

## Air Quality Committee Newsletter

Vol. 21, No. 2

June 2018

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### MESSAGE FROM THE CO-CHAIRS

Elizabeth Hurst and Gary Steinbauer

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Since our last newsletter in November 2017, there has been no shortage of legal developments for air quality practitioners. We strive to keep you apprised of the latest legal developments through regular e-mail updates from our electronic communications vice-chairs, so in addition to our newsletters please check your in-boxes for more frequent updates.

This issue of the committee's newsletter includes feature articles on interesting and timely topics. The first, entitled "Uncooperative Federalism: Citizen Suits, Savings Clauses, and Their Challenges to Negotiated Settlements," deals with one of the Section's priorities this year—federalism. The Clean Air Act, like many of our environmental laws, requires the federal government to establish national standards and delegates the responsibility to implement those standards to the states. This article analyzes the use of the Clean Air Act's savings clauses and citizen suit provisions through the lens of federalism. A second article, entitled "An Assessment of the Challenges Facing Environmental Regulators in the Era of Artificial Intelligence," discusses the rapid deployment of artificial intelligence and challenges AI poses for environmental regulators, a fascinating read considering the Volkswagen emission scandal. There are also detail-rich reports for several EPA Regions, highlighting important

cases and regulatory actions that you should be aware of if you practice in these areas.

This issue also includes an article from one of our program vice chairs, Kathryn Kelly. Ms. Kelly is a toxicologist and her article addresses the science behind benzene exposures in indoor air. We invite others to contribute articles on this topic. If you have an idea for an article on air toxics, please contact one of our newsletter vice chairs.

We would like to thank the guest article authors, regional reporters, and our excellent team of newsletter vice-chairs for another informative and useful publication!

On the programming side, we were pleased with all of the interest in our April 10 committee call that addressed the new guidance issued by the U.S. Environmental Protection Agency on new source review permitting. A recording of the committee call will be available on the Section's website for those that were unable to attend. In addition, if you were not able to attend our recent webinar, "Clean Air Act Advocacy: Tips and Skills for Addressing Regulatory, Permitting and Enforcement Issues with Clients, Regulators and the Public," you can earn CLE and view the webinar on-demand here: <https://shop.americanbar.org/ebus/store/productdetails.aspx?productid=288757065>.

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**Vol. 21, No. 2, June 2018**  
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July 10, 2018  
**The Administration’s Regulatory Reform for  
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 and Potential State Conflicts**  
 Committee Program Call

July 12, 2018  
**DC Bar Environment, Energy and Natural  
 Resources Community Annual Summer  
 Reception**  
 Washington, DC

August 2-7, 2018  
**ABA Annual Meeting**  
 Chicago, IL

August 10, 2018  
**30th Annual Texas Environmental  
 Superconference**  
 Austin, TX  
 Primary Sponsor: State Bar of Texas,  
 Environment & Natural Resources Law Section

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

March 25-27, 2019  
**37th Water Law Conference**  
 Grand Hyatt Denver  
 Denver, CO

March 27-29, 2019  
**48th Spring Conference**  
 Grand Hyatt Denver  
 Denver, CO

**For full details, please visit  
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 the Section of Environment, Energy, and Resources.

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In closing, we strive to be a resource and forum for air quality practitioners and we welcome your views, questions, and feedback. Please email 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.

Sincerely,

*Elizabeth and Gary*



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- New This Year - The Forum: Featuring Rod Rosenstein addressing attendees of the Annual Meeting.
- General Assembly Keynote Speaker: Bryan Stevenson, Attorney, human rights activist, Executive Director of the Equal Justice Initiative, and author of Just Mercy.

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## UNCOOPERATIVE FEDERALISM: CITIZEN SUITS, SAVINGS CLAUSES, AND THEIR CHALLENGES TO NEGOTIATED SETTLEMENTS

Gabriella Mahan

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### Introduction

By statutory grant, Congress intended agencies like the Environmental Protection Agency (EPA) to create and enforce standards for industries across all states. For example, the Toxic Substances Control Act authorizes EPA to implement programs to gather information on and control existing chemical substances, 15 U.S.C. § 2601 et seq. (1982), and the Clean Water Act creates national requirements for pollution discharge into navigable waters, 33 U.S.C. § 1251 et seq. (1972). However, federal law often does not displace state environmental regulation. States formulate and enforce their own standards that are either consistent with or exceed those at the federal level.

In certain circumstances, if regulated entities fail to comply with standards set by the state or by the federal government, affected individuals have additional remedies through savings clauses and citizen suit provisions. Individuals may pursue those remedies in court. Issues arise when the remedies crafted by the judiciary conflict with the outcome of an enforcement action or settlement between the executive agency and the regulated entity.

In recent practice, conflicting remedies from citizen suit and savings clause provisions have intruded on the carefully calibrated regulatory regime established by Congress. Conflicting remedies from both the judiciary and the executive branches disrupt the consistency with which federal agencies enforce their directives, creating uncertainty for regulated entities. In addition to regulatory inefficiency and compliance uncertainty, these cases raise serious separation of powers questions. Two ongoing suits under the Clean Air Act (“CAA”) and the Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA,” or “Superfund”) demonstrate examples of these conflicting remedies.

## Citizen Suit Provisions Under the Clean Air Act

In 2005, EPA instituted an ongoing consent decree resolving emissions exceedances by ExxonMobil Corp. under the CAA. The consent decree remains in effect today. The Texas Commission on Environmental Quality (TCEQ), the state regulatory agency in charge of enforcing state permits, also entered notices of violation and notices of enforcement beginning in 2005.

In 2010, Environment Texas and Sierra Club initiated a citizen suit in the U.S. District Court for the Southern District of Texas, alleging that ExxonMobil again violated the CAA by exceeding emissions limits thousands of times since 2005. The CAA citizen suit provision allows any person to commence a civil action against regulated entities for repeated and ongoing violations of emissions standards under the CAA. *See* 42 U.S.C. § 7604(a)(1). Citizens' prayer for relief included injunctive relief and civil penalties in excess of those in EPA's consent decree.

Pursuant to its investigation, TCEQ entered an agreed enforcement order with ExxonMobil in 2012, which assessed over \$1 million in penalties against ExxonMobil and, in lieu of additional penalties, required corrective action in the form of "environmental improvement projects" to reduce emissions under ExxonMobil's permits. ExxonMobil began implementing the improvement projects in compliance with TCEQ's enforcement order. In its 2014 final order, the district court treated these projects as an indication that ExxonMobil did not receive an economic benefit from noncompliance. This issue was raised by plaintiffs on appeal.

On appeal, the Fifth Circuit agreed with plaintiffs that ExxonMobil gained an economic benefit by not implementing the TCEQ projects sooner and vacated and remanded various conclusions of the district court for failing to consider evidence of ExxonMobil's economic benefit of noncompliance. On remand, the district court was instructed to consider whether the delayed expenditures for the

improvements projects were necessary to correct or prevent the violations alleged by plaintiffs. *See Env't Tex. Citizen Lobby, Inc. v. ExxonMobil Corp.*, No. H-10-4969 (S.D. Tex. 2017). The district court found they were, resulting in the largest civil penalty assessed in a CAA citizen suit—over \$20 million.

In the negotiated settlement with TCEQ, ExxonMobil agreed to implement environmental improvement projects in lieu of additional penalties. These same projects were later used by the Fifth Circuit on appeal and the district court on remand to assess a monetary penalty 20 times the original penalty imposed by TCEQ. Allowing citizen suits to assess additional penalties based on the regulators' agreed-upon remedies reduces certainty and finality in settlement proceedings and thereby encourages regulated entities to divert limited resources to litigating rather than settling claims with regulators. Taken to its logical extreme, these suits also reduce the incentive to enter into environmental improvements projects.

## Savings Clause Provisions Under CERCLA

A similar issue has arisen under CERCLA. In a recent case, the Montana Supreme Court imposed third-party restoration claims in excess of EPA's selected remedy. *See Atlantic Richfield Co. v. Mont. 2d Judicial Dist.*, 2017 MT 324 (2017). CERCLA includes a series of savings clauses that read:

Nothing in [CERCLA] shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants . . .

42 U.S.C. § 9613(d).

Nothing in [CERCLA] shall be construed or interpreted as preempting any State from imposing any additional liability or requirements with respect to the release of hazardous substances within such State.

42 U.S.C. § 9613(a).

Under these savings clauses, property owners brought private tort claims against ARCO seeking additional restoration for contaminating their properties. While the private tort claims were uncontested, the issue before the court was whether claims for restoration damages in excess and before completion of EPA's selected remedy under CERCLA were preempted as a "challenge" to EPA's remedy under CERCLA under the timing of review provision found in 42 U.S.C. § 9613(h) (CERCLA § 113(h)). Section (h) reads:

No Federal court shall have jurisdiction under Federal law other than under section 1332 of title 28 (relating to diversity of citizenship jurisdiction) or under State law which is applicable or relevant and appropriate under section 9621 of this title (relating to cleanup standards) to review any challenges to removal or remedial action selected under section 9604 of this title, or to review any order issued under section 9606(a) of this title . . .

42 U.S.C. § 9613(h). The court held that property owners' requested remedy did not interfere with the uncompleted EPA cleanup.

In her dissent, Justice Laurie McKinnon stated property owners' claim for restoration damages proposed a different cleanup plan from that chosen by EPA, which conflicted with the ongoing CERCLA cleanup. According to Justice McKinnon, CERCLA section 113(h), read in conjunction with jurisdictional language in section 113(b) granting exclusive jurisdiction to district courts, divested state courts of jurisdiction to review state law claims which challenge CERCLA remedial action.

Here, ARCO's ability to properly and quickly complete EPA's cleanup plan may be impeded by conflicting obligations imposed by the court. Rulings such as these create uncertainty around agency-approved settlements and incentivize regulated entities to engage in expensive litigation rather than settle claims to ensure an enforceable outcome. Regulated entities have limited resources to allocate to expensive and lengthy litigation. While judicially-imposed remedies are more

predictable than regulator-imposed remedies, Congress specifically allocated enforcement authority to those regulators to generate efficient results. Allowing a third-party claim for restoration damages before CERCLA cleanup is complete complicates the execution of the carefully negotiated remediation process and places an undue burden on potentially responsible parties that are implementing an EPA remedy.

