



# Air Quality Committee Newsletter

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## MESSAGE FROM THE CHAIRS

**Angela Morrison Uhland**  
**Hopping Green & Sams, P.A.**  
**Tallahassee, Florida**  
**[auhland@hgslaw.com](mailto:auhland@hgslaw.com)**

**Howard J. Hoffman**  
**U.S. Environmental Protection Agency**  
**Washington, D.C.**  
**[howardjhoffman@msn.com](mailto:howardjhoffman@msn.com)**

We want to thank the Air Quality Committee members who have agreed to be our “specialists.” These specialists will be sending out notices through the list serve whenever breaking news happens in their respective areas:

- David Friedland, Beveridge & Diamond—New Source Review
- Mary Ellen Hogan and Colin Harris, Holme Roberts & Owen; and Allison Wood, Hunton & Williams—climate change
- Annie Mullin and Sarah Youngblood, Schiff Hardi—consumer products
- Mark Erman, Pepper Hamilton—enforcement
- John (Jack) Barsanti, Armstrong Teasdale—Title V
- Cindy Langworthy, Hunton & Williams—National Ambient Air Quality Standards
- Alexia Borden, Balch & Bingham—SIP developments at the national level

If you are interested in helping with this effort, we still need specialists in the following area: air toxics,

standards of performance under sections 111 and 129, mobile sources, and a miscellaneous category for everything else under the Clean Air Act (CAA). Sending an e-mail to the list serve is as easy as sending any other e-mail; no special training required! If you closely follow any of these areas and would like to assist with sending notices to our membership, please e-mail Angela at [auhland@hgslaw.com](mailto:auhland@hgslaw.com).

After the notices are sent to the list serve, Roy Belden, our Technology vice chair, uploads the information to the Air Quality Committee’s Web site for future reference. We trust that the information is a timely and helpful resource for you and your practice.

The Air Quality Committee is also planning some Quick Teleconferences (QTs) later this year. Be on the lookout for notices of the exact dates and time. We are currently planning QTs on the new ozone ambient air quality standard in July, enforcement in August or September, and fugitive emissions in October. If you have ideas on speakers or other topics, please contact Mary Ellen Ternes at [aryellen.ternes@mcafeetaft.com](mailto:aryellen.ternes@mcafeetaft.com).

Lastly, we would like to invite you to the ABA Section of Environment, Energy, and Resources 16th Section Fall Meeting to be held in Phoenix on Sept. 17-20, 2008. We are pleased that the Fall Meeting will include a panel dedicated to “Hot Topics in Climate and Air.” The speakers will discuss current CAA developments, including (1) climate change regulatory developments, including permits for coal-fired power plants; (2) National Ambient Air Quality Standards (NAAQS), including the ozone NAAQS; (3) New

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**Kathryn B. Thomson, Editor**

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This newsletter is a publication of the ABA Section of Environment, Energy, and Resources, and reports on the activities of the committee. All persons interested in joining the Section or one of its committees should contact the Section of Environment, Energy, and Resources, American Bar Association, 321 N. Clark St., Chicago, IL 60654.



Source Review (NSR), including the applicability test for power plants that make changes to their plant; and (4) Title V (operating) permits. This panel will be a multi-speaker presentation, but with much time for questions. The Fall Meeting is a great way to connect with other practitioners in the air quality field. We expect to have lively discussions at an informal dinner and a roundtable meeting among committee members. Mark your calendars and plan to join us!

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**MESSAGE FROM THE  
VICE CHAIR, NEWSLETTER**

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**Kathryn B. Thomson**  
***Sidley Austin LLP***  
***Washington, DC***  
***kthomson@sidley.com***

This newsletter focuses on the efforts of the federal and state governments, as well as citizens, to enforce the Clean Air Act (CAA) and, in some instances, expand the reach of existing CAA programs. In that vein, we are pleased to present an article by Alexia Borden that addresses one significant challenge brought by states and environmental groups to an Environmental Protection Agency (EPA) program aimed at regulating mercury emissions from power plants. The report on developments at the federal level also highlights some of the most significant federal, state, and citizen enforcement and compliance efforts in recent months. And, as always, we include reports on notable developments around the country.

