

# Air Quality Committee Newsletter

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## MESSAGE FROM THE COMMITTEE CHAIR

**Angela Morrison Uhland**  
**Hopping Green & Sams, P.A.**  
**Tallahassee, Florida**  
***auhland@hgslaw.com***

The Section's 39th Annual Conference on Environmental Law is moving to Salt Lake City, Utah, in 2010, and we hope you can join us! The conference will be held March 18–21, 2010, at The Grand America Hotel. The Annual Conference on Environmental Law (commonly referred to as the Keystone Conference in the past) is one of the most important educational and professional gatherings available today for environmental law practitioners, academics, nonprofit lawyers, and government lawyers. What began thirty-eight years ago as a small gathering of committed and passionate lawyers has grown to a program that today consistently draws more than 300 attendees. What once was a program known for its morning CLE sessions and free afternoons for the slopes is now a conference spanning four days full of cutting-edge plenary and breakout sessions, packed with keynote and special speakers and an abundance of networking sessions.

The Air Quality Committee members will be getting together for a lunch and a dinner at the Annual Environmental Law Conference, and we will have many opportunities for networking. Also, you won't want to miss the air quality panel. The title of the air panel this year is "Implementing the Obama Administration Clean Air Agenda at One Year." Barely one year into the Obama administration, new EPA

leadership already has taken significant steps toward defining an entirely new clean air agenda. At the one-year mark of the new agenda, with leadership on air, policy, legal, and science issues in place, this panel will discuss the next steps in the Obama administration's ambitious air agenda through new rulemakings and court actions, and its efforts to chart a course for how to achieve its policy goals during the remaining years of the administration. The panel will identify the key Obama administration clean air priorities identified to date, steps the Obama EPA has taken to reverse Bush administration policies, additional policy initiatives the Obama administration likely will identify for the remainder of the term, and steps the Obama EPA likely will take through rulemakings, policies, and litigation to achieve such goals. The speakers on this panel include Gina McCarthy, EPA assistant administrator, Office of Air and Radiation; Robert Meyers, former acting administrator, Office of Air and Radiation; and Vickie Patton, with the Environmental Defense Fund. Roger Martella, former general counsel for EPA, will moderate.

We hope to see you March 18–21 in Salt Lake City. For more information and to register, go to: [www.abanet.org/environ/envlaw/](http://www.abanet.org/environ/envlaw/).

### **BACK ISSUES**

Back issues of this newsletter  
can be found at

[http://www.abanet.org/environ/committees/  
airquality/newsletter/archiveslist.shtml](http://www.abanet.org/environ/committees/airquality/newsletter/archiveslist.shtml)

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**Vol. 13, No. 2, March 2010**  
*Philip E. Karmel, Editor*

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**MESSAGE FROM THE EDITOR**

**Philip E. Karmel**  
**Bryan Cave LLP**  
**New York, N.Y.**  
***pekarmel@bryancave.com***

All members of the Air Quality Committee are welcome to submit articles for the newsletter. Articles may be focused on a new air quality regulation, judicial decision, guidance document, or any other topic that would be of potential interest to committee members. Brief notes on a particular development are as welcome as more lengthy submissions.

As this newsletter is submitted to the ABA staff for publication, there have been several important recent developments that are worthy of mention.

**I. New Nitrogen Dioxide NAAQS**

On February 9, 2010, the U.S. Environmental Protection Agency (EPA) published a new National Ambient Air Quality Standard (NAAQS) for nitrogen dioxide (NO<sub>2</sub>). 75 Fed. Reg. 6474. The new standard is 100 ppb over a one-hour period. To attain this standard, the three-year average of the 98th percentile of the annual distribution of one-hour daily maximum NO<sub>2</sub> concentrations must not exceed 100 ppb. The rulemaking documents state that, based on current data, Cook County, Illinois, is the only area of the country that would be designated as nonattainment with the new standard, but that EPA intends to implement a new NO<sub>2</sub> monitoring network near major roadways whose transportation sources may result in elevated NO<sub>2</sub> concentrations.

**II. PSD Permitting as a Battleground for the Use of Coal Rather Than Natural Gas to Generate Electricity**

On December 15, 2009, the EPA administrator issued an order in *In the Matter of Cash Creek Generation, LLC*, Petition Nos. IV-2008-1 & IV-2008-2, an air permit proceeding for a proposed electric generating facility in Henderson County, Kentucky. As proposed, the facility would use an Integrated Gasification Combined Cycle (IGCC) process that would process

coal to produce coal-derived synthetic gas that would then be combusted in two gas-fired combustion turbines in combination with heat recovery steam generating units in order to produce 770 MW of electricity. The IGCC process is notably less polluting than a conventional coal-fired power plant.

Nevertheless, opposition groups challenged the air permit issued by the Kentucky Division for Air Quality alleging that the plant would be cleaner still if it were to burn natural gas rather than coal-derived synthetic gas and that, accordingly, the Best Available Control Technology (BACT) requirement of the Prevention of Significant Deterioration (PSD)-permitting program requires the plant to operate on natural gas. EPA granted the opponents' petition after concluding that the record before the state permitting agency was insufficient to uphold its rejection of natural gas as BACT for the facility. More specifically, EPA took the state agency to task for failing to document its conclusion that natural gas is not "available" for the facility. EPA directed the agency to develop a more complete record on this issue. EPA declined to hold that the BACT requirement required the use of natural gas, concluding that this was a determination for the state permitting agency to make after it developed the record further. The disturbing implication of the EPA decision is that under its reasoning the "availability" of natural gas for an electric generating facility could foreclose the use of coal-based IGCC technology as noncompliant with BACT, a conclusion that would be at variance with EPA's own acknowledgment in the same order, that the "deployment of IGCC technology is one of the important technologies and a positive strategy to reduce emissions from coal-fired electricity generation."

### **III. Rejection of PM<sub>10</sub> as a Surrogate for PM<sub>2.5</sub> in the Air Permitting Process**

Airborne particulate matter (PM) consists of many different substances suspended in air in the form of particles that vary in size. Fine particles are defined as less than 2.5 micrometers in diameter and are known as PM<sub>2.5</sub>. Particles less than 10 micrometers in diameter, which include both fine and coarse particles, are known as PM<sub>10</sub>. In a different portion of the same order (In the Matter of Cash Creek Generation, LLC,

Petition Nos. IV-2008-1 & IV-2008-2), EPA rejected the state agency's use of PM<sub>10</sub> as a surrogate for PM<sub>2.5</sub> in the PSD permitting process, holding that the agency failed to establish that the use of a surrogate for PM<sub>2.5</sub> was appropriate.

### **IV. EPA Administrator Outlines Agency's Plan to Regulate Greenhouse Gases Under the Clean Air Act**

On February 22, 2010, the EPA administrator, in a public letter to Senator Jay Rockefeller of West Virginia, laid out in some detail EPA's plans to regulate carbon dioxide and other greenhouse gases under the Clean Air Act. The letter is posted on the EPA Web site at [http://epa.gov/oar/pdfs/LPJ\\_letter.pdf](http://epa.gov/oar/pdfs/LPJ_letter.pdf).

