

Air Quality Committee Newsletter

Vol. 13, No. 3

June 2010

MESSAGE FROM THE COMMITTEE CHAIR

Angela Morrison Uhland
Hopping Green & Sams, P.A.
Tallahassee, Florida

If there was no New Orleans, America would just be a bunch of free people dying of boredom.

The Air Quality Committee encourages you to join us at the 18th Section Fall Meeting being held in New Orleans this year. We will be on Canal Street at the Sheraton—in the heart of NOLA! New Orleans is truly a place like no other. If you've been there, you know what I mean. If you've never been, now is your chance. After all, it is home to the "Who Dat Say They Gonna Beat Dem (Superbowl Champion) Saints?"

While at the Fall Meeting you can tour the beautiful areas of New Orleans and see how the city has made significant efforts to rebound from the devastating effects caused by Hurricane Katrina. You can visit the French Quarter, wander through an historic cemetery, see the rebuilding of homes in the Lower Ninth Ward, enjoy a beignet and French market coffee at Café DuMonde, listen to some wonderful jazz music, and explore the historic Garden District. Spend some time at the Audubon Zoo, tour the Aquarium, and shop along Magazine Street. What a wonderful opportunity we have to support this special place.

In addition to enjoying all that New Orleans has to offer, you will not want to miss three outstanding panels that are of particular interest to our committee members: "Air Quality Hot Topics," "A New Era for

EPA as the Regulator of GHG Emissions," and "The Fate of State and Regional Climate Change Regulation." The Fall Meeting is always a great opportunity to not only hear from knowledgeable EPA and state representatives and practitioners in our field, but also network and hold small group discussions with other members of the Committee. We will have our traditional Air Quality Committee dinner one evening, and we will have a roundtable discussion during one of the lunches. The Air Quality Committee continues to increase its membership and the strength of its leadership, and these small group settings are the perfect setting for becoming more involved and more connected with our group.

Make your plans now for September 29–October 2, 2010, by visiting the ABA's Web site for the Fall Meeting: <http://www.abanet.org/environ/fallmeet/2010/home.shtml>.

Annual Conference on Environmental Law Wrap-Up

The Air Quality Committee appreciates all of its members who were able to attend the Section's 39th Annual Conference on Environmental Law this year, which was held for the first time in Salt Lake City, in the beautiful facilities at The Grand America Hotel. We enjoyed a well-attended plenary session on "Implementing the Obama Administration Clean Air Agenda at One Year," moderated by Roger Martella. We also had a lively round table discussion with great participation. Those attending our Air Quality Committee discussion included Gwen Ekland, Steven Kohl, Robert McKinstry, Matt Paque, Richard

Air Quality Committee Newsletter
Vol. 13, No. 3, June 2010
Philip E. Karmel, Editor

In this issue:

Message from the Committee Chair
Angela Morrison Uhland 1

Regional Reports:

EPA Headquarters
Gale Lea Rubrecht, John R. Jacus, and Todd A. Weaver..... 3

EPA Region 1
Dixon Pike, Brian Rayback, and Nick Livesay 12

EPA Region 2
Philip E. Karmel 13

EPA Region 3
Barbara Diane Little 14

EPA Region 4
Paula L. Cobb and Alexia Borden 22

EPA Region 5—Federal Developments
Harvey M. Sheldon 23

EPA Region 5—State Developments
Peter A. Tomasi 24

EPA Region 9
Eric L. Hiser 26

EPA Region 10
Kirk A. Lilley 28

Copyright © 2010. American Bar Association. All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the prior written permission of the publisher. Send requests to Manager, Copyrights and Licensing, at the ABA, e-mail: copyright@abanet.org.

Any opinions expressed are those of the contributors and shall not be construed to represent the policies of the American Bar Association or the Section of Environment, Energy, and Resources.

Raiders, Gale Rubrecht, Mark Shaw, Mary Ellen Ternes, and Larry Volmert. These informal discussions allow members to talk about new state and federal policies and how they may affect our practices, and to share news of recent developments. The networking provided through these roundtables has proven invaluable to many of us over the years. Please consider becoming more involved through either the Fall Meeting or next year’s Environmental Conference.

Issue Editor

Thanks to John R. Jacus of Davis Graham & Stubbs LLP in Denver, Colorado, for serving as editor of this issue of the newsletter.

www.ababooks.org

Your Source for Books from the Section of Environment, Energy, and Resources and ABA Publishing



The Clean Air Act Handbook, Second Edition

Editors: Robert J. Martineau Jr., David P. Novello



Basic Practice Series: Clean Air Act

Author: Roy S. Belden



Global Climate Change and U.S. Law

Editor: Michael B. Gerrard

EPA REGIONAL REPORTS

EPA HEADQUARTERS

Gale Lea Rubrecht
Jackson Kelly PLLC
Charleston, West Virginia

John R. Jacus and Todd A. Weaver
Davis Graham & Stubbs LLP
Denver, Colorado

The U.S. Environmental Protection Agency (EPA) is continuing its response to the U.S. Supreme Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), which held that greenhouse gases (GHGs) are air pollutants for purposes of the Clean Air Act (CAA). Since finding last December that GHGs threaten public health and welfare and that combined emissions of GHGs from new motor vehicles contribute to air pollution (endangerment finding), EPA has completed its reconsideration of a December 2008 memorandum by then-EPA Administrator Stephen L. Johnson that established the agency's interpretation of when a pollutant is covered by the federal Prevention of Significant Deterioration (PSD) permit program under the Act. EPA has also finalized national GHG emission standards for light-duty vehicles, marking the first regulatory controls of GHG emissions under the Act, and is on the verge of promulgating the final PSD/ Title V Tailoring Rule which will establish GHG requirements for stationary sources. Finally, EPA has proposed expansions of the newly promulgated mandatory reporting rule (MRR) for GHGs for a number of industry sectors and we briefly review the provisions of re-proposed Subpart W, affecting oil and natural gas systems, and new subpart RR, concerning CO₂ injection for enhanced oil and gas recovery and geologic sequestration.

The PSD Interpretive Memo

The PSD permitting program is the preconstruction review process for major stationary sources such as

power plants, factories, and other large industrial facilities to ensure that modifications to existing facilities and construction of new facilities will not degrade air quality and to ensure that state-of-the-art control technology known as best available control technology, or BACT, is installed at new facilities or at existing facilities that are undergoing a major modification. With the exception of one limited refinement, EPA will continue applying its existing test requiring the "actual control" of emissions of a pollutant to determine the scope of pollutants subject to the federal PSD program. EPA is refining its interpretation to establish that PSD permitting requirements apply to a newly regulated pollutant at the time a regulatory requirement to control emissions of that pollutant "takes effect," rather than upon the date the regulation containing such a requirement is signed by the EPA administrator, the date the rule is published in the *Federal Register*, or the legally effective date for the rule after publication in the *Federal Register*. Thus, the PSD requirements will not apply to a newly regulated pollutant, such as carbon dioxide (CO₂) and other GHGs until a regulatory requirement to control emissions of that pollutant "takes effect." States and regulated entities generally supported EPA's actual control interpretation. EPA published its decision on April 2, 2010, in a final action titled "Reconsideration of Its Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs" (75 Fed. Reg. 17004).

The December 18, 2008, memorandum, commonly referred to as the PSD interpretive memo or Johnson memo, addresses issues that arose following the U.S. Supreme Court's decision in *Massachusetts v. EPA* and the Environmental Appeals Board's decision in *Deseret Power Electric Cooperative*, PSD Appeal No. 07 03 (EAB Nov. 13, 2008), remanding a PSD permit that did not include BACT limits for CO₂. The board remanded the permit to the EPA region to "reconsider whether or not to impose a CO₂ BACT limit in light of the 'subject to regulation' definition under the CAA."

In affirming its "actual control" interpretation, EPA rejected four alternative interpretations of the term "subject to regulation" found in CAA §§ 165(a)(4) and

169(3), which include the BACT provisions of the act, and in the definition of “regulated NSR pollutant” found in 40 C.F.R. § 52.21(b)(50)(iv), which includes “any pollutant that is otherwise subject to regulation under the Act.” EPA reasoned that none of the alternative interpretations was compelled by the act and that “negative policy implications” would follow if the agency adopted any of these interpretations. *See* 75 Fed. Reg. at 17006, 17011, and 17012. The alternative interpretations that EPA rejected for triggering PSD and BACT requirements were generally supported by environmental and public interest groups and included (1) monitoring and reporting requirements; (2) the inclusion of regulatory requirements for a pollutant in an EPA-approved state implementation plan (SIP); (3) an EPA finding of endangerment; and (4) an EPA grant of a section 209 waiver. *Id.* at 17007–14.

In addition to addressing the proper interpretation of the term “subject to regulation,” EPA also solicited comment on an issue that arose in the *Deseret* matter as to whether § 821 of the CAA amendments of 1990 is part of the act. EPA argued in the *Deseret* matter that § 821 was not a part of the act but indicated in the October 7, 2009, notice that it was inclined to drop this position. The issue is whether the CO₂ monitoring and reporting requirements in EPA’s Part 75 regulations are requirements “under the Act.” Because EPA did not adopt the monitoring and reporting interpretation, it found it unnecessary to decide this question. *Id.* at 17015.

In the October 7, 2009, notice proposing reconsideration of the PSD interpretive memo (74 Fed. Reg. 51535), EPA also solicited comment on the timing of when a pollutant becomes “subject to regulation.” In the PSD interpretive memo, EPA stated that the fourth part of the definition of “regulated NSR pollutant” should “apply to a pollutant upon promulgation of a regulation that requires actual control of the emissions.” *See* memo at 14. In the October 7, 2009, notice, EPA proposed to modify its interpretation of the fourth part with respect to the timing of PSD applicability. EPA also expressed a desire to harmonize the application of the PSD requirements with a limitation in the Congressional

Review Act that a major rule cannot take effect until sixty days after it is published in the *Federal Register*. 75 Fed. Reg. at 17016. Specifically, EPA proposed to interpret the term “subject to regulation” in the statute and regulation to mean that PSD requirements apply “when the regulations addressing a particular pollutant become final and effective.” *Id.* at 17015. States and regulated entities generally supported EPA’s proposal. Many entities urged EPA to use the compliance date of a rule as its “effective” date. *Id.* at 17006.

Based on public comment and other considerations raised in the proposal, EPA decided to “refine” the timing portion of the PSD interpretive memo. EPA distinguished between the “effective date” that is commonly used to describe the date a regulation has the force of law and amends the Code of Federal Regulations, and the “compliance,” “applicability,” or “takes effect” date that refers to the date when a regulated entity must comply with a regulatory requirement. In the final action, EPA interprets the time that a pollutant becomes subject to regulation under the act to be “the point in time when a control or restriction that functions to limit pollutant emissions takes effect or becomes operative to control or restrict the regulated activity.” *Id.* at 17016. Accordingly, EPA “adjust[s] the first paragraph of Section II.F of the Memo (bottom of page 14) to reflect EPA’s conclusion . . . to make a pollutant subject to PSD requirements when the first controls on a pollutant take effect.” *Id.* at 17015. EPA decided against codifying this interpretation of the term “subject to regulation,” however. Nor does EPA intend to reissue its PSD interpretive memo. *Id.* at 17006 and 17015. Thus, permitting authorities and sources seeking PSD permit authorities will want to remember this preamble language.

In deciding to construe the point at which a pollutant becomes “subject to regulation” to be when a control or restriction is operative on the activity regulated, EPA rejected an interpretation that a pollutant does not become subject to regulation “until the time that an individual source engages in the regulated activity.” Nor did EPA agree that a pollutant does not become subject to regulation “until the date when a source must certify compliance with regulatory requirements or submit a compliance report.” *Id.* at 17016.

