Section of Environment, Energy, and Resources
AMERICAN BAR ASSOCIATION

Air Quality Committee Newsletter

Vol. 21, No. 3 **August 2018**

MESSAGE FROM THE CO-CHAIRS

Elizabeth Hurst and Gary Steinbauer

This is our third newsletter this year! Our well-organized Newsletter vice chairs, Irene Hantman, Taylor Hoverman, Rod Johnson, and David Loring, compiled three issues solely for the Air Quality Committee (AQC) and a forthcoming joint committee issue with the Oil and Gas Committee. In the first feature article for this issue, Kurt Blase, who also wrote, "Back to Basics": NAAQS Attainment Plans and Designations (vol. 21, no.1 of this newsletter, discusses the Environmental Protection Agency's April 30, 2018, proposed rule on strengthening transparency in regulatory science in the context of the national ambient air quality standards. In the second article, Tyler Kubik discusses a recent opinion by the Court of Appeals for the D.C. Circuit on an industry challenge to EPA's Regional Consistency Rule. In addition, the Regional Reporters for Regions 1, 2, 3, 4, 5, 6, 9, and 10 have provided detailed updates of regulations and litigation in the states in their regions.

As we close out this fiscal year, we want to thank our Newsletter vice chairs for all their efforts in preparing and editing the AQC Newsletters and the Regional Reporters for keeping our members up-to-date on regional issues. Also, we would like to give a special thanks to Taylor Hoverman, vice chair of Newsletters, and Kathryn E. Kelly, PhD, vice chair of Programs, for not only performing their vice chair functions, but also for contributing articles to the newsletter.

We also want to acknowledge the work of the committee's Electronic Communications vice chairs, Jay Simpson and Adam Gustafson, in preparing the AQC Monthly Updates and a special thanks to Jay for writing the case summaries of recent air-related opinions, which you can find on the AQC webpage. The committee's Program vice chairs, Joel Beauvais, Kathryn E. Kelly, Scott Turner, and Andrea Hudson Campbell, and the vice chairs-at-large, Shannon Broome and Ghislaine Torres Bruner, assisted in developing and participating in four quality air programs covering issues related to the new administration. If you missed any of the presentations, you can listen to a recording at ABA's On Demand CLE webpage: https://www.americanbar.org/cle/webinars.html.

Our vice chair of Social Media, Ben Snowden, did a fantastic job of keeping our members informed of upcoming programs and newsletters. We appreciate his follow-through and general good nature! Zachary Fane and Tom Santoro, the committee's *Year in Review* vice chairs, assembled and edited the Air Quality chapter for *The Year in Review 2017*, which can be found on the SEER webpage in the Publication section and is an excellent source for recent air cases, with links to the cases and related materials. Our final thanks goes to our Membership vice chair, Rachel Cox, for hosting the Taste of SEER dinner for our members attending the SEER 25th Fall Conference in Baltimore. As chairs of a committee we cannot thank our vice

Continued on page 3.

Air Quality Committee Newsletter
Vol. 21, No. 3, August 2018
David Loring, Irene Hantman, Rod Johnson, and Taylor Hoverman, Editors

In this issue:

CALENDAR OF SECTION EVENTS

August 23, 2018
The Administration's Regulatory Reform for Fuel Economy and Vehicle Greenhouse Gas Standards: Assessing the Significant Changes and Potential State Conflicts
Committee Program Call

August 23, 2018
SEER Social- Portland Happy Hour
Portland, OR

September 13, 2018
SEER Social- San Francisco Happy Hour
San Francisco, CA

September 27, 2018
Meet EPA Reg. 4 Administrator Trey Glenn Atlanta, GA
Primary Sponsor: The Environmental Law Institute

October 2, 2018
Autonomous Vehicles: The Good, The Bad, & The Ugly
CLE Webinar

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

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

Continued from page 1.

chairs enough for all the work they carry out to meet our commitments to the AQC members and SEER management.

In the new ABA year, Elizabeth will be serving on the SEER council and Gary will be co-chairing the committee with Jacob Santini. We enjoyed working together and hope we provided you some useful information for your legal practice. If you want to become more involved in SEER or the committee or have any suggestions on how this committee can assist you in your legal practice, please reach out to us, as we like hearing from you. We hope to see you at the SEER 26th Fall Conference in San Diego, October 17–20, 2018! Thanks to everyone for a great year.

Sincerely,
Elizabeth and Gary

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

SCIENTIFIC TRANSPARENCY IN NATIONAL AMBIENT AIR QUALITY PROCEEDINGS

Kurt Blase

On April 30, the Environmental Protection Agency (EPA) proposed a controversial rule, Strengthening Transparency in Regulatory Science (83 Fed. Reg. 18,768). Supporters assert that it is a long overdue effort to provide a meaningful opportunity for public comment on highly technical scientific information underlying EPA's rules. Critics argue that it would bar EPA reliance on key research by requiring public access to the underlying data, thereby disqualifying studies that rely on confidential medical information or other data subject to privacy protections.

A primary focus of both sides on this issue has been application of the proposed rules to proceedings to establish or review National Ambient Air Quality Standards (NAAQS) under the Clean Air Act (CAA). This article examines application of the proposed transparency rules in the context of the statutory provisions relevant to NAAQS review.

CAA section 108(a)(2) requires NAAQS to be based on air quality criteria that "shall accurately reflect the latest scientific knowledge" useful in identifying potential health and welfare effects, including, "to the extent practicable," specific information on variable factors, pollutant interactions, and welfare effects. These statutory provisions impose three distinct requirements for the scientific information contained in criteria documents (now known as Integrated Science Assessments): (1) it must be accurate; (2) it must be the latest relevant information available; and (3) specific data must be provided where practicable.

In adopting these provisions in 1970, the Senate Committee on the Environment and Public Works expressly noted the absence of key scientific information and adopted an ambitious research program to fill the gaps, including research on (1) the contribution of air pollution to the etiology

of disease; (2) synergistic effects; (3) tissue accumulation; (4) functional impairment; (5) contributing factors such as age, occupation, and smoking; and (6) improved predictive models.[1] The committee stated, "This effort should be directed toward the accelerated development of more comprehensive air quality criteria" (*id*.). Accordingly, as new information is developed, Congress directed EPA to include it in more comprehensive versions of the Integrated Science Assessments. Section 108(a)(2) adds that EPA must include specific data "to the extent practicable."

This requirement was strengthened in the 1977 CAA Amendments, which included the rulemaking provisions that now appear in section 107(d) of the act. Those provisions originated in the House bill, and in adopting them the House Committee on Interstate and Foreign Commerce, Subcommittee on Health and the Environment found that "appropriately broad administrative discretion to promulgate regulations to protect health or the environment must be restrained by thorough and careful procedural safeguards that ensure an effective opportunity for public participation in the rulemaking process." *See* H.R. Rep. No. 294, at 319 (1977). Two provisions were adopted to provide such assurance. With respect to proposed rules, section 307(d)(3) provides:

> All data, information and documents . . . on which the proposed rule relies shall be included in the docket on the date of publication of the proposed rule.

Section 307(d)(6)(C) imposes a similar requirement on final rules:

> The promulgated rule may not be based (in whole or in part) on any information or data which has not been placed in the docket as of the date of such promulgation.

As the 1977 House Committee noted, these provisions were necessary because Congress gave EPA broad discretion in developing NAAQS, rejecting the "substantial evidence" standard for judicial review in favor of the more lenient "arbitrary and capricious" standard, under which courts give substantial deference to agency findings of fact. *See, e.g.*, *American Trucking Assn's, Inc. v. EPA*, 283 F.3d 355, 362 (D.C. Cir. 2002) ("*ATA III*") ("Our task is the limited one of ascertaining that the choices made by the [EPA] Administrator were reasonable and supported by the record"). In adopting this approach, Congress wanted to be sure that all of the scientific information on which the agency relies is available for public review at the proposal stage and for judicial review in the wake of a final standard. The House Committee went on to state, "Of course, the agency has at least as great an obligation to include any such documents that contradict its position as it does to include those that support it" (*id.* at 321).

To recap, section 108(a) of the act requires NAAQS to be based on scientific information that is accurate and the latest relevant information available, including specific data where practicable. Section 307(d) requires all data and information on which proposed and final rules are based to be placed in the underlying dockets. These provisions amount to a statutory requirement for EPA to provide scientific transparency to the maximum extent practicable in developing Integrated Science Assessments and proposed and final NAAQS rules.

Considered in this context, EPA's proposed transparency rules appear to be a reasonable effort to comply with the statutory mandates for NAAQS review. Major provisions of the proposal include:

1. EPA would be required to identify specifically the scientific studies and information on which it relies in NAAQS proceedings;
2. EPA would be required to include in the docket the data, models, computer code, and protocols underlying those studies "to the extent practicable" (note the use of the same language employed in section 108(a);
3. Public release would be permitted only "in a fashion that is consistent with law, protects privacy, confidentiality, confidential business information, and

is sensitive to national and homeland security;"

4. EPA would be directed to work with third parties, including universities and private firms, to make information available to the extent reasonable;
5. EPA would be directed to encourage the use of efforts to de-identify data sets to create public-use data files that would simultaneously help protect privacy and promote transparency;
6. Independent peer review of all meaningful information would be required;
7. EPA could grant exemptions where compliance with the transparency requirements is not practicable.

If this proposal is finalized, the final rules and/or application of them to specific NAAQS reviews undoubtedly will be litigated. The most likely candidates for initial application are the pending reviews of the ozone and PM (particular matter) NAAQS, which the Administrator has ordered to be completed by late 2020. Judicial review of the transparency rules will depend to a great degree on how they are applied in these upcoming NAAQS reviews. On its face, however, the proposal appears to be a reasonable effort to implement the statutory NAAQS requirements for data review while providing adequate protections for existing regulations and research, privacy, confidentiality, the peer review process, and other potential problem areas. Accordingly, the proposal is in no way barred by the D.C. Circuit's decision in *ATA III*, *supra*, holding that EPA is not required to provide underlying data where that "would be impractical and unnecessary" (283 F.3d at 372). The language of the proposed regulation would prevent such a result.

Kurt Blase *is Principal, BlaseGroup, LLC and Senior Counsel, Verdant Law, PLLC.*

Endnote

1 A Legislative History of the Clean Air Act Amendments of 1970, vol. 1 at 407 (1970 S. Rep.).

D.C. CIRCUIT UPHOLDS EPA RULE LIMITING GEOGRAPHIC SCOPE OF NON-D.C. CIRCUIT DECISIONS

Tyler Kubik

The D.C. Circuit rejected industry challenges to EPA regulations that allowed EPA to limit the application of judicial decisions inconsistent with national EPA policy to the deciding court's region. *Nat'l Envtl. Dev. Assoc. Clean Air Project v. EPA (NEDACAP II)*, Nos. 16-1344, 2018 WL 2749179, at *4–5 (D.C. Cir. June 8, 2018). The decision is notable because the D.C. Circuit held that the CAA's requirement that EPA apply the CAA uniformly does not apply to adverse judicial decisions, so EPA presumably has wide latitude to address intercircuit inconsistencies going forward. *NEDACAP II* demonstrates that while EPA is bound to apply D.C. Circuit and Supreme Court decisions uniformly nationwide under the CAA, EPA need not alter national policy in response to inconsistent decisions in other circuits.

Background

In 2016, EPA adopted amendments to the Regional Consistency regulations (Regional Consistency Rule) articulating EPA's policy of intercircuit nonacquiescence. The Regional Consistency Rule stated that EPA would (1) only apply Supreme Court and D.C. Circuit decisions uniformly nationwide, and (2) deviate from uniform national application of the CAA only to comply with federal decisions in locally applicable EPA actions. The Regional Consistency Rule was adopted in response to a prior D.C. Circuit decision holding that EPA's policy of intercircuit nonacquiescence was inconsistent with then-existing EPA regulations requiring that EPA eliminate regional inconsistency. *See Nat'l Envtl. Dev. Assoc. Clean Air Project v. EPA (NEDACAP I)*, 752 F.3d 999, 1003 (D.C. Cir. 2014).