## Conclusion

Citizen suit provisions and savings clauses serve valuable purposes. They are intended as a backdrop to address violations of law that the federal regulator refuses to address. Savings clauses likewise carve out exceptions for aggrieved parties to seek compensatory damages from polluters. Negotiated settlements between regulated entities and their enforcing agencies serve a separate but equally valuable purpose. For example, settlements under the Superfund enforcement program direct limited resources away from litigation and toward good-faith, efficient cleanup efforts that are consistent with federal law and the public interest. Notwithstanding their value, citizen suit remedies that interfere with or challenge these settlements duplicate and disrupt thoughtful remedies and reduce compliance certainty. This was not Congress's intent. Under both the CAA citizen suit and the CERCLA savings clause provisions, plaintiffs are required to communicate with the federal government and the agency when private actions are initiated so as to avoid conflict. *See* 42 U.S.C. §§ 7604(b), 9613(l). Therefore, in suits of this nature, the judiciary must carefully balance executive directives with judicial remedies, especially if those remedies conflict with prior settlements between regulator and entity.

**Gabriella Mahan** is a second-year law student at the Antonin Scalia Law School at George Mason University. She is the editor-in-chief of the *George Mason Law Review* and a member of the GMU National Moot Court Team. Gabriella serves in various capacities on the Moot Court Board, Trial Advocacy Association, and Federalist Society. She submits this article in her personal capacity.

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## AN ASSESSMENT OF THE CHALLENGES FACING ENVIRONMENTAL REGULATORS IN THE ERA OF ARTIFICIAL INTELLIGENCE

Scott Nuzum

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These days, the terms “emerging tech” and “automotive industry” are being used a lot in the same sentence. As the technologies underlying today’s cars and trucks have evolved to become evermore complex and sophisticated, so too have the legal and policy implications underlying these technologies. To date, the most widely debated and discussed topics have been focused on two major issue areas: autonomous vehicles (AVs) and connected cars. With respect to AVs, the debate centers on public safety and the degree to—and manner in which—government regulates AVs to ensure that they do not unduly compromise public safety. On the issue of connected cars, the focus is on privacy considerations and the question of how government ensures that companies properly safeguard (and use) the vast quantities of personal data collected from connected cars and their users. Both of these issues are extraordinarily important and already are generating robust discussion in the public space.

A less visible, but no less important, issue centers on how to adequately safeguard environmental concerns where one can utilize artificial intelligence (AI)—particularly machine learning and deep learning—to circumvent regulatory mandates. The Volkswagen (VW) emissions scandal represents the most recent example of an automobile manufacturer utilizing a “defeat device” to evade environmental regulators. VW’s defeat device—a complex algorithm that detected when a vehicle was undergoing an emissions test—constitutes the most sophisticated form of AI yet deployed (or discovered) to skirt environmental law. With future developments in machine learning, it is conceivable that these technologies could again be used to bypass environmental regulation, including cheating on air emissions tests. Further, with the development of deep learning, it is equally possible that automobiles themselves will develop

sophisticated systems to sidestep environmental regulation altogether. Should that become the case, the question becomes one of to whom liability should attach.

This article explores the challenges facing environmental regulators in an era of rapidly developing AI, with specific focus on systems designed to cheat air emissions tests. Part I provides a brief overview of the congressional mandate established in the Clean Air Act (CAA), with specific reference to regulations governing light-duty motor vehicles. Part II summarizes the salient facts underlying the VW emissions scandal. Part III discusses how AI technologies might frustrate—or facilitate—compliance with existing environmental regulatory regimes. Finally, part IV provides a short set of recommendations for how regulators, companies, and others can unleash the potential environmental benefits of AI while minimizing adverse outcomes.

### I. Overview of CAA Statutory Mandate

Pursuant to CAA section 202, the Environmental Protection Agency (EPA) may “prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which . . . cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” 42 U.S.C. § 7521(a)(1). Consistent with this mandate, EPA has promulgated emissions standards and testing procedures for light-duty motor vehicles. *See* 40 C.F.R. pt. 86, subpt. S.

EPA regulations require vehicle manufacturers to identify any auxiliary emission control device (AECD) installed in a vehicle. *See* 40 C.F.R. § 86.1843-01. EPA defines AECD as “any element of design which senses temperature, vehicle speed, engine [revolutions per minute], transmission gear, manifold vacuum, or any other parameter for the purpose of activating, modulating, delaying, or deactivating the operation of any part of the emission control system.” 40 C.F.R. § 86.1803-01. For any AECD installed in a vehicle, the

manufacturer must provide “a justification for each AECD, the parameters they sense and control, a detailed justification of each AECD that results in a reduction in effectiveness of the emission control system, and [a] rationale for why it is not a defeat device.” 40 C.F.R. § 86.1844-01(d)(11).

While the CAA does not impose a blanket prohibition on AECDs, section 203 of the act does prohibit the installation of “defeat devices,” which are a specific type of AECD “that reduces the effectiveness of the emission control system under conditions which may reasonably be expected to be encountered in normal vehicle operation and use.” 40 C.F.R. § 86.1803-01. Defeat devices are expressly designed to “bypass, defeat, or render inoperative elements of the vehicles’ emission control system that exist to comply with CAA emission standards.” *See* Letter from U.S. Environmental Protection Agency to Volkswagen AG, Audi AG, Porsche AG, Volkswagen Group of America, Inc., and Porsche Cars North America, Inc., Re: Notice of Violation (Nov. 2, 2015) (hereinafter Nov. 2, 2015 NOV).

EPA also mandates that vehicle manufacturers undergo air emissions testing to demonstrate compliance with applicable air quality standards. For light-duty passenger vehicles, manufacturers must comply with Federal Test Procedure 75 (FTP-75), a standardized laboratory test whereby a car’s engine is monitored for approximately 31 minutes under various testing scenarios to mimic city driving. During the FTP-75 process, a car “travels” for 11.04 miles at an average speed of 21.2 miles per hour (mph), with a maximum speed of 56.7 mph. In addition to FTP-75, manufacturers must also comply with supplemental FTPs to account for other driving scenarios likely encountered during highway driving.

## **II. A Brief History of the VW Emissions Scandal**

On September 18, 2015, EPA issued a CAA Notice of Violation to VW alleging that the company and

its subsidiaries had utilized a defeat device in its model year 2009-2015 2.0 liter diesel cars that circumvented EPA air emissions standards so that vehicles emitted up to 40 times more pollution than permitted under regulation. *See* Letter from U.S. Environmental Protection Agency to Volkswagen AG, Audi AG, Porsche AG, Volkswagen Group of America, Inc., and Porsche Cars North America, Inc., Re: Notice of Violation (Sept. 18, 2015). Thereafter, on November 2, 2015, EPA issued a second CAA Notice of Violation alleging that VW produced and sold certain model year 2014–2016 3.0 liter diesel cars and SUVs that also utilized a defeat device to emit up to nine times more pollution than allowed by law. *See* Nov. 2, 2015 NOV.

On November 19, 2015, VW admitted that it had utilized the defeat device in all 3.0 liter diesel models in the United States since 2009. VW’s defeat device in both its 2.0 liter and 3.0 liter vehicles constituted an algorithm that could determine when a vehicle was undergoing an emissions test. The algorithm, labeled as an “acoustic condition” in the underlying code, directed the car’s onboard computer to check for as many as ten conditions associated with an emissions test. If the system detected the presence of any of these conditions, it would engage the emissions curbing system, which reduced the amount of nitrogen oxide emitted from the vehicle. Once the system determined that the emissions test was over, the vehicle would revert to normal operating conditions, which generated more pollution.

In January 2016, the U.S. Department of Justice brought criminal and civil charges against VW for alleged violations of the CAA. Over the course of the next two years, VW and the U.S. government negotiated a settlement whereby VW agreed to pay a \$2.8 billion in criminal fines and \$1.5 billion in civil penalties. In addition, the company agreed to plead guilty to three criminal felony counts, while six VW executives faced individual criminal charges.

### III. The Use of Artificial Intelligence to Frustrate—and Facilitate—Compliance with Environmental Regulation

VW’s defeat device constituted a cunning use of AI to skirt environmental regulation. While the VW defeat device may not conform to the image of AI as conceived in science fiction or by Hollywood—the killer robots of *The Terminator* series or the omnipotent virtual assistant in *Her*, for example—the VW algorithm nevertheless qualifies as AI because it “perform[ed] tasks under varying and unpredictable circumstances, without significant human oversight[.]” See, e.g., Fundamentally Understanding the Usability and Realistic Evolution of Artificial Intelligence Act of 2017 (FUTURE AI Act), S. 2217, § 3(a)(1)(A).

While VW’s algorithm is the most recent and notable example of AI used to skirt environmental regulation, the case is hardly the first of its kind, nor is it likely to be the last. Indeed, as machine learning/deep learning processes become increasingly sophisticated and commonplace, companies undoubtedly will seek to capitalize on AI to generate competitive advantage in the marketplace. And while there is nothing wrong with this desire to gain an upper hand on competitors, legal issues may arise in circumstances—similar to those facing VW—where a company finds that it cannot comply with environmental standards and instead must resort to subterfuge in order to create the appearance of compliance. AI will only make it easier for companies to engage in this chicanery and disguise noncompliance, particularly as synthetic systems grow more capable of identifying regulatory testing or enforcement scenarios by being able to “think like humans” or “act rationally . . . [to] achieve goals via perception, planning, reasoning, learning, communicating, decision-making, and acting.” See FUTURE AI Act, § 3(a)(1)(B), (E).

Furthermore, there may come a time in the not too distant future where the underlying AI itself determines that environmental compliance is impossible and warrants action to disguise

noncompliance and bypass environmental enforcement altogether. Under this scenario, a company would play no role in the deceit and may itself be unaware of the actions undertaken on its behalf by AI. Though this scenario sounds far-fetched, technologists are contemplating scenarios such as this, meaning that environmental regulators, companies, and others should be preparing for this contingency as well.