As EPA recognized, the date a regulation “takes effect” may vary depending on the nature of the regulatory requirement that applies to control or restrict emissions of a pollutant. *Id.* Because the fourth part of the definition of “regulated NSR pollutant” is a catchall provision, EPA promises to identify the date when a new pollutant under a portion of the CAA covered by the fourth part of the definition becomes subject to regulation. *Id.* at 17017. However, EPA does not intend to identify the date that a new pollutant becomes subject to regulation each time it regulates a new pollutant in a national ambient air quality standard (NAAQS) or a new source performance standard (NSPS) under the first two parts of the definition.

For example, the control requirements in an NSPS take effect on the effective date of the rule. EPA interprets the second part of § 52.21(b)(50) to make an NSPS pollutant a regulated new source review (NSR) pollutant upon the effective date of an NSPS. *Id.* at 17018. Similarly, EPA will also use the effective date of a NAAQS to determine when a pollutant covered by a NAAQS becomes a regulated NSR pollutant. *Id.* EPA concludes, however, that the language in the first part of the definition suggests that a pollutant becomes a “regulated NSR pollutant,” and hence PSD requirements for the pollutant are triggered on the date a NAAQS is promulgated. Because EPA did not propose to modify this language in its October 2009 notice, EPA states it will propose a revision of the regulatory language in § 52.21(b)(50)(i) at such time as it may consider promulgation of a NAAQS for an additional pollutant. Until then, the agency will continue to apply the terms of § 52.21(b)(50)(i) to mean that PSD requirements for a NAAQS pollutant are triggered on the date a NAAQS is promulgated. *Id.* at 17018–19.

In the April 2 final action, EPA also discusses the application of the PSD interpretive memo to PSD permitting for GHGs and addresses the following four issues: (1) the date by which GHGs will be “subject to regulation”; (2) implementation concerns; (3) interim EPA policy to mitigate concerns regarding GHG emissions from construction or modification of large stationary sources; and (4) transition for pending permit applications. *Id.* at 17019–22. EPA states that

GHGs will initially become “subject to regulation” under the act on January 2, 2011, and that the PSD permitting program would apply to GHGs on that date. Because EPA had not yet finalized the Tailoring Rule for phasing in PSD requirements for GHG sources as of April 2, 2010, EPA concludes only that “GHGs would not be considered ‘subject to regulation’ (no source would be subject to PSD permitting requirements for GHGs) earlier than January 2, 2011.” *Id.* at 17007 and 17019. January 2, 2011, is the date that the regulation of GHG emissions standards for model year 2012 new passenger cars and other light-duty vehicles takes effect under the light-duty vehicle (LDV) rule discussed below. *Id.* at 17007. Those emissions standards constitute “regulation” of GHGs under the actual control interpretation adopted by EPA in the April 2 final action. *Id.* at 17019.

EPA rejected suggestions that the “take effect” date be October 1, 2011, which is the date the National Highway Traffic Safety Administration uses to determine the beginning of the 2012 model year under the Energy Policy and Conservation Act. Because EPA’s standards are promulgated under the CAA, EPA concluded it lacked authority to harmonize its GHG emission standards with the National Highway Traffic Safety Administration corporate average fuel economy (CAFE) standards. *Id.* at 17020. EPA also rejected suggestions that GHG controls in the LDV rule do not take effect until automakers are required to demonstrate compliance with the first fleet average standards at the end of the model year, based on actual vehicle model production. *Id.*

In the April 2 final action, EPA also provides guidance to permitting authorities and large stationary sources regarding permits issued before January 2, 2011. EPA explains that the PSD program requires consideration of energy efficiency when selecting BACT and that the BACT provisions of the PSD program need to be used “to promote technology choices for control of criteria pollutants that will also facilitate the reduction of GHG emissions.” *Id.* at 17020. According to EPA, “BACT for other pollutants can, through application of more efficient production processes, indirectly result in lower GHG emissions.” *Id.* at 17021. EPA recognizes that “the BACT process may be more time and

resource intensive when applied to a new pollutant,” such as CO₂, and promises to issue guidance in the near future on indirect GHG benefits and BACT for GHGs. *Id.* at 17008–09 and 17020–21.

There is no transition or grandfathering provision for PSD permit applications that are complete and pending on January 2, 2011, the date GHGs initially become “subject to regulation.” *Id.* at 17,021. In EPA’s view, permit applications submitted before April effectively have a transition period of nine months. *Id.* at 17021. PSD permits that are issued on or after January 2, 2011, subject to the limitations promulgated in the upcoming Tailoring Rule, will be required to contain provisions that fulfill the applicable program requirements for GHGs. *Id.* at 17022. This requirement applies even if permit applications were filed and determined to be complete before January 2, 2011. *Id.* at 17021–22.

EPA also addressed the application of the Title V program to sources of GHGs. Currently, GHGs are not considered to be subject to regulation and have not been considered to trigger applicability under Title V. Under Title V, any stationary facility or source of air pollutants which directly emits, or has the potential to emit, 100 tons per year (tpy) or more of any pollutant must apply for a Title V permit. EPA continues to maintain its interpretation that the provisions governing Title V applicability for “a major stationary source” can only be triggered by emissions of pollutants “subject to regulation.” EPA bases this interpretation primarily on the purpose of Title V to collect all regulatory requirements applicable to a source in a single document and to assure compliance with such requirements and on the desire to promote consistency with the approach under the PSD program. For many of the reasons described for PSD, EPA concludes that a “takes effect” approach to the triggering of new pollutants is appropriate for Title V. EPA therefore “concludes that GHGs are ‘subject to regulation,’ for purposes of determining whether a source of GHG is a ‘major source’ for Title V, no later than the date on which a control requirement for GHGs ‘takes effect.’” *Id.* at 17023. Thus, a source that is not currently subject to Title V for its GHG emissions could become so no earlier than January 2, 2011. EPA will further

address in the final Tailoring Rule the manner in which sources can become subject to Title V as a result of their GHG emissions. *Id.* at 17022–23.

Because EPA’s final action on reconsideration of the PSD interpretive memo is nationally applicable, any legal challenges must be brought in the U.S. Court of Appeals for the District of Columbia Circuit no later than June 1, 2010. The Coalition for Responsible Regulation, Inc., et al., and Southeastern Legal Foundation, et al., have already filed petitions for review, however. Their petitions, which were filed April 2 and 15, 2010, respectively, will likely be consolidated with the case filed by Sierra Club and other environmental groups challenging the original PSD interpretive memo that is pending in the D.C. Circuit. *Sierra Club v. EPA*, No. 09 1018 (D.C. Cir.). Currently, the parties’ motion to govern future proceedings in that case is due June 24, 2010.

Fuel Economy and GHG Standards for Light-Duty Vehicles

Shortly after EPA issued its final action on reconsideration of the PSD interpretive memo, EPA and the U.S. Department of Transportation (DOT) issued a joint rulemaking on April 1, 2010, establishing the first national standards for control of GHG emissions and increasing the CAFE of all light-duty vehicles sold in the United States. 75 Fed. Reg. 25324 (May 7, 2010). The standards apply to cars, SUVs, minivans, and pickup trucks built in model years (MYs) 2012 through 2016. Together the standards create a national program, allowing manufacturers to build a single, light-duty national fleet that satisfies all federal requirements under both programs as well as the standards of California and other states that have adopted the California standards. EPA’s regulations limiting CO₂ and other GHG emissions from cars and light trucks represent the first regulatory controls of GHGs under the CAA.

EPA projects that the new program will reduce CO₂ emissions by about 960 million metric tons and conserve about 1.8 billion barrels of oil over the lifetime of the vehicles regulated and save the average car buyer of a MY 2016 vehicle \$3,000 over the

lifetime of the vehicle. According to EPA, the vehicles subject to this program account for 60 percent of all U.S. transportation-related GHG emissions and 40 percent of all U.S. oil consumption.

The EPA GHG standards require light-duty vehicles to achieve on average 250 grams per mile (gpm) of CO₂ in MY 2016. The standards would be phased in beginning with the 2012 MY and follow a linear phase-in until full implementation with MY 2016. The standards are based on CO₂ emissions-footprint curves. There are separate standards for passenger cars and light trucks, and different vehicle sizes have varying CO₂ emissions and fuel economy compliance targets. Generally, the largest vehicles have the highest CO₂ emissions compliance target. In addition to the CO₂ standards, EPA is capping tailpipe emissions of nitrous oxide (N₂O) and methane (CH₄) at 0.010 and 0.030 gpm, respectively.

The standard of 250 gpm of CO₂ translates to a fleet average total of 35.5 miles per gallon (mpg), assuming the automotive industry achieves this CO₂ level solely through fuel economy improvements. Fuel economy improvements are expected to be below the 35.5 value, however, because most manufacturers will likely apply some air conditioning improvements to reduce GHG emissions.

To provide compliance flexibility, EPA has established a system of averaging, banking, and trading of credits. Credits are earned based on fleet average performance. At the end of each model year, a sales-weighted fleet average must be calculated for each averaging set (cars and trucks). A manufacturer's car and/or truck fleet earns credits if the fleet achieves a fleet average level better than the standard and debits if the fleet average level does not meet the standard. After offsetting any preexisting deficits within a vehicle category, remaining credits may be banked and used in the five years after the year in which they were generated. A manufacturer may transfer credits between its car and truck fleets to achieve compliance with the standards. Additionally, a manufacturer may trade all credits, except MY 2009 early credits, to other vehicle manufacturers.

EPA finalized a number of credit options to provide manufacturers flexibility in achieving compliance. Credits may be earned for improved air conditioning performance by reducing both hydrofluorocarbon (HFC) refrigerant losses (i.e., system leakage) and indirect CO₂ emissions related to the increased load on the engine. EPA is also allowing credits for flex-fuel and alternative fuel vehicles but only during MYs 2012 to 2015. Beyond MY 2015, EPA will allow flex-fuel vehicle credits if manufacturers are able to demonstrate that the alternative fuel is in fact being used in the vehicles. Credits may also be earned based on the use of advanced technologies, such as electric vehicles, plug-in hybrid electric vehicles, and fuel cell vehicles. Further, EPA finalized a credit for innovative technologies that reduce CO₂ tailpipe emissions, but whose CO₂ reduction benefits are not captured over the two-cycle test procedure used to determine compliance with the fleet average standards. Examples of such off-cycle innovative technologies include solar panels on hybrids, adaptive cruise control, and active aerodynamics. In addition, early credits are available for GHG reductions before MY 2012. These early credits may be generated through additional fleet average CO₂ reductions, early A/C system improvements, early advanced technology vehicle credits, and early off-cycle credits.

Additionally, for manufacturers with limited product lines, EPA finalized less stringent, temporary lead-time allowance alternative standards (TLAAS). The TLAAS option may appeal to manufacturers that have traditionally paid fines to DOT's National Highway Traffic Safety Administration rather than meeting CAFE standards and that need additional lead time to bring their vehicles into compliance with EPA's GHG standards. The temporary standards apply to (1) manufacturers that produce between 50,000 and 400,000 MY 2009 vehicles in the United States and (2) manufacturers that produce less than 50,000 MY 2009 vehicles in the United States. These manufacturers may establish separate, limited vehicle fleets that would be subject to a less stringent GHG standard of 125 percent of the compliance target that would be applicable based on the vehicle's footprint in the absence of the optional temporary alternative standard provision. Manufacturers in the first category

may establish a separate averaging fleet of on average 25,000 vehicles per year and no more than 100,000 total vehicles during MYs 2012–2015. In MY 2016, these manufacturers must comply with the same CO₂ standards as other manufacturers. Manufacturers with sales below 50,000 would be allowed to include up to 200,000 vehicles in their separate averaging fleet during MYs 2012–2015 and an additional 50,000 vehicles in MY 2016. The TLAAS option would end for these manufacturers in 2017.