## **EPA REGIONAL REPORTS**

### **EPA HEADQUARTERS**

**Gale Lea Rubrecht**  
**Jackson Kelly PLLC**  
**Charleston, W.V.**  
**[galelea@jacksonkelly.com](mailto:galelea@jacksonkelly.com)**

#### **I. Air Toxics**

On August 26, 2009, EPA announced in the *Federal Register* (74 Fed. Reg. 43,124) the availability of a letter dated July 22, 2009, from Adam M. Kushner, director of the U.S. Environmental Protection Agency's (EPA's) Office of Civil Enforcement, addressing concerns that have been raised following the D.C. Circuit's decision in *Sierra Club v. EPA*, 551 F.3d 1019 (D.C. Cir. 2008). That court decision vacated two provisions in EPA's General Provisions Rule, namely 40 C.F.R. § 63.6(f)(1) and (h)(1), promulgated under § 112 of the Clean Air Act (CAA), which exempt sources from the requirement to comply with otherwise applicable § 112(d) emission standards during periods of start-up, shutdown, and malfunction (SSM). The two provisions remain in effect, however, until the court's mandate issues. In the letter, EPA lists

the § 112(d) source category rules that will and will not be affected once the court issues the mandate, vacating the SSM exemptions in 40 C.F.R. § 63.6(f)(1) and (h)(1). EPA recognizes that the legality of source category-specific SSM provisions may now be called into question as a result of the decision and promises in the letter to evaluate each of them. EPA also recognizes that some sources may be unable to comply with § 112(d) standards during SSM events. The letter states that, for such sources, “EPA will determine an appropriate response based on, among other things, the good faith efforts of the source to minimize emissions during SSM periods, including preventative and corrective actions, as well as root cause analyses to ascertain and rectify excess emissions, and whether the source has developed and implemented an SSM plan to minimize such emissions.” The letter further states that EPA intends to “closely scrutinize any claim that a Section 112(d) standard cannot be met during a malfunction to determine whether the event was in fact ‘sudden, infrequent, not reasonably preventable’ and was not instead ‘caused in part by poor maintenance or careless operation.’” The letter encourages sources that anticipate compliance difficulties to contact EPA or state regulatory authority and indicates that in some cases an administrative order on consent that includes a schedule for the source to achieve compliance during SSM events may be appropriate.

On October 14, 2009, EPA published an advance notice of proposed rulemaking (ANPR) to request public comment on ideas for improvements that could be made to the emissions factor program (74 Fed. Reg. 52,723). An emissions factor is a representative value that attempts to relate the quantity of a pollutant released to the atmosphere with an activity associated with the release of that pollutant. The EPA-approved emissions factors are contained in an online document called the “AP-42 Compliance of Air Pollutant Emissions Factors.” Emission factors have long been a fundamental tool in developing national, regional, state, and local emission inventories for air quality management decisions and in developing emissions control strategies. More recently, emissions factors have been applied in determining site-specific applicability and emissions limitations in operating permits by agencies, consultants, and industry. In 2003 and 2004, EPA held workshops to solicit input on

what is needed to update and improve the emissions factors program. Stakeholders indicated that EPA needs to continue to maintain the AP-42 factors information compilation and retrieval system. Stakeholders also agreed that it takes the agency too long to develop emissions factors; data submitted for regulatory development have not been used to develop new emissions factors; there have been several inappropriate uses of emissions factors; and, in general, EPA is not developing new emissions factors. Stakeholders urged EPA to develop criteria to address the development and uses of emissions factors for purposes other than just emissions inventory development, including uses such as screening tools for preparing air program permit applications, compliance determinations, and applicability determinations. They also criticized the current program as unresponsive to their needs, too complex for their active participation, and lacking transparency concerning data manipulation. Comments of the National Academy of Sciences and EPA’s Office of Inspector General agreed with those of the other stakeholders. They also noted that EPA should quantify uncertainty to improve emissions factors and should develop and/or update emissions factors regularly. In the ANPR, EPA states it intends to implement a multipart process to improve the emissions factors program. EPA also states it is considering requiring industries to submit certain performance testing information to it via electronic reporting. Under the proposed system, source test data would be compiled electronically via the Electric Reporting Tool (ERT) by the source submitting the data. The ERT provides a format and a process that (i) documents the key information and procedures required by the existing EPA Federal Test Methods; (ii) facilitates coordination among the source, the test contractor, and the regulatory agency in planning and preparing for the emissions test; (iii) provides for consistent criteria to characterize quantitatively the quality of the data collected during the emissions test; (iv) standardizes the form and content of test reports; and (v) calculates the emissions factor, and exports the emissions factor and associated data to WebFIRE. Theoretically, WebFIRE could be structured to calculate a new or revised emissions factor whenever a qualified test is submitted. While EPA acknowledges that updating emissions factors frequently may be disruptive to emissions factors users by creating a moving target and

uncertainty, the agency's approach of scheduling periodic updates may also be problematic for sources with permit limits based on EPA emissions factors. Key issues identified in the ANPR for comment include (i) revisions to the existing ERT, including need for a third-party review, format for tests data ratings, and need for a specific process-related information; (ii) WebFIRE development, including emission factor development decision criteria, data groupings, need for and format of additional statistical parameters, how to assess non-U.S. EPA performance testing methods, and the frequency of emission factor updates; and (iii) identification of steps to enhance public review of the emissions factor development process and outcome and to contribute to the timely development of new and revised factors. Comments were due November 13, 2009.

On October 28, 2009, EPA published a proposed rule to withdraw a portion of final amendments to air toxic standards for petroleum refineries that former EPA Administrator Johnson signed on January 16, 2009 (74 Fed. Reg. 55,505). Those amendments addressed the risk remaining after application of maximum achievable control technology (MACT) standards, provided the results of EPA's eight-year review of development and practices, processes, and control technologies that have occurred during that time, and amended the standard for petroleum refineries to add additional MACT standards for heat exchange systems. EPA has now determined that the residual risks and technology reviews may not accurately characterize the risk posed by petroleum refineries. Comments were due November 27, 2009, unless a public hearing was requested by November 9, 2009. If a public hearing was timely requested, comments were due December 14, 2009. EPA also published a final rule identical to that signed on January 16, 2009, to add technology-based MACT for heat exchanger controls and amend the general provisions cross-reference table of the existing refinery MACT 1 Rule (74 Fed. Reg. 55,670). The final rule took effect October 28, 2009.

On October 29, 2009, EPA published final national emission standards for the control of hazardous air pollutants (HAPs) for nine area source categories in the chemical manufacturing sector (74 Fed. Reg.