We want to welcome Brian Rayback and Dixon Pike of Pierce Atwood in Portland, Maine, and Peter Tomasi of Quarles & Brady in Milwaukee, Wisconsin, as regular contributors to the newsletter. Brian and Dixon will report on CAA developments in EPA Region 1, and, starting with the next newsletter, Peter will report on CAA developments in the states located within EPA Region 5. In addition, a number of other practitioners have expressed interest in writing articles or making other contributions to the newsletter. We appreciate your offers, and I will contact you shortly to discuss.

We hope that you find this newsletter informative, and we greatly appreciate any feedback or comments that you can provide to ensure that we deliver a useful product.

## THE VACATUR OF EPA'S CLEAN AIR MERCURY RULE

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**Alexia B. Borden**  
**Balch & Bingham, LLP**  
**Birmingham, AL**  
**aborden@balch.com**

On Feb. 8, the D.C. Circuit Court of Appeals vacated the Clean Air Mercury Rule (CAMR). *See New Jersey v. EPA*, No. 05-1097 (D.C. Cir. Feb. 8, 2008). The text of the opinion can be found at: <http://pacer.cadc.uscourts.gov/docs/common/opinions/200802/05-1097a.pdf>. The Environmental Protection Agency (EPA) finalized CAMR on May 18, 2005. CAMR established “standards of performance” that limit mercury emissions from new and existing utilities and made the United States the first country in the world to regulate mercury emissions from coal-fired power plants. 70 Fed. Reg. 28,606 (May 18, 2005). The first phase of CAMR was supposed to begin in 2010 and emissions were to be reduced by taking advantage of “co-benefit” reductions—that is, mercury reductions achieved by reducing sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>) emissions under the Clean Air Interstate Rule (CAIR). *Id.* In other words, although the program established a trading scheme, EPA set the Phase I CAMR limits specifically to reflect the installation of selective catalytic reduction (SCR) and scrubbers on hundreds of units. *See id.* at 28,619. Phase II, which was due to begin in 2018, would have required coal-fired power plants to be subject to a second cap that would have reduced emissions to 15 tons upon full implementation. *Id.* Therefore, when fully implemented, these rules would have reduced utility emissions of mercury from 48 tons a year to 15 tons, a reduction of nearly 70 percent. *Id.*

The rule was challenged by a number of states and environmental groups, and the D.C. Circuit held

CAMR unlawful in two respects. First, the court held that EPA’s delisting of coal- and oil-fired electric generating units (EGU) from the list of sources whose emissions are regulated under section 112 of the CAA, 42 U.S.C. § 7412, was unlawful. *See* 70 Fed. Reg. 15,994 (Mar. 29, 2005) (“Delisting Rule”). Second, the court found that CAMR, which was developed pursuant to section 111, 42 U.S.C. § 7411, for coal-fired EGUs was also unlawful. The court did not weigh in on the legitimacy of the cap and trade program, but rather focused on EPA’s disobedience of the procedural aspects of section 112 to delist EGUs from that section of the CAA.

New Jersey, fourteen additional states and various environmental organizations contended, and the court agreed, that the Delisting Rule was contrary to the plain text and structure of section 112. Section 112 requires EPA to regulate emissions of hazardous air pollutants (HAPs) and more specifically, section 112(n) requires EPA to regulate EGUs under section 112 when it concludes that doing so is “appropriate and necessary.” In December 2000, EPA concluded it was “appropriate and necessary” to regulate mercury emissions from coal- and oil-fired power plants under section 112 and listed these EGUs as sources of HAPs regulated under that section. However, in 2005, EPA reconsidered its previous determination and removed these EGUs from the section 112 list. Thereafter it promulgated CAMR under section 111. The court held that EPA’s removal of these EGUs from section 112 list violates the CAA because section 112(c)(9) requires EPA to make specific findings before removing a source listed under section 112 and EPA conceded it never made such findings. Therefore, because coal-fired EGUs are listed sources under section 112, regulation of existing coal-fired EGUs’ mercury emissions under section 111 is prohibited, effectively invalidating CAMR’s regulatory approach. EPA must now proceed to regulate the HAPs from EGUs under the maximum available control technology (MACT) standards of section 112(d).

