

## Air Quality Committee Newsletter

Vol. 20, No. 2

February 2017

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### MESSAGE FROM THE CO-CHAIRS

Elizabeth Hurst and Lauran Sturm

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As the new co-chairs of the Air Quality committee, we invite you to read and reflect on the engaging air-quality related topics highlighted in this issue. Our feature articles focus on the possibility of imminent greenhouse gas regulations for aircraft (Thomas A. Utzinger); revisions to EPA's Appendix W modeling guideline (David Loring); and measuring cooperative federalism through the lens of National Ambient Air Quality Standards (William Smalling). In addition, we offer regional reports from all ten EPA regions, with updates on litigation, regulatory actions, and enforcement.

In December, our committee presented an air quality perspective on CERCLA arranger liability (materials available here: <http://shop.americanbar.org/ebus/store/productdetails.aspx?productId=262835851>) and also co-hosted a committee program call on the new methane and waste prevention rule with the Oil and Gas and Public Land and Resources committees. Please look for our upcoming programs on Clean Air Act basics and a joint "year-in-review" presentation with the Air and Waste Management Association—we'd love for you to join us! Please also plan to attend the 46th Spring Conference in Los Angeles where you can network, get important updates on air law, and learn more about the Section and the Air Quality Committee.

This year, our committee is focusing on broad-ranging and significant air quality topics such as greenhouse gas regulation, PSD/NSR permitting and enforcement, mobile source emissions, risk management plans, and Next Generation compliance. Through this newsletter, our electronic communications, and social media, we will work to highlight significant case developments, regulatory notices, and enforcement actions. We would love your input and encourage you to reach out to us or the committee vice chairs if you have any suggestions, questions, or information to share. You can reach us at [eahurstlaw@gmail.com](mailto:eahurstlaw@gmail.com) and [lauran.sturm@tn.gov](mailto:lauran.sturm@tn.gov), or tweet our social media vice chair with the tag [#abaairquality](https://twitter.com/abaairquality).

A final thank you to our committee vice chairs, who do bulk of the work in developing programs, compiling and editing content, and sending out timely and informative information. On behalf of the committee, thank you for your membership, and please enjoy this issue!

*Elizabeth Hurst and Lauran Sturm are co-chairs of the Air Quality Committee.*

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**Air Quality Committee Newsletter**  
**Vol. 20, No. 2, February 2017**  
**Irene Hantman, Rod Johnson,**  
**David Loring, Editors**

**In this issue:**

**Message from the Co-Chairs**  
 Elizabeth Hurst and Lauran Sturm.....1

**FEATURED ARTICLES**

**U.S. and International Efforts to Curb Aircraft Greenhouse Gas Emissions**  
 Thomas A. Utzinger, Esq.....3

**Revisions to EPA’s Appendix W Modeling Guideline Signal Continued Development of Ambient Air Quality Modeling**  
 David Loring.....7

**The NAAQS as a Metric for the Veil of Cooperative Federalism**  
 William Smalling .....10

**REGIONAL REPORTS**

**EPA Region 1**  
 Dixon Pike and Brian Rayback .....14

**EPA Region 2**  
 Philip E. Karmel .....16

**EPA Region 3**  
 Sarah Clark .....16

**EPA Region 4**  
 Joseph Brown and Deaven Niblock .....17

**EPA Region 5**  
 Gary Pasheilich.....19

**EPA Region 6**  
 John King.....20

**EPA Region 7**  
 Richard D. Winders.....22

**EPA Region 8**  
 Chelsea Grossi and Tarn Udall.....23

**EPA Region 9**  
 Eric L. Hiser and Brandon Curtis .....25

**EPA Region 10**  
 Emerson Hilton, David Weber, and Gus Winkes.....28

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

**CALENDAR OF SECTION EVENTS**

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

March 29, 2017  
**Environmental Summit of the Americas**  
 Los Angeles, CA

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

April 20, 2017  
**A New Era of Environmental Law: Foundations and Principles Colloquium**  
 The Elisabeth Haub School of Law at Pace University  
 White Plains, NY

**For full details, please visit**  
**[www.ambar.org/EnvironCalendar](http://www.ambar.org/EnvironCalendar)**

## FEATURED ARTICLES

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### U.S. AND INTERNATIONAL EFFORTS TO CURB AIRCRAFT GREENHOUSE GAS EMISSIONS

Thomas A. Utzinger, Esq.

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Efforts by the United States and international entities to address greenhouse gas (GHG) emissions are in a multitude of stages. As aircraft produce approximately 3 percent of U.S. GHG emissions and 2 percent of global GHG emissions, recent regulatory and policy developments are increasingly focusing on aviation as a next step.

In 2016, the U.S. Environmental Protection Agency (EPA) finalized an “endangerment finding” for aircraft GHG emissions, triggering a legal duty to develop appropriate regulations under the Clean Air Act. Also in 2016, the International Civil Aviation Organization (ICAO) approved a carbon dioxide (CO<sub>2</sub>) standard for new and in-production aircraft. The ICAO also approved a global market-based program for international flights intended to offset GHG emissions exceeding 2020 levels.

As an ICAO member state, the United States is obligated to adopt domestic standards that are at least as stringent as ICAO standards. An EPA rulemaking for aircraft GHG emissions would therefore translate the ICAO’s CO<sub>2</sub> standard into a domestic regulation in some form. Implementing the ICAO’s corresponding market-based offset program, however, may first require legislation. The Federal Aviation Administration (FAA) would also initiate a subsequent rulemaking to ensure industry compliance.

An EPA aircraft GHG standard would also support, to a small degree, total emissions reductions pledged by the United States under the 2015 Paris Agreement. The Paris Agreement does not apply to international aviation GHG emissions, but generally leaves open the possibility for individual nations to address domestic aviation GHG emissions. Although the incoming administration could change course with respect to U.S. participation

under the Paris Agreement, EPA will remain legally obligated under the Clean Air Act to move forward with a domestic aircraft GHG rulemaking.

### The EPA’s Aircraft Endangerment Finding

Administrator Gina McCarthy published two findings in 2016 related to aircraft GHGs under Clean Air Act section 231(a)(2)(A), 42 U.S.C. § 7571(a)(2)(A). Section 231(a)(2)(A) provides that the administrator “shall, from time to time, issue proposed emission standards applicable to the emission of any air pollutant from any class or classes of aircraft engines which in his judgment causes, or contributes to, air pollution which may reasonably be anticipated to endanger public health or welfare.”

Signed on July 25, 2016, and published in the *Federal Register* on August 15, 2016, Administrator McCarthy’s final action included an “endangerment finding” and a “cause or contribute finding” (collectively referred to as the “endangerment finding”). Finding That Greenhouse Gas Emissions from Aircraft Cause or Contribute to Air Pollution That May Reasonably Be Anticipated to Endanger Public Health and Welfare; Final Rule, 81 Fed. Reg. 54,422 (Aug. 15, 2016). Relying heavily on the technical record supporting an analogous 2009 endangerment finding for new motor vehicles under Clean Air Act section 202(a), Administrator McCarthy determined that elevated concentrations of six well-mixed GHGs in the atmosphere (CO<sub>2</sub>, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride) endanger the public health and welfare. The administrator also found, in the cause-or-contribute finding, that GHG emissions from certain classes of engines used in certain types of aircraft contribute to the greater mix of GHG pollution. Domestic aircraft emit approximately 12 percent of U.S. transportation-related GHG emissions, 3 percent of total U.S. GHG emissions, and 0.5 percent of total global GHG emissions.

The endangerment finding applies to “covered aircraft,” a subset of aircraft to which an

international CO<sub>2</sub> standard would also apply, such as jet airliners, larger turboprops, and larger business jets. Manufacturers of aircraft and aircraft engines sold in the United States would be affected. Although smaller aircraft, helicopters, and military aircraft are not covered, the endangerment finding applies to approximately 89 percent of U.S. aircraft GHG emissions.

The endangerment finding is the latest step in a lengthy regulatory process that began with a petition submitted by environmental groups in 2007. *Petition for Rulemaking Under the Clean Air Act to Reduce the Emission of Air Pollutants from Aircraft That Contribute to Global Climate Change*, Friends of the Earth, et al. (Dec. 5, 2007). The petitioners filed a lawsuit in 2010 following an alleged unreasonable delay by the agency, and in 2011, the U.S. District Court for the District of Columbia held that, under section 231(a)(2)(A), EPA had a nondiscretionary duty to make a finding with respect to endangerment. *Ctr. for Biological Diversity v. EPA*, 794 F. Supp. 2d 151, 162 (D.D.C. 2011). EPA was sued again in 2016. The parties agreed to dismiss the lawsuit following issuance of the agency's long awaited final endangerment finding. *Ctr. for Biological Diversity v. EPA*, No. 16-cv-681 (D.D.C. Sept. 9, 2016).

In response to the endangerment finding's publication, the Biogenic CO<sub>2</sub> Coalition filed a petition for reconsideration on October 14, 2016. *Petition for Reconsideration by Biogenic CO<sub>2</sub> Coalition of EPA Aircraft Endangerment Final Rule*, Docket No. EPA-HQ-OAR-2014-0828 (Oct. 14, 2016). The petition for reconsideration, unrelated to prior claims of unreasonable delay, urged EPA to reconsider how it will treat crop-derived CO<sub>2</sub> emitted from the combustion of biofuels and biomass. The issue is significant because airlines are increasingly using biofuels. The group proposed that crop-derived CO<sub>2</sub> should not be counted toward regulated CO<sub>2</sub> emissions because crop-derived CO<sub>2</sub> is carbon neutral or negligible. The Biogenic CO<sub>2</sub> Coalition also filed a petition for review in the D.C. Circuit. *Petition for Review, Biogenic CO<sub>2</sub> Coalition v. EPA*, No.

16-1358 (D.C. Cir. Oct. 14, 2016). On November 14, 2016, the challenge was held in abeyance by the D.C. Circuit upon a joint request by the parties. Order, *Biogenic CO<sub>2</sub> Coalition v. EPA*, No. 16-1358 (D.C. Cir. Nov. 14, 2016).

The endangerment finding triggers a duty to move forward with a standard-setting rulemaking in some form. *See Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (interpreting analogous provision in Clean Air Act section 202). Although ICAO member states may adopt standards that differ from those issued by the ICAO (upon notice to the ICAO), it is unlikely that the Trump administration's EPA will promulgate standards that exceed or differ substantially from the 2016 ICAO standard, contrary to certain environmental groups' preferences. As part of the regulatory process, under Clean Air Act section 232, FAA would be required to initiate a subsequent rulemaking ensuring that emissions standards are complied with in the aircraft certification and manufacturing process.

If the new administration elects not to enact GHG standards, EPA would be required to propose and promulgate, through notice-and-comment rulemaking, a reversal of the endangerment finding. Such action would likely fail under judicial review because a reversal of the endangerment finding would have to pass as being reasonable and not arbitrary and capricious. EPA would have to offer a satisfactory explanation demonstrating that the reversal is based on an examination of the relevant data. *See Motor Vehicle Mfrs. Ass'n of the United States, Inc. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983). This would be difficult because the aircraft endangerment finding was largely based on the extensive scientific record supporting the 2009 endangerment finding for motor vehicles.

### **An International CO<sub>2</sub> Standard and Global Market-Based Measure**

The ICAO is a United Nations specialized agency responsible for setting international safety, security, efficiency, capacity, and environmental standards.

The ICAO's Assembly considers technical recommendations made by the organization's Committee on Aviation Environmental Protection (CAEP). While aircraft must meet Clean Air Act requirements to fly in the United States, aircraft must meet ICAO standards to fly internationally.

On February 8, 2016, CAEP agreed on a recommended CO<sub>2</sub> standard to reduce emissions, making CO<sub>2</sub> emissions part of the aircraft certification process. Formal ratification is expected in March 2017. The CO<sub>2</sub> standard is a part of a larger "basket of measures" ICAO is taking to reduce GHGs from covered aircraft (i.e., larger commercial and business aircraft). It is the first global technology standard for CO<sub>2</sub> for any sector. See *2016 Environmental Report*, ICAO (2016), available at <http://www.icao.int/environmental-protection/Pages/env2016.aspx>. This CO<sub>2</sub> standard was approved on October 6, 2016, during the ICAO Assembly's 39th session. EPA may now begin to move forward with a rulemaking that incorporates the international standard, although this will not likely happen until 2017 at the earliest.

Briefly, the CO<sub>2</sub> standard is a metric system based on an aircraft's performance during cruise flight, adjusted for fuselage size. The maximum metric value (fuel burn per flight kilometer) is set forth for each covered aircraft type, based on size and weight. Resulting emissions reductions will range from 0 to 11 percent, with greater impact on larger aircraft. An average reduction of 4 percent is expected. The standard applies to new aircraft designs requiring government certification as of 2020 (for business jets, 2023). Aircraft designs that are currently produced must comply after 2023 if they are modified to a point that requires recertification. Otherwise, all aircraft designs being produced must comply by 2028. The standard ensures that new replacement aircraft are more efficient than older in-use aircraft being retired. See *International Civil Aviation Organization's CO<sub>2</sub> Standard for New Aircraft*, ICCT (Feb. 2016), available at [http://www.theicct.org/sites/default/files/publications/ICCT-ICAO\\_policy-update\\_feb2016.pdf](http://www.theicct.org/sites/default/files/publications/ICCT-ICAO_policy-update_feb2016.pdf).

