be held on the proposal on September 25, 2017. The release is available at https://www.rggi.org/docs/ProgramReview/2017/08-23-17/Announcement_Proposed_Program_Changes.pdf.

June 7, 2017 – The 36th RGGI auction on June 7, 2017, resulted in sales of 14,597,470 CO2 allowances at a clearing price of $2.53. The news release is available at http://www.rggi.org/docs/Auctions/36/PR060917_Auction36.pdf.

B. Enforcement Issues

EPA announced an administrative consent agreement with a meat processing facility in MA to resolve allegations that the company mishandled anhydrous ammonia in its refrigeration system and failed to accurately report amounts of ammonia and sulfuric acid at the facility. EPA reported that the company spent about $300,000 on safety upgrades and will pay a penalty of $132,183. EPA's announcement references the General Duty Clause, but not the risk management plan ("RMP") requirements of Section 112(r) of the Clean Air Act. 42 U.S.C. § **7412(r).** The EPA News Release is available at https://www.epa.gov/newsreleases/epa-works-lynn-mass-company-reduce-risk-chemicals-improving-safety-measures.

EPA announced that it reached an agreement with a Rhode Island metals etching company to resolve alleged violations of the Clean Air Act and hazardous waste laws. The company is spending $25,000 to reduce the amount of chlorine it stores and to install alarms and pay a $221,326 penalty. EPA notes that although the company will reduce the amount of chlorine stored below RMP thresholds, it will still be subject to the General

Duty Clause. The news release is available at https://www.epa.gov/newsreleases/epa-works-rhode-island-company-reduce-risks-hazardous-materials.

On May 31, 2017, the U.S. Department of Justice announced that a former operation and maintenance manager of a power plant in Agawam, Massachusetts, was sentenced to 30 months of probation and ordered to pay a fine of $5,000 for tampering with continuous emissions monitoring systems. The release is available at https://www.justice.gov/usao-ma/pr/former-berkshire-power-manager-sentenced-conspiring-tamper-air-pollution-monitors.

On August 15, 2017, EPA announced that emissions controls for mercury will be installed and a penalty of $104,000 will be paid by a sewerage sludge incinerator owned by the City of Waterbury, Connecticut, and operated under contract, according to a proposed agreement lodged in federal court by EPA and the Department of Justice. The agreement would resolve allegations that the facility failed to meet the deadline for complying with EPA's rules regarding mercury emissions. The news release is available at https://www.epa.gov/newsreleases/waterbury-conn-incinerator-control-mercury-emissions.

II. States

A. State Regulations (Proposed/Adopted)

Connecticut

EPA approved SIP revisions proposed by the Connecticut Department of Energy and Environmental Protection ("CT DEEP") to address the nonattainment new source review ("NNSR") requirements for the 2008 8-hour ozone NAAQS. The Federal Register notice is available at https://www.gpo.gov/fdsys/pkg/FR-2017-08-14/pdf/2017-17021.pdf.

In an August 4, 2017, press release, Governor Malloy and CT DEEP Commissioner Klee applauded EPA Administrator Pruitt's announcement that EPA would not postpone the implementation of the 2015 Ozone NAAQS by one year. The press release is available at http://www.ct.gov/deep/cwp/view.asp?A=4918&Q=595210.

On July 26, 2017, CT DEEP released a draft updated energy strategy focusing on decreasing carbon emissions, increasing renewable energy, energy efficiency, modernizing the electric grid and ZEVs. Additional information is available at http://www.ct.gov/deep/cwp/view.asp?a=4405&Q=500752&deepNav_GID=2121.

Maine

EPA approved SIP revisions submitted by the Maine Department of Environmental Protection to repeal Stage II vapor recovery requirements at gas stations as of January 1, 2012. The Federal Register notice is available at https://www.gpo.gov/fdsys/pkg/FR-2017-07-14/pdf/2017-14735.pdf.

Massachusetts

On August 11, 2017, the Massachusetts Department of Environmental Protection issued final regulations establishing, among other things, a carbon dioxide ("CO_2") cap and trade program for affected sources within the Commonwealth to meet its 2008 Global Warming Solutions Act. The new regulations are expected to increase the amount of clean electricity purchased from the regional grid for consumption in the Commonwealth and reduce CO_2 emissions from power plants in Massachusetts by imposing an annually declining aggregate emissions cap on 21 large fossil fuel-fired generators in the Commonwealth. The news release is available at http://www.mass.gov/eea/pr-2017/regulations-issued-to-reduce-greenhouse-gas-emissions.html.

B. State Implementation Plans

Vermont

EPA approved elements of Vermont's SIP proposal regarding the 1997 fine particle matter (PM2.5), 1997 ozone, 2006 PM2.5, 2008 lead (Pb), 2008 ozone, 2010 nitrogen dioxide (NO2), and 2010 sulfur dioxide (SO2) NAAQS. The federal register notice is available at https://www.gpo.gov/fdsys/pkg/FR-2017-06-27/pdf/2017-13055.pdf.

REGION 2

Philip E. Karmel
Bryan Cave LLP

I. EPA Regional Office Issues

A. Generally Applicable Air Program Implementation

Regional Greenhouse Gas Initiative ("RGGI") Update

Buyers at the 37th RGGI auction on September 6, 2017, purchased 14,371,585 CO_2 allowances for $4.35, an increase in price of approximately 72 percent as compared to the prior auction in June 2017. *See* http://rggi.org/docs/Auctions/37/PR090817_Auction37.pdf. Cumulative proceeds from all RGGI CO_2 allowance auctions exceed $2.78 billion. *Id.* The auction occurred soon after the announcement made on August 23, 2017, that the RGGI states have reached agreement on a 30 percent cap reduction by the year 2030, as compared to the current 2020 cap. *See* http://rggi.org/docs/ProgramReview/2017/08-23-17/Announcement_Proposed_Program_Changes.pdf. In a separate development, it appears that New Jersey will rejoin RGGI after a new governor assumes office on January 19, 2018. News reports indicate that the two major party candidates (Phil Murphy [D] and Kim Guadagno [R]) support rejoining the program.

II. States

A. State Implementation Plans

New York and New Jersey Regional Haze Submissions Highlight Emission Reductions

On August 1, 2017, EPA published proposed rules to approve regional haze progress reports submitted by New York (82 Fed. Reg. 35,738) and New Jersey (82 Fed. Reg. 35,734) as revisions to each state's implementation plan (SIP), pursuant to 40 C.F.R. § 51.308. These routine filings are not themselves particularly noteworthy, but they summarize the significant emission reductions that have been achieved in New York and New Jersey as a result of federal and state regulatory programs and the changing economics of energy generation. According to the *Federal Register* notices, from 2002 to 2011, inventoried emissions of sulfur dioxide (SO_2), nitrogen oxides (NOx) and particulate matter (PM) in New York were reduced by 81 percent, 61 percent, and 28 percent, respectively. Over the same time period, inventoried emissions of these pollutants in New Jersey were reduced by 82 percent, 38 percent, and 23 percent, respectively.

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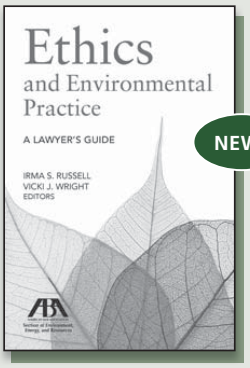

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A Lawyer's Guide
Irma S. Russell and Vicki J. Wright, Editors

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REGION 3
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I. States

A. State Implementation Plans

Delaware

EPA is proposing to approve a state implementation plan (SIP) revision submitted by the state of Delaware regarding reasonably available control technology (RACT) requirements under the 2008 8-hour ozone National Ambient Air Quality Standard (NAAQS), 73 Fed. Reg. 16,436 (Mar. 27, 2008).

The Department of Natural Resources and Environmental Control (DNREC) has proposed revisions to Delaware's SIP, including a certification that the Delaware Emission Statement program and the Preconstruction Review program meet 2008 ozone NAAQS requirements and a declaration that Delaware has no sources covered by EPA's 2016 Oil and Gas Control Techniques Guidelines.

Maryland

EPA approved the following revisions to the state of Maryland's SIP. Maryland requested that EPA incorporate by reference into the Maryland SIP a Maryland Department of the Environment (MDE) order that establishes an alternative volatile organic compound (VOC) emission standard for National Gypsum Company that will ensure that this source remains a minor stationary source of VOCs. Additionally, EPA approved a SIP revision pertaining to Maryland's administrative procedures for the issuance, denial, and appeal of permits issued by the MDE.

Pennsylvania

The Department of Environmental Protection (DEP) has proposed SIP revisions containing the Attainment Demonstration and the Base Year Inventory for the Indiana, Pennsylvania Nonattainment Area and the Beaver, Pennsylvania Nonattainment Area for the 2010 SO_2 1-hour NAAQS. 75 Fed. Reg. 35,520 (Aug. 23, 2010).

Virginia

The Department of Environmental Quality (DEQ) proposed SIP revisions to (1) amend existing regulatory provisions relating to the NAAQS for $PM_{2.5}$; (2) implement RACT requirements for the Northern Virginia Emissions Control Area for the 2008 ozone NAAQS; and (3) maintain compliance with the 2008 ozone NAAQS in the Northern Virginia Ozone Nonattainment Area.

West Virginia

The West Virginia Department of Environmental Protection proposed a SIP revision to include the NOx SIP Call Non-EGU Budget Demonstration that, through the imposition of NOx limitations during ozone season, NOx emissions will not exceed the budget. The maximum potential ozone season NOx emissions total 941 tons, which is less than 50 percent of the budget.

B. State Regulations

Delaware

DNREC has proposed the following regulations, which are expected to become effective in fall 2017:

- Repeal 7 DE Admin. Code 1123, Standards of Performance for Steel Plants: Electric Arc Furnaces. DNREC reviewed the regulation and found that it currently does not apply to any source in Delaware and other more restrictive state and federal requirements would apply to any new furnaces constructed.
- Amend 7 DE Admin. Code 1136 to update the federal reference date in regard to the Acid Rain Program. DNREC determined that there have been a number of updates to portions of 40 C.F.R. parts 72–78 that should be adopted.
- Amend 7 DE Admin. Code 1140 to update the adoption by reference of California's Low Emission Vehicle III and

the greenhouse gas standards. Delaware originally adopted the standards in 2013 and California has since made changes relating to automobile manufacturers. The Clean Air Act (CAA) requires that Delaware state standards be identical to California standards.