The standards do not apply to manufacturers selling fewer than 5,000 vehicles in the United States. The agency intends to issue a rulemaking by September 2011 setting emission standards for these small manufacturers. EPA will also decide whether to extend the new national GHG emission standards beyond MY 2016. Auto manufacturers are generally supportive of the new national program; however, groups challenging EPA's endangerment finding may challenge the rulemaking since it triggers PSD requirements for power plants, factories, and other large industrial sources. Any petitions for review are due July 6, 2010. Indeed, the Coalition for Responsible Regulation, Inc., et al., filed a petition for review in the D.C. Circuit on May 7, 2010. That case has been assigned No. 10 1092. Initial submissions are due June 11, 2010.

PSD/Title V Tailoring Rule

As discussed above, under EPA's final action on reconsideration of the PSD interpretive memo, the final GHG standards for light-duty vehicles trigger PSD and Title V permit requirements for GHG emissions. Due to the challenges in making GHGs emissions subject to the PSD and Title V permit programs for the first time, EPA proposed the PSD/Title V Tailoring Rule last October (74 Fed. Reg. 55292). Relying on judge-made doctrines of "absurd results" and "administrative necessity," EPA seeks to "tailor" the PSD and Title V permit programs to limit which facilities would be required to obtain permits by (1) raising the statutory emission thresholds of either 100 or 250 tpy of GHGs, depending on the source, to 25,000 tpy of CO₂ equivalent (CO₂e); (2) setting the PSD significance level for major modifications of existing sources at an annual amount between 10,000 and 25,000 tpy; and (3) raising the statutory threshold of the Title V

program from 100 tpy to 25,000 tpy. Under the proposal, EPA would reevaluate the final GHG emissions thresholds after five years. EPA would complete a study to evaluate if it would be feasible to administer the PSD and Title V permitting programs at lower GHG thresholds. Following that study, EPA would issue another rule either confirming the thresholds or establishing lower thresholds. EPA sent the draft final rule to the White House Office of Management and Budget on April 20, 2010, and as of this writing, the final rule is expected in May or June 2010. The final rule is expected to contain a number of changes to the thresholds and phase-in dates. For example, in testimony before Congress, Administrator Jackson stated the agency would use 75,000 tpy CO₂e as the new threshold. EPA also confirmed in the final rule on reconsideration of the PSD interpretive memo discussed above that PSD for GHGs will not apply to any sources before January 2, 2011. Further, the agency has said that in the "first half" of 2011, PSD for GHGs would apply only to sources already subject to PSD for non-GHG pollutants, and that in the "second half" of 2011, PSD would begin to apply to other large sources of GHGs; EPA says this is approximately 400 and 1700 permits, respectively. By 2013, depending on thresholds, an additional 3000 sources could need permits according to EPA. Administrator Jackson has said EPA can implement the CAA "in a way that won't require small sources" to undergo PSD/Title V permitting any earlier than 2016.

Proposed MRR Expansion for Oil and Gas, CO₂ Injection

On January 1, 2010, EPA's MRR on Greenhouse Gases, 40 C.F.R. Part 98, went into effect requiring roughly 10,000 facilities to annually report their greenhouse gas (GHG) emissions. 74 Fed. Reg. 56260 (Oct. 30, 2009). However, the final MRR did not include reporting requirements for a number of industries that were initially listed in the proposed rule, including the upstream oil and natural gas industry, so EPA could further review public comments and perform additional analyses.

On March 22, 2010, EPA proposed new rules that will, among other things, amend the MRR to require the reporting of GHG emissions from the upstream oil

and natural gas sector and for operations that inject CO₂ into the subsurface to enhance oil and/or natural gas recovery or for carbon sequestration. These proposed rules would be implemented through the following subparts of the MRR:

- Subpart W—Petroleum and Natural Gas Systems;
- Subpart RR—Carbon Dioxide Injection and Geologic Sequestration.

Reproposed Subpart W—Petroleum and Natural Gas Systems—40 C.F.R. § 98.230 et seq.

EPA's reproposed subpart W will require petroleum and natural gas facilities that emit 25,000 metric tons or more of CO₂ equivalent (CO₂e) per year to annually report their GHG emissions to the agency. Facilities will need to begin gathering data on January 1, 2011, and the first reports will be due to EPA by March 31, 2012. Facilities covered by subpart W include:

- Onshore petroleum and natural gas production;
- Offshore petroleum and natural gas production;
- Onshore natural gas processing plants;
- Onshore natural gas transmission compression;
- Underground natural gas storage;
- Liquefied natural gas storage;
- Liquefied natural gas import and export equipment; and,
- Natural gas distribution.

Definition of "Facility"—40 C.F.R. § 98.238

EPA is proposing a different definition of "facility" for onshore and offshore petroleum and natural gas production than is used throughout the rest of the MRR. For onshore petroleum and natural gas production, EPA is proposing the following definition:

Onshore petroleum and natural gas production facility means all petroleum or natural gas equipment associated with all petroleum or natural gas production wells under common ownership or common control by an onshore petroleum and natural gas

production owner or operator located in a single hydrocarbon basin which is assigned a three digit Geologic Province Code as defined by the American Association of Petroleum Geologists. Where an operating entity holds more than one permit in a basin, then all onshore petroleum and natural gas production equipment relating to all permits in their name in the basin is one onshore petroleum and natural gas production facility.

With this definition, EPA is proposing a basin-wide level of reporting whereby a "facility" would consist of all of the oil and/or natural gas production wells, along with associated equipment such as compressors, generators, piping, and storage tanks, owned and/or operated by one entity within a single hydrocarbon basin. Portable equipment that is not self-propelled, such as drill rigs, skid-mounted dehydrators, and compressors, would also be included within this definition. Importantly, EPA states in a FAQ issued in conjunction with the reproposed subpart W that this unique definition will not impact requirements under other EPA regulations, specifically citing New Source Review under the Clean Air Act.

For offshore petroleum and natural gas production, EPA is proposing the following definition:

Offshore petroleum and natural gas production facility means any platform structure, either floating in the ocean or lake, or fixed on the ocean or lake bed, that houses equipment to extract hydrocarbons from the ocean or lake floor and transports it to storage or transport vessels or transports onshore. In addition, offshore production includes secondary platform structures and floating storage tanks connected to the platform structure by a pipeline.

In contrast to onshore production facilities, EPA is proposing a platform-level of reporting for offshore petroleum and natural gas production facilities. The definition includes the primary platform and all associated equipment such as secondary platforms and

storage tanks that are collectively used for the extraction of oil and/or natural gas.

Reporting Threshold Calculations— 40 C.F.R. § 98.233

To determine if a facility exceeds the reporting threshold of 25,000 metric tons or more of CO₂e, an owner/operator must calculate the annual CO₂-equivalent emissions from various sources, which will vary depending upon industry segment, but generally include the following:

Fugitive and vented CO₂ and methane (CH₄) emissions from a list of sources that include such things as pneumatic devices, dehydrators, production and storage tanks, and well venting during well completion;

- CO₂, CH₄, and nitrous oxide (N₂O) emissions from each flare; and
- CO₂, CH₄, and N₂O emissions for nonflare stationary combustion sources, such as engines, turbines, and other burners on heated separators, dehydrator reboilers, etc.

Information Required in Annual GHG Emissions Report—40 C.F.R. § 98.232 and § 98.236

If after making the above calculations, a facility does exceed the reporting threshold, EPA's repropoed subpart W will require the facility to submit an annual report that includes an extensive compilation of data, including

- Facility annual CO₂, CH₄, and N₂O emissions estimate;
- Within each industry segment (e.g., onshore petroleum and natural gas production), aggregated emissions of CO₂, CH₄, and N₂O for each source type. For example, an onshore oil and natural gas production facility operator would report combined emissions from all pneumatic high-bleed devices, all pneumatic low-bleed devices, etc., for all facilities basin-wide;
- CO₂, CH₄, and N₂O emissions reported separately for any equipment that is in standby mode;

- Activity data aggregated for each source type, such as the number of high-bleed pneumatic devices, number of low-bleed pneumatic devices, glycol dehydrators' absorbent circulation rates, number of wells completed with hydraulic fracturing, etc.;
- Minimum, maximum, and average throughput for each facility;
- CO₂, CH₄, and N₂O emissions reported separately for portable equipment; and
- For offshore petroleum and natural gas production facilities, the number of wells connected to each platform, and whether each is producing oil, natural gas, or both.

Public Comment Period

EPA is currently accepting public comment on subpart W and has specifically asked for comment on a number of subjects noted in the preamble to subpart W. Such subjects include the appropriate threshold level for triggering the GHG reporting requirements (25,000 v. 10,000 metric tons CO₂e) and whether field-level reporting is more appropriate than basin-wide reporting for onshore petroleum and natural gas production. Public comments are due by June 11, 2010.

New Subpart RR—Carbon Dioxide Injection and Geologic Sequestration—40 C.F.R. § 98.440 et seq.

EPA's newly proposed subpart RR will cover all facilities, both onshore and offshore, that inject CO₂ into the subsurface for purposes of enhanced oil and natural gas recovery or for long-term geologic sequestration. Subpart RR will require the annual reporting of certain information regarding CO₂ injection, but does not require the control of GHGs.

Definition of Source Category—40 C.F.R. § 98.440

Subpart RR defines "CO₂ injection facility" as a well or group of wells that inject CO₂ into the subsurface or subseabed geologic formations, and includes all facilities that inject CO₂ for enhanced oil and gas recovery and for long-term geologic sequestration.

Subpart RR also provides a definition of “geologic sequestration facility,” which is considered a subset of “CO₂ injection facilities,” for those facilities that inject CO₂ specifically for the purpose of long-term containment of CO₂ in subsurface geologic formations. A CO₂ injection facility that injects CO₂ for enhanced oil and gas recovery is not a geologic sequestration facility unless that facility injects CO₂ in subsurface geologic formations for long-term containment of a gaseous, liquid, or supercritical CO₂ stream and also chooses to opt in by submitting to EPA a monitoring, reporting, and verification (MRV) plan, which is discussed below.

Reporting Threshold—40 C.F.R. § 98.441

Subpart RR does not include a reporting threshold level. All facilities that meet the definition of a “CO₂ injection facility” or a “geologic sequestration facility” must file an annual GHG emissions report.

Information Required in Annual GHG Emissions Report—40 C.F.R. § 98.442 and § 98.443

In subpart RR, EPA is proposing a tiered approach to its proposed reporting requirements. The first tier applies to all CO₂ injection facilities, while the second tier imposes additional reporting requirements on geologic sequestration facilities. The first annual reports would be due to EPA by March 31, 2012, for CO₂ injections occurring in 2011. For CO₂ injection facilities, EPA is proposing that each facility report the following information:

- For each transfer point flow meter:
 - CO₂ quantity transferred on-site in each quarter;
 - CO₂ concentration in flow in each quarter.
- For each injection flow meter:
 - CO₂ quantity injected in each quarter;
 - CO₂ concentration in flow in each quarter.
- The source of the supplied CO₂, if known, according to the following categories:
 - CO₂ production wells;
 - Electric generating unit;
 - Ethanol plant;
 - Pulp and paper mill;
 - Natural gas processing;

- Other anthropogenic source; or
- Unknown.
- The total CO₂ received on-site in the reporting year;
- The total CO₂ injected in the reporting year.

Along with the above requirements, the proposed subpart RR will require geologic sequestration facilities to report and submit the following:

- The amount of CO₂ geologically sequestered using a mass balance approach;
- A developed and implemented EPA-approved site-specific MRV plan, which must include the following:
 - An assessment of the risk of CO₂ leakage to the surface;
 - A strategy for detecting and quantifying any CO₂ leakage to the surface;
 - A strategy for establishing pre-injection environmental baselines;
 - A summary of how the facility will calculate site-specific variables for the mass balance equation, and for calculating the amount of CO₂ sequestered.