56,008). The final rule establishes emission standards in the form of management practices for each chemical manufacturing process unit as well as numerical emission limits and additional emission control requirements for certain process vents, storage tanks, surge control vessels, bottoms receivers, wastewater systems, and heat exchange systems. The management practices require quarterly inspections for leaks. The rule requires 85 percent reduction from existing batch process vents and 90 percent reduction from batch process vents at new sources; 95 percent reduction from continuous process vents except during period of start-up and shutdown at which time an 85 percent reduction is required; 95 percent reduction from process vents emitting metal HAPs; improved controls for storage tanks, surge control vessels, and bottom receivers; removal of organic HAPs from certain wastewater streams before discarding streams to a wastewater treatment system; on-site or off-site treatment of all wastewater; and quarterly monitoring of certain heat exchange systems. The rule requires each facility to submit one-time notifications of applicability and compliance status, submit semiannual compliance reports under certain circumstances, and keep records to demonstrate compliance. The nine area source categories are (i) Agricultural Chemicals and Pesticides Manufacturing; (ii) Cyclic Crude and Intermediate Production; (iii) Industrial Inorganic Chemical Manufacturing; (iv) Industrial Organic Chemical Manufacturing; (v) Inorganic Pigments Manufacturing; (vi) Miscellaneous Organic Chemical Manufacturing; (vii) Plastic Materials and Resins Manufacturing; (viii) Pharmaceutical Production; and (ix) Synthetic Rubber Manufacturing. This final rule took effect October 29, 2009.

On December 2, 2009, EPA published a final rule establishing national emissions standards for the control of HAPs from area source asphalt processing and asphalt roofing manufacturing facilities (74 Fed. Reg. 63,236). The rule requires affected facilities to operate within specific emission limits on a continuous basis. The emission limits do not apply to hot-mix asphalt facilities, such as those used for road construction. Nor do the standards apply to companies that install built-up roofing (i.e., roofing components including asphalt and aggregate that are combined at the job site instead

of at a manufacturing facility). Affected facilities covered by the final rule are exempt from obtaining Title V permits. The final rule took effect December 2, 2009.

On December 3, 2009, EPA published a final rule establishing national emission standards for control of HAPs for the paint and allied product manufacturing area source category (74 Fed. Reg. 63,504). Under the final rule, the control requirements only apply when an operation is being performed at a process vessel that uses materials containing HAPs. In particular, the final rule requires facilities to operate a particulate control device to reduce emissions of metal air toxics and use management practices to control volatile air toxics emissions. EPA will address limits of volatile organic compounds (VOCs) in a separate consumer products rulemaking. The rule further requires submission of a one-time notification of applicability and initial compliance status and annual compliance certifications for the previous calendar year only if the facility does not meet the requirements of the rule. The final rule took effect December 3, 2009.

On December 8, 2009, EPA released its annual analysis of the Toxic Release Inventory (TRI) of 2008 data, the most recent data set available. The TRI database contains information on chemical releases into the air, land, and water, as well as waste management and pollution prevention activities. The analysis of 2008 data shows air releases decreased 14 percent from 2007 and 30 percent from 2001. This marks the first time that EPA has released its annual analysis in the same calendar year as the data were reported.

On December 15, 2009, EPA published a proposed rule to amend and clarify certain definitions and applicability provisions of the national emission standards to control HAPs from gasoline distribution bulk terminals, bulk plants, and pipeline facilities and from gasoline dispensing facilities, which EPA promulgated on January 10, 2008, and amended on March 7, 2008 (74 Fed. Reg. 66,470). In particular, the proposed amendments include clarification of the definitions of storage tanks, bulk gasoline plants, and gasoline dispensing facilities; clarification of how to calculate and record gasoline throughput; clarifications concerning the inspection, testing, monitoring, record-

keeping, and reporting requirements on various required control technologies; and what to do in the case of overlapping federal standards. Comments are due February 16, 2010.

On December 16, 2009, EPA finalized emissions limits to control HAPs from area source chemical preparations facilities. The final rule limits emissions of particulate matter (PM) that contain chromium, lead, manganese, or nickel compounds. Facilities subject to the rule will be required to operate within specific emission limits, and facility operations that conduct mixing, milling, blending, or extruding, of dry and/or wet chemicals will be required to route their PM emissions to controls that achieve ninety-five percent PM reductions.

On December 16, 2009, EPA finalized emissions limits for air toxics from area source prepared feeds manufacturing facilities. The rule applies to facilities that produce animal (not including cat and dog) feed products and use chromium compounds or manganese compounds. All facilities that are subject to the rule will be required to apply management practices in areas of the facility where materials containing chromium or manganese are stored, used, or handled. In addition, facilities with an average daily feed production level of more than fifty tons per day will be required to have control equipment to reduce emissions from pelleting/pellet cooling. Compliance provisions in the rule include requirements for notifications, record keeping, and reporting. Within 120 days of the effective date of the final rule, each facility is required to submit an Initial Notification to EPA containing basic information about the facility and its operations. For demonstrating ongoing compliance, the requirements include daily, monthly, quarterly, and annual inspections and certifications that the management practices are being followed and the control equipment is operating properly. EPA is exempting chemical preparation facilities that would be covered by this rule from obtaining Title V permits.

## **II. Climate Change**

On October 30, 2009, EPA published the final mandatory greenhouse gas (GHG) reporting rule requiring reporting of GHG emissions from all sectors

of the economy (74 Fed. Reg. 56,260). The rule requires only monitoring and reporting of GHGs above certain threshold levels. Generally, the threshold for reporting is 25,000 metric tons or more of carbon dioxide (CO<sub>2</sub>) equivalent per year. The rule applies to direct GHG emitters, fossil fuel suppliers and industrial gas suppliers, and manufacturers of heavy-duty and off-road vehicles and engines. The only emission source in the agriculture sector covered by the rule is manure management systems at livestock operations. Reporting is at the facility level, except that certain suppliers of fossil fuels and industrial GHGs along with vehicle and engine manufacturers will report at the corporate level. The final rule takes effect December 29, 2009, and requires facilities and suppliers to begin collecting data three days later on January 1, 2010. The first emissions report for emissions during 2010 is due March 31, 2011. In the final rule, EPA added a provision to allow use of best available data in lieu of the required monitoring methods for January through March 2010. Facilities can request an extension beyond March 2010, but EPA will not approve any requests for an extension beyond 2010. Manufacturers of vehicles and engines outside of the light-duty sector will begin reporting CO<sub>2</sub> for model year 2011 and other GHGs in subsequent model years as part of existing EPA certification programs. Reports are submitted annually unless the reporters are facilities with electric generating units that also report under the Acid Rain Program. Those reporters will continue with current practices, as well as submit annual GHG emission reports under the reporting rule. Other source categories can use facility-specific calculations to estimate their emissions. Oil, natural gas, and industrial gas suppliers will report the amount and type of products they produced, imported, and exported. Reporters are required to self-certify the data they submit to EPA. The agency will then verify the data submitted and will not require third-party verification. The rule does not preempt states from requiring their own GHG emission reporting.