Environmentalists support a strong domestic rule that exceeds the ICAO's CO<sub>2</sub> standard for new and in-production aircraft, such as a rule that also applies to aircraft that are currently in use. Under the 1944 Chicago Convention, the United States and other ICAO member states are obligated to adopt domestic standards that are at least as stringent as ICAO standards. The Trump administration, however, is unlikely to promulgate a final rule that regulates more broadly than is required by the ICAO's CO<sub>2</sub> standard for new and in-production aircraft.

On October 6, 2016, the ICAO also approved a global market-based measure requiring offsets for international aviation CO<sub>2</sub> emissions exceeding 2020 levels. *Assembly Resolution A39-3*, ICAO (Oct. 6, 2016), available at [http://www.icao.int/environmental-protection/Documents/Resolution\\_A39\\_3.pdf](http://www.icao.int/environmental-protection/Documents/Resolution_A39_3.pdf). The program, known as "Establishing the Carbon Offsetting and Reduction Scheme for International Aviation" (CORSIA) begins with a pilot phase from 2021 through 2023, followed by a first phase from 2024 through 2026. With some exceptions, participation becomes mandatory in 2027 through 2035. Individual countries must implement CORSIA so that airlines having emissions above 2020 levels can acquire and account for offsets (credits) from non-aviation sources. The United States indicated that it would participate. However, doing so would likely fall outside of the GHG rulemaking process to be undertaken by EPA and may require legislation.

## Other International Measures

In the meantime, the aviation industry worldwide has been setting its own goals for GHG reductions, including targets committed to by the International Air Transport Association (IATA) and other stakeholders. The IATA is analyzing how various fuel-efficient technologies and aircraft design technologies will help the industry achieve three high-level goals of (1) improving fuel efficiency by an average of 1.5 percent per year to 2020; (2) stabilizing GHG emissions from 2020 with carbon-neutral growth; and (3) reducing GHG emissions

by half by 2050 relative to 2005 levels. *See IATA Technology Roadmap*, IATA (June 2013), available at <https://www.iata.org/whatwedo/environment/Documents/technology-roadmap-2013.pdf>.

## Supporting Paris Agreement Commitments by Regulating Domestic Aircraft?

The December 2015 Paris Agreement is the next step of the United Nations Framework Convention on Climate Change (UNFCCC). Agreed to during the twenty-first Conference of the Parties (COP-21) in December 2015 and entering into force on November 4, 2016, the Paris Agreement establishes an international structure to limit average global temperature rise to below 2°C (3.6°F) above pre-industrial levels. *Adoption of the Paris Agreement*, United Nations (Dec. 12, 2015), available at <https://unfccc.int/resource/docs/2015/cop21/eng/l09.pdf>. The Paris Agreement allows countries to develop individually tailored plans for GHG emissions reductions, known as “nationally determined contributions” which are updated every five years. Although the United States did not ratify the 1992 Kyoto Protocol, under the Paris Agreement (not a treaty) President Obama committed to make an “economy-wide” reduction in GHG emissions of 26 to 28 percent from 2005 levels by 2025.

Aviation indirectly intersects with the Paris Agreement to the extent that the Paris Agreement’s framework relies on individual nations to develop

plans pertaining to their domestic emissions sources. This means that while GHG emissions from *international* flights are not covered by the Paris Agreement, but by the ICAO under the Kyoto Protocol, emissions from *domestic* flights can be covered by a country’s nationally determined contribution. A final EPA rule would therefore serve as an additional, albeit small source of emissions reductions toward U.S. commitments.

## Conclusion

In November 2016, the UNFCCC parties convened COP-22 in Marrakesh, Morocco, to discuss initial steps for implementing the Paris Agreement. Depending upon how the Trump administration approaches U.S. involvement as a party going forward, the United States will either continue to seek increasingly aggressive measures to reduce national GHG emissions, or at the other extreme withdraw completely. In either case, EPA will move forward with an aircraft GHG rulemaking, reflecting the international CO<sub>2</sub> standard for new and in-production aircraft. How the United States implements the ICAO’s market-based measure to offset emissions from international flights, however, remains to be seen.

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## REVISIONS TO EPA'S APPENDIX W MODELING GUIDELINE SIGNAL CONTINUED DEVELOPMENT OF AMBIENT AIR QUALITY MODELING

David Loring

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On December 20, 2016, EPA released long-awaited revisions to its air quality modeling guidelines. *See* Guideline on Air Quality Models, 40 C.F.R. pt. 51, app. W (pre-*Federal Register* publication signed December 20, 2016) (“Modeling Guideline”). The Modeling Guideline incorporates a series of best practices aimed at providing consistent and reliable modeling results used to evaluate compliance with National Ambient Air Quality Standards (NAAQS), as well as single-source impacts on ambient air quality for major source permitting under the Prevention of Significant Deterioration (PSD) program. The Environmental Protection Agency’s (EPA) latest refinements to the Modeling Guideline should provide better flexibility and options for determining ambient air quality under more realistic weather and operating scenarios. Moreover, they signal EPA’s increased willingness to allow modeling analyses to represent actual ambient air quality conditions. These revisions are expected to impact forthcoming air quality designations and redesignations under the current 2010 SO<sub>2</sub> NAAQS as well as future NAAQS for other criteria air pollutants.

### A. Reliance on Modeling to Demonstrate Compliance with NAAQS

Historically, determinations of whether areas were in or out of compliance with ambient air quality standards were primarily based upon monitoring rather than modeling data. EPA deviated from this trend in 2010 with the promulgation of the 2010 one-hour SO<sub>2</sub> primary NAAQS. 75 Fed. Reg. 35,520 (June 22, 2010). For the first time, EPA recommended that states rely upon air quality modeling, where sufficient monitoring data were unavailable, to assess whether or not areas meet the air quality standard. EPA even issued technical modeling guidance to assist regulators in the use of modeling to determine NAAQS compliance. *See, e.g.,* EPA,

SO<sub>2</sub> NAAQS Designations Modeling Technical Assistance Document (Aug. 2016).

As EPA increased the availability of its air modeling input and process files for widespread use, output of models began to vary widely. This led to increased challenges to EPA’s air quality designations. This is most notably reflected in the recent designations under the 2010 SO<sub>2</sub> NAAQS. EPA’s technical support documents for the 2010 SO<sub>2</sub> NAAQS area designations are replete with discussions of conflicting modeling analyses. These analyses were submitted to EPA during the public comment process. The accessibility of air dispersion modeling known as “AERMOD” provided the states, regulated community, and the nongovernmental organizations like the Sierra Club the opportunity to utilize differing modeling inputs that each party argued represented better approximated actual air quality impacts.

Ultimately, 65 areas were designated under the 2010 SO<sub>2</sub> NAAQS in 2016. However, despite the volume of modeling data submitted to EPA during the designation process, only 7 of those areas were designated in nonattainment of the 2010 SO<sub>2</sub> NAAQS. An additional 17 areas were determined unclassifiable under the standard. For a substantial number of these area designations, EPA’s decision of whether an area was in compliance with the SO<sub>2</sub> NAAQS was based on a battle of differing AERMOD modeling submissions from the state, Sierra Club, and affected industry. *See, e.g.,* EPA Final Technical Support Document for Final Action on Ohio Area Designations for the 2010 SO<sub>2</sub> NAAQS, Technical Analysis for Gallia County, Ohio (July 2016). In many instances, industry and state agencies requested that EPA consider alternative air quality modeling inputs (known as “beta options”) to better model actual ambient conditions in the area. EPA almost universally rejected reliance on these beta options absent prior case-specific approval from EPA. Not surprisingly, a number of these modeling-based designations are now under reconsideration and appeal before the EPA and various courts. *See, e.g., Samuel Masias v. EPA*, No. 16-1314 consolidated (D.C.C.A. 2016).

## **B. EPA Revisions to the Ambient Air Quality Modeling Guideline**

The reliance on air quality modeling for area designations under the 2010 SO<sub>2</sub> NAAQS provides the backdrop for EPA's recent revisions to its Modeling Guideline. Generally, ambient air quality modeling must comply with EPA's Modeling Guideline for EPA to accept use of the modeling to determine NAAQS compliance. Although EPA regulations do provide for case-specific grants of alternative modeling options not adopted under the guideline, EPA has not previously identified how such alternatives could be accepted. (See section 3.2 of the Modeling Guideline.) The revised Modeling Guideline addresses a myriad of revisions that have been under consideration since July 2015 (80 Fed. Reg. 45,340), to increase flexibility and better account for variability in the use of AERMOD modeling techniques and ambient conditions, respectively.

Most notably, EPA has now approved certain alternative modeling options (so-called beta options) aimed at improving the representativeness of modeling during certain atmospheric conditions. One of the common concerns with ambient air quality modeling is the tendency for modeling to overpredict (that is, model overly conservative) ambient air pollution concentrations, particularly during low wind, stable atmospheric conditions. In response to public comment, EPA adopted the "ADJ\_U\*" beta option as an approved AERMET (the meteorological data preprocessor to AERMOD) modeling option to more accurately predict peak emission impacts from stationary sources during low wind speed and stable conditions.

EPA declined, however, in the final Modeling Guideline to approve for use additional requested low wind speed modeling options. Specifically, EPA declined to incorporate the LOWWIND3 beta option for AERMOD to address lateral plume spread during low wind conditions, citing insufficient scientific certainty in the reliability of the option as the basis for the agency's decision.

As noted above, EPA will still consider, but not necessarily approve, case-specific requests under section 3.2 of the Modeling Guideline for use of LOWWIND3 in AERMOD modeling. See EPA, Clarification on the Approval Process for Regulatory Application of the AERMOD Modeling System Beta Options (Dec. 10, 2015).

Both ADJ\_U\* and LOWWIND3 options were heavily utilized in modeling submitted by industry and state permitting agencies to support proposed area designations under the 2010 SO<sub>2</sub> NAAQS. In all but a handful of areas where EPA had formally approved use of alternative modeling techniques, EPA declined to rely upon modeling results that utilized either ADJ\_U\* or LOWWIND3. The December 2016 revisions to the Modeling Guidelines, therefore, signal at least an increased willingness on the part of EPA to impart additional flexibility into ambient air quality modeling. Whether EPA's approval to use alternative modeling options in the Modeling Guideline impacts designations presently under reconsideration and appeal remains to be seen.

In addition, it's worth noting that section 320 of the Clean Air Act requires that EPA evaluate air quality modeling at least every three years (the last modeling conference on air quality occurred in August 2015). Thus, by mid-2018, EPA will again have the opportunity to adopt additional beta options into its Modeling Guideline. If adopted, those options would be available for remaining designations or redesignations under the December 2020 designation deadline for the 2010 SO<sub>2</sub> NAAQS.

## **C. Possible Use of Modeled Emission Rates in Major Source Permitting to Streamline Assessment of Ambient Air Quality Impacts**

The Modeling Guideline is often also utilized in PSD permitting approvals to demonstrate compliance with the NAAQS. EPA's revised Modeling Guidelines, along with recently issued EPA guidance (see below), indicate that



new modeling techniques for assessing single-source impacts on ozone and secondary PM<sub>2.5</sub> (particulate matter less than 2.5 microns) ambient air quality may be approved in the near future. EPA's consideration comes in response to a July 2010 request submitted by the Sierra Club seeking the establishment of air quality models for major sources applying for major source construction permits.

EPA originally proposed adopting modeled emission rates for precursors (known as "MERPs") that permitting authorities would use to determine whether a major modification would be expected to contribute to a violation of the ozone or PM<sub>2.5</sub> NAAQS. Thus, for example, if a permitting authority determined that the projected increase in nitrogen oxide emissions (an ozone precursor) was above an established MERP, the project would be presumed to cause or contribute to a violation of the NAAQS and the permitting authority would need to take appropriate measures to address the impact prior to permit issuance.

On December 2, 2016, EPA issued a draft technical modeling guidance document for developing MERPs. *See Guidance on the Development of MERPs as a Tier 1 Demonstration Tool for Ozone and PM<sub>2.5</sub> Under the PSD Permitting Program* (Dec. 2, 2016). EPA noted that the guidance itself contained merely recommendations, not requirements, in part because EPA believed that site-specific rather than general nationally applicable conditions were more appropriate in permitting decisions. Consequently, in EPA's revised Modeled Guidelines, issued shortly after the guidance document, EPA ultimately declined to adopt a set of nationally applicable MERPs into appendix W. Instead, EPA indicated that it would defer to state permitting authorities to develop area-specific MERPs to assist in major source permitting.

It remains to be seen whether EPA's Modeling Guideline will eventually adopt standard procedures for evaluating ambient air quality impacts for major source permitting

determinations. In the interim, EPA's proposed MERPs guidance—if finalized—should provide state permitting authorities sufficient direction to establish locally applicable MERPs programs. The incorporation of modeled emission rates to presumptively evaluate NAAQS impacts will undoubtedly impact the issuance of construction permits for major sources and signals the growing importance that NAAQS compliance will play under the Clean Air Act.

**David M. Loring** is a partner in the Chicago Office of Schiff Hardin LLP.

### 2017 Call for Nominations

## NOMINATE

The Section recognizes and honors individuals, entities, or organizations that have made significant accomplishments or demonstrated recognized leadership in the environmental, energy, and natural resources legal areas.

Nominations are now being accepted for the following awards.