Maryland

The MDE and the Motor Vehicle Administration proposed to amend Regulations .01, .03–.05, and .09 under Code of Maryland Regulations 11.14.08. The proposal would delay the initial Vehicle Emissions Inspection Program for new vehicles and exempt pre-on board diagnostics light duty vehicles from inspection. Comments must be received by October 3, 2017.

C. Legislation

Pennsylvania

Proposed legislation: HB 1661, introduced by Representative Carl Walker Metzgar, would provide for the distribution of funds paid into the Environmental Mitigation Trust and distributed to Pennsylvania pursuant to the settlement agreement with Volkswagen. The bill would require, among other things, that at least 60 percent of the funds to be used to deploy vehicles that are certified to one of California Air Resources Board's optional low-NOx standards and vehicles with zero tailpipe emissions. A similar bill, SB 722, was introduced in the Senate by Senator Carmera Bartolotta.

D. Permits/Approvals

Pennsylvania

DEP issued an air quality plan approval on September 8, 2017, to Transcontinental Gas Pipe Line Company, LLC, for air emissions relating to construction activities of the proposed Atlantic Sunrise Pipeline Project in Lancaster County, Pennsylvania. The approval authorizes the use of ERCs to comply with Pennsylvania offset requirements. DEP also approved an application submitted by Perdue Agribusiness, LLC, to use VOC emission reduction credits (ERCs) at its soybean processing facility in Lancaster County in order to comply with the air plan approval issued in May 2016.

Virginia

EPA approved a grant in August for the DEQ to install and operate an air quality monitor and lead detector at the Blacksburg-VPI Sanitation Station to address concerns that the nearby Radford army ammunitions plant is polluting through the open burning of waste. A report on tests conducted last fall found high levels of arsenic, lead, cadmium, chloromethane, and silver.

E. Case Decisions

Delaware

Center for Biological Diversity et al. v. Pruitt: The plaintiffs brought an action before the U.S. District Court for the Northern District of California in July 2016, alleging that EPA failed to perform its duty to make a determination approving or disapproving the Delaware SIP within one year as required by law. In January 2017, the parties entered into a consent decree that requires EPA to make a decision on Delaware's plan to use RACT to control major sources of NOx and VOCs by September 29, 2017. In August 2017, EPA filed a motion for relief from the consent decree, requesting to extend the deadline until February 28, 2018. The court denied EPA's motion and ordered EPA to take action on the Delaware RACT SIP within 90 days of the order (dated Aug. 31, 2017).

F. Enforcement Issues

Maryland

On July 20, the state of Maryland through the MDE, gave notice to EPA Administrator Pruitt of its intent to bring suit under section 304 of the CAA for failure to make a timely determination on Maryland's 126 petition, which alleges that 36 upwind power plant units in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia are significantly contributing to non-attainment in Maryland due to their failure to run pollution controls effectively.

G. Other

Pennsylvania

On August 31, DEP released its 2015 air emissions inventory for unconventional natural gas operations. The inventory shows that emissions of methane and VOCs from unconventional well sites and mid-stream facilities increased, while NOx, SOx, and $PM_{2.5}$ decreased from 2014 levels.

REGION 4

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1. EPA Regional Office Issues

A. Generally Applicable Air Program Implementation

On August 21, 2017, Administrator Scott Pruitt announced the appointment of Trey Glenn as the EPA Region 4 Regional Administrator. Mr. Glenn most recently worked as an independent engineer and consultant focusing on environmental issues. Mr. Glenn previously spent nearly a decade with the Alabama Department of Environmental Management (ADEM), first as ADEM's division director for the Office of Water Resources and then as ADEM's director.

On September 5, 2017, EPA published notice of its responses to state recommendations for the third round of area designations under the 2010 1-hour SO_2 NAAQS. 82 Fed. Reg. 41,903 (Sept. 5, 2017). Within Region 4, EPA has proposed designating all areas addressed in state recommendations as unclassifiable or attainment/unclassifiable with the exception of three areas in Florida that EPA has indicated it believes may be violating the NAAQS, despite state recommendations and information to the contrary. Comments on EPA's proposed designations are due by October 5, 2017. EPA intends to make final designation determinations for the areas of the country addressed by these responses no later than December 31, 2017.

B. Regional—Applicable Court Decisions

On August 22, 2017, the U.S. Circuit Court of Appeals for the D.C. Circuit ruled 2-1 that the Federal Energy Regulatory Commission (FERC) failed to adequately address greenhouse gas emissions under the National Environmental Policy Act from the Sabal Trail natural gas pipeline as part of its decision to grant certificates of public convenience and necessity under section 7 of the Natural Gas Act. Sierra Club v. FERC, No. 16-1329 (D.C. Cir. Aug. 22, 2017). In particular, the court found that FERC failed to fully examine greenhouse gas impacts related to the pipeline project because FERC's environmental impact statement (EIS) for the project failed to consider the impacts from greenhouse gas emissions from the power plants to be served by the proposed pipeline, which runs through Alabama, Georgia, and Florida. The court held that "the EIS for the Southeast Market Pipelines Project should have either given a quantitative estimate of the downstream greenhouse emissions that will result from burning the natural gas that the pipelines will transport or explained more specifically why it could not have done so." The Sabal Trail pipeline is currently constructed and operating.

II. States

A. State Implementation Plans

Alabama

On August 15, 2017, EPA proposed approving of a revision to Alabama's SIP related to regulation of greenhouse gases under the Prevention of Significant Deterioration (PSD) permitting program. 82 Fed Reg. 38,660 (Aug. 15, 2017). EPA's proposal notes several other revisions to Alabama regulations that it has either previously acted on as SIP revisions, will act on in separate actions, or is declining to act on as outside or unnecessary for the SIP. EPA's notice sets a September 14, 2017, comment deadline.

On August 17, 2017, EPA published a direct final rule and parallel proposal approving of a revision to Alabama's SIP that amends transportation conformity rules to be consistent with federal

requirements. 82 Fed. Reg. 39,035 (Aug. 17, 2017) (direct final); 82 Fed. Reg. 39,078 (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are submitted, the direct final rule is effective October 16, 2017.

On August 17, 2017, EPA also separately proposed approval of SIP revisions that would incorporate state allowance trading program regulations for ozone-season NOx emissions to replace EPA's federal trading program regulations for those emissions from Alabama units. 82 Fed. Reg. 39,070 (Aug.17, 2017). EPA's proposed approval includes a September 18 comment deadline.

Finally, EPA also separately proposed approval on August 17, 2017, for a SIP submittal related to compliance with EPA's Regional Haze Rule that would replace Alabama's reliance on the federal Clean Air Interstate Rule with reliance on the Cross-State Air Pollution Rule (CSAPR) as satisfying best available retrofit technology requirements under EPA's Regional Haze Rule for certain units. EPA notes that this proposed approval is contingent on a final determination that CSAPR continues to meet the Regional Haze Rule's best available retrofit technology criteria. In the same notice, EPA also proposed approving of Alabama's infrastructure SIP as meeting visibility requirements for the 2012 fine PM NAAQS, 2010 NO_2 NAAQS, 2010 SO_2 NAAQS, and 2008 ozone NAAQS. 82 Fed. Reg. 39,090 (Aug. 17, 2017). This final notice includes a September 18, 2017, comment deadline.

On August 24, 2017, EPA published a direct final rule and parallel proposal approving of revisions to Alabama's SIP adding a definition of "replacement unit" and clarifying that a replacement unit is a type of existing emission unit under the definition of "emissions unit." 82 Fed. Reg. 40,072 (Aug. 24, 2017) (direct final); 82 Fed. Reg. 40,085 (Aug. 24, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are submitted, the direct final rule is effective October 23, 2017.

Florida

On July 3, 2017, EPA proposed approval of a SIP revision that updated definitions and made administrative revisions to regulations regarding plantwide applicability limits and Florida's Small Business Assistance Program. 82 Fed. Reg. 30,814 (July 3, 2017). The deadline to comment on EPA's proposed approval was August 2, 2017.

On July 3, EPA also published notice of final action approving of a SIP submittal demonstrating attainment for the 2010 1-hour SO_2 NAAQS in Florida's two existing nonattainment areas in Nassau and Hillsborough counties. 82 Fed. Reg. 30,749 (July 3, 2017).

On July 21, 2017, EPA published a direct final rule and parallel proposal approving of a revision to Florida's SIP that would remove nonregulatory introductory language as well as regulations that have been superseded by more stringent regulations. 82 Fed. Reg. 33,807 (July 21, 2017) (direct final); 82 Fed Reg. 33,851 (July 21, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. These revisions were previously submitted to EPA in February 2013. Assuming no adverse comments are submitted, the direct final rule is effective September 19, 2017.

On August 10, 2017, EPA published a direct final rule and parallel proposal that would approve of a Florida SIP submittal addressing infrastructure requirements for the 2010 NO_2 NAAQS relating to monitoring requirements. 82 Fed. Reg. 37,310 (August 10, 2017) (direct final); 82 Fed. Reg. 37,378 (Aug. 10, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are submitted, the direct final rule is effective October 10, 2017.

On August 10, 2017, EPA also proposed approval of portions of five different SIP revisions submitted

between 1999 and 2017 that recodify, clarify, and reorganize Florida's non-title V air permitting and compliance assurance program regulations. 82 Fed. Reg. 37,379 (Aug. 10, 2017). EPA also separately proposed approval of a SIP submittal addressing prongs 1 and 2 of the CAA's interstate transport requirements for infrastructure SIP elements under the 2010 1-hour NO_2 NAAQS. 82 Fed. Reg. 37,384 (Aug. 10, 2017). Both proposed approvals include a public comment deadline of September 11, 2017.

Georgia

On June 29, 2017, EPA proposed approval of a SIP revision incorporating definitions relating to fine particulate matter and amending state rules to reflect the 2008 lead NAAQS. 82 Fed. Reg. 29,466 (June 29, 2017). EPA also separately published a notice proposing approval of changes to existing minor source permitting exemptions and to a definition related to minor source permitting exemptions. 82 Fed. Reg. 29,469 (June 29, 2017).

On August 15, 2017, EPA published a direct final rule and parallel proposal that would approve of SIP revisions related to new source review regulations and other miscellaneous provisions intended to make Georgia's regulations consistent with federal requirements. 82 Fed. Reg. 38,605 (Aug. 15, 2017) (direct final); 82 Fed. Reg. 38,646 (Aug. 15, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are received, the direct final rule is effective October 16, 2017.