Despite the court’s vacation on Feb. 8, CAMR and EPA’s Delisting Rule remained in effect until the Court issued its mandate. Generally, the mandate is not issued until seven calendar days after the time to file a

rehearing expires; however, in this case the court issued its mandate earlier than normal. On Feb. 25, 2008, the Environmental and Tribal Petitioners and Environmental Healthcare intervenors filed a motion for an expedited issuance of the mandate. The D.C. Circuit Rules, specifically Circuit Rule 41, expressly provide the D.C. Circuit authority to issue a mandate whenever it so chooses, and they allow a party to move for an expedited issuance of the mandate if good cause is shown. On March 6, EPA filed an opposition to the motion for an expedited hearing. The D.C. Circuit agreed with the Environmental and Tribal Petitioners and Environmental Healthcare intervenors and on March 14, 2008, the court granted the motion for the expedited issuance of the mandate, which was issued later that day.

On March 24, EPA and the Utility Air Regulatory Group (UARG), an industry trade group, filed a petition for rehearing en banc. Multiple responses in favor and in opposition of the petition were filed by the different parties involved. On May 20, 2008, the D.C. Circuit denied the requests for a rehearing en banc. Now the parties may file a petition for writ of certiorari with the U.S. Supreme Court. A petition for writ of certiorari to the U.S. Supreme Court must be filed within 90 days from the date of the denial of rehearing, which is Aug. 18, 2008.

The practical implications of the vacation of this rule are tremendous. The following are some examples of potential problems with this decision. First, are state implementation plans (SIPs) for the states that have adopted CAMR still valid? Second, should companies continue with projects to comply with the mercury limits of CAMR knowing that the likelihood of these projects will not be sufficient to address the other HAPs that will be potentially regulated now under section 112? Third, what are companies and agencies going to do in the interim while waiting on an appeal and mandate? For example, CAMR requires mercury monitors to be installed by Jan. 1, 2009. The likelihood of an appeal is great; and, it is possible that the decision of the D.C. Circuit could be overturned. Therefore, companies are faced with a decision as to whether to proceed with the installation of mercury monitors.

Congress is already starting to act on the D.C. Circuit's vacatur of CAMR. On Feb. 14, Sen. Thomas Carper (D-Del.) introduced the "Mercury Emissions Control Act" (MECA), specifically in response to the D.C. Circuit's action. The legislation would require coal-fired power plants to reduce mercury emissions by 90 percent. It would also require EPA to propose a regulation to implement these reductions by Oct. 1, 2008. On May 13, 2008, the Committee on Environment and Public Works held hearings on this bill; however, no further action has been taken by the committee.

As evidenced above, the uncertainty surrounding this decision is great and it will be interesting to see how this all plays out.

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## **NATIONAL DEVELOPMENTS— GOVERNMENT ENFORCEMENT AND CITIZEN SUITS**

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**Kathryn B. Thomson**  
**Sidley Austin LLP**  
**Washington, D.C.**  
***kthomson@sidley.com***

### I. Federal Enforcement

In May, the Environmental Protection Agency's (EPA's) Office of Enforcement and Compliance Assurance (OECA) released its FY 2007 OECA Accomplishments Report that highlights the results of the agency's enforcement and compliance efforts over the past fiscal year. (The full report is available at [www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy07accomplishment.pdf](http://www.epa.gov/compliance/resources/reports/accomplishments/oeca/fy07accomplishment.pdf).)