While AI poses a risk to society, including as a means of subverting environmental compliance, it is also important to note that AI stands to greatly benefit society. It is plausible—likely even—that AI will foster many positive and environmentally beneficial developments that allow companies to become even more competitive and environmentally friendly. Thus, it is possible to conceive of a scenario where AI allows a company to design, build, and/or operate a truly clean diesel automobile, for example. The key to unlocking the full potential and benefits of AI as an environmental tool, then, will be to craft policies and cultures that place high value on innovation and at the same time provide adequate safeguards for human health and safety.

### IV. How to Unleash the Potential Environmental Benefits of AI While Minimizing Adverse Outcomes

So how can society foster conditions to facilitate the development of AI that generates environmental benefits? And how can we minimize potential adverse outcomes and avoid a repeat of the VW emissions scandal? Truthfully, there is no single solution; instead, governments, companies, academia, and the general public each must play a role—and work together—to craft workable solutions. What follows is a brief series of recommendations.

First, regulators—including EPA and individual state departments of environmental protection—should work with automotive companies, technology companies, academia, and the non-profit sector to develop greater technical

expertise so to understand and be able to identify circumstances where machine learning/deep learning is used, or could be used, to circumvent environmental regulation, including air quality standards. Ultimately, this will require greater investment by government entities so to attract employees with the necessary technical background (e.g., computer science graduates) to be able to understand how AI might be used in various environmental compliance (or non-compliance) scenarios.

Second, government, academia, and the private sector should reaffirm their commitments to public-private partnerships and work to find multidisciplinary solutions to (1) foster and encourage the development of AI systems that yield tangible environmental benefits; and (2) craft detection and enforcement mechanisms to ensure that AI is not being used to evade environmental regulation. To achieve these complementary goals, federal and state governments should be prepared to devote real money to programs aimed at finding solutions. Certainly, governments should exercise scrutiny in how they spend taxpayer money, but they should not reflexively “zero-out” or otherwise shutter programs—such as the EPA ROVER program—that work on developing verification techniques with real-world applicability. *See, e.g., Peter Whoriskey, EPA Closed the Lab That Might Have Caught VW Emissions Problem Years Ago, WASH. POST Oct. 7, 2015.* For example, had EPA continued to fund the ROVER program, it may have had at its disposal a mechanism to test emissions outside of FTP-75 that AI could not easily anticipate and overcome. *See id.*

Third, governments, companies and the general public should continue to support nonprofit organizations and universities that are working to validate environmental compliance and identify how AI might be utilized in nefarious ways. For example, the International Council on Clean Transportation, a nonprofit that facilitates engagement between environmental regulators and universities to provide independent science, funded the West Virginia University study that ultimately

detected the errors in VW emissions reporting. Likewise, Kirill Levchenko, a computer scientist at the University of California San Diego (UCSD), worked with colleagues at UCSD and Germany’s Ruhr University-Bochum to identify the emissions curbing code in VW’s algorithm. One cannot overstate the importance of these types of academic studies in serving as an independent check on industry and government, particularly as AI grows increasingly more ubiquitous.

Fourth, regulators should consider developing more sophisticated regulatory mechanisms—including robust auditing mechanisms and stiffer criminal and civil penalties—to encourage environmental compliance and deter cheating. Crafting appropriate regulatory mechanisms—i.e., mechanisms that can adequately respond to the rapid rate of technological change—may require congressional action that vests with enforcement agencies greater authority to promulgate interpretive guidance that creates rights and obligations on regulated entities. That said, governments at all levels should work closely with those in the private sector to ensure that regulation does not overly burden or impede innovation—admittedly, this is a very delicate balance. Further, as machine learning progresses to a stage where systems are rewriting their own code to avoid environmental regulation and detection—so that even the companies themselves are unaware of what the machine is doing—it may be necessary to rethink liability and enforcement regimes to avoid the inequity of punishing companies that are not co-conspirators to a crime, but rather are the patrons of sophisticated machines that generate environmentally adverse unintended consequences.

Finally, automotive and technology companies should continue to work to foster corporate cultures that prioritize ethical and legal applications of AI and reject and take swift action against those who seek to stymie those efforts. Companies should develop robust compliance offices and internal auditing/review procedures that give compliance officers a direct line to senior leadership, something that VW, to its credit, has done in

the two-and-a-half years since the emissions scandal first became public. Further, companies should be willing to admit that they cannot know the full range of consequences arising from the development of AI—even narrow AI—and they should strive to be as transparent as possible about what they do and do not know.

Ultimately, there is a lot to be excited about with respect to the rapid development and ubiquitous deployment of AI—particularly with respect to its applications to mobility and environmental compliance. That said, complex legal, policy, and ethical challenges remain and will continue to arise. Addressing these challenges will require full participation and cooperation from every element of society.

**Scott Nuzum** is an attorney in the Washington, D.C., office of Van Ness Feldman LLP. His practice is focused on legal, regulatory, and public policy issues arising at the intersection of the energy, environmental, and technology spaces.



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## SURPRISING TRENDS IN BENZENE RISK

Dr. Kathryn Kelly, DrPH Med

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Our air toxics series starts with benzene, which was listed in the 2005 National Air Toxics Assessment (U.S. EPA, 2011) as one of 10 air toxics that contribute more than 90 percent of the estimated incremental cancer risk associated with breathing outdoor air pollution. The key points:

- Outdoor exposure to benzene and concentrations of benzene in blood have decreased dramatically over the past two decades.
- Unregulated indoor exposure to benzene exceeds regulated outdoor exposure.
- Incidence of leukemia—the greatest health concern associated with exposure to benzene—has not decreased.

### Why Is Benzene a Concern?

We all know benzene. It's the sweetish smell we notice filling our gas tanks. It's on the Environmental Protection Agency's (EPA) Top 10 list because of concern over its association with leukemia in workers exposed to high concentrations over time. And by "high," we mean ongoing exposures to concentrations that are tens of thousands of times higher than we individually experience at the gas stations for an average of 70 minutes a year. Thankfully, these high occupational levels have not been experienced in the United States for decades.

Let's take a closer look at the variables affecting health risk due to benzene exposure:

- What are the trends in emissions of benzene over time?
- What are the trends in resulting air concentrations?
- What are the trends in levels of benzene in our bodies resulting from those concentrations?

- What are the trends in health effects resulting from benzene in our blood?

There is good news to report on nearly all fronts.

### Applicable Regulations

Benzene content in gasoline is limited by regulation (40 C.F.R. § 80.1230). Most recently, in 2008, EPA created a rule specifically targeting benzene emissions from gas stations, which included an extensive discussion of EPA’s rationale for controlling benzene (73 Fed. Reg. 1 916, Jan. 10, 2008).

### How Are We Exposed to Benzene?

Benzene is ubiquitous. It’s even been detected in deep space. After testing air, water, food, and consumer products, EPA concluded that more than 99 percent of personal exposure to benzene was via air—both indoors and outdoors (L. Wallace, Environmental exposure to benzene: an update, 104 (Suppl. 6) ENVTL. HEALTH PERSP. (1996)). It’s in the air you are breathing right now.

But that exposure is decreasing. EPA data going back to 1990 show that the emissions of benzene in the US decreased by about 85 percent in the following two decades, largely due to controlling the amount of benzene in gasoline. Today, our major sources of outdoor exposure to benzene are about evenly split between cars, non-road emissions (e.g., lawnmowers), wildfires, and prescribed burns. The contribution from residential wood combustion—i.e., wood stoves and fireplaces—is increasing.

As you would expect, a significant reduction in emissions has resulted in an equally significant reduction in concentrations measured in the air. According to EPA, from 1994 to 2013 average benzene concentrations in US air declined 87 percent, from 6 to 0.08 µg/m<sup>3</sup>.

### Indoor Exposures to Benzene Exceed Outdoor Exposures

But that does not tell the whole story. In 1979, EPA’s Total Exposure Assessment Methodology (TEAM) assessed our total exposure to contaminants. EPA’s major findings were published over several years in four volumes and concluded that:

Personal and indoor exposures to these toxic and carcinogenic chemicals are nearly always greater—often much greater—than outdoor concentrations. We are led to the conclusion that indoor air in the home and at work far outweighs outdoor air as a route of exposure to these chemicals.

EPA then tested several hundred persons’ exposure to benzene in the air, at work and at home; in urban areas like Los Angeles and Bayonne, N.J., in rural areas; filling up at gas stations; driving to work; and living near petrochemical refineries in California. What they found surprised them (L. Wallace, 82 ENVTL. HEALTH PERSP. 165-69 (1989)):

Now a large study of human exposure to benzene (EPA’s TEAM Study) has been completed, with the surprising result that the main sources of human exposure are associated with personal activities, not with the so-called “major point sources” . . . [I.e., a] number of sources sometimes considered important, such as petroleum refining operations, petrochemical manufacturing, oil storage tanks, urban-industrial areas, service stations, certain foods, groundwater contamination, and underground storage leaks, appear to be unimportant on a nationwide basis. . . . Persons living close to the heavy petrochemical and refining operations at New Jersey and Los Angeles had no greater exposure than those living farther away.

Thus, employees who pump gasoline for a living receive far less exposure to benzene than from other common daily activities—particularly if

they smoke. Then as today, smoking still accounts for half of US exposure to benzene. Other indoor sources include fireplaces and fumes from gasoline and paint in attached garages seeping into homes.

By comparison, the short, intense exposure many millions of Americans get each time we fill up our tank—measured as high as 3,000  $\mu\text{g}/\text{m}^3$  in 1986—only happens for an estimated 70 minutes a year. In light of this, it is perhaps not surprising that no correlation has ever been established between pumping your own gas and developing cancer, even among sensitive subgroups.

### **Why the Steep Decline?**

There are several reasons for this steep decline. First, there were 152,995 retail fueling sites in the United States in 2013—a steep 25 percent decline from the high of 1994, when the station count topped 202,800 sites. Small corner gas stations are increasingly replaced with mega-stations like Costco, even as vehicle miles increase. Miles driven in the US more than doubled from 1980 to 2016.