On August 15, 2017, EPA also proposed approval of a Georgia Environmental Protection Division report addressing progress toward reasonable progress goals under EPA's Regional Haze Rule and a determination that Georgia's existing SIP adequately addresses Regional Haze Rule requirements. EPA's proposed approval finds that Georgia has met applicable requirements though the initial implementation period (though 2018) and that no substantive revisions are required at this time. 82 Fed. Reg. 38,654 (Aug. 15, 2017). On August 16, 2017, EPA also proposed approving portions of a SIP submission concerning EPA's CSAPR and the Clean Air Interstate Rule (CAIR). This action would approve of state regulations to implement CSAPR requirements in Georgia replacing corresponding federal implementation plan requirements. Approval of these portions of the SIP revision would also satisfy Georgia's good neighbor obligations under the CAA for the 1997 annual fine particulate matter NAAQS, the 2006 24-hour fine PM NAAQS, and the 1997 8-hour ozone NAAQS. In addition, approval of this revision would remove from Georgia's SIP those state trading program rules adopted to comply with CAIR. 82 Fed. Reg. 38,866 (Aug. 16, 2017).

Kentucky

On June 29, 2017, EPA proposed approval of a SIP revision submitted by the Kentucky Division for Air Quality (KDAQ) on behalf of the Louisville Metro Air Pollution Control District (District) that would revise certain stationary source emissions monitoring and reporting requirements. 82 Fed. Reg. 29,467 (June 29, 2017). The notice includes a July 31, 2017, comment deadline. The regulation involved provides the District with the authority to require emissions monitoring at stationary sources and requires certain sources to maintain emissions records and provide annual emissions statements to the District. It does not impose any emissions limits or control requirements on any emissions source.

On July 3, 2017, EPA proposed approval of a SIP revision submitted by the Kentucky Energy and Environment Cabinet (EEC) on behalf of the District. This SIP would remove stage II vapor control requirements for new and upgraded gasoline dispensing facilities and allow for the decommissioning of existing stage II equipment in Jefferson County, Kentucky. 82 Fed. Reg. 30,809 (July 3, 2017). The notice includes an August 2, 2017, comment deadline.

On July 5, 2017, EPA took final action approving of a SIP revision redesignating the Kentucky portion of the Cincinnati-Hamilton nonattainment area to attainment for the 2008 8-hour ozone

NAAQS. 82 Fed. Reg. 30,976 (July 5, 2017). EPA's final action was effective upon publication.

On July 17, 2017, EPA proposed approval of SIP revisions reflecting current and historical NAAQS consistent with the CAA. The subject SIP submittal also included additional air quality standards for hydrogen sulfide, fluorides, and odor; however, EPA did not propose approving those state standards for inclusion into the SIP. 82 Fed. Reg. 32,671 (July 7, 2017). The notice includes a comment deadline of August 16, 2017.

On August 7, 2017, EPA proposed approval of a KDAQ report addressing progress toward reasonable progress goals under EPA's Regional Haze Rule and a determination that Kentucky's existing SIP adequately addresses Regional Haze Rule requirements. EPA's proposed approval found that Kentucky has met applicable requirements though the initial Regional Haze Rule implementation period (though 2018) and that no substantive revisions are required at this time. 82 Fed. Reg. 36,707 (Aug. 7, 2017). The notice includes a September 6, 2107, comment deadline.

On August 8, 2017, EPA took final action approving of a KDAQ SIP submittal addressing infrastructure requirements for the 2012 fine PM NAAQS. 82 Fed. Reg. 37,012 (Aug. 8, 2017). In particular, EPA is approving of interstate transport requirements and minor source program requirements. EPA's final action is effective September 7, 2017.

North Carolina

On August 16, 2017, EPA noticed a direct final rule and parallel proposal approving a SIP revision clarifying North Carolina's transportation conformity rules consistent with federal requirements. 82 Fed. Reg. 38,838 (Aug. 16, 2017) (direct final); 82 Fed. Reg. 38,864 (Aug. 16, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are received the direct final rule is effective October 16, 2017. On August 17, 2017, EPA issued a direct final rule and parallel proposal approving of a SIP revision related to air curtain burners as part of North Carolina's strategy to meet and maintain the NAAQS. 82 Fed. Reg. 39,027 (Aug. 17, 2017) (direct final); 82 Fed. Reg. 39,097 (Aug. 17, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Unless adverse comments are received, the direct final rule is effective October 16, 2017. EPA notes that other portions of the subject SIP submittal will be, or have been, addressed in separate actions.

On July 18, 2017, EPA issued a direct final rule and parallel proposal approving of miscellaneous revisions to North Carolina's SIP, including revisions to open burning rules and additions to the exclusionary rules section of the SIP. 82 Fed. Reg. 32,767 (July 18, 2017) (direct final). 82 Fed. Reg. 32,782 (July 18, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are received, the direct final rule is effective September 18, 2017.

On August 10, 2017, EPA proposed approval of a SIP submission related to interstate transport requirements under the 2008 8-hour ozone NAAQS. 82 Fed. Reg. 37,371 (Aug. 10, 2017). In particular, EPA proposed determining that North Carolina's SIP contains adequate provisions to prohibit emissions within the state from contributing significantly to nonattainment or interfering with maintenance of the 2008 8-hour ozone NAAQS in any other state. The notice includes a comment deadline of September 11, 2017.

South Carolina

On June 29, 2017, EPA published a direct final rule and parallel proposal approving of SIP revisions incorporating the 2010 SO_2 NAAQS, 2010 NO_2 NAAQS, 2012 fine PM NAAQS, and 2015 8-hour ozone NAAQS, and removing the 1997 8-hour ozone NAAQS and the standard for gaseous fluorides. EPA's direct final rulemaking assumes the rulemaking is noncontroversial. 82 Fed. Reg. 29,414 (June 29, 2017) (direct final); 82 Fed.

Reg. 29,466 (June 29, 2017) (parallel proposal). Assuming no adverse comments are filed, the direct final rule is effective August 28, 2017.

On August 10, 2017, EPA proposed approving a SIP submittal implementing CSAPR as a replacement for the existing federal implementation plan. This CSAPR state trading program is substantively identical to the CSAPR federal trading programs, with South Carolina retaining EPA's default allowance allocation methodology and EPA remaining the implementing authority for administration of the trading program. 82 Fed. Reg. 37,389 (Aug. 10, 2017). The notice includes a comment deadline of September 11, 2017.

On August 10, 2017, EPA published a direct final rule and parallel proposal approving of a SIP revision related to new source rules. 82 Fed. Reg. 37,299 (Aug. 10, 2017) (direct final); 82 Fed. Reg. 37,378 (parallel proposal) (Aug. 10, 2017). The approved changes include typographical errors, corrections to make internal references consistent, clarifying revisions, and changes to new source review permitting regulations to make them consistent with federal requirements. EPA notes that there are certain components of pending SIP revisions that it will address in separate actions. EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are submitted, the direct final rule is effective October 10, 2017.

On August 15, 2017, EPA proposed approving a SIP revision addressing infrastructure SIP requirements for interstate transport under the 2010 1-hour NO_2 NAAQS. The interstate transport elements addressed prohibit emissions in one state from contributing significantly to nonattainment, or interfering with maintenance, of the NAAQS in another state. 82 Fed. Reg. 38,646 (Aug. 15, 2017). The notice sets a comment deadline of September 14, 2017.

On August 16, 2017, EPA published a direct final rule and parallel proposal approving a SIP revision related to standards for volatile organic compounds and NOx. 82 Fed. Reg. 38,825 (Aug. 16, 2017) (direct final); 82 Fed. Reg. 38,865 (Aug. 16, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial. Assuming no adverse comments are submitted, the direct final rule is effective October 16, 2017.

On August 17, 2017, EPA published a supplemental proposal addressing the potential effects of ongoing litigation over EPA's CSAPR on EPA's prior proposed approval of South Carolina's assessment that its current regional haze plan, in combination with CSAPR, was sufficient to achieve South Carolina's established reasonable progress goals. 82 Fed. Reg. 39,079 (Aug. 17, 2017). EPA's supplemental proposal includes a September 18, 2017, comment deadline.

Tennessee

On June 29, 2017, EPA published a direct final rule and parallel proposal approving of the Tennessee Department of Environment and Conservation's authority to implement and enforce alternative permit terms and conditions for plating and polishing operations with respect to the operation of the Ellison Surface Technologies, Inc., facility in Morgan County, Tennessee, as a substitute for applicable National Emission Standards for Hazardous Air Pollutants. 82 Fed. Reg. 29,432 (June 29, 2017) (direct final); 82 Fed. Reg. 29,470 (June 29, 2017) (parallel proposal). EPA's direct final rulemaking assumes the rulemaking is noncontroversial.

On July 7, 2017, EPA published final approval of a noninterference demonstration that evaluates whether a change in the federal Reid Vapor Pressure (RVP) requirements in Shelby County would interfere with Tennessee's ability to meet applicable NAAQS. Specifically, Tennessee's noninterference demonstration concludes that relaxing the federal RVP requirement from 7.8 pounds per square inch (psi) to 9.0 psi for gasoline sold between June 1 and September 15 of each year in Shelby County would not interfere with attainment or maintenance of the NAAQS. 82 Fed. Reg. 31,462 (July 7, 2017). EPA's final approval is effective July 7, 2017.

On June 15, 2017, EPA published a conditional approval of Tennessee's infrastructure SIP submittal for the 2010 1-hour NO_2, 2010 1-hour SO_2, and 2012 annual fine PM NAAQS with respect to the CAA's visibility transport requirements. 82 Fed. Reg. 27,428 (June 15, 2017). EPA notes that all other applicable infrastructure SIP requirements applicable with respect to these NAAQS have been or will be addressed in separate rulemakings. EPA's approval is effective July 17, 2017.