Petitioners National Environmental Development Association's Clean Air Project, American Petroleum Institute, and Air Permitting Forum each

petitioned for review of EPA's Regional Consistency Rule in the D.C. Circuit, arguing that CAA § 301(a) precludes allowing intercircuit nonacquiescence because that section requires EPA to implement the CAA uniformly and fairly nationwide. EPA countered that the CAA's fairness and uniformity obligations do not apply to judicial decisions, the CAA contemplates intercircuit inconsistency, and EPA's policy of intercircuit nonacquiescence reasonably addressed judicially created intercircuit inconsistencies. The cases were consolidated, and oral argument was held in April 2018.

Court Rejects Challengers' *Chevron* Step One Argument

The court held that the CAA's § 301(a) uniformity obligations were not ambiguous and clearly do not apply to the Regional Consistency Rule; therefore, the uniformity obligations do not preclude EPA's adoption of intercircuit nonacquiescence under *Chevron*. First, § 301(a) does not address judicially created inconsistencies in the application of EPA policies, let alone unambiguously prohibit it.

Second, section 301(a)(2)'s uniformity obligations only apply to regulations involving powers delegated by the EPA administrator to regional offices, i.e. delegation-created inconsistencies. The Regional Consistency Rule merely acknowledged that EPA must not disobey court decisions in that court's jurisdiction, which involves no delegation of power under § 301(a) and is mandatory for EPA officials regardless of delegation.

Third, because CAA § 307 channels petitions to review nationally applicable EPA actions to the D.C. Circuit, and locally or regionally applicable actions to the appropriate circuit, it necessarily allows for judicially created inconsistencies. Forcing EPA to change its rules nationwide every time there is an inconsistent circuit decision would interfere with § 307's allocation of jurisdiction to the D.C. Circuit for nationally applicable regulations. Therefore, § 301(a)'s uniformity requirements were held not to apply to the Regional Consistency Rule.

Court Defers to EPA's Construction of CAA

Because the CAA was silent about how EPA should address judicially created inconsistencies or apply the uniformity provision, the court deferred to EPA's reasonable construction of the CAA in the Regional Consistency Rule to allow intercircuit nonacquiescence. Again, EPA's decision not to automatically apply every adverse federal judicial decision nationwide was consistent with § 307's contemplation of judicially created inconsistencies and § 301's failure to address judicially created inconsistencies; neither section forbids intercircuit nonacquiescence. While Petitioners argued that inconsistent application creates heavy burdens on regulated parties, the court argued that viewing intercircuit conflicts as inherently bad is "shortsighted." Rulemaking and further judicial proceedings, the court contended, could adequately address problems caused by judicially created inconsistencies.

Additionally, the court held that *NEDACAP I*—holding that EPA's policy of intercircuit nonacquiescence was inconsistent with then-existing EPA regulations—was not controlling. Although the wording of the regional consistency regulations in *NEDACAP I* and the CAA's uniformity requirements were similar, *NEDACAP I* failed to address consistency of intercircuit nonacquiescence with the CAA itself. Thus, the court cabined its holding in *NEDACAP I* to ensure that the decision would not preclude EPA from reasonably implementing intercircuit nonacquiescence.

Judge Silberman's Concurrence

Judge Silberman agreed with the court's opinion in full but concurred separately to indicate that EPA can mitigate the problems of intercircuit nonacquiescence by declaring in individual cases that its regional applications of important provisions involve a policy of national scope and effect to channel national issues to the D.C. Circuit.

Conclusion

NEDACAP II is a significant CAA decision. The court clarified that the CAA's uniformity obligations do not apply to judicially created inconsistencies in EPA's nationwide policies. Allowing EPA to deviate from uniform national application of the CAA presents a mixed bag of pros and cons for those affected by environmental regulations. On the one hand, the more inconsistency in court decisions, the greater the patchwork of EPA policy nationwide. This patchwork may make it harder to spur nationwide changes in EPA policy through challenges to locally applicable EPA actions and harder for regulated parties with interstate operations to comply. On the other hand, limiting the application of circuit court decisions allows regional carve-outs from unfavorable, nationally applicable EPA rules that would otherwise have unfortunate environmental or regulatory costs. The decision also prevents a single circuit court from spurring the automatic rewrite of EPA rules nationwide, which preserves EPA's ultimate policy discretion under the CAA.

Tyler Kubik *is a Summer Associate in the Legal Department at American Fuel & Petrochemical Manufacturers in Washington, D.C., and a law student at the Antonin Scalia Law School at George Mason University.*

EPA REGIONAL REPORTERS

EPA REGION 1

Dixon Pike and Brian Rayback
Pierce Atwood LLP
Portland, Maine

EPA Regional Office Issues

The latest Regional Greenhouse Gas Initiative (RGGI) auction on March 14, 2018, resulted in sales of $13,553,767 of CO2 allowances at a clearing price of $3.79. Auction results can be found at https://www.rggi.org/Auction/39.

Connecticut

State Regulations (proposed/adopted)

EPA approved state implementaton plan (SIP) revisions addressing nonattainment new source review (NNSR) requirements for the 2008 8-hour ozone National Ambient Air Quality Standards. The *Federal Register* notice *is available* at https://www.gpo.gov/fdsys/pkg/FR-2018-02-16/pdf/2018-03252.pdf.

Enforcement Issues

Under a settlement with the Environmental Protection Agency (EPA), the U.S. Department of Justice and the borough of Naugatuck, mercury controls will be installed on a sewage sludge incinerator owned by the borough and operated by Naugatuck Environmental Technologies. The facility will also pay a penalty of $100,000 and take measures to limit the mercury content of sewage sludge received. The EPA news release is *available at* https://www.epa.gov/newsreleases/naugatuck-conn-incinerator-control-mercury-emissions-under-settlement.

Maine

On April 25, 2018, the Maine Department of Environmental Protection initiated a rulemaking, as required pursuant to a citizen petition, to adopt new rules establishing greenhouse gas (GHG) emissions requirements for a wide range of sources. The

citizens' proposal would require, inter alia, Title V sources to reduce GHG emissions 8 percent per year until 2035. The citizen petition materials are *available at* http://www.maine.gov/dep/ftp/GHG_Petition/.

Massachusetts

State Regulations (proposed/adopted)

EPA approved a SIP revision that increases the number of commercial parking spaces allowed in the Logan Airport Parking Freeze area by 5000 spaces. The *Federal Register* notice is *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-03-06/pdf/2018-04488.pdf.

Enforcement Issues

A Haverhill company will reduce vehicle idling and pay an $18,000 penalty as part of a settlement with EPA for claims of excessive school bus idling devices on all its buses. The EPA news release is *available at* https://www.epa.gov/newsreleases/haverhill-mass-school-bus-company-reduces-idling-under-settlement.

A New Bedford industrial laundry will reduce emissions and pay a $200,000 penalty to resolve Clean Air Act violations alleged by EPA. The EPA news release is *available at* https://www.epa.gov/newsreleases/epa-action-ensures-new-bedford-industrial-laundry-will-reduce-air-emissions.

The Massachusetts Department of Environmental Protection penalized a transfer station $45,585 for violations involving odor complaints. The press release is *available at* https://www.mass.gov/news/massdep-issues-45585-penalty-to-allied-waste-systems-inc-for-solid-waste-and-air-quality.

New Hampshire

Air Quality Improvements

The N.H. Department of Environmental Services recently reported that "concentrations of the most common air pollutants in New Hampshire are down between 70 percent and 90 percent from 1990 levels." The NHDES news release is *available at* https://www.des.nh.gov/media/pr/2018/20180306-state-of-air.htm.

Rhode Island

Enforcement Issues

Governor Raimondo announced that approximately $14.4 million in Volkswagen settlement funds will be used to, inter alia, purchase electric buses and install electric vehicle infrastructure. The Rhode Island press release is *available at* https://www.ri.gov/press/view/33174.

Vermont

State Regulations (proposed/adopted)

EPA proposed to approve Vermont's sulfur dioxide (SO_2) regulations as meeting the interstate transport "good neighbor provisions" under Clean Air Act section 110(a)(2)(D)(i)(I). The *Federal Register* notice is *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-04-10/pdf/2018-07231.pdf.

EPA approved several revisions to the Vermont SIP to meet Prevention of Significant Deterioration (PSD) and NNSR permit requirements. The *Federal Register* notice is *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-03-19/pdf/2018-05317.pdf.

EPA granted the Vermont Department of Environmental Conservation the authority to implement and enforce, with respect to area sources only, Vermont's Perchloroethylene Dry Cleaning Rule in place of EPA's Dry Cleaning National Emission Standards for Hazardous Air Pollutants (NESHAP). This approval makes the Vermont rule federally enforceable. The *Federal Register* notice is *available at* https://www.gpo.gov/fdsys/pkg/FR-2018-03-05/pdf/2018-04277.pdf.

EPA REGION 2

Philip E. Karmel
Bryan Cave LLP
New York, New York

New York

State Regulations (proposed/adopted)

The New York State Department of Environmental Conservation has proposed a carbon dioxide (CO_2) emission standard for major electric generating facilities. The standard is expected to close the last coal-fired power plant in New York State. In 1990, the electric power industry in New York relied upon coal to produce 19.1 percent of its electric output. *See* https://www.eia.gov/electricity/data.php#generation. By 2016, the industry had almost ceased using coal, relying upon coal to produce only 1.3 percent of its electric output. *Id.* By December 31, 2020, the last coal-fired power plant in the New York State is expected to close due to proposed regulations that, if enacted, will require all coal-fired power plants in New York to meet CO_2 emission limits that can be met only with carbon capture and sequestration or some other advanced emission reduction technology. The proposed regulations were published in the May 16, 2018, *State Register* and if enacted would become effective on December 31, 2020. The proposed rule is *available at* http://www.dec.ny.gov/regulations/113501.html#_blank.

EPA REGION 3

Sarah L. Clark
Pennsylvania Department of Environmental Protection
Harrisburg, Pennsylvania

EPA Regional Office Issues

Enforcement Issues

The Environmental Protection Agency (EPA) and the U.S. Department of Justice entered into a final consent decree with S.H. Bell Co. requiring the company to monitor and reduce fugitive manganese emissions from its raw products storage and handling facility that spans the Pennsylvania-Ohio border.

Delaware

State Regulations (proposed/adopted)

The following regulations are currently under development:

1. Amendments to 7 DE Admin. Code 1101, Definitions and Administrative Principles, and 7 DE Admin. Code 1102, Permits: Provides that removal of lead-containing coatings from water tanks by dry abrasive blasting is no longer exempt from obtaining a permit and adds three necessary definitions. There will be a public hearing on July 12, 2018, and the hearing record will remain open until July 27, 2018.
2. Amendments to 7 DE Admin. Code 1150, Outer Continental Shelf Air Regulations: Incorporates updates to the federal Outer Continental Shelf regulations at 40 C.F.R. 55. The Delaware Department of Natural Resources and Environmental Control (DNREC) expects to publish the proposed regulation for public comment in third quarter 2018.
3. Amendments to 7 DE Admin. Code 1126, Motor Vehicle Emissions Inspection Program: Establishes identical statewide emissions testing requirements and exempts the first seven model years of a vehicle pursuant to H.B. 246. A public hearing will be held in August 2018 with a goal effective date of January 1, 2019.
4. Amendments to 7 DE Admin. Code 1131, Low Enhanced Inspection and Maintenance Program: Establishes identical statewide emissions testing requirements and exempts the first seven model years of a vehicle pursuant to H.B. 246. A public hearing will be held in August 2018 with a goal effective date of January 1, 2019.
5. Amendments to 7 DE Admin. Code 1124, Control of Volatile Organic Compound Emissions: Updates requirements for

gasoline-dispensing facilities to allow decommissioning of existing Stage II vapor recovery systems, remove the requirement to install Stage II systems, and update Stage I requirements to ensure dispensing facilities remain adequately controlled. DNREC expects to hold public review and a hearing in fall 2018.