Public Comment Period

EPA is currently accepting public comment on subpart RR and has specifically asked for comment on a number of subjects, including the definitions of “CO₂ injection facility” and “geologic sequestration facility.”

Both subparts W and RR would impose significant new GHG information gathering and reporting requirements on the upstream oil and natural gas industry. To view the complete text of proposed subparts W and RR, along with their preambles, fact sheets, FAQs, and other information, please visit the EPA’s Web site at: <http://www.epa.gov/climatechange/emissions/proposedrule.html>.

EPA REGION 1

Dixon Pike, Brian Rayback, and Nick Livesay
Pierce Atwood LLP
Portland, Maine

Regional Updates

May 3 through 7 was Air Quality Awareness Week. During that week EPA, state environmental agencies, and the National Weather Service coordinated to inform people about the value of monitoring air quality and remind them that with warmer weather ground-level ozone and “smog” increase. People interested in staying informed about air quality in the New England states may follow EPA on Twitter at www.twitter.com/EPAnewengland.

The summer of 2009 saw a decrease in ozone levels across New England compared to the prior year. From April through September of last year there were 11 days when ozone monitors in New England recorded ozone levels above air quality health standards. There were 28 such days in 2008 and 53 in 2007.

On December 30, 2009, 11 states (the six New England states, plus Delaware, Maryland, New Jersey, New York, and Pennsylvania) signed a memorandum of understanding on the Northeast and Mid-Atlantic Low Carbon Fuel Standard. Signatory states committed to evaluating a regional low carbon fuel program that will reduce the average carbon intensity of transportation and, potentially, heating fuels in the northeast and mid-Atlantic region. These states also committed to developing preliminary recommendations on the program by the end of 2010 and finalizing a proposed program framework by early 2011.

Finally, the next Regional Greenhouse Gas Initiative (RGGI) auction is scheduled for June 9, 2010. Participating states (all of the New England states, plus

Delaware, Maryland, New Jersey, and New York) will offer for sale 40,685,585 CO₂ allowances for 2009–2011 and 2,137,993 allowances for the period 2010–2014.

State Updates

Connecticut

Responding to EPA control techniques guidelines both for offset lithographic and letterpress printing, industrial cleaning solvents, and flexible package printing and for metal furniture coating, large appliance coating and paper, and film and foil coating, the Connecticut Department of Environmental Protection has adopted new reasonably available control technology (RACT) requirements for volatile organic compounds. The new requirements became effective April 6, 2010.

Maine

The Maine legislature recently passed a low-sulfur fuel bill, An Act to Improve Maine’s Air Quality and Reduce Regional Haze at Acadia National Park and Other Federally Designated Class I Areas (P.L. 2009, c. 604). This act imposes reductions in the sulfur content of fossil fuels.

As a result of the new legislation, the sulfur limit on residual (#4 or #6) oil will be lowered to 0.5 percent in 2018, although a facility will have the option to achieve an equivalent sulfur reduction from a baseline year of 2002. The reductions can be due to several factors, including reduced use, alternative fuels, and control. Units with SO₂ control are still exempt as under current law.

The law also requires use of 0.005 percent distillate beginning in 2016, which will then be further reduced in 2018 to 0.0015 percent by weight. The law contains an exemption from distillate limits for “facilities that use distillate fuel oil for manufacturing purposes.” Distillate sulfur limits also will be subject to alternative equivalent sulfur reductions from a 2002 baseline year.

Massachusetts

In April 2010, the Massachusetts Department of Environmental Protection completed amendments to the regulations governing the commonwealth’s Low Emission Vehicle program (310 CMR 7.40). These amendments follow 2009 revisions to the California Zero Emission Vehicle (ZEV) program intended to reflect the state of technology. The amendments continue to require that automobile manufacturers

develop and introduce advanced and zero emission vehicle technologies. At the same time, the amendments provide flexibility to manufacturers by, among other things, allowing a portion of the ZEV mandate to be met with plug-in hybrid electric vehicles, a new class of vehicle, and by adjusting ZEV credit values.

Efforts to amend the state ambient air quality standards in 310 CMR 6.0 to bring them into conformance with the current NAAQS for lead, ozone, and fine particles (PM_{2.5}), begun last year, remain under way.

New Hampshire

On April 28, 2010, the New Hampshire Senate followed the House in passing H.B. 1251, an act that clarifies the sale and transfer procedures for emissions reduction credits (ERCs) resulting from facility closures or shutdowns. The legislation amends RSA 125 J:5, establishing a process for the state to allocate ERCs accumulated in the state bank to promote economic development and subsequently to replenish this bank.

Rhode Island

The Rhode Island Department of Environmental Management proposes to adopt Air Pollution Control Regulation No. 48, "Outdoor Wood Boilers." The proposed APC Regulation No. 48 would prohibit the sale or installation of any outdoor wood boiler on or after the effective date of the regulation unless it has been certified or qualified by EPA to meet the Phase II emissions level for particulate matter (0.32 lbs/MMBtu).

Vermont

As of the last edition of the Air Quality Committee Newsletter with an update for the Region 1 states, the Vermont Department of Environmental Conservation had proposed a Phase II emission limit for outdoor wood boilers. That rule was adopted and went into effect on October 1, 2009. Similar to the rule in Rhode Island, Vermont's rule establishes a particulate matter emission limit of 0.32 lbs/MMBtu of heat output for any outdoor wood boilers sold, distributed, or purchased on or after March 31, 2010.

Also shortly after submission of our last Region 1 update, the Vermont Agency of Natural Resources Department of Environmental Conservation and Department of Forests, Parks, and Recreation released the Air Emissions Test Report: Small Biomass Energy System Particulate Matter Emissions Testing. The report measures the performance of particulate matter control technology being proposed or permitted for small wood-fired boilers, ranging in size from 5 to 17 MMBtu/hr, and evaluates their effectiveness reducing PM emissions.

EPA REGION 2

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

New York Issues BART Rule

On April 21, 2010, the New York State Department of Environmental Conservation (NYSDEC) published a final rule requiring the installation of best available retrofit technology (BART) on eligible stationary sources. The new regulations will be codified at 6 NYCRR Part 249.

The initial test for BART eligibility is dictated by § 169A of the federal Clean Air Act and is thus the same as the test in EPA's BART regulations: to be "BART-eligible," the source must have been built (or reconstructed) during the 15-year window of time from August 7, 1962 to August 7, 1977; have potential emissions of any visibility-impairing pollutant (i.e., SO₂, NO_x, or PM₁₀) of 250 tons per year or more; and be a source that falls within one of 26 identified source categories. Under the NYSDEC regulations, to avoid the imposition of BART, the source must either (i) accept permit conditions that restrict the source's potential to emit to less than 250 tpy for each visibility-impairing pollutant; or (ii) demonstrate through a modeling analysis acceptable to NYSDEC that it does not or will not emit any combination of visibility-impairing pollutants that results in a visibility impairment

equal to or greater than 0.1 deciviews in any federal Class I Area. (The “deciview” index is a numerical index of light extinction designed to be linear with respect to perceived changes in visual air quality.) The use of the 0.1 deciview impact level is more stringent than EPA’s regulation, which calls for the use of a 0.5 deciview threshold, but the more stringent NYSDEC regulation is in keeping with the recommendations of the Mid-Atlantic/Northeast Visibility Union (MANE-VU) Regional Planning Organization.

If the source is subject to BART, the selection of best available retrofit technology controls requires a case-by-case analysis using a five-factor test, which takes into account (i) the cost of compliance; (ii) the energy and non-air quality environmental impacts of compliance; (iii) any existing pollution control technology in use at the source; (iv) the remaining useful life of the source; and (v) the degree of improvement in visibility that may reasonably be anticipated to result from the use of such technology. NYSDEC’s rulemaking documents state that it will consider control equipment below \$5,500 per ton of pollutant reduced (the current threshold for reasonably available control technology (RACT)) to be cost-effective.

BART-eligible sources must submit the required BART controls analysis (or modeling demonstration that BART is not required) by October 1, 2010. If BART controls are required, they must be installed and operating no later than January 1, 2014.

EPA REGION 3

Barbara Diane Little
Jackson Kelly PLLC
Charleston, West Virginia

Regional Updates

Analysis of Power Plants in Mid-Atlantic Region

Region 3 has posted on its Web site an analysis of the power plants in the mid-Atlantic region delineating the primary fuel utilized and percentage of power generated in the region. The number of power plants burning coal, oil, and natural gas are roughly equal in the region as a whole and in many of the states. Oil dominates in the District of Columbia and Virginia whereas coal dominates in West Virginia. However, when looking at the percentage of power generated rather than the number of plants, the statistics change with 62 percent of the power in the region from coal (99 percent in West Virginia). While the number of hydro plants is significant—52 in the region (most of them in Pennsylvania and Virginia)—these plants only produce 1 percent of the power in the region. In contrast to that, even though coal plants make up only 27 percent of the region’s total in terms of numbers, these coal plants tend to be much larger so they produce 62 percent of the power in the region.

Greenhouse Gas Analysis and Initiative

EPA Region 3 promotes the theory that the mid-Atlantic region is particularly vulnerable to the effects of climate change. While the region’s contribution to the problem is roughly comparable to its population (the region has 9.7 percent of the nation’s population and contributes 10.5 percent of its CO₂ emissions), the potential impact of rising sea levels on the region is likely to be greater than average. Region 3 includes many coastal areas, numerous cities on coasts and waterways (including Philadelphia, Baltimore, Washington, and Annapolis), two major estuaries (the Delaware and Chesapeake Bays), and numerous barrier islands impacted by rising sea levels. Additionally, the relative rates of sea-level rise in the mid-Atlantic region are much higher than most other coastal areas and are nearly twice the global rate of 1.7 (±0.5) mm per year.

REGISTER TODAY!

Environmental Issues in Region 6: Recent Developments and Hot Topics



June 14-15, 2010
The Adolphus
Dallas, TX

www.abanet.org/environ/region6

The region has involved state governments and organizations in the efforts to reduce greenhouse gas emissions. Eight northeastern and two mid-Atlantic states (Maryland and Delaware, *see* further details below relative to Maryland and Delaware) have capped and will reduce CO₂ emissions from the power sector 10 percent by 2018 via the Regional Greenhouse Gas Initiative (RGGI), the country's first market-based, mandatory cap-and-trade program to reduce greenhouse gas emissions. States sell nearly all emission allowances through auctions and invest proceeds in consumer benefits: energy efficiency, renewable energy, and other clean energy technologies. The intent is that RGGI will spur innovation in the clean energy economy and create green jobs in each state.

The RGGI Web site (www.rggi.org) provides a portal for official user platforms, state applications, and materials for participants in RGGI, as well as current information about the status of RGGI auctions and state rules.

Index to Region 3 State SIPs (DE, DC, MD, PA, VA, WV)

Region 3 has initiated on its Web site a very user-friendly index to each state's SIP plan, rules, and source-specific requirements providing the date of the relevant state's effective date and the date and citation for the *Federal Register* approval into the SIP. Dependent on the state, the records go as far back as 1981, so the resource provides a quick and useful research tool.

State Updates

Delaware **SIP Revisions**

On April 8, 2010 (75 Fed. Reg. 17,863), EPA approved Delaware's Reasonable Further Progress (RFP) Plan, 2002 Base Year Inventory, Reasonably Available Control Measures, Contingency Measures, and Transportation Conformity Budgets for the Delaware Portion of the Philadelphia 1997 8 Hour Ozone Moderate Nonattainment Area. This is a revision to the Delaware SIP to meet the reasonable further progress requirements of the Clean Air Act for the Delaware portion of the Philadelphia 1997 8 hour

ozone moderate nonattainment area. EPA is also approving the RFP plan's motor vehicle emissions budgets, the 2002 base year emissions inventory, contingency measures, and the reasonably available control measure analysis associated with this revision. This final rule becomes effective on May 10, 2010.