B. State Regulations

Alabama

On September 6, 2017, the Alabama Department of Environmental Management (ADEM) held a hearing to consider proposed revisions to Division 335-1 (General Administration) and Division 335-3 (Air Division) of the ADEM Administrative Code. This includes revisions to rules 335-1-1-.03, 335-1-1-.04, and 335-3-3-.05. ADEM has proposed revisions to rules 335-1-1-.03 and 335-1-1-.04 to include the federal CAA requirements that members of boards and commissions, (who oversee state air quality efforts) conform to requirements in the CAA involving disclosure of potential conflicts of interest. In addition, revisions to rule 335-3-3-.05 are being proposed to incorporate an equivalent production-based mercury emission limit and add additional monitoring and record-keeping requirements for existing commercial and industrial solid waste incineration units in the waste-burning kiln category.

Florida

On August 23, 2017, the Florida Department of Environmental Protection (FDEP) published a hearing notice in the *Florida Administrative Register* concerning a proposed SIP revision to confirm that Florida's existing regulations meet the CAA's infrastructure SIP requirements for interstate transport under the 2008 ozone NAAQS. FDEP previously prepared and submitted a SIP revision addressing other infrastructure SIP requirements for the 2008 ozone NAAQS. The public hearing is scheduled for September 26, 2017 (if requested), and FDEP also requested any comments from EPA by that date.

Georgia

On June 28, 2017, the Georgia Environmental Protection Division adopted a variety of miscellaneous updates to rule 391-3-1, including revisions related to work practice standards applicable to cotton gins and CSAPR.

Kentucky

The Kentucky EEC conducted a public hearing on Aug. 24, 2017, to receive comments on a proposed revision to Kentucky's SIP to opt out of the federal reformulated gasoline (RFG) program in Boone, Campbell, and Kenton Counties. The submittal for the revised SIP would demonstrate that the removal of the RFG requirements would not interfere with attainment or maintenance of the 2008 ozone NAAQS.

Mississippi

The Mississippi Commission on Environmental Quality (Commission) accepted comments through July 27, 2017, on a proposed SIP revision providing that at least a majority of the members of the Commission not receive a significant portion of their income from persons regulated under the CAA. The SIP revision would also incorporate the addition of revisions to section 49-2-5 Mississippi Code Annotated.

North Carolina

The North Carolina Department of Environmental Quality has also noticed a number of public hearings and public comment periods on a variety of agency actions, including:

- a hearing on May 18, 2017, to receive comments on the amendment of PSD rules (these revisions were approved by the Environmental Management Commission at its July 13, 2017, meeting and were approved on August 17, 2017, by the Rules Review Commission);
- a hearing on August 3, 2017, to receive comments on amendments to ozone-related regulations to reflect the 2015 ozone NAAQS and to meet state periodic review requirements;
- a hearing on September 27, 2017, receive

comments on proposed amendments to regulations for sewage sludge incineration units to incorporate emission guidelines requirements for existing facilities in 40 C.F.R. part 60, subpart MMMM; and

- a hearing on November 29, 2016, to receive comments on a request for delegation of authority to implement and enforce the CAA section 111(d)/129 federal plan under 40 C.F.R. Part 62, subpart LLL—Federal Plan Requirements for Sewage Sludge Incineration Units Constructed on or Before October 14, 2010.

C. Permit Challenges

Kentucky

On June 2, 2017, Sierra Club filed a petition with EPA objecting to issuance of a revised title V permit for Kentucky's Mill Creek Generating Station based on allegations that a 720-hour rolling sulfur dioxide emission standard in the permit is unlawful and jeopardizes public health. Sierra Club's petition generally argues that the 720-hour rolling standard is inadequate in light of the 2010 1-hour SO_2 NAAQS. Sierra Club's petition remains pending as of September 13, 2017. A copy may be obtained online in EPA's Title V Petition Database.

North Carolina

On June 30, 2017, EPA granted a Sierra Club petition objecting to a title V operating permit renewal for Duke Energy's Roxboro and Ashville Steam Electric Plants. Petitions Number IV-2016-07; IV-2016-06. The petitions generally claimed that the SO_2 emission limits in the proposed permits were insufficient to prevent an exceedance of, or contribution to, the violation of the 2010 1-hour SO_2 NAAQS as required by the North Carolina SIP. EPA found that the petitions had demonstrated that the title V permits and permit records were unclear regarding when and how applicable North Carolina regulations would require an emission limit in the title V permit to ensure that the 2010 1-hour SO_2 NAAQS is not violated. In addition, EPA found that the permits were insufficient to explain whether more stringent SO_2 emissions limits were required.

D. Other

Mississippi

Mississippi's Environmental Permits Division (EPD) announced that Krystal Rudolph was chosen to replace Harry Wilson as the chief of the EPD in the Office of Pollution Control. Mr. Wilson retired on June 30, 2017. Ms. Rudolph has worked within the Mississippi Department of Environmental Quality for more than 16 years in both the EPD and the Air Division. She most recently served as interim manager of the Energy and Transportation Branch in EPD.

REGION 5

Gary Pasheilich
Squire Patton Boggs (US), LLP

I. States

A. State Implementation Plan

Illinois

EPA issued a proposed rule approving a SIP revision to amend requirements applicable to certain coal-fired electric generating units (EGUs). Will County 3 and Joliet 6, 7, and 8 EGUs are to permanently cease combusting coal. Other EGUs are to cease combusting coal as an alternative means of compliance with mercury emission standards. The revisions also exempt the Will County 4 EGU from SO_2 control technology requirements and require EGUs to comply with a group annual NOx emission rate. 82 Fed. Reg. 41,376 (Aug. 31, 2017).

EPA issued proposed and direct final rules approving revised rules to include the 2015 primary NAAQS for ozone, add monitoring methods, and address EPA's revocation of the 1997 ozone NAAQS. In addition, the revised rules contain the timing requirements for the "flagging of exceptional events" (events that can affect air quality monitoring data) and the submission of documentation supporting exceptional events for

the initial area designations for the 2015 primary annual ozone standard. 82 Fed. Reg. 32,782 (July 18, 2017), 82 Fed. Reg. 32,771 (July 18, 2017).

EPA issued proposed and direct final rules approving a SIP revision that includes a certification that the existing annual emissions statement satisfies the CAA emissions statement requirement for the Illinois portions of the Chicago-Naperville, Illinois-Indiana-Wisconsin, and St. Louis-St. Charles-Farmington, Missouri-Illinois nonattainment areas under the 2008 ozone NAAQS. 82 Fed. Reg. 31,913 (July 11, 2017), 82 Fed. Reg. 31,931 (July 11, 2017).

Indiana

EPA issued a final rule approving a SIP revision to (1) redesignate the Indiana portion of the Cincinnati-Hamilton, OH-IN-KY, nonattainment area to attainment for the 1997 $PM_{2.5}$ annual NAAQS; (2) approve Indiana's updated emissions inventory that includes emissions inventories for volatile organic compounds and ammonia; and (3) approve a maintenance plan that includes a budget for the mobile source contribution of $PM_{2.5}$ and NOx. 82 Fed. Reg. 41,527 (Sept. 1, 2017).

EPA issued a proposed rule approving a SIP revision for infrastructure requirements of CAA section 110 for the 2012 $PM_{2.5}$ NAAQS. 82 Fed. Reg. 41,379 (Aug. 31, 2017).

Michigan

EPA issued a proposed rule approving a SIP revision that contains changes to the permit-to-install requirements. 82 Fed. Reg. 38,561 (Aug. 15, 2017).

Minnesota

EPA issued a proposed rule approving a SIP revision to demonstrate the sufficiency of interstate transport requirements for the 2008 ozone NAAQS. 82 Fed. Reg. 32,673 (July 17, 2017).

EPA issued a proposed rule approving a SIP revision addressing state board requirements and infrastructure requirements for the 1997 ozone, 1997 $PM_{2.5}$, 2006 $PM_{2.5}$, 2008 lead, 2008 ozone, 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS. 82 Fed. Reg. 32,669 (July 17, 2017).

EPA issued a proposed rule approving a SIP revision for PSD rules, which incorporate federal rules by reference. 82 Fed. Reg. 31,741 (July 10, 2017).

Ohio

EPA issued proposed and direct final rules approving a SIP revision to address various formatting issues and to correct errors and omissions, including the removal of facilities and units permanently shut down and modifying certain source applicability exclusions. 82 Fed. Reg. 31,931 (July 11, 2017), 82 Fed. Reg. 31,916 (July 11, 2017).

Wisconsin

EPA issued proposed and direct final rules approving a SIP revision that imposes certain requirements at the mineral wool production process at the USG Interiors LLC facility located in Walworth, Wisconsin (USG-Walworth), including a requirement for a taller cupola exhaust stack and a SO_2 emission limit related to the minimum cupola stack flue gas flow rate. 82 Fed. Reg. 31,458 (July 7, 2017), 82 Fed. Reg. 31,546 (July 7, 2017).

Gary Pasheilich is an attorney in the Environmental, Safety, and Health practice group at Squire Patton Boggs (US), LLP in Columbus, Ohio, where his practice focuses on a wide range of issues including air permitting and regulatory compliance.

REGION 6

John King
Breazeale, Sachse & Wilson LLP

I. States

A. State Implementation Plans

Louisiana

The Baton Rouge area has been formally redesignated as in attainment of the 2008 ozone NAAQS. EPA redesignated the Greater Baton Rouge Nonattainment Area (BRNA) to attainment for the 2008 8-hour ozone NAAQS. EPA also approved Louisiana's 10-year maintenance plan for maintaining attainment in the BRNA. The designation is the culmination of decades of efforts to improve air quality, which involved industry, the public, and the Louisiana Department of Environmental Quality (LDEQ).

B. State Regulations

Arkansas

The Arkansas Department of Environmental Quality (ADE) is seeking comments on its proposal to revise its regional haze state implementation plan to achieve even greater reductions in nitrogen oxides than EPA's 2016 federal implementation plan for regional haze. The state plan revision will allow Arkansas electricity-generating units to comply with regional haze requirements through participation in the Cross-State Air Pollution Rule.

Louisiana

LDEQ finalized a rule allowing mobile sources to generate emission reduction credits (ERCs). Previously, only stationary sources could generate ERCs. In order to be eligible to generate ERCs, on-road mobile sources must be part of a commercial, governmental, or institutional fleet, must be capable of being used or operated for their intended purpose, and must be no more than 20 years old. To qualify, emission reduction strategies may include, among others, exhaust control technologies in which a pollution control device is installed or the installation of a technology or device that reduces unnecessary idling.