The following proposed regulations have been adopted:

1. Repeal 7 DE Admin. Code 1123, Standards of Performance for Steel Plants: Electric Arc Furnaces. DNREC reviewed the regulation and found that it currently does not apply to any source in Delaware and other more restrictive state and federal requirements would apply to any new furnaces constructed. Approved as final on February 1, 2018.
2. Amend 7 DE Admin. Code 1136 to update the federal reference date in regard to the Acid Rain Program. DNREC determined that there have been a number of updates to portions of 40 C.F.R. pts. 72–78 that should be adopted. Approved as final on February 1, 2018.
3. Amend 7 DE Admin. Code 1140 to update the adoption by reference of California's Low Emission Vehicle III and the greenhouse gas standards. Delaware originally adopted the standards in 2013 and California has since made changes relating to automobile manufacturers. The Clean Air Act requires that Delaware standards are identical to California standards. Approved as final on February 6, 2018.

Administrative Rulings

Suzanne E. P. Thurman v. Delaware Department of Natural Resources and Environmental Control, EAB Appeal No 2017-09—The appellant appealed DNREC's issuance of several permits to Rehoboth authorizing the city to construct and operate an ocean outfall to dispose of treated effluent from its wastewater treatment facility. The board dismissed the appeal for lack of standing.

Case Decisions, Suits

DNREC issued a Conciliation Order by Consent to Sunoco Partners Marketing & Terminals, LP, addressing alleged violations of air pollution regulations for modification and operation of a flare without a permit. Under the order, Sunoco will pay a $600,000 penalty and an additional $150,000 for an environmental improvement project to support the transition of Delaware's ambient air pollution monitoring network to continuous monitors located throughout the state.

District of Columbia

Permits

The Department of Energy and Environment (DOEE) announced its intent to issue the following air quality permits:

- Nos. 6358-R1 and 7208 to Imperial Auto Body of DC to operate two existing automotive paint spray booths. The public comment period closed on May 28.
- No. 6506-R1 to the U.S. General Services Administration to operate an 800 kWe emergency generator. The public comment period closed on May 21.
- No. 6208 to the U.S. Government Publishing Office to operate a Presstek 52DI non-heatset sheet-fed offset lithographic printing press. The public comment period closed on May 21.
- No. 6472-C3 renewal to the District of Columbia Water and Sewer Authority to construct and operate a Dewatered Sludge Loading Facility Odor Scrubber. The public comment period closed on May 14.
- No. 6677-R1 to 13 & F Associates Limited Partnership to operate an existing 800 kWe Caterpillar emergency generator set. The public comment period closed on April 30.
- Nos. 7178 and 7179 to JBG/Foundry Office, LLC, to operate existing 100 kWe fire pump generator set and 180 kWe emergency generator set. The public comment period closed on April 30.
- No. 7193 to Roubin & Janeiro Inc. to construct and operate portable screener

equipment at its hot mix asphalt plant facility. The public comment period closed on April 23.
- No. 6372-C2/O to the District of Columbia Water and Sewer Authority to construct and operate Biosolids Handling Facilities. The public comment period closed on April 16.
- Nos. 7180–7187 to the Catholic University of America to construct and operate eight 6.0 billion Btu per hour dual fuel-fired boilers. The public comment period closed on March 19.
- No. 7189 to the U.S. Government Publishing Office to operate a Ryobi 928PF non-heatset UV-LED sheet-fed offset lithographic printing press. The public comment period closed on March 26.
- No. 7192 to Potomac Electric and Power Company to construct and operate a new fleet fueling system at the Benning Service Center. The public comment period closed on March 19.

Other
The District's Draft Annual Ambient Air Quality Monitoring Network Plan for 2019 opened for public comment on May 11 and will be submitted to EPA on July 1. DOEE is not proposing any changes to the plan.

Maryland

State Regulations (proposed/adopted)
The Secretary of the Environment adopted the following regulations:
- COMAR 26.11.36: Establishes stationary engine requirements equal to EPA for Quad I, J, and Z. The regulation became effective on February 12, 2018.
- COMAR 26.11.09.11: Repeals existing regulations in order to remove conflicts with EPA particulate matter (PM) emission requirements for small wood boilers. The regulation became effective on February 12, 2018.
- COMAR 26.11.33: Repeals chapter regarding Architectural Coatings, which is superseded by COMAR 26.11.33, Architectural and Industrial Maintenance (AIM) Coatings. The regulation became effective on February 12, 2018.
- COMAR 26.11.17.05: Allows interprecursor trading of volatile organic compounds (VOC) and NOx offsets. The regulation became effective on April 9, 2018.
- COMAR 26.11.40, 26.11.01, and 26.11.14: Establishes NOx Ozone Season Emission Caps for Non-trading Large NOx Units to meet federal EPA NOx SIP Call requirements. The regulation became effective on February 23, 2018.

The following regulations have been proposed:

- The Maryland Department of the Environment (MDE) has proposed to establish new NOx reasonably available control technology (RACT) requirements for large municipal waste combustors with a capacity greater than 250 tons per day. The proposal was presented to the Air Quality Control Advisory Council (AQCAC) in December and MDE expects to schedule a public hearing in summer 2018.
- MDE has proposed to revise the Maryland CO2 Budget Trading Program to incorporate amendments to the Regional Greenhouse Gas Initiative (RGGI) Model Rule. The proposal was presented to AQCAC at its March 12, 2018, meeting and MDE expects to schedule a public hearing in summer 2018.

Legislation (proposed/passed)
S.B. 290 (Pinsky) was adopted and approved by the governor on April 5, 2018. The bill amends the circumstances under which the state may withdraw from RGGI by requiring the General Assembly to enact a law approving the withdrawal.

Case Decisions, Suits
On July 20, the State of Maryland through the Maryland Department of the Environment, gave

notice to EPA Administrator Pruitt of its intent to bring suit under section 304 of the Clean Air Act for failure to make a timely determination on Maryland's 126 petition, which alleges that 36 upwind power plant units in Indiana, Kentucky, Ohio, Pennsylvania, and West Virginia are significantly contributing to nonattainment in Maryland due to their failure to run pollution controls effectively.

Pennsylvania

State Implementation Plan and Federal Implementation Plan

EPA published a final rule approving PennsylvaniaA's state implementation planSIP revision pertaining to RACT requirements for automobile and light-duty truck assembly coatings covered by EPA's Control Techniques Guidelines.

State Regulations (proposed/adopted)

The Independent Regulatory Review Commission voted to adopt a final-form rulemaking to amend 25 Pa. Code chapters 121 and 129 to implement control measures to reduce volatile organic compound (VOC) emissions from industrial cleaning solvents. The rulemaking is expected to be published as final in August 2018.

Permits

Governor Wolf and the Pennsylvania Department of the Environment (DEP) announced two final general permits that address methane emissions and other air pollutants related to natural gas. The final GP-5 applies to midstream and natural gas transmission facilities and the final GP-5A applies to unconventional well sites and pigging stations.

Case Decisions, Suits

EPA published a notice of final action denying a 2016 petition by the State of Connecticut asking EPA to find that Brunner Island Power Plant emits air pollutants that contribute significantly to nonattainment or interfere with maintenance of the 2008 National Ambient Air Quality Standard for ozone in Connecticut.

US and PA DEP v. MarkWest Liberty Midstream, LLC, et al.: A consent decree resolving violations regarding emissions from unpermitted pigging operations was filed with the U.S. District Court for the Western District of Pennsylvania and is subject to public comment. Under the consent decree, MarkWest agreed to control pigging emissions at all sites and obtain operating permits for compressor stations with pigging, in addition to paying civil penalties to DEP and EPA.

Enforcement Issues

DEP published notice on April 20 that it is suspending enforcement of the summertime gasoline low reid vapor pressure regulations in the Pittsburgh-Beaver Valley area for the 2018 compliance period.

Virginia

State Regulations (proposed/adopted)

The State Air Pollution Control Board has proposed regulatory amendments to part VII of 9VAC5-140 to reduce and cap CO2 from fossil fuel-fired electric power generating facilities through an interstate trading program. The public comment period ended on April 9, 2018, and included six public hearings.

Permits

The Department of Environmental Quality (DEQ) held a public hearing to receive comment on a draft Prevention of Significant Deterioration permit for C4GT, LLC, to build an electric power generation facility. The public comment period on the draft permit closed on April 24.

DEQ held a public hearing on a draft permit amendment for the Prevention of Significant Deterioration permit for the Greensville Power Station, in which the permittee is proposing to remove the permitted 10 percent capacity factor on the natural gas-fired auxiliary boiler. The public comment period on the draft amendment ended on May 29.

DEQ held a hearing on a draft major source construction permit for Norcraft Companies LLC to modify its cabinet manufacturing facility, which emits VOCs and PM. The public comment period closed on May 31.

West Virginia

Legislation (proposed/passed)

S.B. 395 (Trump)—Providing for judicial review of appealed decisions of the Air Quality Review Board, Environmental Quality Board, and Surface Mine Board. The bill was approved by the governor on March 20.

EPA REGION 4

Joseph Brown
Hopping Green & Sams, P.A.
Tallahassee, Florida

Alabama

State Implementation Plan and Federal Implementation Plan Updates

On January 3, 2018, the Alabama Department of Environmental Management (ADEM) submitted a request to the Environmental Protection Agency (EPA) to redesignate the Troy area to attainment under the 2008 lead National Ambient Air Quality Standards (NAAQS) and to approve an associated state implementation plan (SIP) implementing a maintenance plan for the area. The Troy area is comprised of a portion of Pike County surrounding the Sanders Lead Company facility. On April 13, 2018, EPA noticed a proposed rule that would approve of that submittal. 83 Fed. Reg. 16,021 (Apr. 3, 2018). EPA's proposed rule was subject to a May 14, 2108, comment deadline.

State Regulations (proposed/adopted)

On May 9, 2108, ADEM held a public hearing and solicited public comment on revisions to a variety of ADEM Administrative Code Rules, including Rules 335-3-8-.40, 335-3-10-.01, 335-3-10-.03, 335-3-11-.01, 335-3-11-.06, 335-3-11-.07, 335-3-14-.04, and 335-3-19-.01 through 335-3-19-.05. These revisions would incorporate by reference changes to the EPA's New Source Performance Standards (NSPS) and National Emission Standards for Hazardous Air Pollutants (NESHAP); incorporate title changes to be consistent with EPA's Cross-State Air Pollution Rules (CSAPR); clarify the definition of replacement units; and rescind previous regulations dealing with control of emissions at Existing Municipal Solid Waste Landfills. Changes to chapters 335-3-8 and 14 would be incorporated into Alabama's federally enforceable SIP.

Florida

State Implementation Plan and Federal Implementation Plan Updates

On April 2, 2018, EPA published a final rule approving a portion of a Florida Department of Environmental Protection (FDEP) SIP submittal revising requirements and procedures for emissions monitoring at stationary sources. FDEP's submittal amends several code sections to eliminate redundant language, makes updates to the requirements for emissions monitoring at stationary sources, and removes a code section previously approved by EPA for removal from the SIP but was never actually removed. EPA's final rule was effective May 2, 2018. *See* 83 Fed. Reg. 13,875 (Apr. 2, 2018).