In the final rule, EPA made a number of changes from the proposed rule that was published April 10, 2002. For example, EPA reduced the number of source and supply categories that facilities and suppliers must report under the final rule. The following source and

supply categories are not required to report at this time: electronics manufacturing; ethanol production; fluorinated GHG production; food processing; industrial landfills; magnesium production; oil and natural gas systems; SF<sub>6</sub> from electrical equipment; underground coal mines; wastewater treatment; and suppliers of coal. EPA also replaced the “once-in/always-in” provision in the proposed rule with a mechanism for facilities and suppliers to cease annual reporting by reducing their GHG emissions. Facilities and suppliers may cease reporting after five consecutive years of emissions below 25,000 metric tons CO<sub>2e</sub>/year; after three consecutive years of emissions below 15,000 metric tons CO<sub>2e</sub>/year; or if the GHG-emitting processes or operations are shut down. Regarding combustion sources, EPA added exemptions for unconventional fuels, flares, hazardous wastes, and emergency equipment; reduced the need for mass flow monitors for some units and fuels; and allowed more facilities to aggregate reporting of emissions from smaller units rather than report emissions for each individual unit. For manure management systems, EPA added an animal population threshold to reduce the burden of determining applicability and reduced the monitoring requirements. In addition, EPA added monitoring options, changed monitoring locations, or allowed engineering calculations to reduce the need for installing new monitors in several subparts; reduced the required frequency for sampling and analysis for fuel combustion and some other source categories; added an exemption for research and development activities; added calibration requirements for flow meters and other monitoring devices including a 5 percent accuracy specification; added a provision to require submittal of revised annual GHG reports if needed to correct errors; changed the general records retention period from five years to three years; and required more data to be reported rather than kept as records to allow EPA to verify reported emissions in several subparts.

On December 15, 2009, EPA published a final rule making two distinct findings regarding GHGs under § 202(a) of the CAA (74 Fed. Reg. 66,496). The first finding, termed the “Endangerment Finding,” finds that the current and projected concentrations of six GHGs

in the atmosphere threaten the public health and welfare of current and future generations. The six GHGs are carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>). The second finding, termed the “Cause or Contribute Finding,” finds that the combined emissions of these six GHGs from new motor vehicles and new motor vehicle engines contribute to the GHG pollution which threatens public health and welfare. These findings do not themselves impose any requirements on industry or other entities. They will, however, allow EPA to finalize the GHG standards proposed for new light-duty vehicles as part of the joint rulemaking with the Department of Transportation and the Prevention of Significant Deterioration (PSD)/Title V Tailoring Rule proposed for large stationary sources if Congress fails to pass climate legislation. The findings take effect January 14, 2010.

### III. Mobile Sources

On September 28, 2009, EPA and the U.S. Department of Transportation published a proposed rule to impose GHG emission standards and new corporate average fuel economy (CAFE) standards for light-duty vehicles (74 Fed. Reg. 48,454). These standards would apply to passenger cars, pickup trucks, sport-utility vehicles, and minivans, covering model years 2012 through 2016. The proposal would establish a harmonized and consistent national program enabling automobile manufacturers to build a single light-duty national fleet that satisfies all requirements under both programs. If finalized, EPA’s proposed GHG motor vehicle emission standards would also establish, for the first time, actual regulation of CO<sub>2</sub> and other GHGs under the CAA. EPA has stated that this would subject GHGs to the CAA’s PSD program and Title V permitting requirements. Comments were due November 27, 2009.

### IV. NAAQS

On September 16, 2009, the EPA announced that it would reconsider the eight-hour ozone standards that were adopted in 2008. EPA announced the reconsideration in a press release and notice filed in a

lawsuit pending in the U.S. Court of Appeals for the District of Columbia Circuit, *Mississippi v. EPA*, No. 08-1200 and consolidated cases (D.C. Cir.). EPA intends to sign a proposed ozone National Ambient Air Quality Standard (NAAQS) by January 6, 2010, and to promulgate a final ozone NAAQS by August 2010. In March 2008, EPA strengthened the ozone standards by lowering them from 0.08 parts per million (ppm) to 0.075 ppm (73 Fed. Reg. 16,436; March 27, 2008). In addition to changing the level of the standards, EPA specified the level of the standard to the third decimal. An area would meet the 2008 standards if the three-year average of the annual fourth-highest daily maximum eight-hour average at every ozone monitor is less than or equal to the level of the standard (i.e., 0.075 ppm). The previous standard, set in 1997, was 0.08 ppm but because ozone is measured out to three decimal places, the standard effectively became 0.084 ppm as a result of rounding. EPA’s Clean Air Scientific Advisory Committee (CASAC) recommended stronger standards, i.e., 0.06–0.07 ppm. EPA’s own scientists concurred with CASAC’s recommendations. For the primary standard, the EPA final staff paper recommended a range of levels from below 0.080 ppm down to 0.060 ppm and further recommended specifying the level of the standard to three decimal places. For the secondary standard, the final staff paper recommended a standard that is a cumulative, weighted total of daily 12-hour exposures over a three-month period within the growing season and a range from 21 ppm-hours to 7 ppm-hours. Based upon 2004–2006 air quality data, 345 counties violated the 2008 ozone NAAQS. That same data indicate that the number of violating counties would have been 510 if EPA had set the NAAQS at 0.700 ppm, 594 if EPA had set the NAAQS at 0.065 ppm, and 614 if EPA had set the NAAQS at 0.060 ppm. Indeed, only 20 counties had design values of 0.060 ppm or less. During the interim period of reconsideration, EPA will propose to stay the 2008 standards for the purpose of attainment and nonattainment area designations. EPA intends to limit the reconsideration to the scientific and technical record used in the March 2008 review. The fact sheet also indicates that eight-hour ozone attainment state implementation plans (SIPs) will now be due December 2013.

On October 29, 2009, EPA announced the release for public comment of a draft risk assessment document titled “Risk and Exposure Assessment to Support the Review of the Carbon Monoxide (CO) Primary National Ambient Air Quality Standards—First External Review Draft” (74 Fed. Reg. 55,843). The draft report describes the approaches taken to assess exposures to ambient CO and to characterize associated health risks, as well as present the initial key results, observations, and related uncertainties associated with the quantitative analyses performed as part of the review of the NAAQS for CO. EPA is soliciting advice and recommendations from CASAC by means of a review of the draft document at an upcoming public meeting of CASAC. Following the CASAC meeting, EPA will consider comments received from CASAC and the public in preparing revisions to this assessment document.