#### Nominations Due: May 12, 2017

- Distinguished Achievement in Environmental Law and Policy Award
- State or Local Bar Environment, Energy, and Resources Program of the Year
- Law Student Environment, Energy, and Resources Program of the Year Award
- Environment, Energy, and Resources Government Attorney of the Year
- Environment, Energy, and Resources Dedication to Diversity and Justice

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

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## THE NAAQS AS A METRIC FOR THE VEIL OF COOPERATIVE FEDERALISM

William Smalling

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### Introduction

From 1970, modern environmental law has been a joint venture between the federal government and the states. When Congress enacted the Clean Air Act (CAA) of 1970 it crafted the model for most of the pollution control legislation enacted in the ensuing decades. Referred to as “cooperative federalism,” the concept was to delegate authority to a federal agency, such as the Environmental Protection Agency (EPA), to enact standards to achieve clean air goals. EPA then invites the states to participate in implementation and enforcement. As it relates to the environment, cooperative federalism involves inducement of state participation in a coordinated EPA program. Many states have lately become concerned about EPA failure to adhere to the CAA cooperative federalism schematic.

Cooperative federalism has a pragmatic basis. States and local governments are best positioned to develop compliance strategies to protect the environment in a way that is relevant to local needs and conditions. (Jonathan H. Adler, *Jurisdictional Mismatch in Environmental Federalism*, N.Y.U. ENVTL. L.J., 130, 134–39 (2005–06).)

### CAA History and Cooperative Federalism

The 1970 act established a strong role for the states because it was designed “to preserve the federal system” and “recognized that the task of implementing . . . the clean air program was so enormous that it would be helpful to have effective agencies at the state and local level to get the job done more quickly and thoroughly.” (Edmund S. Muskie, *Role of the Federal Government in Air Pollution Control*, 10 ARIZ. L. REV. 17 (1968–69).) In addition, the states and local governments were thought to be best situated to implement some control policies (such as land use) thought to be critical to effective

pollution control. (S. Rep. No. 1196, at 2 (1970).) The 1977 law moved the balance of federal-state authority toward more EPA control. The states’ autonomy mostly was maintained by reiterating the states’ freedom to adopt controls more stringent than EPA.

The 1990 law digressed another step from an “equal” partnership between the two government levels. The 1990 amendments were driven by the consistent inability of many states to comply with the National Ambient Air Quality Standards (NAAQS). The revised law set new timelines for NAAQS compliance in nonattainment areas (NAAs) and defined “reasonable further progress” steps necessary to move NAAs toward compliance. Sanctions were available to EPA if states did not make said progress. (42 U.S.C. § 7410(m).)

### Air Quality and Cooperative Federalism

Although air quality has improved in the United States over the past 46 years, there is a mounting concern that EPA, instead of cooperating with the states as an equal partner, is co-opting the states by treating them as mere regional offices of a huge federal bureaucracy. (Att’y Gen. Jon Bruning et al., White Paper, *Perspective of 18 States on Greenhouse Gas Emission Performance Standards for Existing Sources Under § 111(d) of the Clean Air Act*, at 2 (2013).) This could undermine a strategy that has helped to garner for the CAA broad public support.

### Issues in Implementation

The principle that states are EPA’s partners under the CAA is not always reflected in how EPA conducts rulemaking proceedings that impact the states. EPA often seeks to undermine the cooperative process with the states by providing little advance consultation with the states before publication of a proposed rule, then allowing a very short time frame for states to comment on the rule proposal, and often gives little attention to state concerns.

For example, EPA's disregard for the role of the states arose in the context of EPA's premature reconsideration of the ozone NAAQS in 2010. Many states objected to the adverse impacts of this unscheduled reconsideration. (States' Comments re: 2010 Ozone NAAQS Reconsideration. National Ambient Air Quality Standards for Ozone, 75 Fed. Reg. 2938.)

Members of Congress spoke out against the proposed action as well. In July 2011, Senator Jeff Sessions (R-AL), wrote a bipartisan letter joined by 33 other U.S. senators, which implored EPA not to revise the ozone NAAQS. Upon receipt of the letter, EPA delayed the issuance of the ozone rule and reconsidered the proposal. The president agreed with the request and directed EPA to halt the ozone standard revision. (Letter from Cass Sustein, Off. of Info. and Reg. Affairs, to Lisa Jackson, Admin. EPA (Sept. 2, 2011).) However, the president's decision came 18 months after EPA commenced the ozone reconsideration process. By that time states had spent significant resources preparing for the revision.

### **“Uncooperative” Federalism; Recent Examples**

EPA's failure to adequately involve the states in CAA rulemaking is reflected in the following two recent rulemakings. In both cases, the agency's failures impose significant burdens on the states.

On September 27, 2016, EPA published in the *Federal Register* a proposed determination that the Houston-Galveston Brazoria (HGB) area failed to attain the 2008 8-hour ozone NAAQS by the applicable deadline of July 20, 2016. Upon finalization and publication, this resulted in a reclassification by operation of law to the designation of “moderate” on December 14, 2016. The EPA action proposed to require that Texas submit state implementation plan (SIP) revisions to EPA by January 1, 2017. These SIP revisions would be required to meet the CAA statutory and regulatory requirements that apply to 2008 ozone NAAQS nonattainment areas.

The Texas Commission on Environmental Quality (TCEQ) commented that the proposed SIP submittal deadline of January 1, 2017, for the HGB area was unreasonable, not consistent with previous practice, and EPA's lack of timely notification of the abbreviated schedule would place an undue burden on the state. TCEQ noted that EPA had told the state and local stakeholders on several occasions that these SIP revisions would be due one year from final reclassification by EPA. TCEQ also requested a clarification on how EPA is working with them to support submittal of the required moderate nonattainment SIP by the proposed January 1, 2017 date. EPA responded that they assist during the monthly calls regarding the HGB 2008 ozone nonattainment areas. A regular topic on the meetings' agenda is to discuss any issues with TCEQ, then aid on any issues requested by TCEQ.

EPA responded that they believed that TCEQ was aware of the likelihood of a January 1, 2017, submission deadline, which lines up with the deadlines of the marginal areas reclassified as moderate in the 81 Fed. Reg. 26,697 (May 4, 2016) action. In that action, EPA stated that it recognized the value of providing states as much time as possible to develop an attainment demonstration; however, it also recognized the value in establishing a single due date for moderate area SIP submissions including reasonably available control technology (RACT). EPA believed the area was provided adequate notice to develop and submit a moderate area attainment plan by January 2017.

TCEQ also disagreed with the proposed January 1, 2017, RACT compliance deadline for the reclassified HGB area and recommended adjusting this deadline to July 20, 2018, the moderate attainment deadline. EPA responded that they believed the time frame is reasonable and consistent with prior actions included in the May 2016 final action. They responded that the state committed to have its state requirements in place by the deadline proposed by EPA and the state has not been prohibited from beginning development of moderate area SIP revisions prior to finalization of this reclassification. Per EPA, Texas's SIP

revision proposal of September 21, 2016, indicated no new RACT requirements in the 2018 attainment demonstration; TCEQ only proposed expanded coverage of a list of existing sources. (Apparently, there is some disconnect between EPA and TCEQ, because Texas's RACT rule "require[s] new control requirements in the HGB area to be achieved by July 20, 2018.")

As a final action on December 14, 2016, EPA determined that the HGB area failed to attain the 2008 ozone NAAQS by the attainment deadline date of July 20, 2016, and that area was reclassified as moderate. Texas should submit the SIP revisions to address the moderate ozone nonattainment area requirements, including a January 1, 2017, RACT compliance deadline, by January 1, 2017. Barring Texas's compliance, EPA could impose a federal implementation plan or other CAA sanctions.

EPA's proposed rule regarding Source Determination for Certain Emission Units in the Oil and Natural Gas Sector (Fed. Reg., Sept. 18, 2015 (EPA-HQ-OAR-2013-0685)) also illustrates EPA's failure to work with the states to develop air pollution controls. EPA stated that the goal of this proposal was to provide certainty to the oil and gas industry regarding the definition of a source and would aggregate many oilfield sources into major new source review (NSR) or Prevention of Significant Deterioration (PSD) sources, thereby subjecting them to a more comprehensive permit review. EPA proposed two options for determining whether two or more properties in the oil and natural gas sector are "adjacent." EPA's preferred option (option 1) relied solely on proximity as the determinative factor for "adjacent," requiring aggregation of oil and gas sources that are within 1/4 mile of each other. EPA's option 2 would have regulated facilities beyond 1/4 mile that are functionally interrelated as a basis for adjacency. Option 2 could be defined as a "hub and spoke" model, where "oil and gas produced from one or more wells has a dedicated flow to only one possible downstream point for further compression, processing or storage."

Texas indicated that both options raised significant implementation issues that would create an overly broad aggregation policy and overburden the permit program. Presently, the vast majority of the 300,000 regularly producing oil and gas sources in Texas are authorized under permits by rule or standard permits (PBR/SP). Many sources previously permitted under PBR/SP would be aggregated into major NSR or PSD sources, which would increase permit review time. Texas contended that under the proposed rule, there would be numerous sources that would be affected by EPA's proposed adjacency definitions.

TCEQ objected to option 1 because the adoption in a rule of any fixed distance between sources, without consideration of how those sources function together, is arbitrary and furthermore does not "approximate a common-sense notion of 'plant'" nor "fit within the ordinary meaning of 'building,' 'structure,' 'facility,' or 'installation.'" TCEQ also did not support option 2, because this configuration could lead to potentially absurd results where several oil and gas wells located over an area of many square miles could be aggregated merely because the product is transported by pipeline, rail, or truck to one central point.

In 2016, EPA finalized the definition that equipment on separate surface sites located more than 1/4 mile apart is not "adjacent" and, therefore, is not part of the same stationary source. In the final rule, EPA modified option 1 to require that emitting equipment located on separate surface sites within 1/4 mile of each other be aggregated as a single stationary source only if the emitting equipment also has a relationship that meets the "common sense notion of a plant." (81 Fed. Reg. 35,623, June 3, 2016.)

In response to TCEQ and others' comments relating to burdening the permit programs, EPA argued that (1) EPA is not requiring states with approved programs to apply its meaning of the term "adjacent," as many approved programs already comply with EPA's PSD, nonattainment

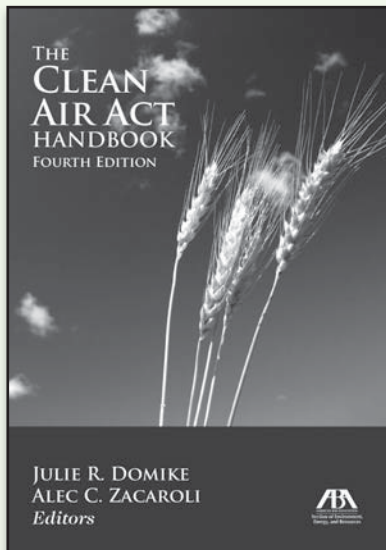
new source review (NNSR) and title V rules, without these changes; (2) states remain free to adopt more stringent requirements in order to address local air quality concerns; and (3) states that administer PSD permitting programs under a delegation of federal authority by EPA will have to follow the approach that EPA is finalizing, or develop their own permitting programs.

EPA's decisions as they relate to cooperative federalism in the case of the ozone redesignation example are a case of minimizing the impacted state's involvement in the rulemaking and increasing the burden of compliance. With the aggregation rule, EPA adopted a more synergistic approach, which combined the two proposed

definitional options. Nonetheless, in oil-producing states such as Texas and Oklahoma, the new definition will create additional permitting burdens on the impacted states because of the sheer land coverage in those states by oil and gas production activities.

**C. William Smalling** is a Thurgood Marshall Law School graduate and has three LL. M. diplomas in energy and environmental law, intellectual property law, and taxation from the University of Houston Law Center. He has an environmental and energy law practice in Houston, Texas. Previously, he has worked as an environmental and engineering consultant, after working at various positions with the Texas Air Control Board (predecessor to TCEQ).

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## REGIONAL REPORTS

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### EPA REGION I

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### RGGI

At the September 7, 2016, the Regional Greenhouse Gas Initiative (RGGI) auction, 14,911,315 allowances were sold at a clearing price of \$4.54/allowance. Click [here](#) or visit [https://www.rggi.org/market/co2\\_auctions/results](https://www.rggi.org/market/co2_auctions/results) for more information.

### Ozone

On September 30, 2016, the Environmental Protection Agency (EPA) confirmed that New England experienced a slight decrease in the number of unhealthy air quality days due to ozone (> 0.070 ppm) this year, compared to 2015. Based on preliminary data, there were 32 days when ozone monitors recorded unhealthy ozone levels in 2016, compared to 38 such days in 2015.

- 31 days in Connecticut (compared to 33 in 2015)
- 11 days in Massachusetts (15 in 2015)
- 6 days in Rhode Island (10 in 2015)
- 5 days in New Hampshire (7 in 2015)
- 4 days in Maine (4 in 2015)
- 1 day in Vermont (0 in 2015)

Click [here](#) or visit <https://www.epa.gov/newsreleases/new-england-experienced-fewer-unhealthy-air-quality-days-during-2016-summer-ozone>.

In addition, EPA has approved SIP revisions submitted by Maine, New Hampshire, Rhode Island, and Vermont addressing interstate transport. EPA has concluded that each state has adequate provisions to prohibit in-state emissions activities from significantly contributing to the nonattainment, or interfering with the maintenance, of the 2008 ozone National Ambient Air Quality

Standards (NAAQS) in any other state. Click [here](#) or visit <https://www.gpo.gov/fdsys/pkg/FR-2016-10-13/pdf/2016-24491.pdf>.