On March 26, 2010, EPA approved (75 Fed. Reg. 12449) a Delaware SIP revision amending the Electric Generating Unit Multi-Pollutant Regulation of Delaware's Administrative Code, and modifying the sulfur dioxide mass emissions limit associated with Conectiv Edge Moor Unit 5 beginning in calendar year 2009. The rule is effective on April 15, 2010.

EPA proposed a SIP revision (75 Fed. Reg. 12168, Mar. 15, 2010) adding a new section 2—Control of Nitrogen Oxide Emissions from Industrial Boilers and Process Heaters at Petroleum Refineries to Delaware's Regulation No. 1142/SIP Regulation No. 42—Specific Emission Control Requirements for controlling nitrogen oxide emissions from industrial boilers. This action is being taken under the Clean Air Act (CAA). Comments were due April 14, 2010.

Memorandum of Understanding for Low Carbon Fuel Standard

December 30, 2009, Governor Jack Markell joined the governors of 10 other northeast (CT, ME, MASS, NH, NJ, NY, RI, VT) and mid-Atlantic (MD, PA) states announcing a memorandum of understanding (MOU) among the states committing to development of a regional low carbon fuel standard (LCFS) to reduce greenhouse gas emissions from fuels for vehicles and other uses. The governor stressed that the program would encourage investment and innovation in alternative fuels and electric cars like those that Fisker Automotive plans to make in Wilmington, Delaware.

The LCFS is a market-based, fuel-neutral program that would apply to the transportation sector, and potentially apply to fuels used for heating buildings. A regional standard is expected to spur economic growth related to development of advanced technologies and green energy jobs. A low carbon standard also has the potential to reduce transportation-related greenhouse gas emissions, which represent approximately 30

percent of emissions in the region, reduce regional vulnerability to petroleum price volatility, and facilitate the long-term transition from petroleum-based fuels in the transportation sector.

Under the MOU, the states agree to analyze low carbon fuel supply options, determine the feasibility of achieving a range of reduction goals, including a 10 percent reduction in carbon intensity of fuels, and develop a framework for a regional LCFS to ensure sustainable use of renewable fuels in the region.

LCFS signatory states, with the exception of Pennsylvania, have already entered into the Regional Greenhouse Gas Initiative (RGGI), which covers greenhouse gas emissions from power plants. A regional program to address transportation and other fuels is considered prudent and efficient among the signatories, given the interconnected nature of the fuel distribution system in the northeast and mid-Atlantic region.

Potential Agreement to Shut Down Unit 3 at Indian River Power Plant

February 3, 2010, the Delaware Department of Natural Resources and Environmental Control announced that it is evaluating a potential agreement with NRG energy to shut down a third coal-fired electrical generating unit (unit 3) from the Indian River Power Plant, leaving only the facility's newest, largest, and lowest-emission unit to remain in operation. Indian River currently operates four coal-fired units. Under a consent decree reached with the department in 2007, NRG agreed to shut down its two oldest units in 2010 and 2011, and to install air pollution controls on units 3 and 4 by the end of 2011 to reduce emissions of nitrogen oxides, sulfur dioxide, and mercury.

Under the proposal being evaluated, unit 3 would operate through 2013 at which time it will be shut down permanently, rather than undergo installation of pollution controls and continue to operate for decades. The facility would continue plans to shut down units 1 and 2 by 2011 and place controls on unit 4, its largest, by the end of 2011. The project will cost approximately \$360 million and create up to 350 construction jobs over two years.

An initial review by the experts who operate the regional electrical grid indicates that the unit shutdown can be achieved without compromising the overall reliability of the electrical system. No additional costs to ratepayers are anticipated.

Expected air quality benefits of the shutdown include:

- Reduction by about 1,173 tons annually of nitrogen oxide and 6,252 tons of sulfur dioxide;
- Elimination of 837,000 tons annually of the greenhouse gas carbon dioxide;
- Reduction in annual fly ash production of between 40,000 and 70,000 tons; and
- Reduction of mercury emissions by five pounds annually.

District of Columbia

Keith A. Anderson Appointed DDOE Interim Director

On February 2, 2010, Mayor Adrian M. Fenty announced Keith A. Anderson as interim director of the District of Columbia Department of the Environment (DDOE). Anderson most recently served as the director of DDOE's Energy Office, where he managed several energy programs, including building weatherization, increasing renewable energy generating capacity, providing energy efficiency and conservation education, establishing the Sustainable Energy Utility and providing direct assistance to low-income residents. Anderson also served as chief of the agency's Energy Affordability Division, assisting low-income residents in managing energy costs.

Comprehensive Greenhouse Gas Analysis

As part of the district's Climate Change Initiative, January 29, 2010, the DDOE released a comprehensive analysis of greenhouse gas emissions within the city. The District of Columbia Greenhouse Gas Emissions Inventory represents the first step in the district's efforts to prevent climate change.

The inventory calculates all measurable greenhouse gas emissions that occurred within the district during

calendar year 2006, the “baseline” year, totaling 10.5 million metric tons of carbon dioxide equivalents (CO₂e), or 18 tons per resident. This amount is below the EPA’s national average of 19.7 tons per person, but higher than other major cities due to energy use by the district’s large daytime population of workers who commute into the city. Of the district’s total emissions, 6 percent were the result of district government operations. The remaining 94 percent of emissions came from activity in the private sector, most notably from building energy used for lighting, heating, and cooling. Greenhouse gas emissions linked to residential and commercial buildings accounted for 75 percent of the district’s total emissions.

The district has begun to take action against climate change with the Renewable Energy Portfolio Standard, the Green Building Act, and the Clean and Affordable Energy Act. The district claims more green and Energy Star® buildings per capita than any other city and the second highest mass transit ridership levels in the nation. The fact sheet and a full copy of the District of Columbia Greenhouse Gas Emissions Inventory are available online at: <http://green.dc.gov/climate>.

Maryland SIP Revision

On February 9, 2010, EPA issued a final rule (75 Fed. Reg. 6307), effective April 12, 2010, as SIP Revision 05 08, replacing the current SIP requirements for the control of carbon monoxide emissions from basic oxygen furnaces at steel mills in Maryland with a new equivalent carbon monoxide standard.

New Permit Judicial Review Procedures

The Maryland Department of Environment has established new judicial review procedures for major permits including preconstruction air quality permits, subject to § 2 404 of the Environmental Article. The new judicial review procedures took effect on January 1, 2010, and will apply to final permit decisions issued on and after January 1, 2010.

Under prior law, permit applicants and third parties with standing under Maryland law could challenge the issuance of a permit or the conditions of a permit through a request for a “contested case” adjudicatory

hearing conducted by the Office of Administrative Hearings. Effective January 1, 2010, the “contested case” process no longer applies to final decisions on applications for these permits. Rather, permits can be challenged through a request for direct judicial review in the circuit court for the county where the activity authorized by the permit will occur. Applicants, and persons who meet standing requirements under federal law and who participated in a public comment process by submitting written or oral comments (where an opportunity for public comment was provided), may seek judicial review. Judicial review will be based on the administrative record for the permit compiled by the department and limited to issues raised in the public comment process (unless no public comment process was provided, in which case the review will be limited to issues that are germane to the permit). Petitions for judicial review of a final determination or permit decision subject to judicial review must be filed in accordance with § 1 605 of the Environment Article no later than 30 days following publication by the department of a notice of final determination or final permit decision, and must be filed in the circuit court of the county where the permit application states that the proposed activity will occur. Petitions for judicial review must conform to the applicable Maryland Rules of Civil Procedure.

Existing procedures for soliciting public comment on draft permits or permit applications will remain unchanged, except that where the department issues a tentative determination on a permit, the department will make available to the public for review the complete permit application, all nonprivileged documents upon which the department relied in making a tentative permit determination, and a privilege log identifying any confidential documents withheld from disclosure.

Maryland Greenhouse Gas Reductions

Maryland has established the Maryland Commission on Climate Change, in addition to joining the Regional Greenhouse Gas Initiative (RGGI). With the passage of the Greenhouse Gas Emissions Reduction Act of 2009 (GGRA), Maryland has committed to reducing greenhouse gas (GHG) emissions by 25 percent by 2020 and by preparing a plan to meet a longer-term goal of reducing GHG emissions by up to 90 percent

by 2050. Maryland has also committed to the regional LCFS initiative.

2009–2010 Port of Baltimore Clean Diesel Program

The purpose of the Clean Diesel Program is to reduce diesel emissions at the Port of Baltimore through funding from the EPA's National Clean Diesel Campaign as part of the American Recovery and Reinvestment Act ("stimulus funding") and the Energy Policy Act of 2005. The Clean Diesel Program is being administered by the Port of Baltimore Steering Committee. Four award subprograms are available: Dray Trucks, Cargo Handling Equipment, Harbor Craft, and Locomotive.

After meeting initial eligibility, the committee will evaluate applications based on cost-effectiveness, expected emissions reductions, technical feasibility, and achievement of program goals. Guidelines and applications for each can be found through: www.epa.gov/otaq/smartway/transport/what-smartway/verified-technologies.htm#idle.

Information on the types of EPA/CARB (California Air Resources Board) verified technologies available can be found at: www.arb.ca.gov/diesel/verdev/vt/cvt.htm.

Pennsylvania SIP Revisions

On December 10, 2009, EPA adopted a final rule (74 Fed. Reg. 65,446) approving the Pennsylvania Clean Air Interstate Rule (CAIR) state implementation plan revision.

2014 CAIR NO_x Allowances Announced

The Pennsylvania Department of Environmental Protection (DEP) is providing notice of the finalization of the 2014 annual and ozone season CAIR NO_x allowance allocations. Based on the December 10, 2009, EPA SIP approval (see above), these allocations replace those under the EPA's federal implementation plan. Pennsylvania's NO_x budget for the annual CAIR program contains 99,049 NO_x allowances; 97,761 NO_x allowances are allocated. The remaining 1288 NO_x allowances (1.3 percent of the annual CAIR program budget) are set aside for future allocation in

accordance with 25 Pa. Code § 145.212(f)(2). Pennsylvania's NO_x budget for the ozone season CAIR program contains 42,171 NO_x allowances, all of which are allocated. For each CAIR unit and qualifying resource receiving a NO_x allocation, the following are listed: the facility name, ORIS code (a 4 digit number assigned by the Energy Information Administration to power plants owned by utilities), unit ID for each CAIR unit, either the gross loading or steam loading depending on type of unit, county, converted heat input from the base year, and control period allowance allocation. Copies of these tables can be found on the Air Quality Web site at: www.depweb.state.pa.us (DEP keyword "Air Quality").

Persons aggrieved by an allocation may appeal, under section 4 of the Environmental Hearing Board Act (35 Pa.Stat. Ann. § 7514) and 2 Pa. Cons. Stat. Ann. §§ 501–508 and 701–704 to the Environmental Hearing Board, Second Floor, Rachel Carson State Office Building, 400 Market Street, P.O. Box 8457, Harrisburg, PA 17105 8457, (717) 787 3483. Appeals must be filed with the board within 30 days of the publication of the notice in the *Pennsylvania Bulletin*.