On November 13, 2009, EPA published a final rule establishing the initial air quality designations for the 2006 24-hour PM<sub>2.5</sub> NAAQS (74 Fed. Reg. 58,688). Based upon air quality monitoring data for 2006–2008, the final rule identifies 31 areas as nonattainment for the 2006 24-hour PM<sub>2.5</sub> NAAQS. In December 2008, EPA identified 58 areas as violating the 2006 24-hour PM<sub>2.5</sub> NAAQS based on air quality monitoring data for 2005–2007. Publication of that rule was delayed, however, to allow the Obama EPA to review the designations. The delay allowed EPA to consider 2006–2008 data and as a result 26 previously violating areas now attain the 24-hour PM<sub>2.5</sub> NAAQS. EPA has identified three counties with newly violating monitors in Arizona and California and is deferring designations while EPA works with states and tribes to determine nonattainment boundaries. The final rule took effect December 14, 2009, and starts the running of the three-year period for states with nonattainment areas to develop and submit SIPs for achieving the 2006 24-hour PM<sub>2.5</sub> NAAQS.

On November 16, 2009, EPA proposed to adopt a new one-hour primary NAAQS for sulfur dioxide (SO<sub>2</sub>) at a level in the range of 50 and 100 ppb. This standard would replace the current 24-hour standard of 140 ppb and the current annual standard of 30 ppb. Using data from 2006 to 2008, EPA projects that 45 counties have monitors that would exceed a NAAQS

of 100 ppb and 147 counties would exceed a standard of 50 ppb. Alternatively, EPA is seeking comment on a one-hour NAAQS of 150 ppb that would supplement the existing 24-hour and three-hour NAAQS.

Nineteen counties apparently monitored levels that would exceed such a standard. Comments are due 60 days after EPA publishes the proposal in the *Federal Register*. EPA is obligated by a consent decree to sign a final rule on the SO<sub>2</sub> NAAQS by June 2, 2010.

## V. New Source Performance Standards

On October 6, 2009, EPA published final revisions to the September 1997 New Source Performance Standards (NSPS) and emission guidelines to control emissions from existing hospital, medical, and infectious waste incinerators (HMIWIs) (74 Fed. Reg. 51,368). EPA recalculated the MACT floors for existing and new HMIWIs and developed new emission limits. The final amendments to the HMIWI regulations include strengthened existing emission limits for all regulated pollutants; additional stack testing requirements for existing and new sources; additional monitoring requirements for new sources; annual inspections of emission control devices; one-time visible emissions test of ash handling operations; procedures for test data submittal; and revised waste management plan provisions. These NSPS and emission guidelines require new and existing HMIWIs to control emissions of hydrogen chloride, carbon monoxide, lead, cadmium, mercury, PM, dioxins/furans, NO<sub>x</sub>, and SO<sub>2</sub> to levels that reflect the degree of emission reduction based on MACT. The final emission limits will require improvements and performance for 50 of the 57 currently operating HMIWIs. EPA estimates that a total of 393,000 pounds per year of the regulated pollutants will be reduced. The final action responds to a previous court remand of the HMIWI regulations and implements the terms of a settlement agreement on the remand reached with Sierra Club and also satisfies the CAA requirement to conduct a review of the standards every five years. Parts of the final rule take effect December 7, 2009, and other parts take effect April 6, 2010.

On October 8, 2009, EPA published final revised emissions control requirements for new coal preparation and processing plants (74 Fed. Reg.

51,950). These NSPS strengthen the PM emissions and opacity limits included in the existing NSPS for thermal dryers, pneumatic coal-cleaning equipment, and coal-handling equipment. The final rule will also expand applicability of the thermal dryer standards so that they will apply to both direct contact and indirect contact thermal dryers drying all coal ranks and to pneumatic coal-cleaning equipment cleaning all coal ranks. In addition, the final rule will establish an SO<sub>2</sub> emission limit and a combined NO<sub>x</sub> and CO emissions limit for thermal dryers. Finally, this action establishes work practice standards to control dust emissions from open storage piles and coal preparation and processing plants. The final rule satisfies a consent decree with Kentuckians for the Commonwealth and satisfies the CAA requirement to conduct a review of the standards every eight years. The final rule took effect October 8, 2009.

EPA has issued requests to renew the following existing approved information collections: NSPS for emission guidelines and compliance times for small municipal waste combustion units constructed on or before August 30, 1999 (74 Fed. Reg. 47,788; September 17, 2009); NSPS for metal furniture coating (74 Fed. Reg. 47,789; September 17, 2009); and NSPS for beverage can surface coating (74 Fed. Reg. 47,790; September 17, 2009).

## **VI. New Source Review**

On October 7, 2009, EPA published a proposed rule on reconsideration of the PSD interpretive memorandum signed by the previous EPA administrator on December 18, 2008 (74 Fed. Reg. 51,535). The memorandum established an interpretation of the regulatory phrase “subject to regulation” that is applied to determine the pollutants subject to the PSD program under the CAA. EPA prefers the interpretation adopted in the memorandum and currently in effect that the phrase “subject to regulation” of the “regulated NSR pollutant” definition includes each pollutant subject to either a provision in the CAA or regulation adopted by EPA under the CAA that requires actual control of emissions of that pollutant. Under this proposed actual control interpretation, PSD for CO<sub>2</sub> would apply once the

GHG motor vehicle emissions standards are final. EPA is taking comments on other interpretations including monitoring and reporting, EPA-approved SIP, finding of endangerment, and granting California a waiver under § 209 of the CAA. In addition, EPA is seeking comment on the specific date on which the PSD regulatory requirements would apply. Comments were due December 7, 2009.

On October 27, 2009, EPA published a proposed rule proposing a GHG emissions regulatory program that will require large facilities that emit at least 25,000 tons of GHGs a year to obtain construction and operating permits covering these emissions (74 Fed. Reg. 55,292). The threshold is 100 times higher than that required by the CAA for criteria pollutants. By raising the standard to 25,000 tons, the proposed rule would exempt millions of smaller sources of CO<sub>2</sub> emissions. Small businesses such as farms and restaurants, and many other types of small facilities, would not be included, at least, initially. If finalized, this program would cover nearly 70 percent of the nation’s total GHG emissions from stationary sources. The final emissions thresholds for GHG emissions under the PSD and Title V programs would take effect immediately upon promulgation of the final rule. The nation’s largest facilities, including power plants, refineries, and cement production facilities, that emit at least 25,000 tons of GHGs a year would be required to obtain operating and construction permits. Municipal solid waste landfills would be subject to PSD review for the first time. PSD permits must demonstrate the use of best available control technologies and energy efficiency measures to minimize GHG emissions when facilities are constructed or major modifications are made. EPA is proposing a two-phase program. The first phase will be a five-year program tailored to address the most significant emitters of GHGs. At the end of that five-year period, there would be a study and proposal either (i) confirming the need to retain the GHG permitting thresholds for PSD and/or Title V at 25,000 tons per year; or (ii) establishing different GHG threshold levels that better reflect the administrative capabilities of permitting authorities to address GHGs. With the proposed emissions thresholds, EPA estimates that 400 new sources and modifications to existing sources would be subject to review each year

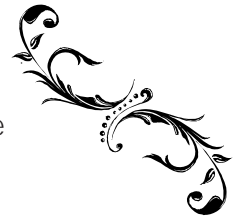
for GHG emissions. In total, approximately 14,000 large sources would need to obtain operating permits that include GHG emissions. Most of these sources are already subject to clean air permitting requirements because they emit other pollutants. The proposed tailoring rule addresses a group of six GHGs: carbon dioxide (CO<sub>2</sub>), methane (CH<sub>4</sub>), nitrous oxide (N<sub>2</sub>O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF<sub>6</sub>). In addition, EPA is requesting public comment on its previous interpretation of when certain pollutants, including CO<sub>2</sub> and other GHGs, would be covered under the permitting provisions of the CAA. A different interpretation could mean that large facilities would need to obtain permits prior to the finalization of a rule regulating GHG emissions. EPA held public hearings November 18 and 19, 2009, on the proposed GHG emissions thresholds defining when CAA permits would apply to new or existing industrial facilities. Comments were due December 28, 2009.