Second, although their size may be increasing, these gas stations are also emitting fewer air toxics over time. At first, there were vapor recovery methods like the rubber seals seen on the nozzles in some states. Through redesign, cars are now recovering 75 percent of gasoline fume emissions, and the rubber seals on gas pump nozzles are interfering with vehicle vapor recovery. In 2012, EPA told its regions that the rubber seals may be creating a “disbenefit” to air quality and rescinded the requirement for “Stage 2” seals.

Third, the concentration of benzene in gasoline has reduced from several percent in the 1950’s, when it was used to reduce engine knocking, to less than 1 percent of gasoline purchased today.

### **So How Much Benzene Is in Our Bodies?**

Less and less benzene has been measured in our bodies over time, measured as benzene in blood. In 2015, the National Cancer Institute (NCI) reported

that 95 percent of the US population over age 20 had less than 0.00000001 ounces of benzene per quart of blood. The NCI has not established a “Healthy People 2020” target for benzene.

### **Are Leukemia Rates Decreasing Also?**

Surprisingly, no. Leukemia is a form of cancer associated with exposure over time to, among other causes, levels of benzene thousands of times higher than in typical US air. It is also a fairly common form of cancer; approximately 1.5 percent of men and women in the US—about one person in 75—will be diagnosed with leukemia at some point during their lifetime. Improved cancer treatment may be reducing the number of leukemia deaths very slightly, but the number of new cases has remained essentially the same since at least 1992, according to the National Cancer Institute (Leukemia Stat Facts, 2017, available at <https://seer.cancer.gov/statfacts/html/leuks.html>).

Yet the significant reductions in emissions of and exposures to benzene—indoor and out, permitted and unregulated—have not resulted in concomitant reductions in leukemia. Why not?

One possibility is that the typical amount of benzene we are exposed to outdoors is very low to start with, rendering large decreases less meaningful. Looking closely at the graphs, a 90 percent reduction—from 10 parts per billion to 1 ppb—reflects very low concentrations to begin with. It’s like a decrease of 10 drops of water in an Olympic-sized pool to 1 drop.

In contrast, workers were once exposed to many thousand parts per billion, day in and day out for a working lifetime. Today, the permissible exposure limit set by the Occupational Safety and Health Administration is 3200  $\mu\text{g}/\text{m}^3$  (1 ppm) for an 8-hour workday and 40-hour workweek—a thousand times higher than the average concentrations we breathe daily.

The data also do not suggest a greater need to regulate indoor exposure to benzene, as the

blood levels of benzene have already declined to concentrations well below thresholds of health concern.

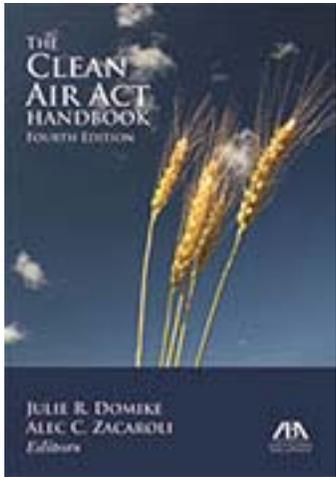
The lack of association between exposure to benzene and leukemia over time suggests that routine exposure to benzene is not a significant cause of leukemia relative to other “leukemogens”—substances causing leukemia.

## What’s the Big Picture?

Regulated emissions of benzene have reduced dramatically over the past three decades, resulting in significant declines of benzene in outdoor air. Levels of benzene in blood—reflecting both outdoor and indoor exposures—are well below thresholds of health concern. Incidence of leukemia, however, remains flat. Significantly reducing our total environmental exposure to benzene is not reducing leukemia.

Quantifying the benefits of further reductions in benzene emissions and exposures may prove challenging, as will maintaining benzene’s reputation as an important air toxic given the success in reducing our exposure.

*Dr. Kathryn Kelly is President of Delta Toxicology, Inc., of Portland, Or., and a Vice Chair of Programming for the SEER Air Quality Committee.*



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## REGIONAL REPORTS

### EPA REGION 1

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

### EPA Regional Office Issues

#### Implementation Plans

Regional Greenhouse Gas Initiative (RGGI) auctions on September 8, 2017, and December 6, 2017, resulted in sales of 14,371,585 CO<sub>2</sub> allowances at a clearing price of \$4.35 and 14,687,989 CO<sub>2</sub> allowances at a clearing price of \$3.80, respectively. Available at <https://www.rggi.org/auctions/auction-results> for auction results.

The Massachusetts Department of Environmental Protection and the New York State Department of Environmental Conservation recently signed a Memorandum of Understanding for the trading/transfer of NO<sub>x</sub> and volatile organic compound (VOC) emission reduction credits between the two states.

#### Enforcement

In December 2017, an industrial laundry company agreed to install a capture and control system to reduce VOC emissions by at least 85 percent and pay a penalty of \$200,000 for alleged new source review violations. Region I has undertaken similar actions against numerous other industrial laundries. Available at <https://www.epa.gov/newsreleases/epa-action-ensures-new-bedford-industrial-laundry-will-reduce-air-emissions> for link to EPA News Release.

In a November 2017 agreement with the Environmental Protection Agency (EPA), a sand and gravel company agreed to replace three existing engines and pay a \$120,000 penalty for violations of New Source Performance Standards (NSPS) and the RICE National Emission Standards for Hazardous Air Pollutants (NESHAP). Available at <https://www.epa.gov/newsreleases/sand-and-gravel-company-central-mass-reduce-emissions-under-settlement-epa> for link to EPA News Release.

## Connecticut

### State Regulations

On November 7, 2017, the Connecticut Department of Energy and Environmental Protection provided notice that it decided to remove Step 2 Tailoring Rule thresholds from its air quality permitting regulations consistent with the U.S. Supreme Court's decision in *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 2427, holding that greenhouse gases (GHGs) are not an air pollutant for purposes of determining whether a source is a major source or modification to a major source. Available at <https://eregulations.ct.gov/eRegsPortal/Search/RMRView/PR2017-018> for link to notice.

## Maine

### State Regulations

The Maine Department of Environmental Protection is proposing to amend the state implementation plan (SIP) by incorporating the section 110(a)(2)(D)(i)(I) Transport Certification for the 2010 NO<sub>2</sub> National Ambient Air Quality Standards (NAAQS). The NO<sub>2</sub> Transport Certification affirms that Maine does not contribute significantly to nonattainment or interfere with maintenance of the 2010 NO<sub>2</sub> NAAQS in any state. On March 26, 2018, EPA issued a proposed rule approving Maine's proposed state implementation plan revisions regarding the infrastructure requirements of the Clean Air Act (CAA) for the 2010 NO<sub>2</sub> NAAQS (as well as the 2008 lead (Pb) and 2008 ozone NAAQS). 83 Fed. Reg. 12,905 (Mar. 26, 2018).

## Vermont

### State Regulations

EPA approved Vermont's Regional Haze Five-Year Progress Report, submitted on February 29, 2016, as a revision to its SIP because it makes adequate progress through 2018. Available at <https://www.gpo.gov/fdsys/pkg/FR-2017-12-18/pdf/2017-27214.pdf> for a link to the *Federal Register* notice.

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## EPA REGION 2

No Report

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## EPA REGION 3

Sarah L. Clark

*Pennsylvania Department of Environmental Protection*

*Harrisburg, Pennsylvania*

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## EPA Regional Office Issues

### Other

EPA Administrator Pruitt announced the appointment of Cosmo Servidio to the position of Regional Administrator for Region 3. Mr. Servidio most recently served as Director of Environmental Affairs for Bucks County Water and Sewer Authority. Prior to joining the Bucks County Water and Sewer Authority, Mr. Servidio served as regional director for the Pennsylvania Department of Environmental Protection's Southeast Regional Office. Mr. Servidio also served as the chief of staff for EPA's Region 2 headquarters from 2005 to 2009.

The nine states, including Delaware and Maryland, that participate in the Regional Greenhouse Gas Initiative (RGGI) finalized a new model rule, which would include an additional 30 percent regional cap reduction between 2020 and 2030. Now each state will be responsible for implementing the changes.

EPA denied a Clean Air Act petition filed in 2013 by nine Ozone Transport Region states (Conn., Del., Md., Mass., N.H., N.Y., Pa., R.I., and Vt.) that requested that EPA expand the region to include nine upwind states, asserting that transported pollutants from the upwind states affect the ability of the states in the region to attain and maintain the ozone NAAQS.

## Delaware

### Implementation Plans

The Environmental Protection Agency (EPA) approved a SIP revision submitted by the State of

Delaware pertaining to reasonably available control technology (RACT) requirements under the 2008 8-hour ozone NAAQS.

### **State Regulations**

The following proposed regulations are still pending or have been repealed:

Repealed: 12 Del. Reg. 1123 (Repealed, effective March 11, 2018), Standards of Performance for Steel Plants: Electric Arc Furnaces.

The Department of Natural Resources and Environmental Control (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.

Pending: Amend 7 Del. Reg. 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. pts. 72–78 that should be adopted.

Pending: Amend 7 Del. Reg. 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 requires that Delaware standards are identical to California standards.

### **Legislation**

S.B. 103 (McDowell), which extends the sunset date on the DNREC’s authority to collect annual fees to implement the Clean Air Act Title V Operating Permit Program through calendar year 2020, became effective on January 1, 2018.

### **Cases**

Delaware announced its intent to file suit against EPA for its failure to require power plants in Pennsylvania and West Virginia to reduce air emissions that negatively impact Delaware’s air quality.

## **District of Columbia**

### **Implementation Plans**

EPA published a direct final rule approving a SIP revision related to the infrastructure requirement for interstate transport of pollution with respect to the 2010 1-hour SO<sub>2</sub> NAAQS. EPA received adverse comments during the public comment period and, as a result, withdrew the direct final rule. EPA will address the adverse comments in a subsequent action and will not open a second public comment period.

## **Maryland**

### **Implementation Plans**

EPA proposed to approve a SIP revision pertaining to RACT for cement kilns, revisions to and recodification of provisions for Portland cement manufacturing plants and internal combustion engines at natural gas compressor stations, and removal of the NO<sub>x</sub> Reduction and Trading Program. Written comments were due before December 13, 2017.