Proposed OTC Control Measures

The Pennsylvania Bureau of Air Quality is seeking comments on control measures under consideration by the Ozone Transport Commission (OTC) for the attainment and maintenance of the ozone national ambient air quality standard in accordance with the requirements of section 7.4 of the Pennsylvania Air Pollution Control Act. The OTC is a multistate organization created under the Clean Air Act that is responsible for developing and implementing regional solutions to the ground-level ozone problem in the northeast and mid-Atlantic regions and Pennsylvania is a member of the OTC. The OTC is planning to consider action in June 2010, by which member states would commit to pursue several control strategies:

- NO_x controls on new natural gas-fired industrial, commercial, and institutional boilers, steam generators, process heaters, and water heaters;

- NO_x controls on oil and natural gas-fired boilers serving electric generating units;
- NO_x controls on stationary generators;
- Volatile organic compound (VOC) controls on consumer products;
- VOC controls on architectural, industrial, and maintenance coatings; and
- VOC controls on large above-ground storage tanks.

The complete draft of the OTC model rules is available on the Bureau of Air Quality Web site at: <http://www.dep.state.pa.us/dep/deputate/airwaste/air/>. Comments should be sent by May 28, 2010, to Arleen Shulman, Chief, Division of Air Resource Management, Bureau of Air Quality, P.O. Box 8468, Harrisburg, PA 17105 8468 or by e-mail to ashulman@state.pa.us.

Monitoring of Oil and Gas Operations

On April 28, 2010, in response to odor complaints, DEP commenced comparative sampling near natural gas operations in Washington and Greene counties. Samples are to be analyzed for VOCs, ozone, nitrogen oxides, hydrogen sulfide, and carbon monoxide. Under the Pennsylvania Air Pollution Control Act, any entity operating a source of odors may be fined up to \$25,000. Compressor stations are permitted via a general permit that imposes best available technology.

Virginia SIP Revisions

On March 12, 2010, EPA approved a SIP revision relative to the timing for the first phase of the sulfur dioxide trading budget under the commonwealth's approved regulations that implement the requirements of the Clean Air Interstate Rule, changing the start date from the control period in 2009 to the control period in 2010, effective April 12, 2010 (*see* 75 Fed. Reg. 11,738).

EPA took direct final action to approve revisions to the Virginia SIP to amend the wording of 22 definitions, including the definition of "volatile organic compound" (75 Fed. Reg. 8575, Feb. 25, 2010), effective April 26, 2010. Additionally February 24, 2010, EPA approved SIP revisions updating methods for

determining compliance with opacity standards for existing, new, and modified stationary sources (75 Fed. Reg. 8249 (final rule), 75 Fed. Reg. 8292 (proposed rule)), effective April 26, 2010.

PSD/ MACT Permitting for Old Dominion Electric Cooperative

The preconstruction permitting process continues for the Old Dominion Electric Cooperative (ODEC) Cypress Creek Power Station in Surry County, Virginia, for construction and operation of a new electric power generating station consisting of two 750-megawatt, supercritical, biomass and pulverized coal-fired boilers, along with ancillary and related equipment.

The Virginia Department of Environmental Quality (DEQ) is processing two air quality permit applications for the proposed power station. The applications are for a Prevention of Significant Deterioration (PSD) of air quality permit and the maximum achievable control technology (MACT) permit. The permitting process commenced in December 2008. The most recent action is a March 24, 2010, DEQ follow-up information request to its Mays 2009 request for a top-down best available control technology (BACT) analysis for PM_{2.5}. The analysis contained in the company's permit application had been for PM₁₀, but DEQ had anticipated the February 11, 2010, EPA 40 C.F.R. Part 52 regulation rescinding the 1997 policy allowing consideration of PM₁₀ as a surrogate for PM_{2.5}. DEQ also requested a top-down best available control technology (BACT) analysis for particulate matter and VOCs for the biomass dryers as well as an analysis of the toxic air pollutants from the biomass dryers.

Proposed Change to Permits for Minor New Source Review

On February 1, 2010, the Virginia State Air Pollution Control Board proposed changes to Permits for New and Modified Stationary Sources (article 6 of Part II of 9VAC5 80), and Standards of Performance for Stationary Sources (article 4 of Part II of 9VAC5 50) to exemption of certain emissions units from minor New Source Review (NSR) applicability:

- A proposed exemption for open pit incinerators;
- Aggregating capacities of similar equipment at a new source or project that is now individually exempted by source type and size, when considering whether or not that equipment should be exempt; and
- Limiting aggregation of equipment capacities for this exemption to areas such as nonattainment or maintenance areas compared to allowing the exemption statewide.

DEQ seeks comment concerning the adequacy of the proposal to address separate requests for exempt changes that would be subject to the NSR program if considered together. DEQ seeks information on costs and benefits associated with debottlenecked emissions units:

- Discontinuing the practice of considering emissions increases from debottlenecked units when evaluating program applicability; and
- Continuing to apply BACT only to physically or operationally changed units and not debottlenecked units.

DEQ is also seeking comments on changing emissions limits that may be placed on new or changed emissions units:

- Applying permit emissions limitations representing BACT to any regulated pollutant emitted by any emissions unit at a new source when the uncontrolled emissions rate of that pollutant from the source is greater than the exempt emission rate threshold;
- Applying permit emissions limits representing BACT to any regulated pollutant emitted by any new or changed emissions unit in a project when the uncontrolled emissions rate increase of that pollutant from the project is greater than the exempt emission rate threshold; and
- Applying such permit emissions limits to other pollutants emitted by new or changed units that may not exceed the exempt emission rate threshold as may be needed to implement BACT.

Regulation of VOC from Consumer Products

A new chapter (9VAC5 45) is established for the control of volatile organic compound (VOC) emissions from various consumer and commercial products. The first part of the new chapter contains general requirements pertaining to all of the types of consumer and commercial products regulated. The second part is composed of articles that contain VOC content and emission standards for individual types of consumer products and contain the control technology, testing, monitoring, administrative, recordkeeping, and reporting requirements necessary to determine compliance with each of the applicable standards.

New articles control VOC emissions from portable fuel containers and spouts, from certain types of consumer products, from architectural and industrial maintenance coatings, adhesives, adhesive primers, sealants, and sealant primers in the northern Virginia, Fredericksburg, and Richmond VOC emissions control areas. These articles implement design, performance, and labeling standards for portable fuel container products before and after May 1, 2010, and prohibit owners from manufacturing, distributing, and selling noncompliant products.

The new chapter also includes an article that controls VOC emissions from asphalt paving operations in all VOC emissions control areas, which prescribes the use of emulsified asphalt coatings except for the purpose of coating residential driveways, and prohibits the mixing, storage, and application of noncompliant products.

Chapter 40, article 48 currently controls VOC emissions from mobile equipment repair and refinishing operations in the northern Virginia and Fredericksburg VOC emissions control areas. This article is being amended to implement these controls in the Richmond VOC emissions control area also.

Petition for Regulation of ELF Magnetic Fields

The Virginia State Air Pollution Control Board has received a petition to promulgate a new regulation concerning ELF magnetic fields around outdoor

overhead high-voltage electric power transmission lines. The petitioner states that an overhead high-voltage electric power transmission line conductor is a substance in the outdoor atmosphere which is or may be harmful to public health because the alternating motion of the conductor's electrons that establish an ELF magnetic field around the conductor are possibly carcinogenic to humans, that a reasonable precaution against exposures to the magnetic fields is necessary, and practices that encourage proximity to overhead transmission lines should be discouraged. In accordance with the board's public participation guidelines, the board will take public comment on the petition from April 26, 2010, through May 17, 2010.

West Virginia SIP Revision

On February 9, 2010, EPA took direct final action (75 Fed. Reg. 6305 (final rule), 75 Fed. Reg. 6336 (proposed rule)) to remove West Virginia's nitrogen oxides (NOX) SIP Call rules. EPA is approving this revision to remove West Virginia's NOX SIP Call rule effective April 12, 2010.

Initial Implementation of Alternative and Renewable Energy Portfolio

West Virginia's 2009 Alternative and Renewable Energy Portfolio requires large utilities selling electricity in West Virginia (e.g., Allegheny Energy and Appalachian Power) to include alternative and renewable energy sources in their generation mix. West Virginia utilities currently use coal for 99 percent of their electric generation and hydro power for 1 percent. The legislation requires that 25 percent of electric sales in West Virginia be met by alternative and renewable energy sources by 2025. The interim goals are 10 percent of sales by 2015 and 15 percent by 2020. A diversity of electric generation technologies can qualify as portfolio fuels: solar (thermal and photovoltaic), wind, biomass, river hydro, geothermal energy, and fuel cell technology. Natural gas can be used to meet one-tenth of the portfolio requirements. Allowable alternative fuels may also include advanced coal technologies that yield reduced CO₂ emissions, coal bed methane, coal gasification, coal liquefaction, integrated gasification combined cycle systems, waste coal, pressurized fluidized bed systems, ultra-

supercritical systems, and systems employing carbon sequestration and recycled energy. Greenhouse gas emission reductions or offset projects also qualify as portfolio opportunities. Efforts concentrating on reducing demand, such as peak demand reduction programs or customer energy efficiency programs, also qualify for the West Virginia portfolio.


The production of electricity qualified as "alternative" is tracked through the issuance of credits. An electric utility is granted one credit for each megawatt-hour (MWh) of electricity generated from an alternative energy source. An electric utility can receive two credits for every MWh of renewable energy generation. Renewable energy from a facility located on a reclaimed surface mine is awarded three credits per MWh.

Several West Virginia projects currently under consideration would qualify for the Alternative and Renewable Energy Portfolio. Appalachian Power's clean-coal technology 600 MW integrated gasification combined cycle electric generation plant proposed for location in Mason County would qualify. There is approximately 330 MW of wind power electricity currently in operation in West Virginia and another 626 MW of wind capacity has been permitted. West Virginia has 264 MW of river hydro operational and another 127 MW of hydro power is in the FERC permit stage. If these developed and permitted renewable energy projects totaling 1,347 MW were purchased by West Virginia utilities they would count as portfolio credits.

Natural Resources & Environment magazine is now on Twitter!

Receive quick and timely updates about open solicitations, upcoming interviews, cartoon contests, and more!

Follow and correspond with us at

FOLLOW US ON 

EPA REGION 4

Paula L. Cobb
Hopping Green & Sams, PA
Tallahassee, Florida

Alexia Borden
Balch & Bingham LLP
Birmingham, Alabama

Endangerment Finding Challenges

Florida, Alabama, Kentucky, Mississippi, and South Carolina were among the twelve states who filed a motion for leave to intervene in the case before the U.S. Circuit Court of Appeals for the District of Columbia challenging EPA's endangerment finding for emissions of greenhouse gases from new motor vehicles. *Coalition for Responsible Regulation, Inc. v. U.S. Environmental Protection Agency*, No. 09 1322 (D.C. Cir.).

State Updates

Alabama

Mr. Lance LeFleur, the owner of a Mobile recycling business, was appointed head of the Alabama Department of Environmental Management on April 16. He was originally scheduled to begin the job in June; however, his start date has been pushed forward in the light of the oil spill.

Georgia

On February 9, 2010, EPA approved revisions to the Georgia SIP. 75 Fed. Reg. 6309 (Feb. 9, 2010). The revisions include updating certain definitions to Georgia's air rules.

In 2008, environmental groups filed suit challenging an air permit authorizing Longleaf to construct and operate a new coal-fired power plant. Based on *Massachusetts v. EPA*, the Superior Court of Georgia invalidated the permit because no BACT analysis was completed for CO₂ and no effort was made to identify, evaluate, or apply available technologies, such as integrated gasification combined cycle (IGCC), for controlling CO₂. The Georgia Court of Appeals reversed the lower court and specifically reversed the

holdings that CO₂ is not a regulated pollutant under the Clean Air Act and therefore not subject to the PSD permitting requirements. On April 9, 2010, Longleaf was issued a final permit to construct.