### Connecticut

In early June, the Connecticut Department of Energy and Environmental Protection filed a “good neighbor petition” with EPA under section 126 of the Clean Air Act (CAA) asking the agency to issue emission limits for the Brunner Island Power Plant in York Haven, Pa., because its emissions allegedly impact ozone levels in Connecticut. Click [here](#) or visit <http://www.yorkdispatch.com/story/money/business/2016/07/09/delaware-connecticut-petition-epa-brunner-island/86899940/>.

EPA approved a state implementation plan (SIP) revision that revises Connecticut’s stationary source sulfur in fuel oil content limits and the sampling and emission testing methods. Click [here](#) or visit <https://www.gpo.gov/fdsys/pkg/FR-2016-05-25/pdf/2016-12120.pdf>.

### Maine

A potato processing plant agreed to pay \$60,500 in civil penalties and to spend \$83,400 on equipment for emergency responders and public safety improvements at its facility to resolve alleged risk management plan (RMP) violations associated with the plant’s ammonia refrigeration system. Click [here](#) or visit <https://www.epa.gov/newsreleases/belfast-maine-processor-provides-emergency-response-equipment-community-under-epa>.

EPA approved state implementation plan (SIP) revisions that establish reasonably available control technology requirements for volatile organic compounds (VOCs) from fiberglass boat manufacturing and surface coating operations. Click [here](#) or visit <https://www.gpo.gov/fdsys/pkg/FR-2016-05-26/pdf/2016-12398.pdf>.

### Massachusetts

The Massachusetts Department of Environmental Protection (MassDEP) penalized a wireless

telephone company \$45,580 after the company voluntarily reported that it had failed to disclose and certify the installation and operation of 45 emergency engines. Click here or visit <http://www.mass.gov/eea/agencies/massdep/news/releases/at-and-t-mobility-penalized-45580-for-generators-.html>.

On May 17, 2016, the Supreme Judicial Court ruled that the RGGI program does not meet the Massachusetts Global Warming Solutions Act, which instead requires MassDEP to promulgate new regulations that “impose a limit on [greenhouse gas] emissions that may be released, limit the aggregate emissions released from each group of regulated sources or categories of sources, set emission limits for each year, and set limits that decline on an annual basis.” In response, MassDEP released working drafts for public comment. The draft regulation addressing power plants would create a CO<sub>2</sub> cap-and-trade program covering only in-state fossil fuel-fired power plants. The in-state plants would be allocated CO<sub>2</sub> allowances annually, which allocation would decrease by 2.5 percent yearly. This state program would be in addition to the existing RGGI program. Click here or visit <http://www.mass.gov/eea/agencies/massdep/air/climate/section3d-comments.html>.

## New Hampshire

A company that manufactures valves in Franklin, N.H., will pay a penalty of \$112,200 to settle EPA claims that it violated two National Emissions Standards for Hazardous Air Pollutants (NESHAPs)—metal fabrication/finishing operations and nonferrous foundries. Click here or visit <https://www.epa.gov/newsreleases/settlement-franklin-nh-manufacturer-will-help-prevent-hazardous-emissions>.

## Rhode Island

A Connecticut-based, local stone-crushing and gravel-processing facility has agreed to pay a penalty of \$84,070 to resolve violations alleged by EPA relating to the NESHAP for stationary

diesel engines/generators and the new source performance standards (NSPS) for non-metallic mineral processing. Click here or visit <http://www.ecori.org/pollution-contamination/2016/6/29/westerly-quarry-fined-for-clean-air-violations>.

## Vermont

The Vermont Department of Environmental Conservation (VT DEC) settled environmental violations involving a rock quarry, stone-crushing operation, manufactured sand and processing operation, and hot mix asphalt plant in Colchester. The settlement includes a \$42,600 penalty for violations of the facility’s air permit. Click here or visit <http://www.vermontbiz.com/news/july/colchester-construction-company-settles-air-pollution-violations-42000>.

EPA approved a SIP revision that sets the amount of PM<sub>2.5</sub> increment that sources are permitted to consume when obtaining a Prevention of Significant Deterioration (PSD) permit and requires PM<sub>2.5</sub> emission offsets under certain circumstances. Click here or visit <https://www.gpo.gov/fdsys/pkg/FR-2016-09-14/pdf/2016-21881.pdf>.



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## EPA REGION 2

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### **New York Adopts Distributed Generation Rulemaking**

On November 6, 2016, the New York State Department of Environmental Conservation (NYS-DEC) published in the *State Register* its notice of adoption of a new rule applicable to distributed generation (DG) sources that have the potential to emit nitrogen oxides ( $\text{NO}_x$ ) below major source thresholds (i.e., 25 tons per year in the New York City metropolitan area and certain towns in Orange County or 100 tons per year elsewhere in New York State). The new rule defines a DG source as a “stationary reciprocating or rotary internal combustion engine that feeds into the distribution grid or produces electricity for use at the host facility or both.” 6 N.Y.C.R.R. § 222.2(b)(2). The rule is applicable only to DG sources with a maximum mechanical output rating of 200 horsepower or greater (in the New York City metropolitan area) or 400 horsepower or greater elsewhere. The rule distinguishes between “emergency generators” (defined as “a stationary internal combustion engine that operates as a mechanical or electrical power source only when the usual supply of power is unavailable, and operates for no more than 500 hours per year,” 6 N.Y.C.R.R. § 200.1(cq)) and “economic dispatch sources” (defined as a DG source that is not an emergency generator). The new  $\text{NO}_x$  and  $\text{PM}_{2.5}$  emission limits apply only to economic dispatch sources, which must comply by May 1, 2017 (unless the source is eligible for an extension of this deadline). The rule is intricate and requires careful reading for owners and operators of subject DG economic dispatch sources.

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## EPA REGION 3

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### **Maryland**

The Maryland Department of the Environment filed a petition under section 126 of the Clean Air Act asking EPA to require a number of coal-fired power plants in West Virginia, Pennsylvania, Ohio, Kentucky, and Indiana to require continuous operation of emissions controls during the May–October ozone season, claiming that the states’ failure to do so affects Maryland’s ability to meet federal air quality standards.

### **Pennsylvania**

The Pennsylvania Department of Environmental Protection will no longer enforce the stage II vapor recovery requirements for new and modified gasoline dispensing equipment, effective November 12, 2016. The PADEP will continue to require operation and maintenance of these requirements for owners and operators of gasoline facilities with existing stage II vapor recovery systems currently in place.





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## **EPA REGION 4**

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### **Alabama**

On November 21, EPA published a final action approving in part, and disapproving in part, portions of an Alabama Department of Environmental Management (ADEM) SIP submittal addressing the 2010 NO<sub>2</sub> NAAQS (81 Fed. Reg. 83,142). EPA's final rule approves of ADEM's submittal as satisfying all applicable Clean Air Act requirements, with the exception of provisions pertaining to prevention of significant deterioration permitting and visibility in other states, for which the final rule takes no action, and provisions respecting state boards, which the final rule disapproves.

Also, on December 5, EPA published a proposed rule that would disapprove of elements of an ADEM SIP submittal that addresses the visibility transport requirements of Clean Air Act section 110(a)(2)(D)(i) for the 2008 ozone NAAQS (81 Fed. Reg. 87,503). EPA's proposal notes that all other applicable infrastructure requirements for this SIP submission have been addressed in separate rulemakings.

### **Florida**

On November 22, the Florida Department of Environmental Protection (FDEP) submitted a proposed revision to Florida's state implementation plan (SIP) to EPA. FDEP's SIP revision includes amendments to Fla. Admin. Code Rule 62-210.700 to address EPA's final "SSM SIP call" published on June 12, 2015 (80 Fed. Reg. 33,840), which found SIPs in more than 30 states substantially inadequate with respect to their treatment of emissions during start-up, shutdown, and malfunction periods. EPA's

SSM SIP call set a November 22, 2016, deadline for proposed SIP revisions.

FDEP also recently published notice of a number of additional proposed SIP revisions, including a SIP revision confirming that FDEP's existing rules are adequate to implement the interstate transport requirements for the 2010 nitrogen dioxide National Ambient Air Quality Standard (NO<sub>2</sub> NAAQS) under Clean Air Act section 110(a)(2)(D)(i); and changes to Fla. Admin. Code chapter 62-297 that FDEP promulgated in 2014 and 2015, including amendments to rules 62-297.310 (General Emission Test Requirements), 62-297.440 (Supplementary Test Procedures), and 62-297.450 (EPA VOC Capture Efficiency Test Procedures). Comments on FDEP's proposed SIP revisions are due by January 5, 2017, and a SIP hearing will be held on January 10, if requested.

Finally, on November 23, EPA published final approval of a prior FDEP SIP submittal addressing the 2010 NO<sub>2</sub> NAAQS (81 Fed. Reg. 84,479). EPA's final action approves of FDEP's SIP submittal as satisfying all Clean Air Act requirements, except certain requirements for ambient air quality monitoring and interstate transport, which EPA indicates it will address in separate actions.

### **Georgia**

On November 21, EPA published a final rule approving of a Department of Natural Resources (DNR) SIP submission for the 2010 annual fine particulate matter NAAQS (81 Fed. Reg. 83,156). EPA's final action approves of DNR's SIP submittal as satisfying all Clean Air Act requirements, with the exception of certain interstate transport requirements under Clean Air Act sections 110(a)(2)(D)(i)(I) and (II). EPA's final rule notes that it is addressing these interstate transport requirements in separate rulemakings.

### **Kentucky**

Last month, the Kentucky Energy and Environment Cabinet submitted a proposed revision to its state

implementation plan (SIP). Specifically, Kentucky sought to revise 401 Kentucky Administrative Regulations (KAR) 50:055 (General Compliance Requirements) by removing section 1(1) and (4) of that section. These provisions deal with excess emissions during start-up, shutdown, and malfunction (SSM). Kentucky's revision is in response to the "SIP call" issued by EPA in May of 2015. Following petition by the Sierra Club regarding the treatment of excess emissions in start-up, shutdown, and malfunction periods in state plans, EPA found that provisions in certain SIPs were inadequate to meet CAA requirements. EPA found that Kentucky's provision was problematic because it gave a state official the discretion to create an emissions limitation exception. Thirty-six states, including Kentucky, were subject to EPA's call regarding the SSM issue, and were required to submit corrective revisions by November 22, 2016.

## **Mississippi**

On November 10, the Mississippi Commission on Environmental Quality (MCEQ) voted to amend state air pollution control regulation 11, Miss. Admin. Code, part 2, chapter 1, Air Emission Regulations for the Prevention, Abatement, and Control of Air Contaminants, and to adopt a SIP revision in response to EPA's "SSM SIP call." The SSM SIP call, published on June 12, 2015 (80 Fed. Reg. 33,840), found SIPs in more than 30 states substantially inadequate with respect to their treatment of emissions during start-up, shutdown, and malfunction periods. EPA's SSM SIP call set a November 22, 2016, deadline for proposed SIP revisions. In addition to addressing EPA's SSM SIP call, MCEQ's regulatory amendments update adoptions by reference for recent amendments to federal new source performance standards and National Emission Standards for Hazardous Air Pollutants and remove references to the revoked federal Clean Air Interstate Rule.

MCEQ will also hold a public hearing on December 21, 2016—which is also the deadline for written comments—concerning the proposed title

V permit fee for Sept 1, 2017 to Aug. 31, 2018. MCEQ is considering a recommended fee of \$47 per ton of regulated air pollutant, with a minimum fee of \$250. Title V permit fees are currently \$41 per ton.

## **North Carolina**

On September 30, 2016, the North Carolina Department of Environmental Quality (NCDEQ) submitted a letter to the regional administrator of U.S. EPA Region 4, in which it made recommendations for the state with regard to the revised 0.070 ppm ozone standard. All state recommendations for areas of nonattainment were due to the EPA by October 1, 2016. Secretary van der Vaart of NCDEQ recommended that all counties in the state be classified as "attainment" for the revised ozone standard. The secretary's recommendation was based upon certified ambient monitoring data from ozone monitors in the 2013–2015 year period, which indicated that all areas in the state fell below the revised 8-hour ozone NAAQS. This letter also referenced North Carolina's 2016 attainment of the same standard in making its recommendation, noting that preliminary data gathered through September 11 of this year showed all ozone monitors in North Carolina as falling below the 0.070 ppm NAAQS for ozone.

## **South Carolina**

South Carolina has also recommended that all counties in the state be separately designated as "attainment" areas for the revised ozone standard.

Earlier this year, the Department of Health and Environmental Control issued a revised version of its original 2006 approved list of pre-construction activities that may occur prior to receiving a PSD construction permit. The revision states that the following activities do not constitute "begin actual construction" as that phrase is defined in SC Regulation 61.62.5, Standard No. 7: Planning, Engineering and Design, and Geotechnical Investigation. The revision further defines the scope of "planning" as used in this context.

The full revised guidance document can be found at <http://www.scdhec.gov/Environment/docs/PSD%20Precon%20Activities%20-%202016-07-27.pdf>.

## Tennessee

EPA recently launched a new research effort called the “CitySpace” project where it will test lower-cost air pollution sensor pods in Memphis, Tennessee. Memphis’s Shelby County Health Department and the Memphis Area Transit Authority are collaborating in EPA’s effort, allowing the sensor pods to be installed at health department and transit authority locations. The sensors will capture data for approximately six (6) months, including particulate matter data and weather data, and will result in several million data points for EPA analysis. A main goal for the project is understanding how this type of technology can inform communities about air pollution patterns on a more localized level, especially in urban areas. According to EPA’s website, as of November, approximately 16 sensor pods have already been installed.