Texas

The Texas Commission on Environmental Quality finalized a revision to the rules relating to open burning, based on a petition for rulemaking filed by the Texas Forestry Association. The new rule provides specific requirements for prescribed burning conducted by certified and insured prescribed burn managers who are certified by the Texas Department of Agriculture. The additional revisions include a change in timing for open burns and removal of the "flag-person" requirement.

C. Other

Arkansas

The ADEQ joined the Ozone Advance Program, a voluntary program designed to ensure continued compliance with the ozone NAAQS and enhance collaborative efforts among EPA, states, local governments, businesses, and industry. ADEQ developed a draft plan to implement voluntary measures and programs to reduce ozone pollution in Crittenden County, and has requested public input on the development of its Ozone Advance Path Forward plan for Crittenden County. While the county's current ozone design value is below the 2015 ozone NAAQS of 70 parts per billion, it is within 6 percent of the 2015 ozone NAAQS. ADEQ hopes that voluntary emissions reduction strategies implemented under the Ozone Advance program will help ensure that ozone levels in Crittenden County remain in compliance with the ozone NAAQS.

New Mexico

Small businesses in New Mexico will benefit from a compliance assessment program developed by the New Mexico Environment Department (NMED). The program offers free assistance to small businesses that discover air quality permit violations, voluntarily disclose the violation(s) to NMED, and correct them within a specified time frame.

REGION 7

Alicia K. Baumhoer
AECI

I. EPA Regional Office Issues

Other

Cathy Stepp, former secretary of the Wisconsin Department of Natural Resources (WDNR), has resigned to become a deputy administrator in EPA's Region 7. Prior to becoming secretary of WDNR, Stepp served as a Wisconsin state senator from 2003 to 2007 and was appointed as DNR secretary by Governor Scott Walker in 2011.

II. States

A. State Implementation Plans

Iowa

On August 25, 2017, EPA released a final ruling approving a revision to the Iowa SIP to incorporate an amendment to an administrative consent order for Grain Processing Corporation (GPC). The consent order allows the state to have more time to complete the processing of an air construction permit application submitted by GPC.

B. Administrative Rulings

Iowa

The Iowa Department of Natural Resources (IDNR) entered into an administrative consent order with soybean processor CHS, Inc. (CHS), on July 21, 2017. Stack tests dating back to July 2014 revealed violations of PM and PM less than 10 microns in diameter (PM_{10}) emission limits. After failing to meet the standards of several compliance plans submitted to IDNR over a 34-month period and failing to obtain a PSD permit, CHS has been ordered to take the following actions:

- Pay a $10,000 penalty;
- Make two baghouses operational at its Creston, Iowa, plant by April 16, 2018; and
- Demonstrate compliance with PM and PM_{10} emission limits within 90 days of April 16, 2018.

IDNR entered into an administrative consent order with pork processor Seaboard Foods of Iowa, LLC (Seaboard). IDNR found that in 2013 Seaboard installed a vertical column driver without an air quality construction permit or a valid small unit exemption. Additionally, Seaboard replaced baghouses that it reported to have originally been damaged by an explosion. However, Seaboard failed to obtain a construction permit modification or a determination from IDNR that the replacement baghouse was identical to the original baghouse. Due to these errors, IDNR found that Seaboard operated without required control technology for two months. IDNR ordered Seaboard to take the following actions:

- Comply with requirements regarding maintenance and repair requirements;
- Contact IDNR prior to knowingly operating any equipment in a manner that may lead to excess emissions;
- Comply with the Iowa statute regarding excess emissions;
- Cease operating its feed mill equipment without notification to IDNR when control equipment is not functioning or excess emissions are taking place; and
- Pay a $5000 penalty.

Missouri

The Missouri Public Service Commission (PSC) released an opinion on August 16, 2017, denying Clean Line Energy Partners LLC's application for a certificate of convenience and necessity for its Grain Belt Express (GBE) project. GBE had proposed a $2.5 billion transmission line, but the PSC found that GBE had failed to meet its burden of proof. GBE was unable to demonstrate that it had obtained all county assents necessary under state law. GBE is intended to transport 4000 MW of wind power from western Kansas to Missouri, Illinois, Indiana, and other states.

C. Permits

Kansas

The Kansas Department of Health and Environment (KDHE) has a pending permit

application from Exide Technologies to modify a construction permit issued in 2014 in order to upgrade its ventilation system and install 14 new curing ovens at its facility in Salina, Kan.

D. Case Decisions, Suits

Kansas

The U.S. District Court for the District of Kansas issued a consent decree between the United States and Hacros Chemicals Inc. Hacros operates 31 chemical manufacturing, blending, repackaging and/or distribution facilities across 19 states, with headquarters in Kansas City, Kan. Hacros violated section 112(r)(1) of the CAA by failing to identify all hazards that may result from releases of hazardous substances using appropriate hazard assessment techniques; failing to design and maintain a safe facility; and by minimizing the consequences of accidental releases that may occur. Prior to consent decree negotiations, three "pilot" audits were conducted at Hacros facilities, revealing deficiencies with General Duty Clause and Risk Management Program requirements. The consent decree orders Hacros to implement CAA compliance measures and submit its facilities to independent compliance audits. Additionally, Hacros must implement a supplemental environmental project to install foam-based fire suppression systems at a cost of approximately $2.5 million. Lastly, Hacros must pay a $950,000 civil penalty to the federal government.

Nebraska

On July 25, 2017, a Nebraska state court ordered Gothenburg Feeds Products Company to pay a $3000 penalty for exceeding opacity limits at an alfalfa dehydration plant. The Nebraska Department of Environmental Quality (NDEQ) received complaints of excessive dust being emitted at the company's Gothenburg, Neb., plant in January of 2015. A NDEQ inspector completed an EPA approved Method 9 visual opacity test at the facility, finding opacity levels of 20 percent to 50 percent, with an average of 34.37 percent opacity during a six-minute test. The NDEQ limit for alfalfa dehydration facilities is 30 percent.

E. Other

Kansas

EPA awarded an additional $499,009 to the Kansas Department of Health and Environment's Air Pollution Control Program. The money will be used to support programs that implement CAA requirements.

REGION 8

Chelsea Grossi and Tarn Udall
Davis Graham & Stubbs LLP

I. States

A. State Regulations

Colorado

The Colorado Air Quality Control Commission will hold a rulemaking to consider revisions to Colorado's Regulation Number 7 ("Regulation No. 7"). The revisions address RACT requirements for each category of sources covered by EPA oil and gas control techniques guidelines (CTGs) in Colorado's ozone SIP. The proposed revisions would address the CAA requirements for areas classified as moderate nonattainment.

The Denver Front Range is in moderate nonattainment; therefore, Colorado must revise its SIP to include RACT requirements for each category of VOC sources covered by a CTG. EPA finalized the CTGs for the oil and gas industry in 2016, and Colorado must comply with the SIP submittal deadline of October 27, 2018. In many cases, Colorado has comparable—or even more stringent—regulations than those in the CTGs, but many of the provisions are not contained in Colorado's SIP. Therefore, the rulemaking aims to revise Regulation No. 7 to include existing state-only requirements for inclusion in Colorado's ozone SIP, propose new requirements for inclusion in Colorado's ozone SIP, and revise and/or clarify existing SIP and state-only provisions. The rulemaking hearing is set for October 19–20, 2017.

South Dakota

The South Dakota Department of Environment and Natural Resources (DENR) is proposing changes to the fee structure for its CAA title V air quality operating permit program. In 1994, DENR set the fee at $6.10 per ton of regulated pollutants emitted from permitted sources and increased the fees to $7.50 per ton of regulated pollutants in 2010. These state fees are lower than the maximum fee permitted under the CAA in an EPA-administered program. Due to increasing costs of implementing the program, South Dakota's existing fee structure does not cover the cost of the program. The CAA requires the fee to cover the entire cost of the program. As a consequence, South Dakota is proposing revisions to its administrative code to ensure DNER has enough resources to implement the title V permit program in South Dakota and maintain its approval status from EPA. The proposed changes include increases in annual administrative fees, fees for the actual amount of pollution emitted from each permitted air pollution source (up to $8.10/ton), and application fees.

A hearing is set for October 18, 2017, before the secretary of DNER to consider the changes. The proposed changes would not impact air fees paid by ethanol plants. Comments are due by October 30, 2017.

B. Case Decisions

Wyoming

On August 31, 2017, a judge for the U.S. District Court for the Northern District of California ruled that the CAA expressly prohibited the state of Wyoming's claims against Volkswagen. *In re: Volkswagen "Clean Diesel" Marketing, Sales Practices, and Products Liability Litigation*, 2017 WL 3816738, No. 16-cv-6646 (N.D. Cal. Aug. 31, 2017). Wyoming brought its case due to Volkswagen's installation of software in its "clean diesel" vehicles that hid accurate emission levels of nitrogen oxide. A number of other states filed similar actions in state courts. Volkswagen previously settled with Wyoming and most other states over consumer matters but not over environmental matters.

Wyoming filed suit in November 2016 in the U.S. District Court for the District of Wyoming based on the operation of the Volkswagen's diesel vehicles within the state, and the case was then transferred to the California federal court. Of the 600,000 "clean diesel" vehicles Volkswagen sold in the United States, approximately 2000 were registered in Wyoming as of 2015. Wyoming claimed that for each day one of those vehicles was operated in the state, Volkswagen violated tampering and concealment provisions of Wyoming's SIP. Wyoming sought billions of dollars in penalties.

The court wrestled with the issue of whether the CAA permitted Wyoming's action. In granting Volkswagen's motion to dismiss, the court reasoned that Wyoming was seeking to "enforce [a] standard relating to the control of emissions from new motor vehicles," 42 U.S.C. § 7543(a), and the CAA prohibits states from enforcing those standards. Volkswagen is expected to seek dismissal of the similar state actions.

Utah

On September 11, 2017, the Tenth Circuit stayed the Obama administration's plan to cut haze-forming emissions from two coal-fired power plants in Utah. *See State of Utah v. EPA*, No. 16-9541 (10th Cir. Sept. 11, 2017). A two-judge panel granted a request to stay EPA's regional haze plan by the state of Utah, two Utah counties, and the owners and operators of Utah power plants, which was published in July 2016. *See* 81 Fed. Reg. 43,894 (July 5, 2016). The plan was developed to improve visibility at national parks and wilderness areas. The Trump administration has announced its intent to revisit the regional haze plan, and the Tenth Circuit found that a stay would preserve the parties' and the court's resources given EPA's decision to reconsider the 2016 regulations.