On April 5, 2018, EPA published a final rule withdrawing the designation of unclassifiable for the Citrus County area under the 2010 SO_2 NAAQS and redesignating the area attainment/unclassifiable. *See* 83 Fed. Reg. 14,597 (Apr. 5, 2018). EPA's action serves as a supplement to its prior December 2017 area designations that comprised the third round of EPA action to designate areas of the United States for the 2010 SO_2 NAAQS. EPA's designation of the Citrus County area was effective April 9, 2018.

State Regulations (proposed/adopted)

On April 26, 2018, FDEP proposed rule revisions to amend Florida Administrative Code Rules 62-210.200, -210.300, -210.310, -210.550, and

-210.900. The revisions create an Air General Permit for asphalt concrete plants and revise FDEP's Facility Relocation Notification form. The revisions also include several clarifying and corrective revisions to existing rule language. These rule revisions were effective July 3, 3018.

Effective April 4, 2018, Florida Administrative Code Rule 62-210.700 ("Excess Emissions"), was revised to postpone the sunset date in subsection 62-210.700(6) from May 22, 2018 to May 22, 2020. FDEP previously revised Rule 62-210.700 in response to EPA's final rule that concluded that multiple states had flawed provisions in their SIPs with respect to treatment of emissions during transient operating periods such as start-up, shutdown, and malfunction (known as the "SSM SIP Call"), which is subject to pending litigation in federal district court. The SSM SIP Call litigation is currently in abeyance, however, as the current EPA administration reevaluates its position. FDEP's delay of the relevant sunset date in Rule 62-210.700 postpones effectiveness of certain components intended to address the SSM SIP Call pending the outcome of EPA's reevaluation and the pending litigation.

Georgia

State Implementation Plan and Federal Implementation Plan Updates

On April 16, 2018, EPA proposed approval of changes to Georgia's SIP that affect emission standards and permitting. In particular, EPA's action would approve changes to permit-by-rule standards for cotton ginning operations in Rule 391-3-1-.03(11)(b); provisions regulating nitrogen oxide emissions from large stationary gas turbines in Rule 391-3-1-.02(2)(nnn); and open burning provisions in Rule 391-3-1-.02(5). Comments were due on EPA's proposed action on May 16, 2018.

On February 2, 2018, EPA published notice of proposed action on several components of Georgia's SIP, including approving of the portion of a July 26, 2017, SIP submittal implementing reliance on the CSAPR for certain regional haze requirements; converting EPA's previous limited approval/limited disapproval of Georgia's regional haze SIP to a full approval; removing EPA's federal implementation plan for Georgia that addressed CSAPR-related deficiencies identified in a prior limited disapproval of Georgia's regional haze SIP; and approving the visibility prong of Georgia's infrastructure SIP submittals for the 2012 Fine Particulate Matter, 2010 Nitrogen Dioxide, 2010 Sulfur Dioxide, and 2008 8-hour Ozone NAAQS. Comments on EPA's proposed action were due March 5, 2108.

State Regulations (proposed/adopted)

In March 2018, the Georgia Department of Natural Resources proposed amendments to Ga. Comp. R. & Regs. 391-3-1. Revisions included the removal of inapplicable ozone nonattainment area rules for areas that have since been redesignated to attainment under the 2008 8-hour Ozone NAAQS, revisions to increase major source permitting thresholds for 13 counties that were formerly designated as severe nonattainment areas under the 2008 8-hour Ozone NAAQS, and revisions to add a new permit application fee. Following an opportunity for public comment in April 2018, these revisions were considered and approved for adoption by Georgia's Board of Natural Resources.

Kentucky

State Implementation Plan and Federal Implementation Plan Updates

On April 2, 2018, EPA published notice of final action approving a Kentucky Division of Air Quality SIP submittal to remove federal reformulated gasoline requirements for Boone, Campbell, and Kenon Counties in the Kentucky portion of the Cincinnati-Hamilton, Ohio-Kentucky-Indiana 2008 8-hour Ozone Maintenance Area. See 83 Fed. Reg. 13,872 (Apr. 2, 2018). EPA's final action was effective April 2, 2018.

On April 18, 2018, EPA proposed approval of a Kentucky Division of Air Quality SIP submittal proposing to approve Kentucky's February 28, 2018, draft SIP submission demonstrating that

no additional emission reductions are necessary to address the "good neighbor" provision of the 2008 Ozone NAAQS beyond the existing requirements of the federal implementation plan for the CSAPR. *See* 83 Fed. Reg. 17,123 (Apr. 18, 2018). The good neighbor provision requires each state's SIP to address the interstate transport of air pollution in amounts that contribute significantly to nonattainment, or interfere with maintenance, of a NAAQS in any other state. Comments on EPA's proposed action were due on May 18, 2018.

North Carolina

State Regulations (proposed/adopted)

Effective May 2018, North Carolina's Environmental Management Commission approved revisions proposed by the North Carolina Department of Environmental Quality (NCDEQ) to postpone the effective date of 15A NCAC 02D .0535 and .0545. These rules were previously adopted in response to EPA's final rule finding that multiple states had flawed provisions in their SIP with respect to treatment of emissions during transient operating periods such as start-up, shutdown, and malfunction (the SSM SIP Call). The SSM SIP Call is subject to pending litigation in federal district court, but the litigation is currently in abeyance as the current EPA administration reevaluates its position. NCDEQ's action is intended to postpone the effectiveness of any response to the SSM SIP Call pending the outcome of EPA's reevaluation and the pending litigation on the SSM SIP Call, as discussed above.

South Carolina

State Implementation Plan and Federal Implementation Plan Updates

On March 13, 2018, EPA proposed approval of a South Carolina Department of Health and Environmental Control request to redesignate the Greenville-Spartanburg, South Carolina, area from unclassifiable to unclassifiable/attainment for the 1997 primary and secondary annual Fine Particulate Matter ($PM_{2.5}$) NAAQS. *See* 83 Fed. Reg. 10,814 (Mar. 13, 2018). This area is comprised of Anderson, Greenville, and Spartanburg Counties in South Carolina. Comments on EPA's proposed action were due April 12, 2018.

Tennessee

Permits

On January 30, 2018, EPA issued an order denying two Sierra Club petitions requesting that EPA object to proposed Title V operating permits issued by the Tennessee Department of Environment and Conservation to the Tennessee Valley Authority for its coal-fired power plant in Gallatin, Tennessee. Among other grounds for EPA's action, EPA stated that it was inappropriate for Sierra Club to attack issues that were subject to state review through preconstruction permitting as part of the Title V permit review process. For example, among other claims, Sierra Club raised issues concerning SO_2 emission limits established through the appropriate preconstruction permit process and EPA concluded that Sierra Club had "the opportunity to challenge the SO_2 emission limit through the appropriate preconstruction permitting process, and may not now use the title V petition process to raise these concerns." EPA's position is of particular note because it reflects a shift in position from the prior administration that EPA has advanced in disposing of issues raised in several other recent Title V petitions. The order is *available at* https://www.epa.gov/sites/production/files/2018-02/documents/tvagallatinorder2018.pdf.

EPA REGION 5

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

Illinois

State Implementation Plan and Federal Implementation Plan Updates

The Environmental Protection Agency (EPA) issued a final rule approving a state implementation plan (SIP) revision for attainment of the 2008

Ozone National Ambient Air Quality Standards (NAAQS) for St. Louis-St. Charles-Farmington, Missouri-Illinois (MO–IL) area, also addressing requirements for maintaining the 2008 ozone standard through 2030 in the St. Louis area, as well as certain motor vehicle budgets for volatile organic compounds (VOCs) and NOx. *See* 83 Fed. Reg. 8756 (Mar. 1, 2018).

EPA issued a final rule approving a SIP revision acknowledging that the state has satisfied the progress report requirements of the Regional Haze Rule. *See* 83 Fed. Reg. 15,744 (Apr. 12, 2018).

EPA issued a final rule approving a SIP revision approving redesignation of the Chicago and Granite City Areas to Attainment for the 2008 lead standard. *See* 83 Fed. Reg. 13,198 (Mar. 28, 2018).

Indiana

State Implementation Plan and Federal Implementation Plan Updates

EPA issued a proposed rule to approve a SIP revision in order to be consistent with EPA's 2015 revisions to the 8-hour Ozone NAAQS and revisions to certain monitoring test methods. *See* 83 Fed. Reg. 19,194 (May 2, 2018).

EPA issued a notice of finding of adequacy regarding the motor vehicle emissions budgets for VOCs and NOx in the 15 percent Rate of Progress Plan for the Indiana portion of the Chicago-Naperville, IL-IN-WI 2008 ozone standard nonattainment area (Lake and Porter Counties) for use in transportation conformity determinations. *See* 83 Fed. Reg. 24,799 (May 30, 2018).

Michigan

State Implementation Plan and Federal Implementation Plan Updates

EPA issued a final rule approving a SIP revision acknowledging that the state has satisfied the progress report requirements of the Regional Haze Rule. *See* 83 Fed. Reg. 25,375 (June 1, 2018).
EPA issued a proposed rule to approve a SIP revision that specifies VOC limits for cutback and emulsified asphalts and the test methods for determining VOC content of these products. *See* 83 Fed. Reg. 13,710 (Mar. 30, 2018).

Minnesota

State Implementation Plan and Federal Implementation Plan Updates

EPA issued a proposed rule to approve a SIP revision for the Prevention of Significant Deterioration infrastructure requirements of Clean Air Act section 110 for the 1997 and 2008 ozone, 1997, 2006, and 2012 PM2.5, 2008 lead, 2010 NO_2, and 2010 SO_2 NAAQS. *See* 83 Fed. Reg. 22,913 (May 17, 2018).

Ohio

State Implementation Plan and Federal Implementation Plan Updates

EPA issued a final rule approving the following changes to the Ohio SIP: (1) a change from reliance on the Clean Air Interstate Rule (CAIR) to reliance on the Cross-State Air Pollution Rule (CSAPR) for certain regional haze requirements; (2) converting EPA's limited approval of Ohio's regional haze SIP to full approval and withdrawing FIP provisions, and to approve the visibility prong of Ohio's infrastructure SIP submittals for the 2012 annual and 2006 24-hour PM2.5, 2010 NO_2, and 2010 SO_2 NAAQS. *See* 83 Fed. Reg. 21,719 (May 10, 2018).

EPA issued a proposed rule to approve a SIP revision to implement certain EPA regulations for PM2.5, including those that define PM2.5 precursors. *See* 83 Fed. Reg. 13,457 (Mar. 29, 2018).

EPA issued a final rule approving a SIP revision approving redesignation of the Delta, Ohio area to attainment for the 2008 lead NAAQS standard. *See* 83 Fed. Reg. 10,796 (Mar. 13, 2018).

Wisconsin

State Implementation Plan and Federal Implementation Plan Updates

EPA issued a proposed rule to approve a SIP revision in order to be consistent with EPA's 2015 revisions to the PM2.5 NAAQS and revisions to certain monitoring test methods. Public comments may be submitted through June 25, 2018. *See* 83 Fed. Reg. 24,256 (May 25, 2018).

EPA REGION 6

John King
Breazeale, Sachse & Wilson LLP
Baton Rouge, Louisiana

EPA Regional Offices Issues

Designations for Region 6 States Under the 2015 Ozone Rule

The states of Region 6 have fared well under the 2015 Ozone National Ambient Air Quality Standards. After a two-tiered designation process and lawsuits to force the final designations, only two of the five states have areas designated as in nonattainment of the standard.

On November 6, 2017, the Environmental Protection Agency (EPA) designated 2646 counties across the United States as in attainment of the 2015 Ozone NAAQS. *See* 82 Fed. Reg. 54,232 (Nov. 16, 2017). Most counties (or parishes in Louisiana) in the Region 6 states were designated as in attainment. All of the counties in Arkansas were designated as in attainment.