With respect to federal air enforcement and compliance efforts, EPA reported the following:

- "EPA's 12 largest stationary source air enforcement cases alone will result in reducing more than 500 million pounds of harmful air pollutants, with annual human health benefits estimated at \$3.8 billion. These actions will reduce harmful emissions of 308 million

pounds of sulfur dioxide, 187 million pounds of nitrogen oxides, and 11 million pounds of particulate matter.”

- In FY 2007, EPA conducted 22,000 compliance inspections and an additional 346 civil investigations. More than 4,000 of these inspections related to Clean Air Act (CAA) enforcement.
- EPA referred approximately seventy-five CAA cases to the Department of Justice (DOJ) for enforcement.
- For FY 2008 to 2010, EPA will continue to focus on enforcement of Maximum Achievable Control Technology (MACT) standards and Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR) compliance.
- EPA is declaring success with respect to its decade old Petroleum Refinery Enforcement Initiative. EPA notes that in FY 2007, the agency “successfully met its principal objective” for the initiative and “[t]o date, EPA has negotiated 21 pollution reduction agreements with companies representing more than 85 percent of U.S. domestic refining (95 refineries located throughout 28 states).” EPA intends to continue to pursue settlements with the remainder of the petroleum refining sector.
- In “Enforcement Case Highlights,” EPA touts its settlements with three coal-fired power utilities (WE Energy, East Kentucky Power Cooperative and PSE&G Fossil) under the New Source Review (NSR) program and another settlement with Cummins Engine Company related to alleged violation of a 1998 consent decree addressing mobile source controls.

The report also contains a section summarizing enforcement and compliance efforts at the state level.

## II. The Role of States and Environmental Groups in CAA Enforcement and Compliance

For many years, states and citizen groups have played a vital role in the development and enforcement of the CAA. In recent years, they have become even more active, and they continue to be at the forefront of some of the most interesting and challenging aspects of CAA regulation, including efforts to impose limitations on pollutants such as greenhouse gases (GHGs) and hazardous air pollutants (HAPs) through a variety of means. The following summarizes some of the most significant actions in recent months.

*In re Deseret Power Elec. Cooperative*, No. 07-03 (EPA EAB) – NSR/Climate Change: On May 29, the EPA Environmental Appeals Board (EAB) heard oral argument in this important case. The case involves a dispute between the Sierra Club and EPA as to whether EPA is required to regulate carbon dioxide as a pollutant under the NSR programs. The controversy centers around a permit issued to Deseret for the construction of a new coal-fired power plant near Bonanza, Utah. The permit does not contain any limits on CO<sub>2</sub> emissions. The Sierra Club argued that EPA must regulate carbon dioxide as a pollutant under the NSR program and that Best Available Control Technology (BACT) is required to control carbon dioxide emissions. EPA countered that carbon dioxide is not currently subject to regulation under the NSR program and thus EPA acted within its discretion in issuing the permit with no carbon dioxide limits or controls. If EPA decides that carbon dioxide must be a regulated pollutant, the decision is likely to have far-reaching effects for all stationary sources that emit carbon dioxide.

*American Lung Ass’n v. EPA* (D.C. Cir.)—Ozone: In late May, the American Lung Association and several other environmental groups sued EPA, claiming that EPA failed to set revised ozone NAAQS at levels that are adequate for protection of human health and the environment. The suit also alleges that EPA improperly took costs into account in setting the revised ozone NAAQS.

*Massachusetts v. EPA*, No. 03-1361 (D.C. Cir.)—Climate Change: seventeen states and several

environmental groups have filed a petition for a writ of mandamus against EPA in the D.C. Circuit. Petitioners contend that EPA has impermissibly failed to act in light of the Supreme Court's April 2007 ruling that EPA has authority to regulate greenhouse gases under CAA Title II. EPA maintains that the Supreme Court decision did not impose any deadline for EPA action and that the agency has not unreasonably delayed a decision.