C. Other

North Dakota

The North Dakota Department of Health announced it will award approximately $162,000 in grants to eight public schools for the replacement of old diesel-powered school buses with new

diesel-powered school buses. The grants are made through EPA. The Diesel Emissions Reduction Act (DERA), which is part of the 2012 Energy Policy Act, provides funds to states for projects that reduce diesel emissions. These competitive grants for the school bus replacements are part of North Dakota's fiscal year 2016 DERA funding. Each of the eight schools will receive approximately $20,000. The funds will be used for up to 25 percent of the cost of a new, cleaner vehicle powered by a 2013 or newer certified engine.

Montana

The Montana Departments of Public Health and Human Services and Environmental Quality (MDEQ) have been encouraging residents and visitors to minimize exposure to poor air quality due to rampant wildfires. Compromised air quality during the summer wildfire months is not unusual, but the 2017 season has been particularly bad; some areas of Montana have endured persistent poor air quality conditions. MDEQ provides daily updates (*see* http://svc.mt.gov/deq/todaysair/) on wildfire smoke and air quality. At this site, MDEQ offers particulate concentrations and health effects from monitoring equipment throughout the state. Additionally, EPA maintains an Air Quality Index (*see* https://www.airnow.gov/index.cfm?action=airnow.local_state) to measure harm from wildfires. The index assists regulators in comparing health risks across different pollutants, including ozone and sulfur dioxide. The Air Quality Index has shown that air in some parts of Montana has obtained the worst-case "hazardous" levels this summer.

REGION 9

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I. EPA Regional Office Issues

A. Environmental Appeals Board Decisions

On June 20, 2017, the Environmental Appeals Board dismissed for lack of jurisdiction a petition to review a modification to Delta Energy Center's permit under the PSD program. *In Re: Delta Energy Ctr.*, PSD Appeal 17-01, 2017 WL 2726844, at *1 (EPA June 20, 2017). Delta operates a combined cycle gas-fired power plant in Pittsburg, California. *Id.* The Bay Area Air Quality Management District (BAAQMD) issued the PSD permit to Delta in 1999 as a federal permit under delegated authority from EPA. *Id.* After a fire at the plant, Delta petitioned the California Energy Commission to amend its license to allow it to make temporary modifications to the plant's steam turbine so necessary repairs could be made while the plant operated in simple cycle mode. *Id.* at *3. The request was approved. *Id.*

Petitioners challenged the action, arguing that the approval illegally modified Delta's PSD permit and that BAAQMD failed to participate in the amendment process. *Id.* After reviewing the statutory and regulatory history, the EAB concluded that, as of August 31, 2016, BAAQMD obtained authority to administer its own PSD program, which transferred to BAAQMD responsibility for all relevant PSD permits, including the Delta PSD permit. *Id.* at *5–6. The board concluded that it "lacks jurisdiction under 40 C.F.R. part 124 to adjudicate challenges to a PSD permit, or permit modification, when an agency such as BAAQMD has obtained EPA approval to administer the PSD program." *Id.* at *6.

B. Enforcement Issues

On May 4, 2017, EPA Region 9 announced settlement with three trucking companies for

violating California's Truck and Bus Regulation. *See* News Release, U.S. EPA Settles with Three Trucking Companies over California Diesel Rule, *available at* https://www.epa.gov/newsreleases/us-epa-settles-three-trucking-companies-over-california-diesel-rule (May 4, 2017). To comply with this rule, trucking companies must upgrade their vehicles to meet specific NOx and particulate matter performance standards, and verify that vehicles that they hire or dispatch are also in compliance. While some companies failed to install particulate filters on their own heavy-duty diesel trucks, others failed to verify that trucks they hired for use in California had complied with the state rule. The settlement required three companies to pay a total of $201,000.

II. States

A. State Implementation Plans

California

On June 12, 2017, EPA approved revisions to the California SIP to achieve attainment of the 1997 8-hour ozone NAAQS in the Coachella Valley nonattainment area. The Coachella Valley is classified as Severe-15 and must achieve attainment no later than June 15, 2019. EPA approved the reasonably available control measures, transportation control strategies and measures, rate of progress and reasonable further progress demonstrations, attainment demonstration, and vehicle miles-traveled offset demonstration. Approval and Promulgation of Implementation Plans; State of California; Coachella Valley; Attainment Plan for 1997 8-Hour Ozone Standards, 82 Fed. Reg. 26,854 (June 12, 2017).

On June 23, 2017, EPA approved revisions to the California SIP applicable to the Western Mojave Desert ozone nonattainment area. In this action, EPA approved the initial six-year 15 percent rate of progress determination for the 1997 8-hour ozone NAAQS. Approval of California Air Plan Revisions, Western Mojave Desert, Rate of Progress Demonstration, 82 Fed. Reg. 28,560 (June 23, 2017).

On July 3, 2017, EPA approved revisions to four permitting rules of the Mendocino County Air Quality Management District portion of the California SIP. The revisions include changes to required permit conditions, new source review standards, and permit application procedures. The EPA approved the revisions, except that it disapproved of the district's failure to include a statement requiring modeling to be conducted in accordance with 40 C.F.R. part 51, appendix W.

On August 14, 2017, EPA approved revisions to the San Joaquin Valley Unified Air Pollution Control District portion of the California SIP regarding emissions of NOx, carbon monoxide, oxides of sulfur, and PM_{10} from boilers, steam generators, and process heaters. Approval of California Air Plan Revisions, San Joaquin Valley Unified Air Pollution Control District, 82 Fed. Reg. 37,817 (Aug. 14, 2017).

On August 15, 2017, EPA approved revisions to the Placer County Air Pollution Control District portion of the California SIP. The revisions relate to the district's RACT demonstration for the 1997 and 2008 8-hour ozone National Ambient Air Quality Standards (NAAQS). The revisions also contain negative declarations for the polyester resin source category for the 2008 8-hour ozone standard. Approval of California Air Plan Revisions, Placer County Air Pollution Control District, 82 Fed. Reg. 38,604 (Aug. 15, 2017).

Nevada

On June 7, 2017, EPA approved revisions to Nevada's April 3, 2012, SIP submission, as well as its August 26, 2016, supplement. These revisions address the requirement to submit by the eighth year of the first maintenance plan a second 10-year maintenance plan for carbon monoxide emissions in the Lake Tahoe area. The revisions include a surrogate monitoring method for carbon monoxide in the area, which requires the state to rely on the indirect indicator of traffic counts. EPA's final action revised the effective date to July 7, 2017. Air Plan Approval; Nevada, Lake Tahoe; Second 10-

Year Carbon Monoxide Limited Maintenance Plan, 82 Fed. Reg. 26,351 (June 7, 2017).

On June 16, 2017, EPA approved revisions to the Clark County Department of Air Quality and Washoe County Health District portions of the Nevada SIP regarding particulate matter emissions from fugitive dust and wood burning. The rule adopted EPA Test Method 9 to determine compliance and added national wood heater requirements. Approval of Nevada Air Plan Revisions, Clark County Department of Air Quality and Washoe County Health District, 82 Fed. Reg. 27,622 (June 16, 2017).

On August 8, 2017, EPA approved a revision to the Nevada Regional Haze SIP consisting of a five-year progress report documenting progress toward achieving visibility goals by 2018 in Class I federal areas in Nevada and neighboring states. Nevada's submission indicated that no SIP revisions would be necessary to make progress toward the reasonable progress goals, and EPA agreed. Approval and Promulgation of State Implementation Plans; Nevada; Regional Haze Progress Report, 82 Fed. Reg. 37,020 (Aug. 8, 2017).

B. Case Decisions, Suits

California

In *Sierra Club v. North Dakota*, the Sierra Club sued to compel EPA to promulgate regional designations following revision of the 2010 SO_2 NAAQS. *Sierra Club v. North Dakota*, No. 15-15894, 2017 WL 3687448 (9th Cir. Aug. 28, 2017). The District Court for the Northern District of California approved a consent decree between the parties, which contained a schedule for EPA to issue the required designations. *Id.* at *1. Several states, which had intervened in the underlying action, appealed the court's approval of the consent decree. On appeal, the states argued "that the Consent Decree improperly disposes of their claims, imposes duties and obligations on the States without their consent, and is not 'fair, adequate and reasonable' because its deadlines far exceed the Act's three-year period to promulgate designations." *Id.* at *3. The Ninth Circuit held that the consent decree did not dispose of the states' claims, nor did it impose duties and obligations on the states without consent because the requirements complained of originated in the Data Requirements Rule, not the consent decree. *Id.* at *4; *see also* Data Requirements Rule for the 2010 1-Hour Sulfur Dioxide (SO2) Primary National Ambient Air Quality Standard (NAAQS), 80 Fed. Reg. 51,052 (Aug. 21, 2015). Ultimately, the Ninth Circuit upheld the consent decree, finding it to be a fair, adequate, and reasonable resolution to EPA's delay.

In *Center for Biological Diversity, et al. v. Scott Pruitt*, defendant Scott Pruitt sought relief from a consent decree requiring EPA to approve, disapprove, or conditionally approve Delaware's plan to use reasonably available technologies to control major sources of NOx and VOCs by September 29, 2017. No. 16-CV-04092-PJH, 2017 WL 3782696, at *1 (N.D. Cal. Aug. 31, 2017). EPA argued that its decision for Delaware's SIP may turn on its ongoing policy review into related start-up, shutdown, and malfunction rules. *Id.* at *2. The court rejected Pruitt's contention because any alleged "change in circumstances" was of EPA's own making and whether EPA's policy review will impact the SIP decision is speculative at this juncture. *Id.* at *3. The court also held that, even if EPA had demonstrated a change in circumstances justifying relief, EPA's request to indefinitely extend the deadline in the consent decree was not suitably tailored. *Id.*

CLE WEBINAR

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REGION 10

David Weber and Gus Winkes
Beveridge & Diamond, P.C.

I. EPA Regional Office Issues

A. Region-issued Permits

On August 11, 2017, EPA approved requests by the Wheeler Pit facility on the Yakima Indian Reservation for coverage under two general permits for air emissions sources. These include the General Air Quality Permit for New or Modified Minor Source Stone Quarrying, Crushing and Screening Facilities in Indian Country and the General Air Quality Permit for New or Modified Minor Source Concrete Batch Plants in Indian Country.