Because EPA did not designate all counties at that time, suits were filed against EPA to mandate the designations. Ultimately, a court order was issued requiring that all designations be finalized by April 30, 2018. The lone exception was the San Antonio area in Texas, for which designations are due by July 17, 2018.

On April 30, 2018, EPA completed the remaining area designations (except San Antonio, see below). All counties in Oklahoma and Louisiana were designated as in attainment of the standard. The five parishes in the Baton Rouge, Louisiana, area were spared a nonattainment designation under the exceptional event policy. Louisiana had previously recommended a designation of nonattainment for these parishes using data from 2014 to 2016. However, Louisiana submitted certified data for 2017, which showed only one monitor out of compliance. Louisiana also established that the monitor had been impacted by large wildfires in the Pacific Northwest. With the exclusion of these data and the 2017 certified air quality data, all monitors in Louisiana showed attainment.

As a result, only New Mexico and Texas have nonattainment areas. The Sunland Park area of Dora Ana County in New Mexico, which is adjacent to the border of Texas and Mexico, was designated as nonattainment. Two areas in Texas with 15 counties (Dallas-Ft. Worth and Houston-Galveston-Brazoria) were designated as nonattainment.

The counties in the San Antonio area are scheduled to be designated on July 17, 2018 as attainment with one county, Bexar, designated as unclassifiable of the 2015 Ozone NAAQS.

Arkansas

The Arkansas Department of Environmental Quality released its State of the Air Report for 2017. It provides information regarding several metrics, such as permitting, inspections, and enforcement. It also provides information on trends in emissions over time. From 2008 to 2014, lower emissions were measured for nitrogen oxides, volatile organic compounds, carbon monoxide, sulfur dioxide, and ammonia. Only particulate matter trended upward. A copy of the Air Report is *available at* www.adeq.state.ar.us/air/state-of-air.

Texas

The Texas Commission on Environmental Quality announced a series of grants designed to improve

air quality. First, $50 million is available for projects designed to reduce emissions of nitrogen oxides from high-emitting vehicles and equipment. The grant would cover up to 80 percent of the cost to replace an eligible vehicle or piece of equipment with a newer vehicle or piece of equipment, repower an existing engine in an eligible vehicle or piece of equipment with a new, rebuilt, or remanufactured engine, and retrofit or add-on emission-reduction technology to an existing engine in an eligible vehicle or piece of equipment.

Additionally, $15.4 million is available to repower or replace heavy-duty diesel or gasoline-powered vehicles with natural gas engines or new natural gas vehicles. Grants will be awarded only to applicants who will operate their repowered or new vehicle in certain counties. Finally, funds are available for the storage of power from renewable energy that is released back to the grid. Examples of electricity storage projects that can be funded include compressed air energy storage, pumped hydropower, thermal storage, and lithium-ion batteries.

EPA REGION 9

Eric Hiser and Brandon Curtis
Jorden Hiser & Joy, PLC
Phoenix, Arizona

Enforcement Issues

On May 14, 2018, the Phillips 66 Company agreed to pay $99,400 to settle air quality violations that occurred at its Rodeo refinery in 2015.[1] The settlement covers 13 Notices of Violations issued by the Bay Area Air Quality Management District. These violations included emission limit exceedances, venting of odorous gases, a failed quality assurance test for a continuous emission monitoring system, and leak detection and repair program violations.

On April 23, 2018, Chevron USA Inc. agreed to pay $170,000 for air quality violations at its refinery in Richmond, California.[2] The payment settles 25 Notices of Violation issued during 2014 and 2015. The violations included flaring events which caused hydrogen sulfide exceedances, missed sampling, and public nuisance violations.

In *United States v. Gibson Wine Co.*, No. 115-CV-01900AWISKO (E.D. Cal. Mar. 13, 2018), the district court approved a consent decree entered between the Environmental Protection Agency (EPA) and the Gibson Wine Company addressing releases of anhydrous ammonia from the company's winemaking facility in Sanger, California. EPA alleged four claims for relief, including violations of sections 112(r)(1) and (7) of the Clean Air Act. The consent decree required Gibson to pay $330,000 in civil penalties and install and continuously operate a computer control system to monitor and control the anhydrous ammonia refrigeration system.

Arizona

State Implementation Plan and Federal Implementation Plan Updates

On February 22, 2018, EPA approved a revision to the Arizona state implementation plan (SIP) requiring a primary copper smelter located in Hayden, Arizona, to take additional steps to improve control of lead-bearing fugitive dust from roads, storage piles, and other related activities. *See* 83 Fed. Reg. 7614 (Feb. 22, 2018).

On May 4, 2018, EPA approved revisions to the Arizona SIP, primarily addressing deficiencies in Arizona's New Source Review (NSR) rules. *See* 83 Fed. Reg. 19,631 (May 4, 2018). The revised SIP ensures that air quality analysis information will be available for public inspection in a location within the affected area; addresses deficiencies in stack height requirements; revises adoptions by reference of federal regulations in 40 C.F.R. pts. 60, 61, and 63; and makes other changes to improve consistency with federal nonattainment and Prevention of Significant Deterioration (PSD) requirements. *See* 82 Fed. Reg. 25,213, 25,216–19 (June 1, 2017). The action also conditionally approves Arizona Department of Environmental

Quality's regulations related to ammonia as a precursor to $PM_{2.5}$ under the nonattainment NSR program, and terminates the sanctions clock related to EPA's related deficiency findings. *See* 83 Fed. Reg. at 19,631.

California

State Implementation Plan and Federal Implementation Plan Updates

On April 6, 2018, EPA finalized its determination that California, among others, failed to submit timely SIP revisions for implementation of the annual 2012 $PM_{2.5}$ National Ambient Air Quality Standards (NAAQS), which were due on October 15, 2016. *See* 83 Fed. Reg. 14,759 (Apr. 6, 2018). California failed to submit certain Moderate area SIP elements required under subpart 4 of part D of title I of the Clean Air Act (CAA), including emissions inventory, control strategies, an attainment demonstration, and contingency measures, among others. *Id.* at 14,761.

On May 18, 2018, EPA approved revisions to the California SIP establishing standards to control emissions from certain new and in-use on-road and off-road vehicles and engines. *See* 83 Fed. Reg. 23,232 (May 18, 2018). California has been granted a waiver by EPA under section 209 of the CAA to issue these regulations, which would otherwise be preempted under federal law. *Id.* The revisions address mobile source pollution from commercial harbor crafts, in-use diesel-fueled transport refrigeration units, on-road heavy-duty diesel engines, and off-highway recreation vehicles. *Id.* at 23,233.

On May 21, 2018, EPA approved revisions to the Bay Area Air Quality Management District (BAAQMD) portion of the California SIP addressing review procedures and permitting for major sources and major modifications under the PSD and nonattainment NSR programs, as well as rules regarding issuance and banking of emission reduction credits (ERC). *See* 83 Fed. Reg. 23,372 (May 21, 2018). The action approves revisions to address 14 deficiencies ranging from revisions to the definition of "PSD pollutant" to include nonattainment pollutants, to increasing the stringency of the ERC certificate issuance process. *See* 83 Fed. Reg. 8822, 8824–26 (Mar. 1, 2018).

Case Decisions, Suits

In *In re Ozone Designation Litig.*, 286 F. Supp. 3d 1082 (N.D. Cal. 2018), EPA's initiative to end the so-called sue-and-settle strategy was put to the test. A coalition of environmental and health organizations alleged EPA violated its nondiscretionary duty to issue initial area air quality designations under the ozone NAAQS. *Id.* at 1084. EPA conceded that it failed to comply with its initial designation duty under 42 U.S.C. § 7407(d)(1)(B)(i), but rejected the plaintiffs' compliance schedule demands. *Id*. at 1085. EPA sought an April 30, 2018, deadline for all remaining area designations, except for the remaining counties in the San Antonio, Texas, area. *Id.* at 1086. For these areas, EPA requested an August 10, 2018, deadline. The court agreed with and adopted EPA's April 30, 2018, deadline request for most of the remaining areas. *Id.* However, the court rejected EPA's August 10, 2018, deadline request. *Id.* at 1089–90. Instead, the court ordered EPA to send Texas within 7 days of the court's order a 120-day notice detailing the designations EPA intends to make for the San Antonio area. *Id.* EPA is then required to promulgate those designations within 120 days of the notice. *Id.* Last, the parties disagreed over whether the designations must be effective immediately upon promulgation. *Id.* at 1090–91. Ultimately, the court sided with EPA, finding that the Clean Air Act does not set forth a specific date by which EPA must make designations effective. *Id.* at 1090. The court thus permitted EPA to make the designations effective within 30 or 60 days of promulgation. *Id.* at 1091.

Endnotes

1 Bay Area Air Quality Management District, Air District Settles Case with Phillips 66 Company (May 14, 2018), *available at* www.baaqmd.gov/~/media/files/communications-and-outreach/publications/news-releases/2018/settle_phillips66_180514_2018_039-pdf.pdf?la=en.

2 Bay Area Air Quality Management District, Air District Settles Case with Chevron USA Inc. (April 23, 2018), *available at* www.baaqmd.gov/~/media/files/communications-and-outreach/publications/news-releases/2018/settle_chevron_180423_2018_032-pdf.pdf?la=en.

EPA REGION 10

Emerson Hilton, David Weber, and Gus Winkes
Beveridge & Diamond, P.C.
Seattle, Washington

Alaska

State Implementation Plan and Federal Implementation Plan Updates

On June 25, 2018, the Environmental Protection Agency (EPA) published a final rule approving a state implementation plan (SIP) submission from the State of Alaska regarding the "good neighbor" provisions of the Clean Air Act (CAA) with respect to interstate transport of NO_2 and SO_2 emissions. *See* 83 Fed. Reg. 29,449 (June 25, 2018). EPA's rule found that sources and emissions activity in Alaska do not contribute significantly to nonattainment for, or interfere with, the maintenance of the NO_2 and SO_2 National Ambient Air Quality Standards (NAAQS) in any other state. EPA previously explained its rationale for this finding in a proposed rule published on April 23, 2018. *See* 83 Fed. Reg. 17,627 (Apr. 23, 2018).

On May 2, 2018, EPA published a proposed rule that would approve an Alaska SIP submission related to the CAA's "good neighbor" provisions with respect to $PM_{2.5}$. *See* 83 Fed. Reg. 19,191 (May 2, 2018). This proposed rule would determine that Alaska's infrastructure SIP for the 2012 annual NAAQS for fine particulate matter ($PM_{2.5}$) is sufficient to meet the interstate transport requirements of the CAA.

On April 12, 2018, EPA published a final rule approving a revision to the Alaska SIP for regional haze. *See* 83 Fed. Reg. 15,746 (Apr. 12, 2018). The final rule approves both a regional haze progress report and a negative declaration submitted by the State of Alaska in 2016, meaning that no further revision of the state's regional haze SIP will be required for the time being.

State Regulations (proposed/adopted)

In June, a diverse group of stakeholders in Fairbanks began a series of monthly meetings to address persistent particulate matter pollution in the Fairbanks North Star Borough (FNSB). The stakeholder group is expected to produce pollution reduction recommendations for local political leaders and the Alaska Department of Environmental Conservation (ADEC). A portion of the FNSB has been a nonattainment area (NAA) for $PM_{2.5}$ since 2009, and, in 2017, EPA reclassified the FNSB NAA from a moderate NAA to a serious NAA. *See* 82 Fed. Reg. 21,711 (May 10, 2017). The State of Alaska and ADEC must demonstrate compliance with federal standards for $PM_{2.5}$ in the FNSB by the end of 2019.