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## EPA REGION 5

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## Indiana

EPA issued a final rule approving a revised SIP authorizing temporary alternate opacity limits at American Electric Power’s Rockport facility during period of boiler start-up and shutdown. 81 Fed. Reg. 67,186 (Oct. 26, 2016).

EPA issued a final rule redesignating Indiana’s portion of the Louisville (KY-IN) nonattainment area to attainment of the 1997 annual standard for PM<sub>2.5</sub>, and approving Indiana’s 2008 emissions inventory for PM<sub>2.5</sub>, SO<sub>2</sub>, VOCs, and ammonia. 81 Fed. Reg. 62,390 (Sept. 9, 2016).

## Indiana and Ohio

EPA issued a notice of adequacy approving the motor vehicle emissions budgets for VOCs and NO<sub>x</sub> in the Cleveland-Akron-Lorain and Columbus, Ohio ozone nonattainment areas, and the Indiana and Ohio portions of the Cincinnati Indiana-Ohio-Kentucky ozone nonattainment area. 81 Fed. Reg. 66,271 (Sept. 27, 2016).

## Ohio

EPA issued a final rule redesignating the Ohio portion of the Campbell-Clermont Kentucky-Ohio area to attainment for SO<sub>2</sub> following the permanent closure of the primary SO<sub>2</sub> emissions source. 81 Fed. Reg. 83,158 (Nov. 21, 2016).

EPA issued a final rule to approve a SIP revision to remove the stage II vapor recovery program for the Cleveland, Cincinnati, and Dayton ozone areas. 81 Fed. Reg. 71,631 (Oct. 18, 2016).

EPA issued a proposed rule redesignating the Cleveland-Akron-Lorain area to attainment for the 2008 8-hour ozone standard and approving the plan

for maintaining the standard. 81 Fed. Reg. 71,444 (Oct. 17, 2016).

EPA issued a final rule redesignating the Columbus area to attainment for the 2008 8-hour ozone standard and approving the plan for maintaining the standard. 81 Fed. Reg. 66,578 (Sept. 28, 2016).

EPA issued a proposed rule redesignating the Cincinnati-Hamilton Ohio-Kentucky-Indiana area to attainment for the 2008 8-hour ozone standard and approving the plan for maintaining the standard. 81 Fed. Reg. 66,602 (Sept. 28, 2016).

EPA issued a final rule to approve a SIP revision regarding PM<sub>2.5</sub> infrastructure requirements. 81 Fed. Reg. 64,072 (Sept. 19, 2016).

## Wisconsin

EPA issued a notice denying two petitions asking EPA to object to the title V permit issued for Appleton Coated LLC. Petitions for judicial review must be filed within 60 days of notice publication (Jan. 30, 2017). 81 Fed. Reg. 86,710 (Dec. 1, 2016).

EPA issued a proposed rule approving a SIP revision to the PSD program to address EPA's prior infrastructure disapprovals and finding of failure to submit. 81 Fed. Reg. 67,261 (Sept. 30, 2016).

EPA issued a proposed rule redesignating the Sheboygan area to moderate nonattainment for the 2008 8-hour ozone standard and that the area is not eligible for an extension of the attainment date. 81 Fed. Reg. 66,617 (Sept. 28, 2016).

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## EPA REGION 6

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Much of the recent rulemaking in the states comprising Region 6 is related to EPA's SSM SIP call. 80 Fed. Reg. 33,840 (June 12, 2015). In general, EPA found that the SIPs were substantially inadequate if they contained provisions providing affirmative defenses or otherwise allowing excess emissions during start-up, shutdown, maintenance, and malfunctions. Specific findings were made regarding each state and they were required to amend their regulations. 80 Fed. Reg. 33,967–69. EPA established a deadline of November 22, 2016, for each affected state to respond to the SIP call.

For example, in Louisiana, various provisions were simply repealed. AQ 360–363. For NO<sub>x</sub> emissions in the Baton Rouge nonattainment area, the pertinent exemption was repealed. However, the operator of an affected point source must comply with the emission factors at all times or with newly established work practice standards designed to minimize emissions during periods of start-up and shutdown. AQ 364.

On the other hand, Texas (which is challenging the rule in the D.C Circuit) specifically did not repeal the provisions identified by EPA as being substantially inadequate. Instead, Texas adopted a rule stating that the affirmative defenses are not intended to limit a federal court's jurisdiction or discretion in determining the appropriate remedy in an enforcement action. It then delayed the applicability of the rule until all appeals of the rule are complete. #2016-040-101-CE.

## Arkansas

Region 6 notified Arkansas that EPA has signed a final federal plan for Arkansas regarding regional haze and interstate visibility transport requirements. The attorney general of Arkansas, on behalf of the Arkansas Department of Environmental Quality

(ADEQ), filed a request for reconsideration of the federal plan. Among other issues, ADEQ requested that EPA reconsider mandating the installation of certain controls on Entergy's Independence facility based on 2015 data that show the state is already exceeding its 2018 visibility improvement goal and reconsider allowing the use of the Cross-State Air Pollution Rule (CSAPR) to meet certain requirements under the rule. In addition, ADEQ requested an administrative stay pending resolution of the issues presented in its request.

## Louisiana

The Louisiana Department of Environmental Quality (LDEQ) revised the notification regulations for reportable quantity releases to make them compatible with federal reporting requirements. It did retain state-only reporting requirements for certain releases: brine from solution mining, oil, produced water, and sweet pipeline gas. #OS093S2.

LDEQ also proposed record-keeping requirements to document the applicability of the exemption from air permitting requirements for very small sources. It requires a source to determine and maintain records of potential criteria and toxic air pollutant emissions and will also require a source to reassess and document any change in potential emissions prior to a modification or otherwise increasing the production rate or hours of operation above the values previously used to determine potential emissions. #AQ367.

## Oklahoma

The Oklahoma Department of Environmental Quality (DEQ) is taking comments and hearing requests on the proposed certification that Oklahoma has adequate resources and authority to implement, maintain, and enforce the requirements of the "good neighbor provision" of the CAA relating to interstate pollutant transport for the 2012 PM<sub>2.5</sub> NAAQS. Oklahoma's prior SIP submittal included a description of the state's transport-related infrastructure, but did not assert

that Oklahoma meets all requirements of the "good neighbor provision."

## Texas

The Texas Commission on Environmental Quality (TCEQ) announced that sulfur dioxide emissions in the Beaumont area have been substantially reduced. At least one site, which had high levels of SO<sub>2</sub>, now meets the regulatory standard. Further, the reported SO<sub>2</sub> emissions in the Beaumont area decreased 76 percent, from 3454 tons per year in 2005 to 828 tons per year in 2014.

TCEQ also updated various rules to reflect significant changes to several major federal regulatory initiatives as a result of court actions and rulemaking. The federal initiatives or regulations addressed as part of this rulemaking include the Clean Air Interstate Rule, the CSAPR, and the permitting of greenhouse gases. #2016-012-122-AI.



Trends is the Section's bimonthly newsletter. In the Jan/Feb 2017 issue, Seth Davis discusses the future for environmental, energy, and resources law in Views from the Chair. Also: LNG exports, Desert Renewable Energy Conservation Plan, Superfund mega-sites, Water and Spring Conferences, In Brief, and People on the Move.

View the Jan/Feb 2017 issue.

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## **EPA REGION 7**

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*Associated Electric Cooperative, Inc.*  
*Springfield, Missouri*

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### **Region 7**

EPA announced Edward H. Chu as Region 7's Deputy Regional Administrator on August 10, 2016. Mr. Chu had held EPA management positions since 1995, including Regions 4 and 10.

Environmental Justice small grant applications are being solicited from Region 7 groups through Tuesday, January 31, 2017. In general, the grants are intended to aid those groups closely connected with communities exposed to environmental harms. The beneficiary projects of the grants should be able to assist local communities by providing a greater understanding of local environmental and public health issues. More information is available at Region 7's website or 1-800-223-0425.

### **Iowa**

Under EPA's National Enforcement Initiative targeting hazardous air pollution, EPA entered into a settlement agreement with the city of Iowa City, Iowa, for its landfill operation. With penalties and compliance costs of over a reported \$2 million, Iowa City would implement monthly monitoring of gas collection wells, a third-party audit of the overall gas collection system, and agree to any post-audit corrective actions. In addition, the city agreed to adopt fire monitoring and risk management plans to minimize the threat of increased hazardous pollutant emissions in the event of a landfill fire. EPA noted that the emission of landfill gases such as methane and carbon dioxide result in ground-level ozone, both cancerous and non-cancerous health effects, and odors.

### **Kansas**

A Shawnee, Kansas, firm has agreed to eliminate a hazardous air emission from its manufacturing fa-

cility. Vita Craft Corporate will remove perchloroethylene (PCE) in its entirety although not required at law to achieve zero emissions of the pollutant. The control equipment scheduled for installation in early fall of 2016 was estimated to remove eight or more tons of the annual emissions. PCE, common in metal manufacturing, is subject to regulation under the Clean Air Act as a hazardous pollutant.

### **Missouri**

In August 2016 EPA's Region 7 announced a settlement agreement with a Missouri landfill to monitor sulfur dioxide emissions. Bridgeton Landfill, LLC, installed two SO<sub>2</sub> ambient air monitors by the Bridgeton Landfill to generate one-hour emission reports for one year. The measuring, which is available at an online portal, will aid EPA and the Missouri Division of Natural Resources (MDNR) in oversight of the Bridgeton landfill and eventually two other locations. EPA's purpose in selecting the locations was to take into consideration varying wind conditions at the landfill site in conjunction with MDNR's monitoring.

In another August 2016 EPA enforcement action, IESI MO Champ Landfill, LLC, agreed to control odor and air emissions from its Maryland Heights landfill facility to meet requirements under the Clean Air Act's new source performance standards (NSPS). The NSPS provide for landfill gas emission controls and other record-keeping requirements to minimize emissions. Champ would add landfill gas extraction wells, commission a third-party audit and adopt corrective actions within a year, and purchase four compressed natural gas trash trucks. The estimated total for the compliance measures was approximately \$2.9 million and according to Region 7 will improve operations while minimizing emissions and odors from the landfill.

In response to alleged contamination of a Spanish Village, Missouri, home on November 22, 2016, EPA announced a residential sampling plan and inspections at local landfills and the West Lake Landfill Superfund site. EPA indicated continuing investigation related to the Spanish Village matter

in addition to the overall compliance aid to Bridgeton, Missouri, and multiple Clean Air Act inspections, including the Champ Landfill noted above.

## Nebraska

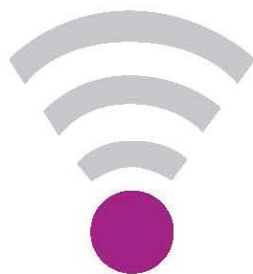
Nebraska Kugler Oil Company entered into a consent decree with EPA to meet the requirements of the Clean Air Act's Risk Management Plan Rule for the storage of and processing of anhydrous ammonia. In addition to civil penalties, Kugler must adopt a program management system, hazard assessment and prevention program, and an emergency response program that, among other things, allows emergency responders to react safely to accidental releases. Anhydrous ammonia, stored as a liquid, converts to gas upon release and is potentially life threatening when encountered by humans.

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## EPA REGION 8

Chelsea Grossi and Tarn Udall  
*Davis Graham & Stubbs LLP*  
Denver, Colorado

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### Colorado—Agreement to Close Coal-Fired Power Plants Is Forged Between EPA, CDPHE, and Industry and Environmental Stakeholders

EPA, the Colorado Department of Public Health & Environment (CDPHE), Tri-State Generation and Transmission Association, and the owners of the Yampa Project at Craig Station, WildEarth Guardians, and National Parks Conservation Association entered an agreement in September 2016 to greatly reduce emissions impacts from the Craig Unit 1 and the Nucla Unit, two presently coal-fired power plants in Montrose County. The agreement is designed such that the two units can be retired by 2022 and 2025, respectively; in the case of the Craig Unit, it could be converted to burn natural gas and retrofitted to limit NO<sub>x</sub>. The extended timeline will allow the community time to transition, and impacts to jobs, the tax base, and other public services will be considered during the winding-down process. The CDPHE anticipates that the agreement will reduce carbon dioxide emissions by up to 4 million tons per year, and decrease thousands of tons per year of other pollutants.

### Montana—Montana Department of Environmental Quality Sues Volkswagen, Audi, and Porsche over “Defeat Devices”

On December 15, 2016, the state of Montana filed claims against Volkswagen Group of America, Inc. (Volkswagen), along with Audi and Porsche, alleging violations of the Clean Air Act that the companies intentionally installed “defeat devices” in 2400 light duty diesel vehicles registered in the state. *See Montana Dept. of Env't'l Quality v. Volkswagen Aktiengesellschaft et al.*, Case No. DDV 2016-1045 (Mont. 2016). The “defeat devices” are alleged to help a car pass emissions testing where that car otherwise would not have passed.

Specifically, the devices are alleged to “remove, alter or render inoperative pollution control devices required by federal law and produce emissions five to 40 times the federal emission limits for nitrogen oxides each time one of those vehicles is operated,” according to the complaint. Though many consumer-related claims have been settled on matters related to the “defeat devices,” this complaint focuses on violations related to the Clean Air Act of Montana. The complaint seeks \$10,000/day for each day a car with this device was driving on the road—potentially subjecting Volkswagen to hundreds of millions of dollars in penalties.