EPA published a direct final rule approving a SIP revision filed in response to EPA’s Findings of Failure to Submit for various requirements relating to the 2008 8-hour ozone NAAQS specific to nonattainment New Source Review requirements. EPA received adverse comments during the public comment period and withdrew the direct final rule. EPA will address the comments received in a subsequent final action and not impose a second comment period.

### **State Regulations**

The Maryland Department of the Environment (MDE) has proposed to establish new NO<sub>x</sub> RACT requirements for large municipal waste combustors with a capacity greater than 250 tons per day. The proposal was presented to the Air Quality Planning Program in December and MDE expects to publish the proposed regulation for comment in May 2018.

MDE and the Motor Vehicle Administration adopted amendments to Regulations .01, .03–.05,

and .09 under COMAR 11.14.08. The proposal would delay the initial Vehicle Emissions Inspection Program for new vehicles and exempt pre-onboard diagnostics light-duty vehicles from inspection. The regulation went into effect on January 1, 2018.

### **Legislation**

S.B. 0133 (Madaleno) and H.B. 0026 (R. Lewis) were introduced and received first reading in committee. The bills would establish a Committee on Air Quality to create air quality sampling and monitoring protocol for the collection of data associated with certain large animal-feeding operations.

### **Cases**

On July 20, the State of Maryland through the Maryland Department of the Environment, gave notice to EPA Administrator Pruitt of its intent to bring suit under section 304 of the Clean Air Act 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 nonattainment in Maryland due to their failure to run pollution controls effectively.

## **Pennsylvania**

### **Implementation Plans**

The Pennsylvania Department of Environmental Protection (PADEP) submitted to EPA three SIP revisions for the 2010 1-hour SO<sub>2</sub> NAAQS. The revisions describe how SO<sub>2</sub> nonattainment areas, including Beaver, Warren, and Allegheny, will attain the standard by the October 4, 2018, deadline.

PADEP submitted a SIP revision to EPA to address the interstate transport of PM<sub>2.5</sub>.

EPA published a direct final rule approving a SIP revision related to RACT requirements for automotive and light-duty truck assembly coating operations covered by EPA's Control Techniques Guidelines. EPA received adverse comments on

the rule during the public comment period and subsequently withdrew the direct final rule. EPA will address the comments received in a subsequent final action and will not institute a second public comment period.

EPA published a proposed determination for comment that Lebanon County attained the 2012 annual PM<sub>2.5</sub> NAAQS.

EPA made a final determination that Philadelphia and certain surrounding counties in Pennsylvania, New Jersey, Maryland, and Delaware met the 2016 deadline for attaining the 2008 ozone NAAQS.

EPA signed a notice designating 47 counties in Pennsylvania as meeting the 2015 ozone NAAQS, including the 7-county Pittsburgh-Beaver Valley area, which had been designated as nonattainment for all prior ozone NAAQS.

PADEP published for public comment an exceptional event analysis demonstrating that EPA should disregard monitored ozone levels at several monitors in the Commonwealth when it completes its attainment designations for 2015 NAAQS for ozone, citing the Fort McMurray, Alberta, Canada fires in May 2016 that caused monitored levels of NO<sub>x</sub> and VOCs to be unusually high.

### **State Regulations**

The Environmental Quality Board voted to adopt a final-form rulemaking amending 25 Pa. Code chapters 121 and 126 relating to Gasoline Volatility Requirements. Once finalized, the rulemaking would provide that requirements for gasoline with a Reid vapor pressure of 7.8 pounds per square inch (psi) or less to be sold or transferred into or within the Pittsburgh-Beaver Valley Area, between May 1 and September 15 of each year for refiners, importers, distributors, resellers, terminal owners, and operators and carriers and between June 1 and September 15 of each year for retailers and wholesale purchaser-consumers, will no longer be applicable once EPA approves the necessary Non-Interference Demonstration SIP revision to the Commonwealth's approved SIP.

## Permits

As part of Governor Wolf's methane reduction strategy, PADEP released two draft final general permits that address methane emissions and other air pollutants related to natural gas. The draft final GP-5 applies to midstream and natural gas transmission facilities and the draft final GP-5A applies to unconventional well sites and pigging stations. The general permits are expected to be finalized in the first quarter of 2018.

## Cases

*PennEnvironment, Inc., et al. v. Arcelormittal Monessen LLC, et al.*: The United States and Commonwealth of Pennsylvania settled a federal suit against ArcelorMittal Monessen LLC, regarding alleged Clean Air Act violations at the company's purified coal (coke) plant in Monessen, Pa. Under the proposed consent decree, which is subject to a 30-day public comment period and final court approval, the company will pay a \$1.5 million penalty and implement air pollution controls to limit particulate matter and sulfur compound emissions.

## Virginia

### Implementation Plans

The Department of Environmental Quality (DEQ) published for comment a proposed SIP revision relating to the NO<sub>x</sub> Budget Trading Program in order to allow emissions from non-EGUs to be controlled.

### State Regulations

The State Air Pollution Control Board has proposed regulatory amendments to part VII of 9VAC5-140 to reduce and cap CO<sub>2</sub> from fossil fuel-fired electric power generating facilities through an interstate trading program. The public comment period extended from January 8 to April 9, 2018, and included six public hearings.

Citing the decrease in revenue from title V permit program emissions fees due to decreased emissions, DEQ adopted final regulations to restructure the title V fee schedule to continue to

fully fund the program and better reflect the actual costs of administering the program. Revised title V fees became effective on January 1, 2018.

## Permits

DEQ has published for comment a draft permit in Augusta County. The Augusta County Service Authority has applied for a significant modification to its title V operating permit for the Augusta Regional Landfill in order to allow the source to continue to operate a municipal solid waste management facility. The public comment period closed January 17, 2018.

## West Virginia

### Implementation Plans

EPA had published for comment a direct final rule approving two SIP revisions submitted by the State of West Virginia requesting removal of regulations that implemented the Clean Air Interstate Rule (CAIR) annual NO<sub>x</sub> and SO<sub>2</sub> trading programs from the SIP due to the fact that the Cross-State Air Pollution Rule (CSAPR) replaced CAIR. Due to receipt of an adverse comment, EPA withdrew the direct final rule.

EPA had published for comment a direct final rule to approve revisions to the SIP to update the effective date by which West Virginia regulations incorporate by reference NAAQS, additional monitoring methods, and additional equivalent monitoring methods. Due to receipt of an adverse comment, EPA withdrew the direct final rule.

EPA published for comment a proposed SIP revision pertaining to the removal of source-specific SIP requirements for five facilities in West Virginia that have permanently shut down: Mountaineer Carbon Company, Stanford Lafarge, Follansbee Steel Corporation, International Mill Service, Inc., and Columbian Chemicals Company.

### Legislation

H.B. 2990 (Sypolt) was introduced and referred to the House Energy Committee. The bill would require oil and gas operators to provide continuous

monitoring of air, noise, dust, and particulates at the residence or “other point or points of impact” closest to a well site and provide the data to entities within 1400 feet of the limit of disturbance that request the data. If monitored levels exceed any of the specified parameters, the operator must implement the maximum available control technology available.

### **Other**

The West Virginia Department of Environmental Protection released results for air quality samples of VOCs, oxygen, hydrogen sulfide, carbon monoxide, chlorine, and ammonia taken in the area surrounding the fire at the Intercontinental Export Import warehouse in Parkersburg. WVDEP’s air monitoring station in Vienna measured 14.5 micrograms per cubic meter of PM<sub>2.5</sub> over a 24-hour period on the day after the fire, October 22, 2017.

EPA awarded a \$300,000 grant to the WVDEP to assist the state in implementing air quality standards and support development and improvement of air quality programs.

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## **EPA REGION 4**

No Report

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## **EPA REGION 5**

Gary Pasheilich  
*Squire Patton Boggs (US), LLP*  
*Columbus, Ohio*

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## **Illinois**

### **Implementation Plans**

EPA issued a proposed rule approving a SIP revision for attainment of the 2008 ozone NAAQS for St. Louis-St. Charles-Farmington, Missouri-Illinois (Mo.–Ill.) area, also addressing requirements for maintaining the 2008 ozone standard through 2030 in the St. Louis area, as well as certain motor vehicle budgets for VOC and NOx. 82 Fed. Reg. 57,892 (Dec. 8, 2017).

EPA has withdrawn a direct final rule issued to approve the regional haze progress report as part of a SIP revision, as published on October 18, 2017 (82 Fed. Reg. 48,431), due to receipt of adverse comments. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 57,836 (Dec. 8, 2017).

EPA has withdrawn a direct final rule issued to approve a SIP revision to redesignate the Chicago and Granite City nonattainment areas to attainment for the 2008 lead NAAQS, as published on October 18, 2017 (82 Fed. Reg. 48,448), due to receipt of an adverse comment. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 57,853 (Dec. 8, 2017).

EPA issued a Notice of Finding of Adequacy of certain motor vehicle budgets for VOC and NOx in the Illinois portion of the Metro-East St. Louis, Illinois, 2008 Ozone Standard Nonattainment Area. 82 Fed. Reg. 58,195 (Dec. 11, 2017).

EPA has withdrawn a direct final rule issued to approve a SIP revision that redefined the definition of volatile organic material (i.e., VOCs), as published on November 2, 2017 (82 Fed. Reg. 50,811), due to receipt of an adverse comment. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 60,545 (Dec. 21, 2017).

## **Indiana**

### **Implementation Plans**

EPA issued a proposed rule to approve the regional haze progress report as part of a SIP revision and adequacy of a related negative declaration submitted with the report. 82 Fed. Reg. 57,694 (Dec. 7, 2017).

## **Michigan/Minnesota**

### **Implementation Plans**

EPA issued a final rule to approve a SIP revision addressing state board requirements and infrastructure requirements for 1997 ozone, 1997,

2006, and 2012 PM2.5, 2008 lead, 2008 ozone, 2010 NO2, and 2010 SO2 NAAQS. 82 Fed. Reg. 50,807 (Nov. 2, 2017).