On December 11, 2009, EPA published an interim final rule providing an additional stay through March 31, 2010, of the agency's regulations concerning the inclusion of fugitive emissions under the PSD and Non-attainment New Source Review (NSR) program (74 Fed. Reg. 65,592). EPA published a final rule on December 19, 2008 (73 Fed. Reg. 77,882), requiring fugitive emissions to be included in determining whether a physical or operational change results in a major modification only for sources and industries that have been designated through rulemaking under § 302(j) of the CAA. That final rule was challenged by the Natural Resources Defense Council, and on April 24, 2009, EPA convened a reconsideration proceeding and granted a three-month administrative stay of the final rule. That three-month stay expires December 30, 2009, and EPA is providing for an additional stay until the agency reaches a final decision on the reconsideration which EPA "anticipates completing . . . by March 31, 2010." EPA intends to publish a notice in the near future that will propose an additional stay of the fugitive emissions rule during the time period while EPA reconsiders the rule. Since that proposed rule has not yet been published, EPA is invoking the good cause exception under the Administrative Procedure Act to provide an additional stay and is not taking notice and comment rulemaking on the additional stay.

## VI. Stratospheric Ozone

On December 15, 2009, EPA published a final rule adjusting the allowance system controlling U.S. consumption and production of hydrochlorofluorocarbons (HCFCs) (74 Fed. Reg. 66,412). The HCFC allowance system is part of EPA's CAA program to phase out ozone-depleting substances to protect the stratospheric ozone layer. The United States is obligated under the Montreal Protocol on Substances That Deplete the Ozone Layer to limit HCFC consumption and production to a specific level and, using stepwise reductions, to decrease the specific level culminating in a complete HCFC phaseout in 2030. The final rule is effective January 1, 2010.

### CALL FOR NOMINATIONS



The Section invites nominations for the following awards:

*The Environment, Energy, and Resources Government Attorney of the Year Award* will recognize exceptional achievement by federal, state, tribal, or local government attorneys who have worked or are working in the field of environment, energy, or natural resources and are esteemed by their peers and viewed as having consistently achieved distinction in an exemplary way. The award will be for sustained career achievement, not simply individual projects or recent accomplishments. Nominees are likely to be currently serving, or recently retired, career attorneys for federal, state, tribal, or local governmental entities.

*The State or Local Bar Environment, Energy, and Resources Program of the Year Award* will recognize the best CLE program or public service project of the year focused on issues in the field of environmental, energy, or natural resources law. Nominees are likely to be state or local bar sections or committees focused on these practice areas.

Nominations for these awards are due at the ABA Section office by April 23, 2010. The awards will be presented at the ABA Annual Meeting in San Francisco in August 2010. Award recipients should plan to be present at the award presentation.

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## EPA REGION 2

**Philip E. Karmel**  
*Bryan Cave LLP*  
New York, N.Y.  
[pekarmel@bryancave.com](mailto:pekarmel@bryancave.com)

### **I. Appointment of Judith Enck as Regional Administrator**

On November 5, 2009, Judith A. Enck was appointed regional administrator of EPA Region 2. In her immediately previous position, she served as deputy secretary for the environment in Governor Paterson's administration.

### **II. Diversion of Regional Greenhouse Gas Initiative Funds**

On December 4, 2009, Governor Paterson signed into law a deficit reduction measure (Bill No. A40023) that allows \$90 million of New York State proceeds from its sale of CO<sub>2</sub> allowances under the Regional Greenhouse Gas Initiative to be transferred to the state's general fund. Prior to this bill, the funds had been earmarked for energy efficiency projects.

### **III. Settlement of Litigation Challenge to Regional Greenhouse Gas Initiative**

In December 2009, a proposed consent decree was lodged with the New York State Supreme Court in Albany County in *Indeck Corinth, L.P. v. Paterson, et al.*, Index No. 5280-09. If approved by the court, the consent decree would resolve Indeck's litigation challenge to the state's participation in the Regional Greenhouse Gas Initiative.

## EPA REGION 4

**Paula Cobb**  
*Hopping Green & Sams, P.A.*  
Tallahassee, Florida  
[pcobb@hgslaw.com](mailto:pcobb@hgslaw.com)

**Alexia Borden**  
*Balch & Bingham LLP*  
Birmingham, Alabama  
[aborden@balch.com](mailto:aborden@balch.com)

### **I. Enforcement**

On December 28, 2009, EPA Region 4 announced its enforcement results for 2009. Enforcement actions taken by the region will result in the investment of more than \$2 billion by respondents in pollution control or cleanup, the reduction and treatment of more than 100 million pounds of pollutants, and the treatment, minimization, and proper disposal of nearly 64 million pounds of hazardous wastes. EPA Region 4 also announced a renewed commitment to ensuring the integration of environmental justice into all regional programs, policies, and activities to achieve measurable results for the environment and the public health of affected communities.

### **II. State Implementation Plans—Alabama**

On October 2, 2009, EPA published notice of its proposed approval or, in the alternative, proposed disapproval of revisions to the Visible Emissions Rule (74 Fed. Reg. 50,930; October 2, 2009). EPA approved revisions to Alabama's opacity rule in October 2008 (*see* 73 Fed. Reg. 60,957; October 15, 2008). However, environmental groups challenged the

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approval by filing a petition for review and a petition for reconsideration in December of 2008. EPA denied the petition for reconsideration, but after the Obama administration came into power the environmental groups filed a second petition for reconsideration, which was granted. The *Federal Register* notice published in October of 2009 seeks comments on issues raised in the environmental groups' petition for reconsideration. Comments on the notice were due on December 16, 2009.

Trey Glenn, the director of the Alabama Department of Environmental Management (ADEM), resigned on December 11, 2009. John Hagood, an ADEM attorney, has been named interim director of the agency. It is currently unknown who will be named the new director.