### **North Dakota—EPA and Slawson Exploration Company, Inc., Sign Consent Decree for Clean Air Act Claims in North Dakota**

On December 1, 2016, Slawson Exploration Company, Inc., lodged an agreement with the U.S. Environmental Protection Agency (EPA) to improve emission control systems in its oil storage facilities in the Williston Basin in North Dakota. In accordance with the agreement, Slawson Exploration will evaluate, monitor, and report on the design, operation, and maintenance of its storage tank systems.

As part of the emissions reduction requirements, Slawson will install automatic tank gauging equipment on a select number of tank storage systems. Slawson Exploration will also retrofit drilling rigs with selective catalytic reduction (SCR) equipment or utilize electric motors to reduce emissions from diesel engine exhaust. The consent decree was published in the *Federal Register* on December 7, 2016, where a public comment period followed for 30 days (ending on January 6, 2017). At the time this excerpt was drafted, the agreement had not been made final.

### **South Dakota—South Dakota Submits Initial Recommendations to EPA for Area Designations for 2015 Ozone National Ambient Air Quality Standard**

On September 30, 2016, South Dakota submitted its initial recommendations to EPA for area

designations pursuant to the 2015 ozone National Ambient Air Quality Standard (NAAQS). South Dakota Secretary of the Department of Environment and Natural Resources recommended that EPA designate all counties in South Dakota as attaining the 2015 revised ozone standard. Recorded design values from monitoring sites across the state indicate that South Dakota is attaining the revised ozone standard. Based on data collected from 2013 to 2015, the Badlands site has the lowest design value concentration at 82 percent of the standard with the South Dakota School site in Sioux Falls having the highest design value at 91 percent of the revised standard. South Dakota’s recommendations are *available at* <https://denr.sd.gov/des/aq/airprogr.aspx>.

### **Utah—Utah Division of Air Quality Continues Winter Fine Particulate Study**

The Wyoming Department of Air Quality (DAQ), in collaboration with the National Oceanic & Atmospheric Administration (NOAA), Environmental Protection Agency (EPA), the University of Utah, the University of Toronto, and the University of Washington, is continuing its pilot study on the chemical processes related to fine particulate pollution. The air basins near Utah’s Wasatch Mountains, which are home to 2.4 million people, face some of the most serious air pollution in the country. This is largely due to elevated levels of particulate matter less than 2.5 micrometers in diameter (PM<sub>2.5</sub>). The majority of PM<sub>2.5</sub> exceedance days fall during the winter when inversions (also known as “persistent cold air pools”) are common. Secondary particulates that form through reaction of gas-phase precursors make up most of the PM<sub>2.5</sub> present during such inversions. The study began during the winter of 2015–2016 to better understand the causes of wintertime pollution and to research the chemical formation of PM<sub>2.5</sub>. The second phase of the study will utilize NOAA’s light aircraft known as the Twin Otter to further research the emissions, transport patterns, and chemistry associated with PM<sub>2.5</sub> exceedances in the region. DAQ will incorporate the findings in its air quality modeling. The hope is that the study’s results will enable DAQ to



introduce better control strategies to reduce air pollution. More information on the study can be found at <http://www.deq.utah.gov/ProgramsServices/programs/air/research/winter-fine-particulate-aircraft-study.htm>.

### **Wyoming—Wyoming Transfers Environmental Lawsuit Against the Volkswagen Group of America, Inc., to California Federal Court**

On November 16, 2016, Wyoming transferred its environmental lawsuit against the Volkswagen Group of America, Inc., and other vehicle manufacturers to federal district court in northern California. *See State of Wyoming v. Volkswagen Group of America, Inc. et al.*, 3:16-cv-06646, at Docket No. 6 (N.D. Cal. 2016). A little over two weeks earlier, on November 1, 2016, Wyoming filed suit against Volkswagen, Audi, Porsche, and related firms alleging violations of the Wyoming Environmental Quality Act and the Wyoming Air Quality Standards and Regulations, which are federally enforceable under the Clean Air Act through Wyoming’s state implementation plan. Wyoming alleges that defendant companies approved technology designed to conceal emissions of nitrogen oxide, ozone, and particulate matter in certain diesel engines for model years 2009–2015. Wyoming further claims that approximately 1200 of the subject vehicles were registered in the state. On October 25, 2016, the U.S. District Court for the Northern District of California approved a \$10 billion partial settlement in a related fraud case brought against defendant companies by numerous plaintiffs to either buy back or fix the affected vehicles, create an environmental mitigation fund, and provide funds to states to improve transportation infrastructure and access to zero emission vehicles. Wyoming asserts that the partial settlement does “not address or resolve any claims for civil penalties for Defendants’ numerous environmental violations.” Wyoming’s suit joins more than 1000 civil suits with similar claims pending before Judge Charles R. Breyer in the U.S. District Court in San Francisco.

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### **EPA REGION 9**

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### **Region 9 Regulatory Developments**

EPA has recently taken action on state and federal implementation plans in Arizona and California.

On November 21, 2016, EPA revised portions of the Arizona regional haze federal implementation plan applicable to the Phoenix Cement Company Clarkdale plant and the CalPortland Cement Rillito plant. Promulgation of Air Quality Implementation Plans; Arizona; Regional Haze Federal Implementation Plan; Reconsideration, 81 Fed. Reg. 83,144 (Nov. 21, 2016). Formerly, this federal implementation plan required the plants to perform control technology demonstration projects to evaluate whether the selective non-catalytic reduction controls at the cement kilns could achieve higher control efficiencies for nitrogen oxide emissions. *Id.* EPA agreed to replace the demonstration project requirements with a series of revised record-keeping and reporting provisions. *Id.* This shift came as a result of data obtained from a 2015 demonstration project performed by the CalPortland Cement facility’s Mojave plant, which showed that more stringent control efficiencies were not achievable. *Id.*

On October 19, 2016, EPA approved California’s submittal of base year emission inventories as comprehensive, accurate, and current inventories of actual emissions from volatile organic compound and nitrogen oxide sources within four nonattainment areas for the 2008 ozone National Ambient Air Quality Standards. Approval and Promulgation of Implementation Plan; California; Calaveras County, Chico (Butte County), San Francisco Bay Area and San Luis Obispo County (Eastern San Luis Obispo) Base Year Emission Inventories for the 2008 Ozone Standards, 81 Fed. Reg. 71,997 (Oct. 19, 2016). These areas include Calaveras County, Butte County, San Francisco Bay Area, and Eastern San Luis Obispo. *Id.*

On November 21, 2016, EPA approved the South Coast Air Quality Management District's revision to its rule governing control of nitrogen oxide emissions from off-road diesel vehicles, Rule 2449. Revisions to the California State Implementation Plan; South Coast Air Quality Management District; Control of Oxides of Nitrogen Emissions from Off-Road Diesel Vehicles, 81 Fed. Reg. 83,154 (Nov. 21, 2016). Rule 2449 imposes more stringent requirements on certain in-use off-road vehicle fleets whenever the district provides funding to assist the fleet in reducing nitrogen oxide emissions. *Id.*

Finally, on November 23, 2016, EPA determined that the San Joaquin Valley nonattainment area failed to timely attain the 1997 annual and 24-hour fine particulate matter National Ambient Air Quality Standards. Findings of Failure to Attain the 1997 PM<sub>2.5</sub>, 81 Fed. Reg. 84,481 (Nov. 23, 2016). This requires California to revise its SIP to expeditiously attain the 1997 PM<sub>2.5</sub> standards and to effect a 5 percent annual reduction in the emissions of direct PM<sub>2.5</sub> or a PM<sub>2.5</sub> plan precursor pollutant in the San Joaquin Valley. *Id.*

## Region 9 Litigation

*Helping Hand Tools v. EPA*. On September 2, 2016, the Ninth Circuit held that EPA did not abuse its discretion in granting a PSD permit to Sierra Pacific Industries to construct a new biomass-burning power plant at its lumber mill in California. *Helping Hand Tools v. U.S. Env'tl. Prot. Agency*, 836 F.3d 999 (9th Cir. 2016). The court highlighted the significance of its decision, saying:

This is the first time we have reviewed EPA's doctrine of "redefining the source." It also appears to be the first time that EPA's framework for evaluating the best available control technology for greenhouse gas emissions from facilities burning biomass fuels is considered by any circuit in the United States.

*Id.* at 1001. On both issues of first impression, the court sided with EPA.

Petitioners challenged EPA's decision on two bases. First, petitioners argued "that EPA was required to consider solar power and a greater natural gas mix as clean fuel control technologies in the BACT analysis." *Id.* at 1005. The court held that EPA's failure to consider these technologies was reasonable because "consideration of solar or increased natural gas would disrupt [the] purpose [of the project] and redefine the source." *Id.* The court reached this conclusion, in part, because EPA was owed deference on the technical question of when a proposed control technology goes so far that it "redefines the source." *Id.*

Second, petitioners contended that EPA should not have considered the use of biomass fuel alone as a control technology during step 1 of the best available control technology (BACT) analysis. *Id.* at 1010. EPA responded that it only considered the use of biomass fuel as a baseline to which other options were compared. *Id.* at 1011. Relatedly, the petitioners argued that EPA should have considered the effect of burning different biomass fuel stocks in step 1 of the BACT analysis. *Id.* EPA agreed in theory, but claimed that it lacked the necessary scientific data to engage in such a quantitative analysis. *Id.* On these issues, the court deferred to the agency, which the court regarded as "acting at the frontiers of science." *Id.* at 1012.

*Bahr v. EPA*. On September 12, 2016, the Ninth Circuit held that EPA did not abuse its discretion in approving Arizona's state implementation plan to achieve a 5 percent annual reduction in airborne particulate matter around Maricopa County. *Bahr v. U.S. Env'tl. Prot. Agency*, 836 F.3d 1218 (9th Cir. 2016).

First, petitioners contended that EPA should have required the plan to include best available control measures and most stringent control measures for control of PM<sub>10</sub>. *Id.* at 1230. They argued that Arizona's failure to reassess and update these controls and EPA's failure to scrutinize the existing controls were arbitrary. *Id.* at 1231. Among other things, the court held that, while the Clean Air Act requires these measures and controls upon a serious

nonattainment designation, it does not require reassessment or revision of these controls upon imposition of the 5 percent plan requirement under 42 U.S.C. § 7513(e). *Id.*

Second, petitioners argued that EPA violated its own guidance in allowing Arizona to exclude from consideration 135 exceedances of the NAAQS. *Id.* at 1232. EPA excluded these exceedances because they were “reasonably well-controlled” and therefore fulfilled the agency’s prerequisite for exclusion as an exceptional event. *Id.* The court rejected petitioners’ argument, finding that EPA complied with its guidance to the extent it squarely addressed the issues and otherwise provided a reasoned explanation for its decision to exclude. *Id.* at 1232–35.

Finally, petitioners argued that EPA acted unreasonably in approving contingency measures that had already been implemented. *Id.* at 1235. The court agreed with petitioners, finding that the plain language of the CAA states that contingency measures are measures undertaken in the future upon the occurrence of triggering events, such as the failure to achieve reasonable further progress. *Id.* at 1235–37. Because the contingency measures had already been undertaken and thus did not satisfy CAA requirements, the court remanded that portion of the SIP to EPA for further consideration. *Id.* at 1237.

*In re: Volkswagen “Clean Diesel” Mktg., Sales Practices, & Products Liability Litigation.*

Finally, several developments have taken place in the Volkswagen’s emission cheating litigation. On October 18, 2016, the U.S. District Court for the Northern District of California preliminarily approved a class action settlement agreement concerning the 2.0-liter turbocharged direct injection diesel engine vehicles between Volkswagen and Volkswagen-branded franchise dealers. *In re: Volkswagen “Clean Diesel” Mktg., Sales Practices, & Products Liability Litigation*, 2016 WL 6442227 (N.D. Cal. Oct. 25, 2016). The settlement entitles class members to a cash payment, averaging \$1.85 million per member,

and to certain non-monetary benefits, such as the ability to defer obligations to renovate or construct facilities. *Id.* at \*3. The settlement also required Volkswagen to repurchase any affected vehicles that cannot be timely fixed. *Id.*

On October 25, 2016, the court approved a partial consent decree resolving the United States’ claims regarding violations of the Clean Air Act. *In re: Volkswagen “Clean Diesel” Mktg., Sales Practices, & Products Liability Litigation*, 2016 WL 6091259 (N.D. Cal. Oct. 18, 2016). Among other things, the decree requires Volkswagen to remove or modify at least 85 percent of the vehicles registered as of September 17, 2015, across the United States and in California by June 30, 2019. *Id.* at \*2. If the company fails to meet these deadlines, it will be subject to severe monetary penalties: \$85 million for each 1 percent failure in the national recall and \$13.5 million for each 1 percent failure in the California recall. *Id.*

On that same day, the court approved a settlement between Volkswagen, consumers, and reseller dealerships. *In re: Volkswagen “Clean Diesel” Mktg., Sales Practices, & Products Liability Litigation*, 2016 WL 6248426 (N.D. Cal. Oct. 25, 2016). Members of the class may either sell their vehicles back to Volkswagen or require Volkswagen to fix the vehicle if and when an emissions modification is approved. *Id.* at \*4. This settlement has been appealed.