By some accounts, air quality in the FNSB is worse than anywhere else in the United States. In May 2018, EPA awarded $4 million in Targeted Airshed Grants to ADEC for the purpose of addressing air quality in the FNSB. That is in addition to $2.5 million in similar EPA grants awarded to ADEC in 2017 for the same purpose.

Carbon Emissions Reduction Efforts and Lawsuits

In April 2018, the Third Judicial District Superior Court in Anchorage heard oral argument on the State of Alaska's motion to dismiss a climate change lawsuit filed by 16 youth plaintiffs in October 2017. The case, *Sinnok v. Alaska*, Case No. 3AN-17-09910 CI, alleges that state policies have violated the youth plaintiffs' constitutional rights by contributing to, and failing to mitigate, global climate change. As in similar cases throughout the United States, including in Oregon and Washington, the youth plaintiffs in Sinnok are represented by Our Children's Trust. The *Sinnok* plaintiffs previously filed a petition for rulemaking with ADEC, asking the state agency to reduce and

inventory greenhouse gas emissions in Alaska, and to develop a climate action plan. ADEC denied the petition in September 2017. A decision on the state's motion to dismiss the *Sinnok* complaint is pending at the time of this writing.

Idaho

State Implementation Plan and Federal Implementation Plan Updates

On June 19, 2018, EPA published a final rule approving a revision to the Idaho SIP with respect to crop residue burning. *See* 83 Fed. Reg. 28,382 (June 19, 2018). The rule, slated to become effective on July 19, 2018, approved the State of Idaho's February 2018 change to Idaho Administrative Procedure Act section 58.01.01.621.01 and Idaho Code 39–114. The state had sought EPA approval of these SIP revisions in September 2017, and EPA originally proposed to approve the changes in January 2018. *See* 83 Fed. Reg. 2955 (Jan. 22, 2018).

This approved SIP revision authorizes Idaho regulators to permit crop residue burning so long as ambient ozone concentrations on the burn date do not exceed 90 percent of the ozone NAAQS. Prior to this revision, crop residue burning could not be permitted if ambient ozone concentrations exceeded 75 percent of the ozone NAAQS. Idaho determined that an increase in the maximum allowable ambient ozone concentration on crop residue burning days would allow for the choice of burn dates with better atmospheric conditions for purposes of smoke management—that is, dates on which crop residue smoke would be more likely to disperse.

On May 11, 2018, EPA published a proposed rule that would (1) approve a limited maintenance plan (LMP) for the Pinehurst PM_{10} NAA and Pinehurst PM_{10} expansion NAA; (2) redesignate the Pinehurst PM_{10} NAAs as attainment areas; and (3) approve the exclusion of relevant PM_{10} data collected during a high wind event in 2013. *See* 83 Fed. Reg. 21,976 (May 11, 2018). Idaho submitted a redesignation request and LMP for the Pinehurst PM_{10} NAAs in September 2017. In proposing to approve those submissions on May 11, EPA also proposed to approve the base year emission inventory for Idaho's West Silver Valley $PM_{2.5}$ NAA in the Silver Valley. Idaho submitted a redesignation request for the Pinehurst PM_{10} NAAs in September 2017.

State Regulations

On June 6, 2018, Idaho's Department of Environmental Quality (IDEQ) published a Notice of Negotiated Rulemaking that would allow crop residue burning fees to be paid after the burn date rather than before. *See* IDEQ Docket No. 58-0101-1803. The proposed schedule for this state rulemaking would allow implementation of the rule prior to the spring 2019 burning season.

Oregon

State Implementation Plan and Federal Implementation Plan Updates

On February 8, 2018, EPA issued a finding of attainment and a clean data determination for the Oakridge-Westfir (Oakridge), Oregon $PM_{2.5}$ (Oakridge NAA). EPA's notice specified that (1) the Oakridge area had demonstrated attainment of the 2006 24-hour $PM_{2.5}$ NAAQS by the December 31, 2016, attainment date as demonstrated by quality-assured and quality-controlled 2014–2016 ambient air monitoring data; and (2) the Oakridge attainment plan met the requirements of section 110(k) of the CAA. The designation status of the Oakridge area will remain nonattainment for the 2006 $PM_{2.5}$ NAAQS until such time as EPA determines that the area meets the CAA requirements for redesignation to attainment under CAA section 107(d)(3)(E). This final rule became effective on March 12, 2018. *See* 83 Fed. Reg. 5537 (Feb. 8, 2018).

On May 17, 2018, EPA issued a notice approving a revision to the Oregon regional haze SIP, dated July 18, 2017. Specifically, EPA approved the Oregon Regional Haze Progress Report as meeting the applicable requirements of the CAA

and the federal Regional Haze Rule, as set forth in 40 C.F.R. 51.308(g). EPA determined that the existing regional haze SIP is adequate to meet the state's visibility goals and requires no substantive revision at this time, as set forth in 40 C.F.R. 51.308(h). Additional information is provided in the Oregon Regional Haze Progress Report, including a summary of the emissions reductions achieved throughout the state through implementation of the control measures relied upon to achieve reasonable progress. Specifically, Oregon identified emissions reductions achieved through controls on Oregon best available retrofit technology-eligible sources, including emissions reductions achieved at the PGE Boardman Plant, the PGE Beaver Plant, the Georgia Pacific Wauna Mill, and International Paper Mill. According to the report, implementation of control measures caused significant reductions in SO_2 emissions at all four facilities, as well as reductions in NOx and coarse particulate matter (PM_{10}) emissions at all facilities except the Georgia Pacific Wauna Mill. The progress report also detailed emissions reductions achieved as part of the smoke management program. In particular, the progress report highlights alternatives to burning such as biomass removal, chipping, and other techniques to reduce fire hazard, offsetting up to 13,500 tons of $PM_{2.5}$ estimated in 2015 compared to burning. This final rule is effective on June 18, 2018. *See* 83 Fed. Reg. 22,853 (May 17, 2018).

On May 24, 2018, EPA issued a final rule approving Oregon's December 27, 2013 and October 20, 2015 SIP submissions as meeting specific infrastructure requirements of the CAA. Specifically, EPA found that the Oregon SIP met the following CAA section 110(a)(2) infrastructure elements for the 2010 NO_2, 2010 SO_2, and 2012 $PM_{2.5}$ NAAQS: (A), (B), (C), (D)(i)(II), (D)(ii), (E), (F), (G), (H), (J), (K), (L), and (M). EPA approved, and incorporated by reference at 40 C.F.R. part 52, subpart MM, the following rule sections submitted October 20, 2015 (state effective date, Oct. 16, 2015): OAR 340-202-0060 (Suspended PM); and OAR 340-250-0030(22) (NAAQS); and, the following rule section submitted July 18, 2017 (state effective date, July 13, 2017): OAR 340-202-0090 (Ozone). This final rule is effective June 25, 2018. *See* 83 Fed. Reg. 24,034 (May 24, 2018).

State Regulations (proposed/adopted)

On April 6, 2016, Governor Brown directed the Oregon Department of Environmental Quality (ODEQ) and the Oregon Health Authority (OHA) to develop a health risk-based air toxics permitting program. According to ODEQ, the goal of the program, known as "Cleaner Air Oregon," is to "evaluate potential health risks to people near commercial and industrial facilities that emit regulated air toxics, and ultimately reduce those risks below health-based standards. Affected facilities could include some that are not currently permitted for their air contaminant emissions, in addition to those that already have air quality permits." *See* https://www.oregon.gov/deq/Rulemaking%20Docs/cao-pn2notice.pdf. ODEQ and OHA published a proposed rule in 2017, which came under criticism from the regulated community and stakeholders. The fees required to implement the Cleaner Air Oregon program were subject to approval by the Oregon legislature.

Cleaner Air Oregon. Senate Bill (S.B.) 1541 authorized fees for implementation of the Cleaner Air Oregon program, subject to ODEQ and OHA making key changes to reduce the stringency and cost of the proposed rules designed to implement the Cleaner Air Oregon program. Requirements of S.B. 1541 include:

- Risk Action Levels (RALs): For existing facilities, the cancer RAL increases from 25 in 1 million to 50 in 1 million, and the non-cancer RAL increases from a hazard index of 1 to 5.
- Toxics Best Available Control Technology (TBACT): In general, if a facility is subject to Maximum Achievable Control Technology (MACT) under a major source National Emission Standard for Hazardous Air Pollutants (NESHAP), then the source is considered to meet TBACT. If a source is not employing MACT under a NESHAP, the TBACT determination will

be on a case-by-case basis.
- Pilot Project: S.B. 1541 allows ODEQ to adopt future regulations for one pilot project to address multi-source risk in one area. The area must be less than ~ 5 square miles and located in the Portland metro area. If the multi-source area risk is above 100/million cancer risk or Hazard Index of 10, additional steps are needed if facilities contributing to the risk want to make changes that increase risk. ODEQ may require facilities to send a plan to reduce air pollutants (i.e., from its facility, other facilities, or mobile sources in the area), or pay into a Clean Communities Fund.

In the coming months, ODEQ and OHA will publish revised rules that reflect S.B. 1541. The agencies expect the proposed rules will finalized by late 2018.

Asbestos Rulemaking. On May 15, 2018, ODEQ released for public comment proposed changes to OAR 340, division number 248, that would evaluate and clarify regulations and standards for asbestos-related activities, where a potential for exposure to asbestos fibers exists. Public comments on the proposal were due by June 22, 2018. The proposed changes are significant and include:

- Residential Renovation Survey: Renovation activities at residential buildings with four or fewer dwelling units would be required to have an asbestos survey.
- Moving Nonfriable Disposal Requirements into the Friable Disposal Requirements Section: Removing Nonfriable Asbestos Disposal Requirements section 340-248-0290 and adding nonfriable to the Friable Asbestos Disposal Requirements section 340-248-0280. This change will result in requiring nonfriable asbestos waste to be packaged, labeled, transported, and disposed similar to how friable asbestos waste is currently managed. Currently nonfriable waste does not need to be packaged and could be disturbed through transport and disposal, making the nonfriable to become friable. This proposed change would make costs to dispose of nonfriable asbestos-containing waste material similar to the costs of disposing friable asbestos-containing waste material.
- Accredited Laboratories for Asbestos Testing: Laboratories that analyze samples for the presence of asbestos would need to demonstrate proficiency within two years of rule adoption through participation in a nationally recognized testing program or an equivalent testing program.

Changes to Ambient Benchmark Concentrations

On May 11, 2018, Oregon's Environmental Quality Commission adopted amended rules that contain revisions to 23 standing Ambient Benchmark Concentrations, and new benchmarks for phosgene, n-propyl bromide, and styrene. The benchmarks will function within Oregon's existing air toxics program as goal reference values. Three separate actions could be triggered under the Toxics Program if monitoring data show ambient air toxics concentration to be above a benchmark. These include (1) the development of emission reduction strategies for specific emission source categories (like diesel engines or woodstoves); (2) evaluation of a major industrial facility under the "Safety-Net" program; or, (3) community planning work in select geographic areas. Key changes to the Ambient Benchmark Concentrations from the 2010 benchmarks are as follows:

- Chlorine: twice as stringent
- Formaldehyde: approximately 10 times more stringent
- Hexane: 10 times more stringent
- Hydrogen Fluoride: slightly more stringent
- Nickel (soluble compounds): Five times more stringent.
- Tetrachloroethylene: approximately 10 times more stringent
- Trichloroethylene: approximately twice as stringent

Carbon Emissions Reduction Efforts and Lawsuits

The Oregon legislature failed to pass a bill that would have established a statewide greenhouse

gas (GHG) cap-and-trade system during a short 2018 legislative session. The proposed legislation sought to cap GHG emissions and auction emission allowances to covered entities. Oregon's system would have taken effect in 2021. It was designed to establish an annually declining cap, with a goal of reducing GHG emissions to levels 80 percent below 1990 levels by 2050. Entities whose emissions exceeded 25,000 tons per year would be covered. The proposed legislation also included a framework for Oregon to participate in a broader regional trading market—the Western Climate Initiate—with California, Quebec, and Ontario. Despite the failure to pass legislation, Oregon House and Senate members have convened a Joint Committee on Carbon Reduction and Governor Brown has created a Carbon Policy Office in order to continue to work on and revisit the legislation in 2019.