EPA has issued a notification of action denying certain petitions for reconsideration by the U.S. Steel Corporation of rules addressing regional haze planning requirements for Michigan and Minnesota. 82 Fed. Reg. 57,125 (Dec. 4, 2017).

EPA has withdrawn a direct final rule issued to approve the regional haze progress report as part of a SIP revision, as published on October 18, 2017 (82 Fed. Reg. 48,435), due to receipt of an adverse comment. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 57,835 (Dec. 8, 2017).

EPA has withdrawn a direct final rule issued to approve the regional haze progress report as part of a SIP revision, as published on October 18, 2017 (82 Fed. Reg. 48,425), due to receipt of an adverse comment. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 57,848 (Dec. 8, 2017).

EPA issued a final rule to approve a SIP revision demonstrating that the SIP meets certain interstate transport requirements relating to the 2008 ozone NAAQS. 82 Fed. Reg. 58,116 (Dec. 11, 2017).

EPA has issued a proposed rule to extend the comment period on the proposed rule published on August 15, 2017, relating to changes to Michigan's minor New Source Review requirements. Comments on the proposed rule will be accepted through January 24, 2018. 83 Fed. Reg. 1003 (Jan. 9, 2018).

## **Ohio**

### **Implementation Plans**

EPA has issued a proposed rule to approve a SIP revision relating to infrastructure requirements for the 2012 PM2.5 NAAQS concerning interstate transport. 82 Fed. Reg. 57,689 (Dec. 7, 2017).

EPA has withdrawn a direct final rule issued to approve a SIP revision to redesignate the Fulton County nonattainment areas to attainment for the 2008 lead NAAQS, as published on October 18, 2017 (82 Fed. Reg. 48,442), due to receipt of an adverse comment. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 57,854 (Dec. 8, 2017).

EPA has issued proposed and direct final rules to approve a SIP revision addressing reasonable progress goals for regional haze. 82 Fed. Reg. 48,030 (Oct. 16, 2017), 82 Fed. Reg. 60,543 (Dec. 21, 2017).

EPA has issued a proposed rule to approve a SIP revision relating to regional haze, particularly that the state's participation in CSAPR meets the regional haze rule's criteria to qualify as an alternative to best available retrofit technology. EPA received comments through January 22, 2018. 82 Fed. Reg. 60,572 (Dec. 21, 2017).

## **Wisconsin**

### **Implementation Plans**

EPA issued a Notice of Finding of Adequacy of certain motor vehicle budgets for VOC and NOx in the Kenosha County, Wisconsin, 2008 Ozone Standard Nonattainment Area. 82 Fed. Reg. 50,418 (Oct. 31, 2017).

EPA has withdrawn a direct final rule issued to approve the regional haze progress report as part of a SIP revision, as published on October 20, 2017 (82 Fed. Reg. 48,766), due to receipt of an adverse comment. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 57,836 (Dec. 8, 2017).

EPA has withdrawn a direct final rule issued to approve certain revisions to the Wisconsin Administrative Code for construction permits as part of a SIP revision, as published on November 7, 2017 (82 Fed. Reg. 51,575), due to receipt of an adverse comment. EPA intends to address the adverse comment in a subsequent final action. 82 Fed. Reg. 60,545 (Dec. 21, 2017).

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## **EPA REGION 6**

John B. King

*Breazeale, Sachse & Wilson  
Baton Rouge, Louisiana*

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### **Louisiana**

#### **Implementation Plans**

EPA approved Louisiana's clean-air plan for regional haze. Louisiana's plan includes reduction of sulfur dioxide, oxides of nitrogen, and particulate matter using best available retrofit technology (BART) at six electric-generating units and three other facilities. EPA determined that Louisiana's plan established appropriate technical requirements for electric-generating and non-electric-generating units to meet the requirements of the CAA's regional haze rule.

#### **Cases**

EPA entered into a settlement with ExxonMobil resolving allegations that ExxonMobil failed to properly operate and monitor industrial flares at petrochemical facilities in Louisiana and Texas. The settlement involved five facilities in Texas (located near Baytown, Beaumont, and Mont Belvieu) and three facilities in Baton Rouge, Louisiana. ExxonMobil will spend approximately \$300 million to install and operate control and monitoring technology to reduce emissions from 26 industrial flares at these locations. Once fully implemented, emissions of volatile organic compounds will be reduced by more than 7000 tons per year, and emissions of hazardous air pollutants, including benzene, will be reduced by more than 1500 tons per year.

### **Texas**

#### **Other**

Michael Honeycutt, Ph.D., the director of the Toxicology Division of the Texas Commission on Environmental Quality, was appointed chairman of EPA's Science Advisory Board by Administrator Scott Pruitt. The board provides advice to the administrator on broad scientific matters. Dr.

Honeycutt has been employed by the TCEQ since 1996 and has managed 14 toxicologists since 2003. He is also an adjunct professor at Texas A&M University and has published numerous articles in peer-reviewed literature.

### **New Mexico**

#### **Implementation Plans**

EPA formally notified New Mexico on December 20, 2017 that it had completed its additional area designations for the health-based NAAQS for sulfur dioxide established in 2010. EPA found that all areas of New Mexico were in attainment for the standard. The status of Indian lands was not included.

#### **State Regulation**

The New Mexico Environment Department plans to eliminate the regulations (part 20) establishing particulate matter (PM) emissions limits for lime manufacturing plants and lime hydrators. The repeal will eliminate the 0.15 pound per ton of lime feed PM emissions limit for lime hydrators. NMED reports that there are no lime manufacturing sources in New Mexico subject to the NSPS/NESHAP for such sources. There is only one lime hydrator source currently subject to part 20. However, the most recent dispersion modeling analysis conducted for the facility demonstrated that the facility will not cause a violation of the NAAQS, as permitted and constructed.

### **Arkansas**

#### **Other**

The Arkansas Department of Environmental Quality continues to seek reductions in diesel emissions from medium and heavy-duty vehicles and equipment through its Reduce Emissions from Diesels (DERA) Program. The program reimburses agencies, businesses, cities, counties, and schools for a percentage of expenses for projects that reduce or eliminate diesel emissions. For the 2017 program year, ADEQ was awarded \$219,359 in DERA funds to distribute to governmental, private, and nonprofit entities. Eligible projects will reduce diesel emissions in Arkansas through

exhaust controls, engine upgrades, idling reduction technology, engine replacements, or vehicle/equipment replacements.

## Oklahoma

### Other

Oklahoma was allocated approximately \$21 million dollars from the Volkswagen Environmental Mitigation Trust Agreement. The money will be used to reduce nitrogen oxide emissions from the transportation sector. To obtain the funds, the Oklahoma Department of Environmental Quality will submit a Beneficiary Mitigation Plan, a high-level plan describing the state's intentions for utilizing Oklahoma's funding allocation. On December 5, 2017, ODEQ conducted a public meeting to collect information from stakeholders and receive comments concerning the BMP.

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## EPA REGION 7

No Report

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## EPA REGION 8

No Report

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## EPA REGION 9

Eric Hiser and Brandon Curtis  
*Jorden Hiser & Joy PLC*  
*Phoenix, AZ*

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## EPA Regional Office Issues

### Permits/EAB Decisions

Region 9 is soliciting comments on a proposed minor New Source Review permit for the Chaparral Commerce Center in Scottsdale, Arizona. The proposed permit would authorize installation and operation of two emergency diesel-fired generators at buildings located at the Salt River Pima-Maricopa Indian Community. The generators would be operated intermittently for testing and maintenance and during emergency situations. Comments were due January 24, 2018.

## Enforcement Issue

On November 29, 2017, Region 9 announced its settlement with Wal-Mart Transportation, LLC, to resolve alleged violations of California's Truck and Bus Regulation. Under the settlement, Wal-Mart will upgrade its fleet with diesel particulate filters and fund an environmental project to reduce air pollution at schools in the Los Angeles area. This project requires Wal-Mart to pay \$300,000 for the installation of air filtration systems at one or more schools near the ports of Los Angeles and Long Beach in early 2018.

## Arizona

### Implementation Plans

On October 10, 2017, EPA approved a revision to the Arizona SIP providing an alternative to best available retrofit technology for the Coronado Generating Station. 82 Fed. Reg. 46,903. EPA approved the request, determining the alternative would provide greater reasonable progress toward natural visibility conditions. *Id.* The BART alternative consists of an interim operating strategy that will begin on December 5, 2017, and a final operating strategy that will begin on December 31, 2025. *Id.* at 49,604. Additional details on the strategies are available in the *Federal Register*. *Id.*

On December 15, 2017, EPA approved as part of Arizona's SIP the second 10-year maintenance plan for the San Manuel area for the 1971 NAAQS for sulfur dioxide. 82 Fed. Reg. 59,521 (Dec. 15, 2017). EPA found the plan demonstrates compliance with the NAAQS through the second maintenance period of 2018–2028. *Id.* at 59,522. EPA designated the San Manuel area as a nonattainment area on March 3, 1978, based on monitored violations between 1975 and 1977. 82 Fed. Reg. 46,444. After closure of the BHP Copper Incorporated copper smelter, the largest source of SO<sub>2</sub> emissions in the area, Arizona's designation request and initial maintenance plan were approved on January 18, 2008. *Id.*

## California

### Implementation Plans

On December 11, 2017, EPA found that three California counties failed to timely submit required SIP elements for the 2008 ozone NAAQS. 82 Fed. Reg. 58,118. If the county does not submit and EPA does not approve a SIP, EPA must impose a federal implementation plan under CAA 110(c) no later than two years from this rulemaking. Additional sanctions, including the offset sanction and the highway sanction at 40 C.F.R. 52.31, will apply if the state does not adequately and timely address EPA's finding.

On October 10, 2017, EPA approved and conditionally approved revisions to the Antelope Valley Air Quality Management District portion of the California SIP. 82 Fed. Reg. 46,923 (Oct. 10, 2017). The approval finalizes revisions to the district's reasonably available control technology demonstration for the 1997 and 2008 8-hour ozone NAAQS. *Id.* The approved RACT requirements are codified in district rules for organic liquid loading; emissions from stationary, nonroad, and portable internal combustion engines; motor vehicle and mobile equipment coating operations; and solvent cleaning operations, among others. *Id.* at 46,924.