B. Enforcement Issues

EPA Region 10 entered into several minor settlements for allegations regarding violations of the Risk Management Plan requirements in section 112(r) of the Clean Air Act in administrative enforcement actions. These include expedited settlement agreements with RainSweet, Inc. (East Plant) in Salem, Oregon, on May 31, 2017 (Dkt. No. CAA-10-2017-0071); Pendleton Flour Mills LLC in Pendleton, Oregon, on May 1, 2017 (Dkt. No. CAA-10-2017-0057); and Mill Creek Water Treatment Plant in Walla Walla, Washington, on April 26, 2017 (Dkt. No. CAA-10-2017-0085).

II. States

A. State Implementation Plans

Alaska

On August 28, 2017, EPA issued a final rule approving SIP revisions submitted by the Alaska Department of Environmental Conservation (ADEC) on September 15, 2016. These revisions primarily update adoptions of federal regulations in the Alaska SIP. The revisions also strengthen Alaska's minor source permitting requirements and remove obsolete source-category specific regulations. In addition, EPA approved SIP revisions to Alaska's general and transportation conformity regulations submitted by ADEC on March 10, 2016. This final rule is effective September 27, 2017. 82 Fed. Reg. 40,712 (Aug. 28, 2017).

On May 10, 2017, EPA issued a final rule determining that the Fairbanks North Star Borough (FNSB) failed to attain the 2006 24-hour $PM_{2.5}$ NAAQS by the applicable attainment date of December 21, 2015. 82 Fed. Reg. 21,711, 27,712 (May 10, 2017). As a result of this rulemaking, the FNSB was automatically reclassified from a moderate nonattainment area to a serious nonattainment area. *Id.* EPA's final rule—and the corresponding reclassification of the FNSB—became effective on June 9, 2017. *Id.* The rule likely moots still-pending litigation filed by the Sierra Club against EPA in October 2017. *See* Dkt. No. 2:16-cv-01594-RAJ (W.D. Wash.). Alaska is now required to submit a serious nonattainment air quality plan for the FNSB by December 21, 2017, in which best available control measures (BACM) and best available control technology (BACT) are established. Alaska must demonstrate compliance with the NAAQS by the end of 2019.

On July 18, 2017, Alaska proposed rule changes that would incorporate elements of local FNSB ordinances into the state's SIP. Public comments on the rule changes were due August 30.

On June 13, EPA proposed to approve several SIP submissions from Alaska designed, among other things, to ensure consistency between the state's PSD program and corresponding federal requirements; to revise routine permitting requirements; to remove obsolete source-specific regulations; and to revise the state's transportation conformity criteria and procedures. 82 Fed. Reg. 27,031 (June 13, 2017).

On August 10, EPA issued a final rule approving Alaska's SIP submission for addressing the infrastructure requirements of the lead NAAQS promulgated by EPA in 2008. 82 Fed. Reg. 37,307 (Aug. 10, 2017). The rule was effective as of September 11. *Id.*

On September 8, 2017, EPA issued a final rule approving Alaska's SIP submissions addressing CAA requirements for the 2006 24-hour $PM_{2.5}$ NAAQS in the FNSB moderate nonattainment area. 82 Fed. Reg. 42,457 (Sept. 8, 2017). These submissions, along with submissions in 2015, 2016, and earlier in 2017, constitute the FNSB Moderate Plan. As noted above, on May 10, 2017, the FNSB was reclassified from moderate to serious nonattainment for the 2006 24-hour $PM_{2.5}$ NAAQS.

Idaho

In a final rule published on May 10, 2017, EPA deferred a finding that the Logan, Utah-Idaho nonattainment area, which includes Idaho's Cache Valley region, failed to achieve attainment with the 2006 $PM_{2.5}$ NAAQS by the required date of December 31, 2015. 82 Fed. Reg. 21,711, 21,712 n.4 (May 10, 2017). In late 2016, EPA had proposed to make that finding and thereby downgrade the area from moderate to serious nonattainment status. 81 Fed. Reg. 91,088 (Dec. 16, 2016). But EPA later received new information from Utah requiring further consideration. 82 Fed. Reg. at 21,712 n.4. On the basis of that new data, EPA proposed on June 1 to approve Idaho's attainment demonstration for its portion of the Cache Valley nonattainment area. 82 Fed. Reg. 25,208, 25,209 (June 1, 2017). EPA later finalized that determination on August 8. 82 Fed. Reg. 37,205 (Aug. 8, 2017). Relatedly, EPA proposed on June 8, 2017, to grant Idaho two one-year extensions of the compliance date for the 2006 $PM_{2.5}$ NAAQS. 82 Fed. Reg. 26,638 (June 8, 2017). Idaho must comply with that NAAQS by the end of 2017. *Id.* For the time being, the Cache Valley region will remain designated as a moderate nonattainment area. *Id.* The decision to grant Idaho two one-year extensions of the compliance date for the 2006 $PM_{2.5}$ NAAQS was made final on September 8, 2017. 82 Fed. Reg. 42,447 (Sept. 8, 2017).

Idaho, presumably in an effort to improve data collection in the Cache Valley portion of the nonattainment area, recently proposed to operate the Federal Reference Method monitor in the city of Franklin on a daily basis rather than every third day. Comments on this proposal were due on September 5, 2017.

The state also held a public hearing on September 14, 2017, to discuss a SIP revision that would allow crop residue burning whenever ozone levels do not exceed 90 percent of the ozone NAAQS. Under the state's prior regulation, crop residue burning was prohibited when ozone levels exceeded 75 percent of the NAAQS.

Oregon

On June 6, 2017, EPA filed a notice regarding its finding that the motor vehicle emissions budgets (MVEB) for $PM_{2.5}$ in the Oakridge-Westfir $PM_{2.5}$ SIP attainment plan are adequate for transportation conformity purposes. The attainment plan was submitted to EPA by the Oregon Department of Environmental Quality (ODEQ) on January 20, 2017. As a result of this adequacy finding, ODEQ, the Oregon Department of Transportation, and the U.S. Department of Transportation will be required to use these MVEBs for future transportation conformity determinations. This finding was effective June 21, 2017. 82 Fed. Reg. 26,090 (June 6, 2017).

Washington

On April 10, 2017, EPA approved revisions to the Washington SIP incorporating updated air quality regulations from the Southwest Clean Air Agency (SWCAA). 82 Fed. Reg. 17,136 (Apr. 10, 2017). The regulations address minor and nonattainment New Source Review (NSR) permitting programs. *Id*. The SIP revisions also incorporate certain Department of Ecology (Ecology) regulations for facilities subject to major nonattainment NSR that the SWCAA applies in its jurisdiction. *Id*. at 17,138–39.

On May 30, EPA approved updates to the Energy Facility Site Evaluation Council (EFSEC) regulations in the Washington SIP. 82 Fed. Reg. 24,531 (May 30, 2017). The EFSEC regulations generally adopt by reference Ecology regulations

previously approved by EPA. EPA also approved the transfer of the PSD permitting program to EFSEC for major energy facilities. *Id*. Previously, PSD permits for these facilities had been issued under a federal implementation plan. *Id*.

B. State Regulations

Alaska

In response to EPA's anticipated May 10, 2017, rule resulting in the reclassification of the FNSB from moderate to serious nonattainment, Alaska finalized a rule on June 9, 2017, requiring the removal or replacement of older wood-fire home heating devices at the time of any real estate transaction. In addition, the state finalized a separate rule on August 15, 2017, requiring wood sellers to register with the state for purposes of encouraging the sale and use of dry wood to reduce wood heat emissions. The wood seller registration rule was first adopted by the state in 2014 as a voluntary program, but the August 2017 rule made registration mandatory.

Oregon

On July 12, 2017, the Oregon Environmental Quality Commission adopted rules to update Oregon's regulations by incorporating new and amended federal standards and emission guidelines. The rulemaking included:

- New rules to incorporate by reference the new federal New Source Performance Standards for Kraft pulp mills for which construction, reconstruction, or modification commenced after May 23, 2013; Crude oil and natural gas facilities for which construction, modification, or reconstruction commenced after September 18, 2015; and, greenhouse gas emissions for electric generating units;
- New rules to incorporate by reference the new federal area source National Emission Standards for Hazardous Air Pollutants (NESHAPs) for wool fiberglass manufacturing;
- Updates to existing rules to incorporate amended federal area source NESHAPs, amended federal major source NESHAPs, and amended federal New Source Performance Standards; and
- An update to an existing rule and the state plan to implement federal changes to the emission guidelines for commercial and industrial solid waste incineration units.

Oregon DEQ is proposing changes to OAR 340, division number 246, which will make revisions to 23 standing ambient benchmark concentrations, and add new benchmarks for phosgene, n-propyl bromide, and styrene. ODEQ is also proposing some minor plain language edits and to add which statutes are being implemented by the rules. The public comment period for the Air Toxics Benchmarks Review rulemaking ends in early October. According to ODEQ, of the 23 revisions to benchmarks and recommendations for 3 new benchmarks being proposed, only 4 garnered substantial attention during the committee meetings. These include diesel particulate matter, lead, polycyclic aromatic hydrocarbons, and trichloroethylene.

Washington

Ecology is moving forward with implementation of the Clean Air Rule, Washington's statewide multisector program to reduce greenhouse gas emissions (GHGs). The rule is subject to multiple ongoing state court challenges, which are discussed below. Currently, Ecology is seeking comments, due October 13, 2017, on external carbon markets that would generate emissions allowances that parties could obtain to satisfy their compliance obligations under the Clean Air Rule. The first compliance period for the rule, which applies to parties with at least 100,000 metric tons CO_2e/year, is 2017–2019.

In February 2017, Ecology announced a rulemaking to establish GHG emissions performance standards for power plants based on a 970 pounds of GHGs per megawatt hour standard specified by the Washington Department of Commerce as required by RCW 80.80.050. Ecology has been conducting related stakeholder

meetings, and intends to issue a proposed rule in October 2017.

In February 2017, Ecology also announced its intent to commence rulemaking related to fees for air emissions sources. The proposed rule was supposed to be released in August 2017, but, as of this writing, the proposed rule had not been issued.

In June 2015, Ecology announced a plan to revise state regulations concerning emissions standards during start-up, shutdown, and malfunction (SSM) events in response to an EPA SIP call. This rulemaking process was revised in December 2016 after EPA clarified that the emissions standards for SSM events should also apply in the title V permit program. Ecology held meetings with stakeholders between November 2016 and March 2017 concerning the scope of the rulemaking. Ecology is also contemplating regulatory changes related to public notice requirements and regulation of certain small non-road engines as part of the rulemaking package. However, as of this writing, no proposed rule has been released, despite announcements that the proposed rule would be completed last spring.