## **Region 9 Enforcement**

On September 7, 2016, EPA announced a settlement with Mid Pac Petroleum, LLC, valued at more than \$600,000. *EPA, EPA Requires Mid Pac Petroleum to Install Air Pollution Controls at Big Island Facility*, NEWS RELEASES FROM REGION 09 (2016), <https://www.epa.gov/newsreleases/epa-requires-mid-pac-petroleum-install-air-pollution-controls-big-island-facility>. The settlement resolved alleged federal Clean Air Act violations at the company’s Kawaihae facility on the Island of Hawaii. *Id.* Specifically, EPA alleged that the company failed to install required vapor pollution

controls, which led to the illegal discharge of about 20 tons per year of volatile organic compounds from its gasoline loading equipment. *Id.* The settlement requires the company to spend \$432,000 to bring its facility into compliance and pay \$200,000 in civil penalties. *Id.*

On October 24, 2016, the Bay Area Air Quality Management District announced a settlement with Valero Refining Co. involving 29 alleged violations at its refinery in Benicia. BAAQMD, *Air District Settles Case with Valero Refining Co.*, BAAQMD NEWS (2016), [http://www.baaqmd.gov/~media/files/communications-and-outreach/publications/news-releases/2016/settle\\_161024\\_valero-pdf.pdf?la=en](http://www.baaqmd.gov/~media/files/communications-and-outreach/publications/news-releases/2016/settle_161024_valero-pdf.pdf?la=en). The violations included missed leak inspections for valves omitted from the inspection database, emission limit exceedances, and minor hydrocarbon leaks from storage tanks, among other things. *Id.* Under the settlement, the company must pay \$249,000 in fines. *Id.*

On October 27, 2016, EPA announced a settlement with Halliburton Energy Services, Inc. resolving claims that a fleet of diesel trucks violated California's truck and bus regulation. EPA, *U.S. EPA Requires Halliburton to Reduce Air Pollution near Schools*, NEWS RELEASES FROM REGION 09 (2016), <https://www.epa.gov/newsreleases/us-epa-requires-halliburton-reduce-air-pollution-near-schools-0>. The settlement requires the company to spend \$180,600 on projects designed to reduce air pollution around Los Angeles area schools and \$75,000 on other air quality improvements in the San Joaquin Valley. *Id.* Beyond these improvements, the company must pay a \$154,400 civil penalty and take other measures to come into compliance. *Id.*

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## EPA REGION 10

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## Alaska

### EPA Regulatory Approvals

On July 20, EPA proposed to approve components of Alaska's May 12, 2015, SIP submission responding to the NO<sub>2</sub> and SO<sub>2</sub> NAAQS published separately in 2010. 81 Fed. Reg. 47,103 (July 20, 2016). When EPA promulgates a new NAAQS, states must submit and obtain EPA approval of plans providing for the "implementation, maintenance, and enforcement" of the new NAAQS. 42 U.S.C. § 7410(a)(1); *see also id.* at 47,104. The components of these plans are known as "infrastructure elements." 81 Fed. Reg. at 47,104. EPA accepted comments on Alaska's proposed NO<sub>2</sub> and SO<sub>2</sub> infrastructure elements until August 19.

On November 25, EPA issued a direct final rule approving minor modifications to Alaska's SIP concerning air permit administration and emissions fees. 81 Fed. Reg. 85,160 (Nov. 25, 2016). The rule will take effect as part of Alaska's SIP on January 24, 2017, unless EPA receives adverse comments from the public by December 27, 2016. *Id.*

### Fairbanks North Star Borough—Fine Particulate Pollution

On November 3, EPA announced a proposed consent decree with two environmental groups to resolve a citizen suit concerning fine particulate matter pollution in Alaska's Fairbanks North Star Borough (FNSB). The June 2016 lawsuit, covered previously here, sought to force EPA to take action on a proposed state implementation plan for achieving compliance with the 2006 24-hour NAAQS for PM<sub>2.5</sub> in the FNSB, which suffers from some of the worst fine particulate pollution in the country. The proposed consent decree, if approved,

would require EPA to take final action on Alaska's implementation plan by August 28, 2017.

In a related action, the same environmental groups filed a separate citizen suit against EPA on October 11 (No. 2:16-cv-01594 (W.D. Wash. Oct. 11, 2016)). The more recent suit seeks to force EPA to issue a determination that the FNSB has not achieved compliance with the 24-hour NAAQS for PM<sub>2.5</sub>, and that the borough is a "serious" nonattainment area for fine particulate matter. The October 11 lawsuit is the third action in three years by environmental groups to force EPA to take action on particulate pollution in the FNSB.

Meanwhile, Alaska regulators have adopted several recent changes to the state's air quality regulations that are intended to address ongoing air quality issues in the borough. As explained here previously, the rules create three separate "air quality control zones" within the FNSB nonattainment area and create a number of new restrictions on the installation, use, and emissions of solid fuel-fired home heating devices. On November 22, Alaska's Department of Environmental Conservation submitted these rule changes for EPA approval as part of the state's SIP.

### **Enforcement: \$425 Million Refinery Settlement**

On July 18, EPA and the U.S. Department of Justice announced a \$425 million settlement agreement to resolve Clean Air Act violations at six petroleum refineries in Alaska, Washington, Hawaii, California, North Dakota, and Utah. Five of the refineries are operated by subsidiaries of Texas-based Tesoro Corporation, including one in Alaska's Kenai Peninsula Borough and one in Anacortes, Washington. The sixth refinery, now operated by Par Hawaii Refining in Kapolei, Hawaii, was owned and operated by a Tesoro subsidiary until 2013.

The state of Alaska and Washington's Northwest Clean Air Agency joined the federal government as parties to a consent decree approved on September 28 by Judge Orlando Garcia of the U.S. District

Court for the Western District of Texas. Under the consent decree, Tesoro agreed to pay a \$1.3 million civil penalty to the state of Alaska for violations at the Kenai refinery. Tesoro must also reimburse the state of Alaska for administrative fees, legal fees, costs, and expenses.

Additionally, the consent decree requires installation and operation of pollution control equipment at the covered refineries; establishes stipulated damages for violations of consent decree terms; and mandates three environmental mitigation projects. All told, EPA estimates that Tesoro and Par Hawaii will spend \$425 million to comply with the consent decree.

## **Idaho**

### **EPA Regulatory Approvals**

On September 12, EPA finalized its approval of various provisions included in Idaho's May 21, 2015, SIP submission. 81 Fed. Reg. 53,290 (Sept. 12, 2016). As discussed in a previous report here, these newly approved Idaho SIP revisions establish annual facility-wide emissions caps for minor sources. They also include modifications to the permitting requirements for nonmetallic mineral process plants such as rock crushers and asphalt plants, and they establish new flexibility for stationary sources that combust sulfur-containing fuels. EPA received no comments on its earlier proposal to approve the revisions.

On October 27, EPA issued a proposed rule partially approving and partially disapproving Idaho's attainment plan for the Cache Valley PM<sub>2.5</sub> nonattainment area. 81 Fed. Reg. 74,741 (Oct. 27, 2016). The Cache Valley nonattainment area spans portions of southeast Idaho and northern Utah. The Idaho portion consists of rural, sparsely populated Franklin County, where fine particulate pollution is caused principally by woodstove emissions and road sanding. Idaho submitted its attainment plan for the Cache Valley PM<sub>2.5</sub> nonattainment area in 2012.

EPA previously approved, in 2014, certain Idaho SIP elements designed to reduce particulate

emissions from woodstoves and road sanding in the Cache Valley. *Id.* at 74,743–44. EPA’s latest rulemaking now proposes to find that Idaho’s attainment plan satisfies the CAA’s requirements regarding reasonably available control measures for nonattainment areas. *Id.* at 74,747. However, EPA also proposes to disapprove certain elements of Idaho’s attainment plan, including the state’s identification of contingency measures to satisfy section 172(c)(9) of the CAA. *Id.* at 74,747–48.

EPA’s proposed determinations regarding Idaho’s nonattainment plan for the Cache Valley PM<sub>2.5</sub> nonattainment area appear to be consistent with the agency’s obligations under a June 2 consent decree approved by a federal judge in California. As reported here before, the June 2 consent decree resolved a lawsuit brought by environmental organizations alleging EPA’s failure to comply with a non-discretionary duty under the CAA to approve or disapprove 2012 and 2013 SIP submissions for nonattainment areas under the 2006 PM<sub>2.5</sub> NAAQS.

## Oregon

### Climate Change Litigation—Public Trust

On August 12, 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. The plaintiffs include a group of 21 young citizens; Earth Guardians, an association of young environmental activists; and James Hansen, acting as guardian for “future generations.” *See Juliana et al. v. United States et al.*, No. 15-cv-1517, 2016 WL 6661146 (D. Or. Nov. 10, 2016).

### Case Background

Plaintiffs’ complaint includes causes of action against the United States and various government officials and agencies on the basis that the government has known for decades that carbon dioxide (CO<sub>2</sub>) pollution has been causing climate change and has failed to take necessary action to curtail fossil fuel emissions. Plaintiffs allege

that the government and its agencies have taken action or failed to take action that has resulted in increased carbon pollution through fossil fuel extraction, production, consumption, transportation, and exportation, causing greenhouse gas emissions to increase to dangerous levels. Plaintiffs assert that a reduction of global CO<sub>2</sub> concentrations to less than 350 parts per million is possible, but action must be taken immediately to prevent further ocean acidification and ocean warming.

Plaintiffs allege that the government has failed to implement plans for climate stabilization, thereby endangering plaintiffs’ lives, liberties, and property. According to the complaint, these risks infringe upon the plaintiffs’ constitutional rights under the Due Process Clause, Equal Protection Clause, and Ninth Amendment, and also violate the federal government’s responsibilities under the public trust doctrine.

### Denial of Motions to Dismiss

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. Intervenor National Association of Manufacturers, American Fuel & Petrochemical Manufacturers, and American Petroleum Institute moved to dismiss on the same grounds.

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. In denying the motions, the magistrate judge *assumed* that the defendants had a duty to limit greenhouse gas emissions. Turning to the public trust doctrine, the magistrate judge found that a federal version of that doctrine exists, that it applies to the territorial ocean waters and atmosphere of the nation, and that it provides substantive due process protections for some plaintiffs within the navigable waters of Oregon.

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. The court’s decision framed the case as follows:

*This is no ordinary lawsuit. . . . This lawsuit is not about proving that climate change is happening or that human activity is driving it. For the purposes of this motion, those facts are undisputed. The questions before the Court are whether defendants are responsible for some of the harm caused by climate change, whether plaintiffs may challenge defendants’ climate change policy in court, and whether this Court can direct defendants to change their policy without running afoul of the separation of powers doctrine.*

*Id.* at \*2 (footnote omitted) (emphasis added).

In denying the motions to dismiss, the court made three key rulings:

*First*, the court rejected defendants’ arguments that the case should be dismissed because the lawsuit raises a nonjusticiable political question. Judge Aiken ruled that the lawsuit simply asks the court to determine whether defendants have violated plaintiffs’ constitutional rights, and that “question is squarely within the purview of the judiciary.” *Id.* at \*8 (citing *INS v. Chadha*, 462 U.S. 919, 941 (1983)). Judge Aiken cautioned: “Should plaintiffs prevail on the merits, this Court would no doubt be compelled to exercise great care to avoid separation-of-powers problems in crafting a remedy.” *Id.* at \*9.

*Second*, the court held that plaintiffs had adequately alleged they have standing to sue. In their motions to dismiss, the defendants and intervenors asserted that the plaintiffs lacked Article III standing because their claims are generalized grievances better resolved by the executive and legislative branches of the government rather than by the judiciary. The court found that the relief sought by plaintiffs would at least partially redress their

asserted injuries, and therefore that the plaintiffs had sufficient standing. *Id.* at \*14.

*Third*, the court ruled that the “federal government, like the states, holds public assets—at a minimum, the territorial seas—in trust for the people. Plaintiffs’ federal public trust claims are cognizable in federal court.” *Id.* at \*23–24.

In upholding plaintiffs’ public trust claims, the court evaluated whether such claims had been displaced by acts of Congress. The court held that the plaintiffs’ claims were not displaced by federal statutes, including the Clean Air Act (CAA). Judge Aiken wrote that public trust claims are unique: “The public trust imposes on the government an obligation to protect the *res* of the trust. A defining feature of that obligation is that it cannot be legislated away. *Because of the nature of public trust claims, a displacement analysis simply does not apply.*” *Id.* at \*24 (emphasis added).

Judge Aiken’s ruling and displacement analysis stand in apparent contrast to two notable decisions. In *American Electric Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*), the Supreme Court addressed whether a federal common law public nuisance claim against greenhouse gas emitters could be maintained after passage of the CAA. The Supreme Court held unambiguously “that the Clean Air Act and the EPA actions it authorizes” displace any such claims. *Id.* at 424.

A year later, in *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849 (9th Cir. 2012), the Ninth Circuit affirmed a district court’s dismissal of an Alaska Native village’s claim for damages against major emitters of greenhouse gas emissions who had allegedly contributed to global warming that was destroying sea ice that protected the village from erosion. In that case, the district court had dismissed the complaint on several grounds, including the plaintiff’s failure to state a claim, its lack of standing, and the fact that it sought resolution of a political question. The Ninth Circuit addressed only the failure to state a claim,

affirming on the ground that “[t]he Supreme Court has already determined that Congress has directly addressed the issue of domestic greenhouse gas emissions from stationary sources and has therefore displaced federal common law.” *Id.* at 856 (citing *AEP*, 410 U.S. at 424).

In this context, it is important to note that unlike the claims in *AEP* and *Kivalina*, the Oregon plaintiffs are suing the government, not private companies. In addition, the plaintiffs are asking the court to impose equitable remedies as opposed to money damages.