### **III. State Implementation Plans—Florida**

As previously reported, on January 15, 2009, EPA found that Florida, along with 36 other states, failed to submit the revised SIP required by the regional haze rule, starting the two-year countdown to an EPA-promulgated federal implementation plan (FIP) (74 Fed. Reg. 2392; January 15, 2009). In preparation to submit the revised SIP, the Florida Department of Environmental Protection will likely hold a public hearing in January 2010 to receive comments on its proposed regional haze plan and implementation of best available retrofit technology.

### **IV. State Implementation Plans—Georgia**

Effective November 27, 2009, EPA found that three states—Georgia, Illinois, and Pennsylvania—failed to submit state implementation plans (SIPs) related to attaining the 1997 NAAQS for PM<sub>2.5</sub>. States with nonattainment areas for PM<sub>2.5</sub> were required to submit SIPs by April 5, 2008, that demonstrate how each nonattainment area within each state would attain the PM<sub>2.5</sub> standards “as expeditiously as practicable.” This action triggers the two-year timeline for EPA to promulgate a FIP (74 Fed. Reg. 62,251; November 27, 2009).

## **EPA REGION 6**

**Laura L. LaValle**  
***Beveridge & Diamond, P.C.***  
***Austin, Texas***  
***llavalle@bdlaw.com***

### **I. EPA Region 6 Developments**

On November 5, 2009, EPA Administrator Lisa Jackson announced the selection of Dr. Alfredo “Al” Armendariz as regional administrator for EPA Region 6. Dr. Armendariz is a research associate professor at Southern Methodist University in Dallas, where he has taught environmental and civil engineering since 2002. He received his S.B. in chemical engineering from the Massachusetts Institute of Technology in 1993; his M.E. in environmental engineering from the University of Florida in 1995; and his Ph.D. in environmental engineering from the University of North Carolina at Chapel Hill in 2002. During 2002 he spent the summer on special assignment as an environmental scientist in the Multimedia Planning and Permitting Division of EPA Region 6. Armendariz has served as a member of the advisory board of the Environmental Defense Fund’s Texas office, and as technical advisor for citizen groups based in Texas, Colorado, and New Mexico.

### **II. New Mexico Developments**

On December 4, 2009, New Mexico Governor Bill Richardson signed Executive Order 2009-047, directing the implementation of new emission-reduction strategies to address climate change. The order is intended to build upon actions taken under Executive Order 2006-069, pursuant to which the state’s Climate Change Advisory Group produced a plan in December 2006 to reduce greenhouse gas emissions by the equivalent of 267 million metric tons. The latest executive order maintains a state government implementation team assigned to carry out climate change policies, and calls for continued participation in the Western Climate Initiative. The order also seeks to promote development of recommendations for establishing an emission performance standard for new fossil-fueled generating facilities and new long-term power purchase agreements. The order calls for

evaluation of mechanisms for quantifying and awarding greenhouse gas emission allowances for emission reductions, in advance of state or federal cap-and-trade programs that would mandate such reductions.

On September 24, 2009, the Environmental Appeals Board remanded to EPA a preconstruction permit for a proposed Desert Rock Energy Co. power plant in New Mexico, for EPA to consider gasification technology as a less-polluting alternative to the pulverized-coal boiler that would power the plant (*In re Desert Rock Energy Co.*, EPA EAB, PSD Appeal Nos. 08-03, 08-04, 08-05, and 08-06, *remand order* 9/24/09). The permit at issue is for a 1500-megawatt coal-fired electric generating facility to be built on the Navajo Indian Reservation approximately 25 miles southwest of Farmington, N.M. EPA had requested a voluntary remand of the permit in order to review the Bush administration's 2008 decision to issue the permit without considering integrated gasification combined cycle as a potential emissions control technology in its PSD permitting analysis. Region 9 had issued the permit under the PSD program, rejecting requests by environmental groups that EPA consider the plant's carbon dioxide emissions in the PSD analysis.

### **III. Texas Developments**

On November 20, 2009, Travis County District Attorney Rosemary Lehmberg, in cooperation with the Texas Commission on Environmental Quality (TCEQ), announced the creation of an environmental crimes prosecutor position. The assistant district attorney serving in this position will be based in Austin, but will prosecute cases throughout Texas (since the Travis County district attorney's office has statewide authority regarding environmental crimes under the Texas Water Code and Texas Health and Safety Code). The person named to the position is Patty Robertson, an experienced white-collar prosecutor. As explained in the press release issued by the district attorney's office, "[t]he specialized prosecutor will seek to provide consistency in charges filed and case resolutions as well as a shorter time frame in the indictment and disposition of environmental cases across the state." TCEQ Executive Director Mark Vickery voiced his support: "Establishing a full-time presence at the Travis County District Attorney's Office, solely for the prosecution of environmental crimes, will ensure that

criminal offenses against our natural resources will be dealt with swiftly and effectively." The new position is funded by a grant from TCEQ.

On November 23, 2009, TCEQ submitted comments on the three proposals that the EPA published on September 23, 2009 to disapprove various Texas SIP revision submittals based upon EPA's position that they fail to meet federal Clean Air Act requirements. Specifically, EPA proposed disapproval of the following: (i) the Texas Flexible Permitting Program; (ii) revisions relating to the Texas Qualified Facilities State Program, and changes to the definitions of "best available control technology" and "modification of existing facility"; and (iii) the Standard Permit for Pollution Control Projects, and revisions to Texas Major and Minor New Source Review (NSR) SIP and the Texas Major PSD SIP. Each of the November 23, 2009, comment documents outlines various EPA concerns that the TCEQ executive director will propose be addressed by rulemaking. The TCEQ executive director is planning to present to the TCEQ commissioners proposed rulemaking relating to EPA's proposed SIP disapprovals according to the following schedule: Public Participation (December 2009); definition of PSD Best Available Control Technology (January 2010); Qualified Facilities (March 2010); Flexible Permits (May 2010); and NSR Reform (August 2010).

On November 13, 2009, TCEQ staff met with representatives of natural gas production companies with operations in the Barnett Shale natural gas formation to discuss ongoing developments regarding air contaminant emissions from those operations. Recent private and TCEQ studies of air quality in the area have suggested elevated levels of benzene and other constituents near those operations. Following concerns raised by residents of the small town of DISH, Texas, that town hired a consultant earlier this year to conduct an independent study of emission levels resulting from production equipment located in DISH. DISH subsequently published the results, which indicated emissions of several constituents exceeded TCEQ's Effects Screening Levels. Representatives of the companies operating in the Barnett Shale dispute the results of that study. TCEQ's evaluation of emissions relating to Barnett Shale operations resulted in the issuance of a preliminary

report dated October 23, 2009. TCEQ has indicated it will issue a final report by the end of 2009, and that the agency will conduct additional testing in early 2010.