On December 4, 2017, EPA finalized approval of a revision to the Sacramento Metropolitan Air Quality Management District portion of the California SIP. 82 Fed. Reg. 57,123. The revision adopts rules to control volatile organic compound emissions from organic chemical manufacturing operations. *Id.* The revised submission resolves EPA's August 12, 2016, partial disapproval and eliminates the potential for sanctions. *Id.* at 57,124.

## Nevada

### Implementation Plans

On October 20, 2017, after the decommissioning and demolition of the Mohave Generating Station in Clark County, Nevada, EPA approved the Nevada Department of Environmental Protection's

request to rescind the FIP governing the plant. 82 Fed. Reg. 48,769 (Oct. 20, 2017).

## Hawaii

### Cases

In *In re Application of MAUI ELECTRIC COMPANY, LIMITED, for Approval of the Amended & Restated Power Purchase Agreement with Hawaiian Commercial & Sugar Co.*, the Supreme Court of Hawaii held that "the protections of the due process clause apply to the right to a clean and healthful environment as defined by laws related to environmental quality." *Id.* at \*1. The case arose when Maui Electric Company, Limited, filed an application with the Public Utilities Commission on March 31, 2015, seeking approval of a power purchase agreement between Maui Electric and Hawaiian Commercial & Sugar Company. *Id.* The Sierra Club sought to "intervene or to participate without intervention in the proceedings concerning the Application in order to assist the Commission in fully developing the facts and law regarding the fuel mix at the Pu'unene Plant and other matters at issue in the proceeding." *Id.* at \*2. The organization asserted a fundamental due process right to participate in the hearing, arguing that the agreement would impact its members' health, and aesthetic and recreational interests, among other things. *Id.* After having its motion to intervene denied at various stages, the case reached the Supreme Court of Hawaii. *Id.* at \*3–4. The Supreme Court determined that article XI, section 9 of the Hawai'i Constitution created a protectable property interest in a clean environment. *Id.* at \*9. It provides: "Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources." *Id.* The court went on to find that Sierra Club was entitled to "a hearing by the Commission to consider the impacts of approving the Agreement on Sierra Club's members' right[s]" under article XI, section 9 of the Constitution and its implementing rules. *Id.* at \*17.

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## **EPA REGION 10**

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### **EPA Regional Office Issues**

#### **Enforcement Issues**

EPA has entered into a couple settlement agreements related to alleged violations of the Clean Air Act's Risk Management Plan requirements by Alaskan facilities. On August 29, 2017, EPA settled claims against E. C. Phillips and Son, Inc. involving compliance issues stemming from ammonia refrigeration process equipment and imposed a \$5760 fine. In the settlement of another enforcement action announced in October 2017, EPA imposed \$45,743 in penalties and required \$175,000 to be spent on environmental projects, in connection with the failure to report storage of anhydrous ammonia by North Pacific Seafood's Red Salmon Cannery in Naknek.

#### **Alaska**

##### **Implementation Plans**

On December 8, 2017, EPA issued an update to the materials that are incorporated by reference into the Alaska SIP. According to the notice, EPA is correcting minor typographical errors and rearranging and republishing the contents of 40 C.F.R. § 52.70(c). EPA is also rearranging and republishing the contents of 40 C.F.R. § 52.70(e) to align the contents with the outline of the Alaska state plan volumes and sections. 82 Fed. Reg. 57,836 (Dec. 8, 2017).

#### **Idaho**

##### **Implementation Plans**

On December 4, 2017, EPA took final action finding that the Idaho SIP meets the following CAA section 110(a)(2) infrastructure elements for the 2012 PM 2.5 NAAQS: (A), (B), (C), (D) (i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and

(M). Previously on December 23, 2015, Idaho submitted a certification that the Idaho SIP meets the infrastructure requirements of CAA sections 110(a)(1) and (2) for the 2012 PM 2.5 NAAQS. On September 12, 2017, EPA proposed to approve the submission as meeting certain infrastructure requirements (82 Fed. Reg. 42,772). 82 Fed. Reg. 57,132 (Dec. 4, 2017).

#### **Oregon**

##### **Implementation Plans**

On November 14, 2017, EPA issued a notice proposing to make a finding of attainment by the attainment date and a clean data determination (CDD) for the Oakridge-Westfir (Oakridge), Oregon, fine particulate matter nonattainment area (Oakridge NAA). EPA also proposes to approve revisions to Oregon's SIP consisting of the updated Oakridge-Westfir PM 2.5 Attainment Plan (Oakridge Update) submitted by the Oregon Department of Environmental Quality (ODEQ) on January 20, 2017. The purpose of the Oakridge Update, developed by Lane Regional Air Protection Agency in coordination with the ODEQ, is to provide an attainment demonstration of the 2006 24-hour PM 2.5 NAAQS and correct deficiencies in the 2012 Oakridge Attainment Plan. EPA stated that neither the proposed finding of attainment by the attainment date nor CDD is equivalent to the redesignation of the area to attainment. This proposed action, if finalized, will not constitute a redesignation to attainment under section 107(d)(3)(E) of the CAA, because the state must have an approved maintenance plan for the area as required under section 175A of the CAA, and a determination that the area has met the other requirements for redesignation in order to be redesignated to attainment. The designation status of the area will remain nonattainment for the 2006 PM 2.5 NAAQS until such time as EPA determines that the area meets the CAA requirements for redesignation to attainment in CAA section 107(d)(3)(E). The public comment period ended on December 14, 2017. 82 Fed. Reg. 52,683 (Nov. 14, 2017).

On October 11, 2017, EPA approved changes to Oregon's SIP submitted on April 22, 2015. The changes related to the criteria pollutants for which EPA has established national ambient air quality standards—carbon monoxide, lead, nitrogen dioxide, ozone, particulate matter, and sulfur dioxide. Specifically, the changes account for new federal requirements for fine particulate matter, update the major and minor source pre-construction permitting programs, and add state-level air quality designations. The changes also address public notice procedures for informational meetings, and tighten emission standards for dust and smoke. In addition, Oregon reorganized rules in the SIP by consolidating definitions, removing duplicate provisions, correcting errors, and removing outdated provisions. The final rule became effective on November 13, 2017. 82 Fed. Reg. 47,122 (Oct. 11, 2017).

### **State Regulations**

On October 20, 2017, ODEQ issued a notice of public comment on the proposed Cleaner Air Oregon program concept and rulemaking, including comment on the proposed permanent rules and rule amendments to chapter 340 of the Oregon Administrative Rules. The public comment period closed on January 22, 2018. The Environmental Quality Commission (EQC) will consider final Cleaner Air Oregon rules in 2018. The EQC must approve the rules before they take effect. By way of background, on April 6, 2016, Governor Brown directed ODEQ and the Oregon Health Authority (OHA) to develop a health risk-based air toxics permitting program. This action was triggered in part by regulatory gaps in current rules that allowed for localized health risks from industrial and commercial emissions. In this proposed new program and rulemaking, ODEQ proposes to add a new division, division 245, to the existing Oregon Administrative Rule (OAR) chapter 340. ODEQ is also proposing to make changes to OAR 340 divisions 12, 200, 209, 210, 216, 218, 220, 244, and 246. The proposed amendment of OAR 340-200-0040 would incorporate non-substantive changes to existing rules into the Oregon SIP.

The goal of the Cleaner Air Oregon program is to evaluate potential health risks to people near commercial and industrial facilities that emit regulated air toxics, and ultimately reduce those risks below health-based standards. Affected facilities could include some that are not currently permitted for their air contaminant emissions, in addition to those that already have air quality permits. Facility risk assessments would rely on emissions data specific to, and provided by, each facility. Facilities will be required to calculate and report the risk posed by their emissions where people would be exposed. Regulatory actions would be triggered when the risk posed by a facility's emissions exceed specified "risk action levels." If emissions exceed a risk action level, facilities have flexibility in how they reduce emissions. Options include installing emission controls, incorporating pollution prevention, substituting less-hazardous materials for more-hazardous materials, or altering work practices. If risk from a facility's emissions is already below defined risk action levels, the facility generally will only be required to report periodically on its emissions. For existing facilities with emissions presenting risk above risk action levels that have demonstrated use of all feasible emission reduction measures, the proposed regulations would allow ODEQ to approve continued operation above risk action levels with periodic review for newly available technology or controls. Proposed regulations would prohibit operation of facilities whose risks are significantly above the risk action levels, exceeding a proposed upper risk limit. Over time, facilities in areas significantly impacted by risk from multiple facilities could be prevented from increasing their emissions contributing to further risk, and new facilities that could pose additional risks over de minimis levels could be prohibited from locating in these areas.

ODEQ is currently reviewing the asbestos rules in Oregon Administrative Rule 340 Division 248 under the authority of Oregon Revised Statute 468A.700-.760. This review was initiated following a previous rulemaking in 2015 for Senate Bill 705. The narrow scope for that rulemaking

was in response to direction from the legislature. The bill required ODEQ to adopt rules requiring an asbestos survey to be performed before a residential building can be demolished. The current asbestos rulemaking has a broader scope of rule review. This rulemaking provides stakeholders and ODEQ with an opportunity to evaluate and clarify regulations and standards for asbestos-related activities, where a potential for exposure to asbestos fibers exists.

## Other

On December 12, 2017, a Portland, Oregon, stained glass manufacturer filed a \$30 million federal lawsuit against state and county government officials for allegedly damaging the company's goodwill through their enforcement of air pollution laws. *Bullseye Glass Co. v. Brown et al.*, No. 17-cv-1970, complaint filed, 2017 WL 6336820 (D. Or. Dec. 12, 2017). The company alleges the state government violated the company's civil rights by depriving it of its goodwill without due process during "unprecedented" enforcement of the Clean Air Act, 42 U.S.C.A. § 7401. The company bases its civil rights claims on the alleged disparate treatment it received from ODEQ after a U.S. Forest Service study revealed high levels of heavy metals in tree moss near Bullseye's facility last year. The Democratic governor and the heads of ODEQ, Oregon Health Authority, and Multnomah County Health Department are defendants in the case. Bullseye seeks \$30 million in damages, declaratory and injunctive relief from "improper" government action, and attorney fees.