### **Notable Decision—Citizen Suit over Land Use Violations**

On September 30, 2015, plaintiff Rogue Advocates filed a citizen suit in the U.S. District Court for the District of Oregon against defendant Mountain View Paving, Inc., under section 304 of the CAA, 42 U.S.C. § 7604. The plaintiff alleged that the defendant’s operation of an asphalt plant, as well as associated activities on its property, violated its federally enforceable air quality permit and thereby resulted in violations of the CAA from 2010 to the present. *Rogue Advocates v. Mountain View Paving, Inc.*, No. 1:15-cv-01854, 2016 WL 6775636, at \*1 (D. Or. Nov. 15, 2016).

Defendant owned and operated an asphalt plant and conducted associated activities on a property zoned for residential use within the floodplain of Bear Creek—a tributary of the Rogue River—in Talent, Oregon. Defendant possessed an air contaminant discharge permit (ACD permit), issued by the Oregon Department of Environmental Quality (DEQ), to operate the asphalt plant. The ACD permit is federally enforceable under the CAA and was issued pursuant to Oregon’s SIP. OAR § 340-216-0020.

A unique aspect of this case centers around this language of the ACD permit:

This permit is *not valid* \* \* \* at any location where the operation of the permittee’s processes, activities, and insignificant activities

*would be in violation of any local land use or zoning laws. \* \* \** It is the permittee’s sole responsibility to obtain local land use approvals, as, or where, applicable before operating this facility at any location.

*Rogue*, 2016 WL 6775636, at \*14 (emphasis added).

In its complaint, the plaintiff did not specifically allege that the defendant had violated any emissions standards. Instead, the plaintiff alleged that the defendant was in violation of the CAA because it did not have proper county-zoning approvals.

The defendant moved for summary judgment, arguing, among other things, that whether the plant had obtained necessary land use approvals was a matter committed to the exclusive jurisdiction of the county and the Oregon Land Use Board of Appeals. The defendant also sought dismissal on the grounds that on January 11, 2016, it had shut down and relocated its asphalt plant, thereby mooting plaintiff’s citizen suit. Plaintiff in turn filed a cross-motion for partial summary judgment seeking to establish defendant’s liability under the CAA.

The court *granted in part* the defendant’s motion for summary judgment and held that the plaintiff’s claim for declaratory relief, injunctive relief, and civil penalties relating to the defendant’s allegedly unlawful operation was moot. *Id.* at \*13 (“While the entire facility has not been dismantled, the issue here is whether there is a likelihood defendant will resume its batching operation on the property. Because the batch plant has been removed, the Court believes the need for the deterrent effect of civil penalties has been eliminated.”).

However, the court *denied* the defendant’s motion for summary judgment as to whether its zoning violations violated the terms of its ACD permit and therefore violated the CAA. Here, the court reasoned that neither party disputed that the defendant continued to engage in associated activities on the property at issue and the court



observed that some of the defendant’s associated activities appeared to be in violation of local land use laws. According to the court, “if these activities do fall under the ACD permit, defendant would be in violation of its permit for operating in violation of local land use laws. Based on the plain language of the ACD permit, the Court finds that a dispute exists as to whether or not defendant’s associated activities violate its permit.” *Id.* at \*13–14.

### **Key Takeaway**

One key reminder from this decision is that under the CAA, an operator’s violation of a state or local permit’s terms or conditions issued pursuant to a SIP may also constitute a violation of an emission standard or limitation. Such a violation is the hook allowing private citizens to initiate judicial proceedings against an operator “who is alleged to have violated . . . or to be in violation of . . . [the] emission standard or limitation.” 42 U.S.C. §§ 7604(a)(1), (f)(4); *see also Rogue*, 2016 WL 6775636, at \*14.

## **Washington**

### **Greenhouse Gas Regulation**

In September, the Department of Ecology (“Ecology”) finalized the Clean Air Rule, which regulates greenhouse gas (GHG) emissions in Washington State. As expected, the rule was quickly challenged by businesses and industry organizations. Youth plaintiffs also returned to state court to argue that the rule was not stringent enough.

Clean Air Rule Mechanics—In general, entities with annual baseline or projected GHG emissions of at least 70,000 metric tons carbon dioxide equivalent (“CO<sub>2e</sub>”) must reduce emissions by 1.7 percent of baseline emissions each year. Sources with at least 100,000 metric tons CO<sub>2e</sub> per year must comply starting in 2017. Sources with lower emissions have later compliance dates.

Parties in energy-intensive, trade-exposed (EITE) industries are presented a choice for their emission reduction requirements. Depending on an EITE

party’s efficiency relative to industry norms, it may be entitled to less stringent requirements. This system rewards efficient operations. An EITE party can also opt to be treated like a non-EITE party, though, once made, this decision is permanent.

In addition to the entities that must reduce GHG emissions, the Clean Air Rule also allows voluntary participation by parties otherwise not covered by the rule.

Participating entities can reduce emissions at their sources or obtain and retire emission reduction units (ERUs). ERUs may be generated by emission reductions beyond required levels, emission reductions achieved by qualifying projects in the state, and, in decreasing amounts, emission allowances from approved regulatory programs in other jurisdictions. ERUs can be banked for later use and exchanged.

The rule also establishes an ERU reserve that will serve several purposes, including, for example, accommodating modest economic growth, encouraging renewable energy development, and promoting emission reduction projects that meet certain environmental justice criteria.

Ecology also amended chapter 173-441 WAC, the state greenhouse gas emissions reporting requirements, to align with the Clean Air Rule.

Clean Air Rule Lawsuits—The Clean Air Rule is facing three challenges from businesses and industry organizations. A fourth salvo is being led by youth plaintiffs, as part of continuing litigation to secure protective greenhouse gas regulations.

*Avista Corp. v. Department of Ecology* was filed in federal court by utilities. No. 2:16-cv-00335 (E.D. Wash. Sept. 27, 2016). The utilities also filed a state court action with the same name. No. 16-2-03966-34 (Thurston Cty. Super. Ct. Sept. 30, 2016). It has been consolidated with another state court challenge filed by industry associations. *Ass’n of Wash. Bus. v. Dep’t of Ecology*, No. 16-2-03923-34 (Thurston Cty. Super. Ct. Sept. 27,

2016). The federal case has been stayed pending resolution of the state law claims.

The state law claims involve allegations, in part, that Ecology lacks the authority to issue the rule under the Washington Clean Air Act; that Ecology should have issued an environmental impact statement under the state Environmental Policy Act (SEPA); that the rule violates the Washington Administrative Procedure Act because it is arbitrary and capricious and the agency failed to follow proper rulemaking procedures; and that the rule constitutes, in part, an unlawful tax under the Washington Constitution.

On November 10, Ecology filed a motion to dismiss the challengers' SEPA claims. This motion was scheduled for hearing in December. On December 5, the challengers asked the court for leave to file amended petitions for judicial review that would include new factual allegations intended to thwart standing arguments raised by Ecology's motion to dismiss.

Briefing on other claims is scheduled to take place in the first quarter of 2017 with oral arguments at the end of March.

In *Foster v. Department of Ecology*, youth plaintiffs won a legal victory in May when they persuaded a state court that Ecology, as obligated by the state CAA, the state constitution, and the public trust doctrine, was required to adopt greenhouse gas regulations by the close of 2016. No.14-2-25295-1 (King Cty. Super. Ct. Orders filed May 16, 2016 and Nov. 19, 2015). However, on October 16, the plaintiffs, in a motion for an order to show cause, asked the court to determine that the Clean Air Rule violated the court's previous orders regarding Ecology's duty to address climate change. The plaintiffs maintain that the motion is not a direct challenge to the rule. Rather, in a subtle distinction, they seek to confirm that the rule in its current form does not meet the obligations identified by the court and to "require science-based, numeric emission reductions be achieved with all deliberate speed." No. 14-2-25295-1 (Mot. to Show Cause filed Oct. 18, 2016).

Clean Power Plan—The state has revealed little information about how it intends to comply with the federal Clean Power Plan (CPP). But, in comments submitted in January 2016 on EPA's proposed federal plan, model trading rules, and the Clean Energy Incentive Program, the state recognized "several benefits in pursuing a mass-based plan." Even if the Trump administration rolls back the CPP, emissions from power plants in Washington will still be regulated by the Clean Air Rule, assuming the rule survives legal challenges.

Carbon Tax—A carbon tax initiative, I-732, was roundly defeated at the ballot box in November. The initiative would have imposed a tax on greenhouse gas emissions while providing reductions and subsidies in other areas. The Alliance for Jobs and Clean Energy plans to advocate for an alternative carbon tax proposal in the 2017 state legislative session.

### **Start-up, Shutdown, and Malfunction Regulation**

Ecology has initiated a rulemaking to update to regulations regarding excess emissions during start-up, shutdown, and malfunction (SSM) events in response to a May 2015 state implementation plan (SIP) call by EPA. 80 Fed. Reg. 33,839 (June 12, 2015). In November, Ecology began seeking feedback on proposed changes from stakeholders. Ecology is aiming to propose a rule addressing SSM events in March 2017 and to adopt a final rule during the summer. Ecology did not submit a corrective plan by EPA's November 22 deadline.

In draft-proposed rule changes shared with stakeholders in December, Ecology set out a process for developing an "alternative emission limitation" for start-up and shutdown periods to be applied by the permitting authority for federally enforceable requirements, i.e., SIP standards. Alternative emissions limits may not result in an exceedance of the NAAQS. Ecology has also floated a malfunction abatement plan requirement. For state-only requirements, Ecology would retain an affirmative defense for unavoidable excess emissions.

The outcome of a federal lawsuit, *Walter Coke Inc. v. EPA*, D.C. Cir., No. 15-1166 (D.C. Cir. filed June 12, 2015), challenging EPA's SSM SIP call will likely affect any regulatory changes ultimately adopted by states.

### **EPA Regulatory Approvals**

On October 6, EPA approved SIP revisions in chapters 173-400 and 173-476 of the Washington Administrative Code (WAC), General Regulations for Air Pollution Control Sources and Ambient Air Quality Standards, reflecting the adoption of federal law by reference, including certain prevention of significant deterioration (PSD) regulations, clarifications that the Benton County Clean Air Agency does not implement WAC PSD regulations, and changes to the ozone NAAQS. 81 Fed. Reg. 69,385 (Oct. 6, 2016); 81 Fed. Reg. 53,362 (Aug. 12, 2016).

On September 29, EPA took direct final action approve corrections to "minor typographical errors" discovered in prior SIP submittals concerning chapter 173-400 WAC, General Regulations for Air Pollution Sources. 81 Fed. Reg. 66,823 (Sept. 29, 2016).

On July 14, EPA approved a limited maintenance plan for the Spokane carbon monoxide limited maintenance area, thereby incorporating it into the Washington SIP. 81 Fed. Reg. 45,417 (July 14, 2016).

### **Enforcement Actions**

In August, Ecology entered into agreed orders with Intalco Aluminum LLC and Alcoa Wenatchee LLC to install and operate ambient sulfur dioxide and meteorological monitoring equipment to evaluate whether either of the aluminum smelters complies with the one-hour sulfur oxides NAAQS. Ecology Docket Nos. 13551 and 13552.

### **Indian Tribes and Reservations**

EPA Region 10 has authority over 271 federally recognized Indian Tribes. On 39 reservations in Idaho, Oregon, and Washington, air quality is

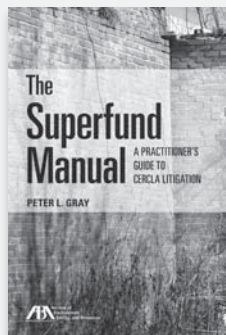
governed by EPA's 2005 Federal Air Rules for Indian Reservations (FARR).s

On June 16, EPA entered into a consent agreement with CHS Inc. to resolve an alleged violation of the FARR. CHS, which operates a grain facility on the Yakama Indian Reservation in Toppenish, Washington, agreed to pay a \$3,052 civil penalty for failing to timely register its facility as an emissions source with EPA as required by the FARR.

On July 21, EPA announced a settlement with PNW Wind Down LLC related to alleged Clean Air Act violations at an on-reservation plywood veneer manufacturing facility owned by the Confederated Tribes of the Colville Reservation. The facility is leased by the tribe to PNW Wind Down, a successor to Omak Wood Products. Under the settlement, PNW Wind Down agreed to pay a civil penalty of \$89,000 for alleged exceedances of opacity limits during an emissions source test, noncompliance with an administrative compliance order, and failure to submit a complete response to an EPA information request made under section 114 of the CAA. The settlement is the culmination of multiple EPA enforcement actions and extensive technical assistance since 2013, when operations at the facility resumed after a several-year shutdown.

On October 6, EPA announced a settlement with Pace International LLC related to alleged Clean Air Act violations at a facility located on the Yakama Indian Reservation in Washington. Pace, which manufactures post-harvest fruit coatings, agreed to pay a civil penalty of \$77,134 and to spend \$78,427 on facility improvements designed to reduce emissions of volatile organic compounds (VOCs). The Clean Air Act violations at issue were discovered during an unannounced inspection of the Pace facility; a second, follow-up inspection employed forward-looking infrared camera technology to identify VOC emissions.

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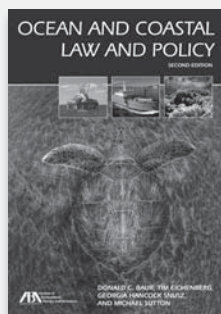


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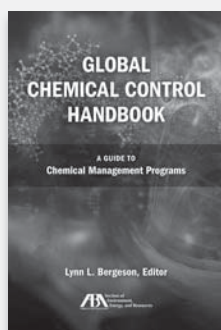


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