Florida

In the 2010 legislative session, Florida enacted S.B. 550, to simplify the regulatory process and memorandum of agreement procedures associated with expedited permit applications and make renewable energy projects eligible for the consolidated and expedited permitting process. There are three distinct eligibility provisions applying to renewable energy generating facilities; biofuel or bio-diesel processing facilities; and agricultural lands greater than 1,000 acres in size that are used in the production of biofuel stocks. All three of these types of projects are eligible for expedited permit review in accordance with the newly enacted provisions of S.B. 550.

Mississippi

On January 13, 2010, EPA approved updates to the Mississippi SIP. In particular, Mississippi is updating portions of its SIP that have been incorporated by reference into the Mississippi SIP to reflect EPA-approved revisions that have occurred since the last update. 75 Fed. Reg. 1712 (Jan. 13, 2010).

Tennessee

On March 31, 2010, a district court in Tennessee held that the 1988 economizer and superheater replacement projects at Tennessee Valley Authority's (TVA) Bull Run plant were routine maintenance, repair, and replacement (RMRR). The National Parks Conservation Association and the Sierra Club filed this Clean Air Act citizen suit against TVA in 2001, alleging that TVA made major modifications of the plant without bringing pollution controls up to required standards. On March 30, 2009, the court denied the parties' summary judgment motions holding that genuine issues of material fact existed as to whether the economizer and superheater projects were "major modifications." Specifically, the court held that several issues of material fact remained, including whether the projects at issue were RMRR, whether the projects resulted in increased emissions, and whether TVA had fair notice of its obligations under the CAA. Trial on these issues commenced June 1, 2009.

Kentucky

Cash Creek Title V Decision, Dec. 15, 2009—After Kentucky permitted an IGCC plant, EPA Administrator Lisa Jackson decided (in response to a Title V petition) that the BACT analysis for the IGCC plant was invalid because the state did not require it to consider using natural gas instead of gasified coal.

EPA REGION 5

Harvey M. Sheldon
Hinshaw & Culbertson LLP
Chicago, Illinois

Federal Developments

Administrator Appointment

Susan Hedman has been appointed the new regional administrator for Region 5. She has most recently served as Illinois Attorney General Lisa Madigan's Environmental Counsel and Senior Assistant Attorney General, playing a role as chief negotiator for litigation and legislation relating to environmental protection, energy efficiency, renewable energy, carbon capture technology, and associated consumer issues. Prior to that, she held numerous positions in environmental law and policy including senior policy advisor on energy and recycling at the Illinois Department of Commerce and Economic Opportunity; staff attorney for the Environmental Law and Policy Center with cases focused on facilities in Illinois, Indiana, Iowa, Michigan, Minnesota, Ohio, and Wisconsin; First Legal Officer for the U.N. Security Council team charged with analyzing environmental damage from oil fires in Kuwait; and as research director for the Center for Global Change at the University of Maryland. In addition to her law degree, Dr. Hedman has a B.A. in politics and government from Ripon College, an M.A. from the La Follette Institute of Public Affairs at the University of Wisconsin-Madison, and a Ph.D. from the Gaylord Nelson Institute for Environmental Studies in Madison, Wisconsin.

Enforcement Priorities

In a recent brief interview, George Czerniak, head of Air Enforcement for the region, said that New Source

Review investigations continue to be at the top of the list for regional inspectors and enforcement attorneys. Most larger fossil-fueled utilities have already undergone scrutiny, and attention is shifting to smaller private and municipal electric systems. Additionally, cement production, glass manufacture, and acid production are to get special attention. A number of larger refineries and utilities have received violation notices. At refineries and large chemical production facilities, EPA inspectors are going to be making site inspections that include the taking of measurements at key valves and connections that are subject to leak detection and repair rules. At refineries especially, flaring of waste gas is a particular concern. EPA Region 5 believes that some companies may be "over-steaming" their flares. Steaming reduces smoke, but over-steaming can result in temperature reduction that allows excess emission of certain toxic air pollutants due to incomplete combustion.

Another enforcement priority in the last few months has been the issuance of violation notices to companies failing to control emission of refrigerants and other chemicals in violation of stratospheric ozone restrictions.

Schools Initiative

The region has focused some of its enforcement attention at areas of industrial production in the vicinity of schools. In addition to scrutinizing particular sources and taking enforcement action as warranted, the region is participating in a national study of toxic air pollutants by placing monitoring stations at 15 schools in the region's six states. EPA scientists warn against drawing conclusions at this point as their study is designed to determine whether long-term, not short-term, exposure poses health concerns for residents of the community, school children, and staff. Outdoor air at each of the schools is being monitored for 60 days, and air-quality monitors will take a minimum of 10 daily samples during the sampling period. Once monitoring is complete, the full set of results from all of the schools will be analyzed to evaluate the potential for health concerns related to long-term exposure to these pollutants.

Air Programs

Region 5 has renewed a request to the state of Michigan for a demonstration by the state that its Title V permit fee structure adequately supports and pays for the Title V program. According to an April 5, 2010, letter, EPA had been expecting a beefed-up fee structure and supporting submittal for over a year, but recent legislative effort has fallen short. The state is given thirty days to submit an adequate program respecting fees.

In early January, Cheryl Newton, director of the Air and Radiation Division for the region, advised the Wisconsin Department of Natural Resources (DNR) that it is not pleased with the apparent practice there of issuing “after the fact” construction permits for modifications of facilities that have already taken place. The region requested an explanation from the state and indicated it will further investigate the practice, which its communication deemed not compliant with requirements of the approved state implementation plan that construction not occur until permits are issued.

The Year in Review 2009 is now available online!



Section members are now able to view *Environment, Energy, and Resources Law: The Year in Review 2009* in the Section Members Only portion of the Section

Web site. The online version contains all chapters found in the printed copy, each in .pdf format. As a Section member, you have access to view *The Year in Review 2009*, as well as back issues starting from 2003, after logging onto the Web site with your ABA Member ID number and password.

www.abanet.org/environ/pubs/yir/

EPA REGION 5

Peter A. Tomasi
Quarles & Brady LLP
Milwaukee, Wisconsin

State Developments

Wisconsin NSR Reform Package Upheld

Administrator Lisa Jackson recently denied a closely watched petition challenging Wisconsin’s New Source Review (NSR) reform rules. The reform rules, approved in final form in December 2008, were subject to a petition for reconsideration based on claims that the rules violated the anti-backsliding provisions of section 193 of the Clean Air Act, and that EPA failed to address certain comments made on the rule. The anti-backsliding argument was based in part on a 2006 PowerPoint presentation prepared by Wisconsin DNR staff that suggested that implementation of the NSR reform rules could potentially increase emissions without triggering PSD. Granting reconsideration of the rules would have potentially opened the door to similar anti-backsliding challenges to the NSR reform rule packages adopted in other SIP-approved states.

In a decision issued earlier this year, Administrator Jackson declined reconsideration of the rule package, determining that EPA had adequately addressed comments submitted on the rule, and further determined that, based on the experience with NSR reform in Michigan, the program would not result in “negative outcomes.”

Illinois: Judge Partially Dismisses NSR Suit Against Current Owner

In mid-March, federal Judge John Darrah of the U.S. District Court for the Northern District of Illinois granted Midwest Generation LLC’s request to dismiss nine counts of a 38-count complaint brought by the state of Illinois and by the Obama administration. The order also partially dismissed a 10th count, while leaving the remainder of the plaintiffs’ 38 claims for relief intact. The NSR suit was filed last summer, and alleges that modifications triggering NSR were made to six Illinois plants that Midwest Generation purchased from Commonwealth Edison Co. in 1999. The alleged

changes occurred prior to the sale of the units to Midwest Generation.

Judge Darrah's order concluded that EPA regulations prohibit the construction or modification of a major stationary source without obtaining the required PSD permit. However, because any violation occurred at the time of construction—before Midwest Generation ever owned the plants—the company cannot now be held liable for those projects.

Ohio BAT Exemption Under Fire

The Ohio Environmental Protection Agency is currently appealing an order, issued by a federal magistrate judge, that found unlawful a small-source air permitting exemption. On February 2, federal magistrate Mark Abel issued granted partial summary judgment in favor of environmental plaintiffs, determining that when Ohio adopted regulations in 2006 exempting sources with emissions of less than 10 tons of volatile organic compounds from imposing best available technology (BAT), the state violated the Clean Air Act and the requirements of the Ohio SIP. Magistrate Judge Abel further ruled that the provisions of Ohio Revised Code 3704.03, which contained a statutory BAT exemption for sources under 10 tons, are preempted by the Clean Air Act and by the provisions of the Ohio SIP. Both determinations were reached in part by the fact that while Ohio created the 10-ton exemption in

2006, it did not submit the exemption as a part of a SIP revision package until 2008, and EPA later found the proposed SIP revision to be incomplete.

Ohio EPA has filed an appeal with the Sixth Circuit on the issue of standing, and has filed a request for an emergency stay of the district court proceedings pending the outcome of that appeal. In the interim, the agency has issued guidance to permit writers requiring them to make case by-case BAT determinations for sources smaller than 10 tons.

Indiana Achieves Statewide NAAQS Attainment

At the end of April, Indiana Governor Daniels announced that for the first time since the passage of the 1970 Clean Air Act, all 92 Indiana counties met all applicable federal air quality standards in 2009. EPA redesignated Lake and Porter counties and a portion of Dearborn County, the last three areas in Indiana classified as nonattainment, as having reached attainment with the 1997 8 hour health-based ozone standard.

Michigan, Minnesota

No update for Minnesota and Michigan in this quarter.



The premier forum on environment, energy, and resources law.

18th Section Fall Meeting:

The ABA Environment, Energy, and Resources Law Summit

September 29–October 2, 2010
Sheraton New Orleans
New Orleans, LA

The background of the flyer features a close-up, artistic photograph of a bird's nest with several eggs, rendered in a soft, pinkish-red color palette.

EPA Region 9

Eric L. Hiser

Jorden Bischoff & Hiser, PLC
Scottsdale, Arizona

Judicial Developments

In *American Trucking Ass'n v. EPA*, — F.3d —, 2010 WL 1353599 (D.C. Cir. 2010), the District of Columbia Circuit Court of Appeals upheld EPA's decision to allow California to impose emission standards on in-use nonroad engines, particularly truck refrigeration units (TRUs). In 1994, CARB imposed rules on TRUs that were *operating* in California, not just those that were based in California. It then sought approval from EPA. Under the relevant provisions of the Clean Air Act, EPA is required to approve California's proposed TRU rule unless EPA concluded that (i) California unreasonably determined that its rule is at least as protective of public health and welfare as federal standards, (ii) California does not need its rule to meet compelling and extraordinary conditions in the state, or (iii) California's rule precludes other states from choosing not to regulate TRUs or imposes excessive costs. ATA did not challenge EPA's decision under the first criterion; instead, ATA contended that EPA erred in applying the second and third criteria. The court deferred to California and EPA's conclusion that California suffers from continuing poor air quality, which satisfied the second prong. On the third prong, ATA had argued that California's rule effectively precluded states from not adopting the California rule because so many of the nation's trucks pass through California. The court declined this challenge, holding that the Clean Air Act does not impose a "constitutional Commerce Clause"-like test to uphold a state regulation. Senior Circuit Judge Williams dissented in part.