*California v. EPA* (9th Cir.)—Climate Change: In April, the Ninth Circuit rejected a motion by EPA to dismiss a lawsuit filed by in November, by California and fourteen other states concerning EPA's alleged improper denial of California's request for a CAA waiver that would allow California to regulate GHG emissions from automobiles. In denying the motion, the court rejected EPA's arguments that the D.C. Circuit was the proper location for suit and that the action is premature because EPA had not yet published its decision to deny the waiver request at the time California filed suit.

*Connecticut v. American Elec. Power Co.* (2d Cir.)—Climate Change: Since June 2006, the Second Circuit has been considering an appeal of a global climate change nuisance case brought by a number of states and environmental groups against five utilities. The case was dismissed by the lower court on the grounds that it raised political questions that should be addressed by Congress, not the courts. 406 F. Supp. 2d 265 (S.D.N.Y. 2005). A decision is expected at any time.

*Native Village of Kivalina and City of Kivalina v. ExxonMobil Corp.* (N.D. Cal.)—Climate Change: In the most recent action (filed on Feb. 26), Inupiat Eskimos have filed suit against numerous energy companies and energy supply companies, alleging that those GHG emissions caused directly or indirectly by those entities has irreparably damaged their Alaskan communities. The plaintiffs assert federal public nuisance claims, state private and public nuisance claims, and civil conspiracy and concert of action claims.

*Mercury MACT Litigation*: In early May, the Sierra Club and other environmental groups served Duke

Energy with a notice of intent to sue the company over the construction of a coal-fired boiler at the company's Cliffside power plant. The notice alleges that the permit for construction, issued by the North Carolina Department of Environment and Natural Resources in January 2008, fails to contain limits on emissions of mercury and other HAPs as required by CAA Section 112(g). On May 6, the Sierra Club announced that it had served similar notices on a number of other power plants across the United States.

*NRDC v. EPA*, No. 07-1053—Hazardous Organic NESHAP Rule: In April, the D.C. Circuit heard oral arguments concerning a challenge to a final rule governing emissions of hazardous organics from the synthetic organic chemical industry. The petitioners contend that the rule is too lenient because it fails to require the advance technology mandated by Congress. The dispute centers principally around the level of human health risk that is acceptable under the statute. Petitioners argue that the cancer risk for people living near chemical plants must be no greater than 1 in 1 million. EPA counters that a risk of 100 in 1 million is consistent with the statutory requirements. A decision is pending.

## II. Other Notable Developments at the Federal Level

### A. New Source Review and New Source Performance Standards

1. New Enforcement Policy: In late May, EPA announced that it would pursue future NSR enforcement actions against power plants using an actual-to-projected-future-actual annual emissions test for power plants. Under a previous policy (issued in 2005), EPA had pursued new enforcement actions using a narrower, hourly emission rate test.

2. Revised New Source Performance Standards for Petroleum Refineries: On April 30 EPA announced revised new source performance standards (NSPS) for the petroleum refining sector. The new rule will impose more stringent limits on emissions of particulate matter, sulfur dioxide and nitrogen oxides from approximately thirty facilities in the United States. EPA, however, declined to regulate GHG emissions from

petroleum refineries under its NSPS authority, maintaining that the CAA does not impose an obligation to cover new pollutants not previously addressed by NSPS rules.

3. NSR Requirements for Particulate Matter: EPA, on May 8, issued a final rule that is intended to clarify state, local, and tribal requirements for enforcing the NSR program with respect to fine particulate matter (or PM<sub>2.5</sub>). The rule sets a significance threshold of 10 tons per year of PM<sub>2.5</sub> and will allow stationary sources to trade, within limits, pollutants between states and regions. No trading is allowed within nonattainment areas. In addition, states are authorized to adopt regulations more stringent than those promulgated by EPA.