A key issue for lawmakers to address in 2019 is reconciling a proposed cap-and-trade approach with existing GHG reduction policies, including Oregon's Clean Electricity and Coal Transition Act—or Senate Bill (S.B.) 1547. S.B. 1547 requires the state's investor-owned electric utilities to provide their Oregon retail customers with electricity that is coal-free by 2030, and to completely phase out reliance on coal-fired power by 2035.

On March 7, 2018, the U.S. Court of Appeals for the Ninth Circuit denied the United States' request to issue a writ of mandamus and suspend the district court proceedings in *Juliana et al. v. United States et al.*, No. 17-71692 (9th Cir. Mar. 7, 2018). In *Juliana*, a group of child 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 allege the government has violated their constitutional rights by not acting to reduce greenhouse gas emissions. The district court previously denied the government's motion to dismiss the lawsuit. *Juliana et al. v. United States et al*., No. 15-cv-1517, 2016 WL 6661146 (D. Or. Nov. 10, 2016). In its petition for a writ of mandamus, the United States argued that allowing the case to proceed would result in burdensome discovery obligations on the federal government that will threaten the separation of powers. The Ninth Circuit found the government had not met the criteria for extraordinary mandamus relief at the still early phase of litigation. "The issues that the defendants raise on mandamus are better addressed through the ordinary course of litigation." *In re Juliana*, 884 F.3d 830, 834 (9th Cir. 2018) (citations omitted). The court noted that "litigation burdens are part of our legal system, and the defendants still have the usual remedies before the district court for nonmeritorious litigation, for example, seeking summary judgment on the claims." *Id*. at 836.

On April 28, 2018, ODEQ submitted comments regarding EPA's proposal to repeal the Clean Power Plan (CPP). *See* EPA-HQ-OAR-2017-0355-20993. In its comment letter, ODEQ stated that it strongly opposes the proposed repeal. Specifically, ODEQ objected to EPA's changes to its (1) approach to calculating the social cost of carbon; (2) assumptions regarding the health benefits of $PM_{2.5}$ reductions; (3) assessment of environmental justice impacts related to the CPP; and, (4) consideration of the co-benefits of regulation in its cost benefit analysis. ODEQ stated further that "EPA's changes do not have a basis in the peer-reviewed scientific literature and ignore the direct health and environmental impacts of exposure to pollution from power plants that have been studied and documented by scientists and public health practitioners for decades, including EPA's own scientists in its Integrated Science Assessment for Particulate Matter." *See* ODEQ Letter to EPA at page 6 in EPA-HQ-OAR-2017-0355-20993.

Washington

State Implementation Plan and Federal Implementation Plan Updates

On January 9, 2018, EPA finalized a rule establishing initial air quality designations for certain areas for the 2010 SO_2 primary NAAQS.

See 83 Fed. Reg. 1098 (Jan. 9, 2018). In Washington, Lewis, and Thurston Counties were designated as unclassifiable. Chelan, Douglas, and Whatcom Counties will be designated by December 31, 2020. The other counties in the state were designated as unclassifiable/attainment. *See* 83 Fed. Reg. 1098, 1167.

On May 31, 2018, EPA proposed to approve the Regional Haze 5-Year Progress Report submitted by Washington, as well as a negative declaration that further revisions to the state's regional haze implementation plan are not required at this time, finding that the state's long-term strategy for achieving reasonable progress goals for Class 1 areas for 2018 was adequate. *See* 83 Fed. Reg. 24,954 (May 31, 2018). Both were submitted pursuant to the federal Regional Haze Rule. *Id*. Washington submitted the progress report on November 6, 2017. *Id*. at 24,955. In addition to existing emissions control measures, Washington's efforts to implement its regional haze plan was focused largely on the installation of Best Available Retrofit Technology at sources with the potential to contribute to regional haze impairments. *Id.* at 24,956.

State Regulations (proposed/adopted)

Washington adopted the Clean Air Rule to regulate GHG emissions from various stationary sources and associated with petroleum importers and natural gas producers in September 2016. However, as discussed below, on December 15, 2017, a judge in Thurston County Superior Court issued a bench ruling striking down the parts of the Clean Air Rule. On March 14, 2018, the judge affirmed that the entire regulation should be vacated. *See Ass'n of Wash. Bus. v. Wash. Dep't of Ecology***,** No. 16-2-03966-34, Order Denying Ecology's Request to Sever (Mar. 14, 2018). On April 27, 2018, the court entered an order invalidating the regulation. *See* No. 16-2-03966-34, Order Granting Petition for Judicial Review (Apr. 27, 2018). The Washington State Department of Ecology (Ecology) and environmental groups that intervened to defend the rule have sought a direct appeal to the Washington Supreme Court. Pending resolution of the legal challenge to the Clean Air Rule, Ecology has suspended compliance with the rule.
On April 17, 2018, Ecology Director Maia Bellon submitted joint comments with several other state environmental and energy agency leaders opposing EPA's proposed repeal of the Clean Power Plan.

On February 21, 2018, Ecology adopted amendments to chapter 173-407 WAC—Greenhouse Gas Mitigation Requirements and Performance Standard for Power Plants (formerly named Carbon Dioxide Mitigation Program, Greenhouse Gases Emissions Performance Standard and Sequestration Plans and Programs for Thermal Electric Generating Facilities). The amendments became effective on March 24, 2018. The amendments require power plants to reduce CO_2 emissions, meet a revised GHG performance standard, and develop programs to reduce GHGs, as approved by Ecology. *See* Rulemaking Order, WSR 18-05-091 (Feb. 21, 2018). The CO_2 emission mitigation requirements apply to "all new and certain modified fossil-fueled thermal electric generating facilities" with a capacity of more than 25 MWs of electricity. WAC 173-407-010(1). The revised GHG performance standards are triggered by a variety of events, including, but not limited to, commencement of operation, facility upgrades, ownership changes, and long-term financial commitments. WAC 173-407-120.

In February 2017, Ecology also announced its intent to commence rulemaking related to fees for air emissions sources. The proposed rule was supposed to be released in August 2017. Several preproposal drafts of amendments to chapter 173-400 WAC—General Regulations for Air Pollution Sources and chapter 173-455—Air Quality Fee Rule have been released for public comment, and related stakeholder meetings have been held. On April 18, 2018, Ecology withdrew the original notice of rulemaking and then immediately refiled a new Preproposal Statement of Inquiry for the rulemaking, stating that "we realized we were changing the structure of the registration program

without clearly identifying this as a purpose in our original notice of rulemaking." As of this writing, no proposed amendments had been released.

In June 2015, Ecology announced a plan to revise state regulations concerning emissions standards during start-up, shutdown, and malfunction (SSM) events in response to an EPA SIP Call. This rulemaking process was revised in December 2016 after EPA clarified that the emissions standards for SSM events should also apply in the Title V permit program. The package of rule amendments will address air regulatory issues beyond applicable emissions standards during SSM events, including public notices for air permits, the federal definition of volatile organic compound, and non-road engines. Ecology released the proposed amendments on February 5, 2018, triggering a public comment period that closed on March 20, 2018. Ecology announced plans at a March 13 public hearing that it would likely adopt the rule in mid-May, with an effective date of in mid-June. As of this writing, the final rules have not been adopted.

Legislation (proposed/passed)

Following November 2017 elections, the Democratic Party gained the majority in the State Senate. Observers anticipated that this development would result in quick action on climate change. However, in the 2018 legislative session, which ended on March 8, 2018, no GHG reduction laws were passed.

During the short session, the state legislature considered a number of air quality-related bills. A couple passed and were signed into law by the governor:

- S.B. 6207 (Chapter 148, Laws of 2018): A law clarifying that tax revenue can be used by ports to fund programs and activities to reduce air emissions from vehicles used for cargo transport in connection with port facilities and for cargo vessels at port facilities.
- S.S.B. 6055 (Chapter 147, Laws of 2018): A law allowing authorizing various regulatory agencies to issue permits to cities and towns "partially within a quarantine area for apple maggot" for limited burning of "brush and yard waste" to control the spread of apple maggots.

Other potentially significant bills were introduced or considered related to climate change and/or regulation of GHG emissions:

- S.B. 6104: This bill was introduced in January 2018. It would require Ecology to defend against federal censorship of climate change data. It was given a hearing on January 24, 2018, in the senate committee on energy, environment and technology.
- H.B. 1144: This bill was first introduced in January 2017. It would set additional GHG reduction goals for the state for 2025, 2035, and 2050. The bill passed the house in January 2018. After passing a couple of senate committees, the bill was returned to the house rules committee on March 8, 2018.
- S.B. 5172: This bill was first introduced in January 2017. It would repeal requirements for Ecology to consult with the climate impacts group at the University of Washington regarding the science on human-caused climate change and to report to the legislature with recommendations on whether revisions to state GHG emission goals should take place. The bill was reintroduced in January 2018 and remains in committee.
- S.B. 6203: The bill was introduced in January 2018. It would impose a tax that increases annually on the sale or use of fossil fuels in the state and on the generation and importation of electricity generated through combustion of fossil fuels; it would direct revenue from the tax to an "energy transformation account," a "water and natural resource resilience account," a "transition assistance account," and a "rural economic development account"; and it also would establish a clean energy investment fund for utilities that could generate credits that would reduce carbon tax obligations.

- S.B. 6096: The bill was introduced in January 2018. It would also impose a tax on fossil fuel sale and use and generation or importation of electricity derived from fossil fuels.
- H.B. 2412: The bill was introduced in January 2018. It would require limits on the global warming potential of certain materials used for certain capital projects funded by the state and declarations by winning contractors regarding the global warming potential of materials used. It would also require assistance from the University of Washington in understanding how to analyze the global warming potential of certain building materials.
- H.B. 2225: This bill was first introduced in January 2017. It would align state GHG reduction goals with the goals set out in the Paris Climate Agreement. It was reintroduced on January 8, 2018.

On March 2, 2018, a coalition of interest groups filed an initiative (No. 1631) called the "Protect Washington Act," which would set a fee on carbon emissions. The initiative's supporters are in the process of gathering enough signatures for the initiative to be placed on this year's ballot for the general election. According to recent news coverage, supporters were on track to exceed roughly 260,000 signatures by the end of June. K. Yoder, *Land of the Fee?* GRIST (June 6, 2018), *available at* https://medium.com/@grist/land-of-the-fee-337bebacd5fb.

Administrative Rulings

On October 27, 2017, the Pollution Control Hearings Board (PCHB) denied summary judgment motions in *Marine Vacuum Services, Inc. v. Puget Sound Clean Air Agency*, PCHB No. 16-130c (Oct. 27, 2017 Order on Mots.). On February 8, 2018, the PCHB issued a final order in the appeal (Feb. 8, 2018 Findings of Fact, Conclusions of Law, and Order). In upholding the Puget Sound Clean Air Agency's (PSCAA's) decision to issue Notices of Violation (NOVs) to Marine Vacuum, a business that provides "waste remediation and disposal facilities," for failure to obtain a construction permit and then to assess penalties for failure to comply with the NOVs, the PCHB, among other things found that PSCAA's odor control regulations were not preempted by federal law; refused to rule on what the PCHB considered a "facial" procedural due process challenge regarding the lack of notice provisions in PSCAA regulations; found that PSCAA provided sufficient notice of violations, consistent with applicable regulations, to satisfy "as-applied" due process requirements; and found that Marine Vacuum was required to submit an application for a new source construction permit, even though Marine Vacuum had been in business since 1980, because the permit requirement was construed as a continuing obligation.