In October 2009, EPA sent Governor Rick Perry a letter pointing to 2006–2008 data suggesting that Harris County may be out of attainment with the 1997 NAAQS for PM<sub>2.5</sub> and gave TCEQ 120 days to respond with a recommendation. At a stakeholder meeting on November 19, 2009, TCEQ staff presented data that support retention of the existing unclassifiable/attainment designation for Harris County for the PM<sub>2.5</sub> NAAQS. Currently, the entire of state of Texas is designated unclassifiable/attainment, a designation made by EPA in 2005. At their December 4, 2009, work session, the TCEQ commissioners approved a proposal to recommend that Harris County remain designated as attainment for the annual PM<sub>2.5</sub> standard. The EPA requested the state's recommendation be submitted to the EPA by February 5, 2010.

On October 6, 2009, Public Citizen, Inc., filed a lawsuit against the TCEQ in Travis County District Court requesting that TCEQ be directed to regulate CO<sub>2</sub> emissions pursuant to the Texas Clean Air Act (TCAA). Asserting that CO<sub>2</sub> is, by definition, an “air contaminant” that TCEQ is required to regulate under the TCAA, Public Citizen has requested that the court declare that (i) TCEQ rules are invalid to the extent they allow unlimited emissions of CO<sub>2</sub> by coal and petcoke-fueled power plants; (ii) TCEQ rules cannot be applied to preclude parties from presenting evidence regarding CO<sub>2</sub> emissions and climate change in contested case hearings before the State Office of Administrative Hearings (SOAH); and (iii) air quality permits for power plants cannot be issued without findings regarding CO<sub>2</sub> emissions. In the petition, Public Citizen references three contested case hearings regarding power plant air permit applications in which persons opposing the application unsuccessfully attempted to offer evidence regarding CO<sub>2</sub> emissions. Looking forward, Public Citizen predicts that in the next twelve months TCEQ could issue permits for at least five new power plants that could increase annual CO<sub>2</sub> emissions by a total of approximately 37 million tons.

TCEQ issued its much-anticipated Flare Task Force Draft Report on September 3, 2009, and accepted public comments on that document until October 12, 2009. The draft report, issued by a task force formed earlier this year and charged with assessing the adequacy of existing flare standards and operational practices, provides a series of general recommendations and a catalogue of data and supporting material that exceeds 2000 pages. In brief, the recommendations to the executive director are to continue review of flaring practices, emissions reduction efficiencies, and regulations. Specifically, the task force made recommendations regarding enhanced monitoring, flare minimization plans, agency process changes, public outreach, and research. The recommendations and continuing evaluation by TCEQ could ultimately lead to fairly significant rulemaking efforts by TCEQ. Assuming the report is made final and the task force recommendations are implemented as outlined, it is TCEQ's flare research study that may have the most wide-ranging, and perhaps national, implications, although enhanced monitoring and flare minimization plans could be burdensome in themselves.

On September 23, 2009, the TCEQ commissioners approved the proposal of various SIP and associated rule revisions for the Houston-Galveston-Brazoria (HGB) and Dallas-Fort Worth (DFW) nonattainment areas for the 1997 eight-hour ozone standard. Specifically, for the HGB nonattainment area, the proposed SIP revisions are intended to address the severe ozone nonattainment area requirements and show reasonable further progress toward attainment. Associated rulemakings include changes to the Highly-Reactive Volatile Organic Compound (HRVOC) Emission Cap and Trade (HECT) program, the Mass Emissions Cap and Trade (MECT) program, and Volatile Organic Compounds (VOC) Control Technique Guidelines. For the DFW nonattainment area, TCEQ has proposed a Reasonably Available Control Technology (RACT) update, a 30 Texas Administrative Code Chapter 117 Rule Revision Noninterference Demonstration, and Attainment Demonstration Contingency Plan SIP revisions. Associated rule changes to the VOC Control Technique Guidelines are also proposed. The comment period for the SIP revisions and associated rulemakings closed on November 9, 2009.

## EPA REGION 10

**Kirk A. Lilley**  
**Kirk Lilley PLLC**  
**Seattle, Washington**  
**kirk.lilley@comcast.net**

### I. Idaho Fertilizer Plant Permit Imposes CO<sub>2</sub> Emissions Limits

The Idaho Department of Environmental Quality (DEQ) issued a revised air permit in November that imposes an emission limit for CO<sub>2</sub>. The permittee, Southeast Idaho Energy (SIE), will build a fertilizer production plant fueled by coal gas produced in an associated coal gasification facility. SIE accepted the limits after Sierra Club and the Idaho Conservation League challenged an earlier version of the permit without CO<sub>2</sub> limits. The groups claimed that, although not required, the Idaho DEQ should impose a CO<sub>2</sub> limit to protect air quality in the region. SIE chose to negotiate with the groups. Under the resulting settlement, SIE asked the Idaho DEQ to add the limit to the permit.

The permit will require the coal gasification plant to reduce its potential CO<sub>2</sub> emissions by fifty-eight percent, by limiting CO<sub>2</sub> emissions to 756,000 tons per year. Five years after the plant is completed, emissions above the limit must be captured and sequestered. Until that time, the company must meet the limit by purchasing carbon offsets for emission above the limit (1.1 million tons at full operating rates).

The Idaho DEQ has made it clear that CO<sub>2</sub> is not currently a regulated pollutant and that it will not impose CO<sub>2</sub> limits in other permits until federal regulations require it. But even though the limit was added at the permittee's request to hasten permit

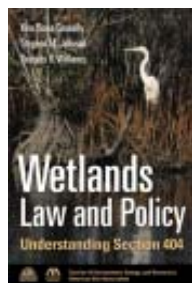
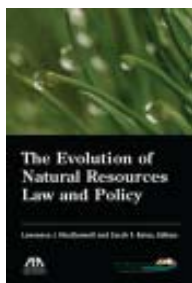
issuance, it is nonetheless a first and will undoubtedly be noticed. A copy of the permit is available at the Idaho DEQ Web site.

### II. Greenhouse Gas Reporting Rule Proposed in Washington State

The Washington State Department of Ecology is proposing to adopt a mandatory greenhouse gas (GHG) reporting rule that would be more stringent than EPA's reporting rule. Ecology plans to finalize the rule in early 2010.

As proposed, the rule would apply to owners or operators of on-road motor vehicle fleets that, as a fleet, emit at least 2,500 metric tons of GHGs annually in the state; or a source or combination of sources that emit at least 10,000 metric tons of GHGs annually in the state. The reporting threshold under the federal rule is 25,000 metric tons. The proposed state rule would also include facilities that the federal rule excludes, including food processors, industrial landfills, and natural gas extraction, processing, storage, transmission, and distribution. Further, the state rule would require reporting of indirect GHG emissions (though applicability is based on direct emissions only); the federal rule requires reporting only direct emissions.

The regulation responds to a 2008 law requiring large vehicle fleets and large stationary sources of GHGs to start reporting their emissions in 2010. Affected fleets will include trucking and delivery fleets, rental car companies, large customer service fleets, large government-agency fleets, and large fleets of aircraft, marine vessels or rail equipment. Affected sources will include larger factories and power facilities, including refineries, pulp and paper mills, cement kilns, some lumber mills, large food processors, and some fossil fuel-fired generation plants.



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