In 2015, a group of plaintiffs filed a civil rights lawsuit in the U.S. District Court for the District of Oregon seeking an order that requires the government to create a plan to dramatically reduce greenhouse gas emissions released by the burning of fossil fuels. *See Juliana et al. v. United States et al.*, No. 15-cv-1517, 2016 WL 6661146 (D. Or. Nov. 10, 2016). The defendants filed motions seeking dismissal on multiple grounds, including that the plaintiffs lack standing, have not stated cognizable constitutional claims, and have not asserted a

cognizable claim under the public trust doctrine. On April 8, 2016, Magistrate Judge Thomas M. Coffin issued Findings and a Recommendation that the court allow plaintiffs to proceed with their lawsuit. *Juliana*, 2016 WL 6661146, at \*27. Thereafter, on November 10, 2016, U.S. District Judge Ann L. Aiken adopted Magistrate Judge Coffin's Findings and Recommendation to deny the motions to dismiss. *Id.* at \*26. On March 7, 2017, defendants moved to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) from the district court's order denying the motion to dismiss. Defendants also moved for a stay of proceedings. On June 9, 2017, defendants filed a petition for writ of mandamus seeking to bar the climate lawsuit from proceeding. On December 11, 2017, the Ninth Circuit Court of Appeals heard oral argument on the United States' petition. During oral argument, two of the three Ninth Circuit judges on the panel, Chief Judge Sidney Thomas and Judge Marsha Berzon, appeared disinclined to grant the United States' petition. The third judge, Judge Alex Kozinski, expressed skepticism regarding the legal basis of the plaintiffs' lawsuit. In an unexpected turn of events, on December 18, 2017, Judge Kozinski announced his resignation from the Ninth Circuit. Chief Judge Thomas must now decide whether to replace Judge Kozinski and schedule a new oral argument, or proceed to decide the petition for writ of mandamus without additional argument.

The Oregon state legislature will consider carbon pricing bills during the six-week February 2018 legislative session. The legislation is expected to be based on Senate Bill 1070, which was introduced in 2017. Key components of the bill will likely include a statewide cap on GHG emissions coupled with establishing a price per ton of GHG emissions for the larger emitters in the state, and a plan to utilize the proceeds for environmental and economic justice programs in the state.

## Washington

### Implementation Plans

On December 14, 2017, EPA took final action finding that Washington failed to submit an

infrastructure SIP to satisfy interstate transport requirements of the CAA for the 2012 PM 2.5 NAAQS. This creates a two-year deadline for EPA to promulgate a FIP to address the interstate transport SIP requirements pertaining to significant contribution to nonattainment and interference with maintenance unless the state submits a SIP that meets these requirements. The final rule is effective on January 16, 2018. 82 Fed. Reg. 58,745 (Dec. 14, 2017).

On November 16, 2017, EPA issued a final rule designating as “attainment/unclassifiable” certain areas in the United States, including Washington, for the 2015 8-hour ozone NAAQS. *See* 82 Fed. Reg. 54,232 (Nov. 16, 2017). The designations included unclassifiable designations for Benton, Franklin, and Walla Walla Counties, which had been requested by the state. *Id.*; *see also* 40 C.F.R. § 81.348.

### **State Regulations**

Washington’s Clean Air Rule, which regulates GHG emissions from various stationary sources and is associated with petroleum importers and natural gas producers, was adopted in September 2016. However, as discussed below, on December 15, 2017, a judge in Thurston County Superior Court issued a bench ruling striking down parts of the Clean Air Rule. Previously, the Washington Department of Ecology had issued for public comment “regulatory orders” for entities covered by the rule that do not qualify as “energy intensive and trade exposed” businesses. The regulatory orders specify the “GHG emission reduction pathway in units of MT CO<sub>2</sub>e for each calendar year in the compliance period” and “[t]otal reduction pathway for each compliance period.” Wash. Admin. Code (WAC) 173-442-060(2). Under the rule, orders must be issued by “January 30 of the second year of a covered party’s first compliance period.” WAC 173-442-200(6). The first compliance period is 2017–2019. *See* WAC 173-442-030. However, following the December 15 court ruling, Ecology has at least informally suspended certain compliance obligations, including the regulatory orders, pending further developments in the case.

On October 4, 2017, Ecology proposed amendments to chapter 173-407 WAC—Carbon Dioxide Mitigation Program, Greenhouse Gases Emissions Performance Standard and Sequestration Plans and Programs for Thermal Electric Generating Facilities. The amendments would require power plants to reduce CO<sub>2</sub> emissions, meet a revised GHG performance standard, and develop programs to reduce GHGs, as approved by Ecology. *See* Original Notice of Proposed Rulemaking, Washington State Register 17-20-099 (Oct. 4, 2017). The CO<sub>2</sub> emission mitigation requirements would apply to “all new and certain modified fossil-fueled thermal electric generating facilities” with capacity of more than 25 MWs of electricity. Proposed WAC 173-407-010(1). The revised GHG performance standards would be triggered by a variety of events, including, but not limited to, commencement of operation, facility upgrades, ownership changes, and long-term financial commitments. Proposed WAC 173-407-120. Comments on the proposed rule were due on November 14, 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. Several pre-proposal drafts of amendments to chapter 173-400 WAC—General Regulations for Air Pollution Sources, and chapter 173-455—Air Quality Fee Rule have been released for public comment, and related stakeholder meetings have been held.

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. The package of rule amendments will address air regulatory issues beyond applicable emissions standards during SSM events, including public notices for air permits, the federal definition

of volatile organic compound, and nonroad engines. At a November 29, 2017, stakeholder meeting, Ecology indicated that it was planning to release a proposed rule on January 24, 2018, accept public comments until March 6, 2018, and finalize a rule no later than June 1, 2018.

## Legislation

Several climate change bills were previously proposed in the Washington legislature (S.B. 5509, H.B. 1646, S.B. 5421, and H.B. 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. H.B. 2230, which would also implement a carbon tax regime, was introduced in June 2017. It remains in committee.

In January 2017, a bill (S.B. 5172) was introduced that would repeal requirements for Ecology to consult with the climate impacts group at the University of Washington regarding the science on human-caused climate change and to report to the legislature with recommendations on whether revisions to state GHG emission goals should take place. The bill also remains in committee.

The Democratic Party gained the majority in the state Senate in the November 2017 elections. Because the party now controls both state legislative houses and the governor's office, some observers expect the state to try to pass a package of energy and climate change-related legislation in upcoming legislative sessions.

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

A bill, S.B. 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. The bill also remains in committee.

In January 2017, a bill (S.H.B. 1911) concerning regulation of odors at marijuana facilities, was introduced. The bill also remains in committee.

## Administrative Ruling

The Washington Pollution Control Hearings Board has continued to process civil penalty appeals arising out of odor complaints against commercial cannabis facilities. In *Green Freedom LLC v. Olympic Region Clean Air Agency*, PCHB No. 17-028c (Nov. 28, 2017 Order Denying Summ. J. Mots.), the PCHB, finding too many contested factual issues, denied summary judgment on whether a cannabis operation met an "agricultural land" exemption from the requirements of the state Clean Air Act. See RCW 70.94.640. Subsequently, in a slightly unusual decision, the PCHB agreed that its members would visit the cannabis facility to help determine the applicability of the exemption. PCHB No. 17-028c (Dec. 28, 2017 Order Granting Mot. for Site Visit).

The PCHB also recently denied summary judgment motions in *Marine Vacuum Services, Inc. v. Puget Sound Clean Air Agency*, PCHB No. 16-130c (Oct. 27, 2017 Order on Mots.), finding, among other things, that a notice of violation (NOV) issued by the Puget Sound Clean Air Agency was not barred by a statute of limitations, because the NOV being challenged was "remedial" (it required a construction permit application), not "a penalty," and rejecting a panoply of equitable defenses. The case involves NOVs and related penalties stemming from long-running odor complaints associated with a facility that provides "waste remediation and disposal services."

The PCHB also upheld penalties issued by the Northwest Clean Air Agency to a gas station owner when the owner failed to submit a construction permit application upon commencing operations and then later failed to install stage 1 enhanced vapor recovery equipment. *Annette Holding LLC v. Northwest Clean Air Agency*, PCHB No. 16-033c (Dec. 20, 2017 Amend. Findings of Fact, Conclusions of Law, and Order).

## Cases

On December 15, 2017, a judge in Thurston County Superior Court issued a bench ruling striking down the parts of the Clean Air Rule that would have regulated GHG emissions associated with natural gas distributors and petroleum importers, or “indirect emitters.” See *Association of Washington Business v. Department of Ecology*, No. 16-2-03023-34, Verbatim Report of Proceedings at 102:10 (Dec. 15, 2017). At Ecology’s request, the court agreed to consider briefing on whether the severability clause at WAC 173-442-370 would allow the portions of the rule that apply to stationary sources to survive. As of this writing, only Ecology had submitted briefing on the issue.

The environmental groups that intervened to defend the Clean Air Rule have stated that they would appeal the Thurston County Superior Court decision even if portions of the rule are allowed to survive. Immediately following the bench ruling,

however, Ecology indicated that it would await resolution of the severability issue before deciding whether to initiate an appeal. See J. Brunner, *Judge: Wash. State Can’t Enforce Inslee Order to Cut Greenhouse-Gas Emissions*, SEATTLE TIMES, Dec. 19, 2017.

On September 5, 2017, in an unpublished decision, Division I of the Washington Court of Appeals, ruled that the King County Superior Court erroneously granted a Civil Rule 60(b) motion (relief from judgment) in *Foster v. Department of Ecology*, No. 14-2-25295-1 (King Cty. Super. Ct.) when the superior court reversed an earlier decision that found that Ecology had properly denied a petition from youth plaintiffs in the case requesting that the agency issue a rule regulating GHG emission in the state. See 200 Wash. App. 1035, No. 75374-6-1 (Sept. 5, 2017). The decision reinstates the November 2015 order from the superior court upholding Ecology’s denial of the youth petition for rulemaking.



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