In *Natural Resources Defense Council v. South Coast Air Quality Management District*, — F. Supp. 2d —, 2010 WL 939990 (C.D. Cal. Jan. 7, 2010), the district court for the Central District of California rejected an attempt by NRDC and other environmental groups to sue the SCAQMD to preclude the use of certain internal offsets for

nonattainment areas under SCAQMD's air pollution control program. In a complex, 25-page decision, the court held: (1) the review of contents of a state implementation plan (SIP) for a nonattainment area could not be made in context of a CAA citizen suit in district court; (2) the court of appeals has exclusive jurisdiction to hear any citizen suit under a CAA provision that challenges the content of SIPs for nonattainment areas; the CAA citizen suit claiming that validity of distribution of pre-1990 credits by the air quality management district could not be verified, in violation of the SIP for the nonattainment area, could not be brought under regulations that identified types of emissions standards and limitations that had to be set forth in the SIP; (3) a cause of action against SCAQMD, which sought to have internal offsets "retired" when facilities shut down or otherwise cease their utilization of credits, was moot; (4) district's internal offsets did not have to comply with requirements of rules that applied only to applications for, and calculation of, emission reduction credits (ERCs); (5) neither SIP, nor permit program contained within SIP, was required to include tracking system as to emission reduction credits or other offsets; and (6) a *Federal Register* preamble issued in connection with approval of SIP by EPA for nonattainment area does not create a SIP duty that can be enforced under citizen suit provision of CAA.

Regional Administrative and Enforcement Developments

EPA obtains penalties against Mobil Oil subsidiaries for failure to install VOC controls. EPA obtained a \$2.4 million settlement from Mobil Oil Guam, Inc., and Mobil Oil Mariana Islands, Inc., for the companies' alleged failure to install VOC emission controls on large storage tanks and on loading racks. Both Mobil Oil subsidiaries agreed to install air pollution controls and monitors, submit required reports, and obtain appropriate permits. In addition to the penalty, the Mobil subsidiaries estimated that they will spend more than \$15 million to bring the two bulk gasoline terminals into compliance with the Clean Air

Act and reduce VOC emissions by approximately 400 tons.

EPA orders Columbus Manufacturing to take corrective actions to address anhydrous ammonia leak. During an August 2009 incident, a Columbus Manufacturing plant in the San Francisco area accidentally released approximately 200 pounds of anhydrous ammonia into the air, causing the evacuation of all facility employees and several neighboring businesses. Nearly 30 people from the nearby Genentech campus sought medical attention and 17 individuals were hospitalized. One person remained hospitalized for four days. In addition, off-ramps from Highway 101 and several local streets were shut down as a result of the release.

The facility's accidental release in August was allegedly caused by a buildup of hydrostatic pressure in a section of piping which caused the subsequent rupture of a nearby component. Following the incident, EPA and San Mateo County's Division of Environmental Health Services inspections revealed a number of safety concerns regarding the design and maintenance of the facility's anhydrous ammonia refrigeration system. EPA ordered Columbus Manufacturing to complete a series of tasks including the replacement of certain safety relief valves, the replacement of all components with any signs of corrosion or made from incompatible materials such as brass, and the proper tagging and labeling of all of its ammonia refrigeration system piping and valves. The facility has 105 days to comply.

EPA releases regional enforcement results. On December 23, 2009, EPA released its 2009 enforcement summary for each state and territory. The information can be found on the EPA Region 9 Web site under press releases for December 23, 2009.

Arizona

ADEQ seeks to adopt new major and minor NSR program. ADEQ has been involved in an intensive

stakeholder process to develop a new minor NSR program and adopt the federal major NSR changes. On federal major NSR, ADEQ has proposed basically to follow the federal rule, but is considering using a five-year, instead of ten-year, look-back period and using a single baseline period for all pollutants, instead of the federal rule's multiple baseline periods. ADEQ has also expressed a belief that all projects using the projected actual emissions (PAE) should maintain records of their emissions.

On minor NSR, ADEQ is proposing to require registration for sources exceeding one-half of the PSD significance thresholds. Registration sources would submit basic information and would need to renotify if emissions changed significantly. ADEQ also proposes to define a new category of "minor NSR modification" which includes Class I or Class II sources that make a change that exceeds one-half of the PSD significance thresholds (the so-called permit exemption thresholds). Facilities that trigger minor NSR would need to demonstrate either (1) that they will not cause or contribute to a NAAQS violation; or (2) install RACT. New source performance standards (NSPS), EPA's control technique guidelines, certain county rules, and general permits designated as RACT are designated as "presumptive RACT" for sources that do not want to go through the modeling effort, although ADEQ reserves the right to require modeling in appropriate cases. A proposed rule is anticipated in the *Arizona Register* in the next several months.

On March 23, 2010, Governor Jan Brewer submitted her recommendations to EPA for designation of new PM_{2.5} nonattainment areas in Pinal County. The governor recommended a 24-hour PM_{2.5} proposal to require an annual PM_{2.5} nonattainment area based on a single, localized hot spot monitor, citing 40 C.F.R. § 58.30(a)(1). A copy of the governor's letter is available at: <http://www.azdeq.gov/enviro/air/plan/download/032910a.pdf>.

California

On April 13, 2010, EPA approved into the SIP a new "new source review" rule for the San Joaquin Unified

Air Pollution Control District. The stricter rule will affect approximately 350 facilities in the area emitting more than 10 tpy of ozone-producing pollutants rather than the current threshold of 25 tpy. The approved action is part of an ongoing effort to improve air quality in the San Joaquin Valley, which is currently designated as an extreme nonattainment area for ozone or smog. At the same time, EPA revised the state's Clean Air Plan to require permitting of agriculture facilities emitting more than 5 tpy of ozone-producing pollutants, consistent with state law.

Upcoming Section Programs—

For full details, please visit www.abanet.org/environ/calendar/

June 7

The Current State of Carbon Trading
Quick Teleconference

June 11

38th National Spring Conference on the Environment—Chemicals Regulation: REACHing for TSCA Reform
Primary Sponsor ABA Standing Committee on Environmental Law
Baltimore, MD

June 14-15

Environmental Issues in Region 6: Recent Developments and Hot Topics
Dallas, TX

June 18

Meet the Administration: A Luncheon Visit with Associate General Counsel Leslye M. Fraser S.M., J.D., Office of General Counsel, Pesticides and Toxic Substances Law Office, U.S. EPA
Quick Teleconference

June 23

Developing Offshore Wind Power in Reverse: Community Driven Development Models
Quick Teleconference

EPA REGION 10

Kirk A. Lilley
Kirk Lilley PLLC
Seattle, Washington

Ninth Circuit Title V Decision

In March the Ninth Circuit denied a petition challenging a Title V permit issued to an oil and gas processing plant in Prudoe Bay, Alaska. *MacClarence v. EPA*, No. 07 72756 (Mar. 4, 2010). The Alaska Department of Environmental Conservation (ADEC) issued the permit to British Petroleum Exploration (BP) for “Gathering Center #1” (GC1). GC1 is part of the Prudoe Bay Unit (PBU) operated by BP. The PBU is a series of oil and gas facilities—well pads, production centers, and support facilities—extending over 300 square miles on Alaska’s North Slope.

MacClarence had petitioned EPA to object to issuance of the permit for failure to aggregate all the pollutant-emitting sources in the PBU into a single stationary source. But EPA denied the request, finding that MacClarence failed to meet his burden under Title V to “demonstrate” that the permit did not comply with the Clean Air Act. The Ninth Circuit upheld EPA’s denial based on the agency’s conclusion that MacClarence failed to provide adequate information to support his claim. The court, therefore did not evaluate whether MacClarence’s substantive aggregation argument was correct. The opinion does, however, describe the substantive issues, which may be of interest to practitioners handling source aggregation issues.

The opinion explains that both MacClarence and EPA Region 10 submitted comments on the draft Title V permit, asking ADEC to treat GC1 as part of a larger stationary source consisting of all BP units within Prudoe Bay, because they are interdependent, located on adjacent properties, and operated by the same person under common control. After additional back-and-forth, ADEC, EPA, and BP engaged in discussions to settle the issue, resulting in a new permit using a “hub-and-spoke” aggregation model. Under this model, ADEC aggregated GC1 with the well pads

that supply it with crude oil, but not with all the other Prudoe Bay Unit facilities. The opinion quotes ADEC’s explanation that it did not aggregate the entire PBU because (1) it covers roughly 300 square miles and aggregation for such a large region “stretches the concept of proximity” underlying aggregation determinations, (2) the complexity of administering and operating such a large source without clear corresponding environmental benefit argues against aggregation, and (3) there is no precedent for defining such a large stationary source.

EPA Issues PSD Permits for Exploratory Drilling in the Arctic OCS

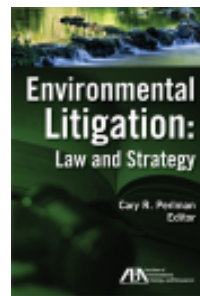
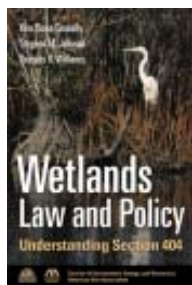
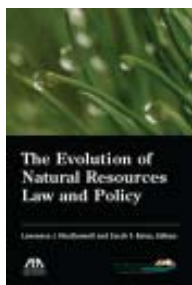
EPA Region 10 has issued two final PSD permits to Shell for a multiyear exploratory oil and gas drilling program with a drillship and support fleet on Outer Continental Shelf leases in the Chukchi and Beaufort Seas, north of Alaska’s seaward boundary. The region issued the Chukchi permit in January and the Beaufort permit in February.

The permits require BACT-level controls for emission sources (engines, generators, and an incinerator) onboard the drillship, and impose operational limits on the support fleet of two icebreakers and a supply ship.

The permits also require Shell to use selective catalytic reduction on one of the icebreakers, catalytic diesel particulate filter on a supply vessel, and ultra-low sulfur diesel fuel in all vessels that comprise the project.

Alaska Seafood Company to Pay \$570,000 Penalty

Westward Seafoods Inc., which operates a seafood processing plant in Dutch Harbor, Alaska, is paying a \$570,000 civil penalty to settle EPA allegations under the Clean Air Act that it burned roughly 1.3 million gallons of diesel fuel with excessive sulfur, operated diesel generators with inoperable controls, failed to respond to repeated requests for information from state and federal inspectors, and failed under the Emergency Planning and Community Right-to-Know Act (EPCRA) to annually report 80,000 pounds of ammonia in use and storage at the Dutch Harbor plant. Under the settlement agreement, the Seattle-based company must create a preventative maintenance and operations plan, develop and implement an annual training plan for all employees responsible for operating generating equipment, develop and submit to EPA an organizational chart of staff with environmental compliance responsibilities, and develop internal procedures for submitting required reports.



www.ababooks.org

Your Source for Books from the
Section of Environment,
Energy, and Resources
and ABA Publishing

One Million Trees Project



American Bar Association
Section of Environment,
Energy, and Resources

One Million
Trees Project—
Right Tree for the Right Place
at the Right Time

One Million Trees by 2014

The American Bar Association's Section of Environment, Energy, and Resources (SEER) announced its **"One Million Trees Project - Right Tree for the Right Place at the Right Time"** nationwide public service project in March 2009. We call on ABA members to contribute to the goal of planting one million trees across the United States in the next five years. Trees are important to the environment through their

ability to reduce atmospheric carbon dioxide and also contribute to the overall health of communities, wildlife and aesthetics. In addition to the actual planting of trees, SEER also intends through public outreach and partnering efforts, to raise the nation's awareness of the multiple benefits of trees and their role in helping to fight climate change.

How to get started

A key aspect of the project is ABA partnerships with well recognized tree-planting organizations, including Alliance for Community Trees, The Arbor Day Foundation, Tree Link/Tree Bank, American Forests, and the Institute for Environmental Solutions. Members are encouraged to get involved in

hands-on tree planting activities in their communities in addition to purchasing a tree or trees through the program partners.

To participate in this project please visit any of the information pages at our partners' websites.

Our Partners



For more information, please visit our Web site at:

http://www.abanet.org/enviro/projects/million_trees/home.shtml