C. Legislation

Alaska

A citizens' advocacy group is pursuing a local ballot initiative that, if passed, would prohibit the FNSB from regulating solid and other combustible fuel-fired home heating devices. Similar initiatives have passed—and others have been defeated—since 2010. If enough signatures in support of the initiative are approved by September 21, 2017, the Home Heating Reclamation Act will be placed on municipal ballots in the 2018 FNSB election. Even if passed, the state will retain authority to regulate home heating devices—as it has increasingly done in recent years—for air quality purposes.

Oregon

Senate Bill (SB) 1008, signed into law by Governor Brown on August 16, 2017, authorizes the state of Oregon to receive moneys pursuant to the Volkswagen Environmental Mitigation Trust Agreement (Agreement). It allows the state to deposit Agreement moneys in the Clean Diesel Engine Fund, and to the extent authorized by the Agreement, SB 1008 directs ODEQ to allocate funds among (1) school buses powered by diesel engines for 30 percent of replacement costs beginning with oldest buses in the state and continuing until 450 buses have been replaced; and (2) specified categories of vehicles powered by diesel engines. SB 1008 prohibits ODEQ from awarding grants from the Agreement moneys for any other purpose without prior approval from the Legislative Assembly.

House Bill (HB) 2462, signed into law by Governor Brown on May 25, 2017, increases the amount by which a vehicle equipped with a fully functional idle reduction system designed to reduce fuel use and emissions from engine idling may exceed maximum weight limitations. HB 2462 provides a limited exemption from maximum weight limitations for a vehicle that uses natural gas as its fuel source.

Proposed Senate Bill (SB) 197, a highly controversial bill targeting emissions from dairies, was defeated during the 2017 Oregon state legislative session. Proposed SB 197 would have enacted requirements for regulating air contaminant emissions from dairy confined animal feeding operations (CAFOs). SB 197 was backed by environmental interests and opposed by the Oregon Farm Bureau and the Oregon Dairy Farmers Association. SB 197 would have directed the Oregon Environmental Quality Commission (EQC) to adopt by rule a program for regulating air emissions from dairy CAFOs.

Proposed House Bill (HB) 2269 sought to amend the fee schedule for sources subject to a federal operating permit program under title V of the CAA to include a specific activity fee to fund the Cleaner Air Oregon program. HB 2269 was defeated, dealing a setback to a key initiative backed by Governor Brown. HB 2269 was designed to provide Cleaner Air Oregon program funding for ODEQ. As proposed, it would have charged major sources an average of $1456.

Washington

Several climate change bills were previously proposed in the Washington legislature (SB 5509, HB 1646, SB 5421, and HB 1144). These bills, which would reduce state GHG emission targets and enact a carbon tax, have been stalled in committee since at least March 2017. HB 2230, which would also implement a carbon tax regime, was introduced in June.

A bill addressing the local regulation of emissions from asphalt plants in urban areas was introduced in January 2017 (HB 1028). This bill also remains in committee.

A bill, SB 5658, curtailing the ability of Ecology and local air pollution control authorities to call for burn bans when temperatures fall below 32 degrees, was introduced in February 2017.

D. Administrative Rulings

Washington

On June 5, 2017, the Pollution Control Hearing Board affirmed a penalty issued by the Spokane Regional Clean Air Agency to a marijuana production and processing facility for causing an odor violation. *Bang's Original Company, LLC v. Spokane Regional Clean Air Agency*, PCHB No. 16-129 (June 5, 2017 Findings of Fact, Conclusions of Law, and Order). A key issue was whether the facility qualified for an exemption from the state Clean Air Act at RCW 70.94.640 for odors caused by an "agricultural activity consistent with good agricultural practices on agricultural land." Ultimately, the board was unable to determine that the facility met the exemption under the facts of the case. However, the decision raises the possibility that other rural marijuana facilities will be able to take advantage of this exemption in future enforcement proceedings.

E. Case Decisions

Oregon

The Ninth Circuit Court of Appeals is considering an appeal regarding challenges to the Oregon Clean Fuels Program (the Program). The Program is modeled, in part, after California's low carbon fuel standards (LCFS) regulations, and provides an economic incentive for fuels that emit less greenhouse gas over the course of their entire life cycles. *American Fuel & Petrochemical Manufacturers, et al. v. O'Keeffe et al.*, No. 15-35834. Oral argument is scheduled for November 2017. The Program requires regulated parties to demonstrate compliance by calculating credits and deficits generated by the fuels they produce or import and to balance those credits and deficits. Or. Admin. R. § 340-253-1030. Deficits are created by importing or producing fuels with carbon intensities that exceed the annual standard, while credits are created by producing or importing fuels that have carbon intensity below the annual standard. Or. Admin. R. § 340-253-1000(5).

Producers and importers are not required to sell only fuels that meet the standards. Rather, if they sell fuel with a carbon intensity above the annual standard, they generate a deficit that they must offset with a credit generated by a fuel with a carbon intensity below the annual standard. After Oregon adopted its Phase II rules, the American Fuel & Petrochemical Manufacturers, American Trucking Associations Inc., and the Consumer Energy Alliance filed a complaint for declaratory and injunctive relief against various Oregon officials. The complaint alleged that the Oregon Program, Or. Admin. R. § 340-253-0000 et seq., violates the Commerce Clause of the U.S. Constitution because it discriminates against transportation fuels imported into Oregon with the intended purpose and effect of promoting the development of in-state economic interests.

The complaint also alleged that the Oregon program violates the Commerce Clause by attempting to regulate and control economic conduct occurring outside of Oregon's boundaries. Finally, the complaint alleged that the Oregon program was preempted by a provision of the CAA by attempting to regulate a fuel or fuel additive (methane) where EPA has found that no control is necessary. The California Air Resources Board and Washington state sought, and were granted, intervenor status, as did the Oregon Environmental

Council, Climate Solutions, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club. The district court granted the motions to dismiss and for judgment on the pleadings on the ground that the complaint stated no claim on which relief could be granted, and entered judgment for the Oregon defendants, state intervenors, and conservation intervenors. The Ninth Circuit appeal followed.

Washington

Washington courts are home to a clutch of climate change-related cases. None of the ongoing state court legal challenges to Washington's Clean Air Rule have been resolved. In *Association of Washington Business v. Department of Ecology*, No. 16-2-03023-34 (Thurston Cty. Super. Ct.), the parties have completed merits briefing. However, the court rescheduled a hearing in the case originally planned for June 30, 2017, and as of this writing, a decision on the merits has not been reached. Federal litigation filed by a group of utilities that also challenged the rule in state court remains on hold.

On April 18, in *Foster v. Department of Ecology*, No. 14-2-25295-1 (King Cty. Super. Ct.), the court granted youth plaintiffs' request to file an amended petition for review naming the state of Washington and Governor Jay Inslee as additional defendants and expanding the claims to allege specific violations of the state constitution and public trust doctrine. In light of the related appeal, the court ordered the plaintiffs to seek approval to amend the petition from the court of appeals.

The court of appeals is currently hearing challenges to the superior court's orders from November 2015 and May 2016, which required Ecology to promulgate regulations addressing climate change. No. 75374-6-1 (Wash. Ct. App. Div. I). A hearing was held on the case on July 18. As of this writing, no decision had been rendered.

On July 14, 2017, the court in *Holmquist v. United States*, No. 2:17-cv-0046-TOR (E.D. Wash.), granted the United States' motion to dismiss. The court found that the plaintiffs' claims regarding the Interstate Commerce Commission Termination Act (ICCTA) of 1995, which may preempt local bans on the transit of coal and oil by rail through Spokane, were not ripe. The court also determined that plaintiffs lacked standing and that any relief requested would "amount to an advisory opinion." Importantly, certain proposed local ordinances, which formed the heart of the plaintiffs' complaint, had never been enacted, and so the preemptive effect of the ICCTA had never been applied to any actual legislation before the court.

F. Enforcement Issues

Alaska

On June 13, the U.S. Department of Justice issued a notice extending the public comment period regarding a proposed consent decree resolving alleged CAA violations by Westward Seafoods at its processing plant in Dutch Harbor. 82 Fed. Reg. 27,079 (June 13, 2017). The consent decree, first proposed in April 2017, would require Westward to pay $1.3 million in penalties and undertake both air quality compliance upgrades and mitigation projects. *Id.*

Oregon

In July 2017, ODEQ began a new round of air quality monitoring related to the AmeriTies-West operation in The Dalles. AmeriTies-West is an 83-acre wood-preserving and railroad tie production facility that has operated in The Dalles since the 1920s. AmeriTies uses the coal tar by-product creosote. After receiving complaints about bad smells, the Oregon DEQ initiated an odor nuisance investigation of the facility in 2014. In April 2016, an enforceable agreement was signed with AmeriTies to reduce odors, requiring AmeriTies to try alternative solutions. The sampling objective is to determine if emissions associated with tie treatment plant facilities are present above human health risk-based concentrations or, in the case where risk-based concentrations are below naturally occurring background concentrations, where those emissions exceed background levels.

On August 25, 2017, ODEQ made available air toxics facility data on the agency's website. The information includes facility air toxics emissions estimates in a searchable format in order to streamline public records requests for this information. These data were submitted to ODEQ as part of the Cleaner Air Oregon regulatory program. ODEQ required simple and standard air contaminant discharge permit and title V permit holders to submit emissions inventory data on 187 EPA hazardous air pollutants, as well as other air toxics. The data are preliminary and represent estimates only. The database does not estimate health risk estimates and does not represent estimates of the potential risk posed from a facility's emissions, and will go through many steps of refinement and is subject to change. To search and view the data**:** http://www.oregon.gov/deq/aq/air-toxics/Pages/Air-Toxics-Facility-Data.aspx**.**

III. Tribes

On June 29, 2017, EPA announced an award of over half a million dollars in Diesel Emission Reduction Act funding to federally recognized tribes in Alaska and Washington. Funds awarded to the Native village of Chalkyitsik in Alaska will be used to replace two older diesel generators that are the village's sole source of electricity. Funds awarded to the Lummi Tribe in Washington will be used to replace outdated diesel engines

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