The PCHB has continued to process civil penalty appeals arising out of odor complaints targeting commercial cannabis facilities. On March 20, 2018, the PCHB upheld penalties assessed against a marijuana operation, Green Freedom, LLC, by the Olympic Region Clean Air Agency in connection with odors emanating from the facility. *Green Freedom, LLC v. Olympic Region Clean Air Agency*, PCHB No. 17-028c (Mar. 20, 2018 Findings of Fact, Conclusions of Law, and Order). In upholding the penalties, the PCHB determined that the operation did not qualify for an exemption from the state Clean Air Act for "agricultural activity consistent with good agricultural practices on agricultural land." *Id*.; see also RCW 70.94.640(1), (5). The state statute defines agricultural land as "at least five acres of land devoted primarily to the commercial production of . . . agricultural commodities." *Id*. Although the operation leased a 7.5-acre parcel, the PCHB concluded, after a site visit and presentation of evidence, that Green Freedom, LLC, was not utilizing at least 5 acres of the parcel "in the production or processing of marijuana." PCHB No. 17-028c (Mar. 20, 2018 Findings of Fact, Conclusions of Law, and Order).

On March 16, 2018, in *Evergreen Shingle Recycling LLC v. Puget Sound Clean Air Agency*, PCHB No. 17-097 (Mar. 16, 2018 Order Granting

Summ. J. & Dismissing Appeal), the PCHB dismissed an appeal by Evergreen Shingle Recycling, LLC (Evergreen), of a penalty assessed by PSCAA, because PSCAA was not served by Evergreen with a notice of appeal of the penalty. "The Board strictly construes deadlines for filing and serving appeals." *Id.*

On March 27, 2018, the PCHB issued a summary judgment decision on a range of issues in connection with an appeal by the National Parks Conservation Association (NPCA) of a Prevention of Significant Deterioration permit issued to BP West Coast Products, LLC (BP). *National Parks Conservation Assoc. v. State of Washington***,** PCHB No. 17-055 (Mar. 27, 2018 Order on Summ. J.). BP sought the PSD permit to authorize several modifications at its refinery, including replacement of two coker heaters and installation of a lean oil absorption system with a compressor in the coker off-gas system. *Id*. Under the permit, BP is required to apply Best Available Control Technology (BACT) to the modified emissions units. NPCA alleged several procedural and substantive deficiencies with the permit, including, among other items, the failure to properly assess the "adverse impact on Air Quality Related Values . . . at national parks" and the failure to properly establish emission control limits consistent with BACT for nitrogen oxide emissions and sulfur dioxide emissions. The PCHB concluded that several of the issues briefed for summary judgment, including the analysis of air quality impacts and application of BACT to the modified emission units, were "highly complex technical issues" that warranted "further testimony and evidence in the context of a hearing." *Id***.** However, the PCHB agreed that the Technical Support Document (TSD) for the permit satisfied public notice requirements for Ecology's decision regarding the air quality impacts analysis in the Technical Support Document for the permit. *Id*. The PCHB also agreed that the NPCA did not have standing to challenge Ecology's notice on behalf of any federal agencies that provided comments on the permit application and TSD. *Id***.**

Subsequently, on April 20, 2018, BP received a favorable ruling on a motion in limine to exclude testimony proffered by NPCA's expert regarding gas-phase Merox controls for sulfur dioxide PCHB No. 17-055 (Apr. 20, 2018 Order on Mot. in Limine).

On May 3, 2018, the PCHB upheld a penalty assessed by the Spokane Regional Clean Air Agency (SRCAA) against an individual for failing to conduct an asbestos survey, as required by SRCAA Regulation I, article IX, section 9.03, before renovating a home. *Rizkalla v. Spokane Regional Clean Air Agency*, PCBH No. 17-107 (May 3, 2018 Order Granting Mot. for Summ. J.). When the SRCAA inspector sampled construction debris from the project, the results indicated that asbestos was not present. *Id***.** The PCHB also upheld the reasonableness of the penalty, which was set at $2000. *Id*. On June 1, 2018, the PCHB denied a request for consideration. PCHB No. 17-107 (June 1, 2018 Am. Order Den. PCHB).

Case Decisions, Law Suits

On December 15, 2017, a judge in Thurston County Superior Court issued a bench ruling striking down the parts of the Clean Air Rule that would have regulated GHG emissions associated with natural gas distributors and petroleum importers, or "indirect emitters." *See Association of Washington Business v. Department of Ecology***,** No. 16-2-03023-34, Verbatim Report of Proceedings at 102:10 (Dec. 15, 2017). At Ecology's request, the court agreed to consider briefing on whether the severability clause at WAC 173-442-370 would allow the portions of the rule that apply to stationary sources to **survive. The** court ultimately determined that the entire rule should be vacated. Order Den. Dep't of Ecology's Req. to Sever (Mar. 14, 2018). On April 27, 2018, the court entered an order granting the petition for review and vacating the Clean Air Rule. Order Granting Pet. for Rev. (Apr. 27, 2018). In May 2018, Ecology and environmental groups that intervened to defend the rule filed notices of appeal to the state supreme court, seeking direct review of the superior court's decision. Resp't Notice of Appeal (May 11, 2018); Respondent-Intervenors Notice of Appeal (May 17, 2018).

In June 2018, the parties to the Clean Air Rule litigation in the state-court system filed briefing in the parallel federal court proceeding in the Eastern District for the U.S. District Court of Washington in connection with a disagreement over whether the stay in the federal case should remain in place. Avista Corp. v. Bellon, No. 2:16-cv-00335-TOR (E.D. Wash.) (June 1, 2018 Mot. to Continue to Hold Case in Abeyance); *id*. (June 15, 2018 Defs.' Resp. to Pls.' Mot. to Hold Case in Abeyance). The business and industry challengers have argued that the stay should remain in place until the state court litigation has been fully resolved. Ecology has argued that continuing with the federal case would eliminate lingering uncertainty about the legal status of the regulation based on the federal claims that would exist even if Ecology were to prevail in its appeal of state law issues to the Washington Supreme Court. As of this writing, no decision had been issued in connection with the stay.

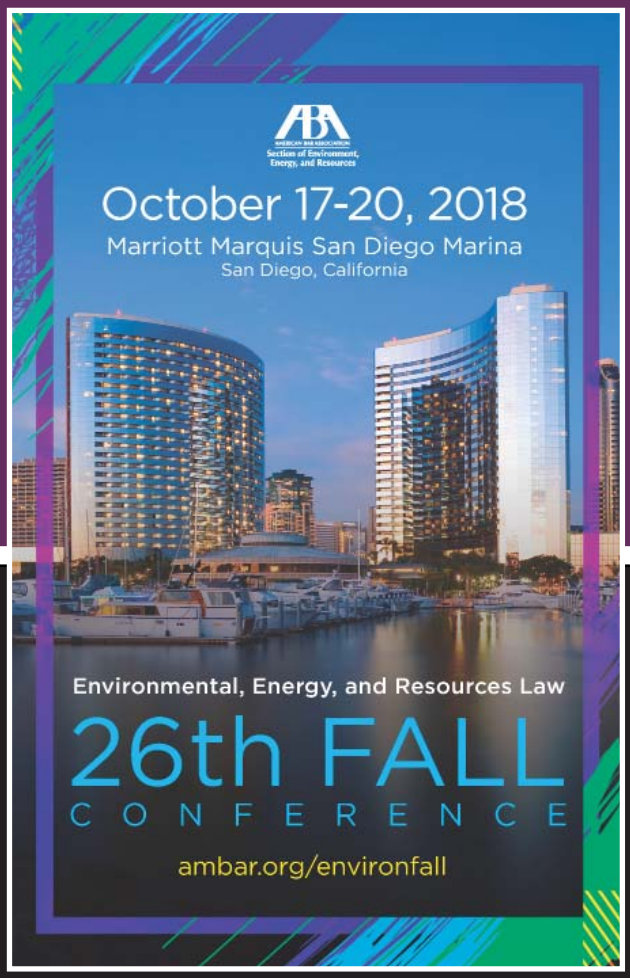
On February 16, 2018, a group of youth plaintiffs filed a follow-on lawsuit to the *Foster v. Department of Ecology* litigation, No. 14-2-25295-1 (King County Super. Ct.) and 200 Wash. App. 1035, No. 75374-6-1 (Wash. App. Sept. 5, 2017). The *Foster* litigation was dismissed after a state appeals court found that the trial court had abused its discretion by reversing its initial finding that Ecology had lawfully denied a petition for rulemaking to regulate GHG emissions previously sought by the youth plaintiffs.

The new climate change complaint, captioned as *Aji v. the State of Washington*, was also filed in King County Superior Court. The complaint alleges that the failure by the state, by the governor, and by a range of state agencies to sufficiently mitigate GHG emissions and the authorization of projects that would increase GHG emissions violate the minor plaintiffs' state substantive due process rights, including "life, liberty, and property, personal security, reasonable safety, and to a stable climate system that sustains human life and liberty"; the plaintiffs' constitutionally "reserved" right to "to live in a healthful and pleasant environment"; the state constitution's equal protection clause, because minor children are more likely to be adversely impacted by climate change; and the Public Trust Doctrine, which includes "the rights of present and future generations to access, use and enjoy those essential resources that are of public importance to the citizens of the state of Washington." Compl., No. 18-2-04448-1 SEA (King County Super. Ct. filed Feb. 16, 2018). The defendants filed a motion to dismiss on June 4, 2018, arguing that the Uniform Declaratory Judgments Act and the state Administrative Procedure Act did not allow the court to hear the claims. Further, the defendants asserted that the state legislature was a necessary party and that any effort by the court to require the legislature or governor to take certain actions to address climate change would violate the separation of powers doctrine. Last, the defendants disputed the existence of the "fundamental rights" for which the plaintiffs sought recognition and that the alleged constitutional injuries were cognizable. Defs.' 12(C) Mot. for J. on the Pleadings (filed June 4, 2018). As of this writing, briefing on the motion had not been completed.

Marine Vacuum Services, Inc., filed a petition for review in Thurston County Superior Court of the PCHB's decisions upholding notices of violation and penalties issued by the Puget Sound Clean Air Agency in connection with Marine Vacuum's alleged failure to obtain a required construction permit for a new source. *Marine Vacuum Services, Inc. v. State of Washington Pollution Control Hearing Board*, No. 18-2-01427-34 (Thurston County Super. Ct. filed Mar. 12, 2018) (appealing PCHB No. 16-130c). As of this writing, a briefing schedule for the appeal had not been set.

Enforcement Issues

In June 2018, the Southwest Regional Clean Air Agency fined the TransAlta coal-fired power plant $331,000 for emissions in 2017 that exceeded mercury and nitrogen oxide standards. The fine is substantially higher than fines typically issued by the agency, according to an agency spokesperson. D. Pesanti, *Power Plant Issued $331,000 Fine*, The Columbian (June 13, 2018).



CLE
HOT TOPICS
SOPHISTICATED ANALYSIS
EXPERT INSIGHT PANELS
NETWORKING
PUBLIC SERVICE
LEADERSHIP DAY

Visit ambar.org/environfall for the most current schedule, speaker updates, and registration information.

Join your colleagues for two days of cutting-edge CLE programming.

Session topics include:

- Tech giants' environmental, energy, and natural resource footprints;
- Non-federal efforts to address climate change;
- The current terrain of public land law;
- Counseling clients before, during, and after natural disasters;
- The long road to Superfund reform;
- Defining the future of offshore energy; and
- Changing regulatory landscapes under the Clean Air Act and Clean Water Act.