4. Litigation: *United States v. Cinergy Corp.* (S.D. Ind.): This nearly 9-year old enforcement action went to trial in front of a ten-person jury in May, with the plaintiffs alleging that fourteen different replacement projects at five different power plants in Indiana and Ohio were subject to NSR requirements. (At its height, the case involved more than fifty alleged violations. The claims that did not go to trial were previously dropped or judgment for Cinergy had already been granted.) In late May, the jury returned a verdict for Cinergy on ten of the fourteen projects, findings that a reasonable power plant owner or operator would not have expected the replacement projects to result in significant net increases in annual emissions. The jury returned a verdict for plaintiffs on the remaining four projects—all of which occurred at the company's Wabash River plant more than 5 years before EPA filed suit. Although penalties are precluded by the 5-year statute of limitations, the parties are preparing for a Dec. 8, 2008 trial to determine the appropriate remedy, if any, for four Wabash River projects.

## B. Mercury MACT

In February, the D.C. Circuit struck down EPA's CAMR on the grounds that the rule did not satisfy EPA's CAA obligations to regulate mercury as a HAP under CAA Title III. *New Jersey v. EPA*, No. 05-1097. Specifically, the court concluded that EPA must establish national emission standards based on MACT

and that EPA cannot sidestep those requirements by adopting a cap and trade program for mercury under Title I of the Act. The court declined, however, to rule that EPA could not adopt a cap and trade program under Title III. On March 13, the court issued a mandate giving immediate effect to its February vacatur of CAMR. Subsequently, on May 20, the court denied EPA's request for reconsideration. Alexia Borden's article above describes the lawsuit in more detail (including the implications and impact of the court's ruling).

## C. NAAQS

1. Lead: EPA recently proposed to strengthen the lead NAAQS. Under the proposed rule, issued May 1, EPA is offering a range of options that could set both the primary and secondary NAAQS at levels between 0.10 micrograms per cubic meter of air and 0.30 micrograms per cubic meter of air. The current primary and secondary standards are set at 1.5 micrograms per cubic meter of air. EPA remains under a court order to finalize a revised lead NAAQS by Sept. 1, 2008. The comment period is open, and EPA will hold two public hearings (one in St. Louis and one in Baltimore) in mid-June.

2. Carbon Monoxide: On May 5, EPA was ordered to complete its review and, as appropriate, revise the existing NAAQS for carbon monoxide by May 13, 2011. *Communities for a Better Environment v. EPA*, No. 07-3678 (N.D. Cal.).

## D. Clean Air Implementation Rule

The D.C. Circuit heard challenges to EPA's Clean Air Interstate Rule (CAIR) on March 25, 2008. *North Carolina v. EPA*, No. 05-1244. The challenges were brought by North Carolina and a number of power companies. North Carolina asserts that the CAIR rule does not go far enough to reduce emissions of nitrogen oxides and sulfur dioxides from power plants. The power plants, in contrast, argue that, in a number of respects, EPA exceeded its authority in developing the CAIR program, including the cap and trade scheme included in the program.

## EPA REGIONAL REPORTS

### EPA Region 1

**Dixon Pike**

**Brian Rayback**

***Pierce Atwood LLP***

***Portland, Maine***

***dpike@pierceatwood.com***

***brayback@pierceatwood.com***

#### I. Regional Greenhouse Gas Initiative

One of the key air initiatives in EPA Region 1 states is the Regional Greenhouse Gas Initiative (RGGI). All of the Region 1 states, plus Delaware, Maryland, New Jersey, and New York, are members RGGI. The goal of this initiative is to develop a regional program for controlling greenhouse (GHG) emissions that contribute to global warming without unduly threatening energy affordability and reliability. In general, the plan will apply to electric generating units that have a nameplate capacity of at least 25 megawatts and burn more than 50 percent fossil fuel. Some exceptions apply, such as for sources that sell less than 10 percent of the electricity they produce to the grid.

Central to the RGGI program is the creation of a multi-state cap and trade program with a market-based emissions trading system. The plan limits GHG emissions by establishing a regional cap, which is approximately equivalent to the average carbon dioxide (CO<sub>2</sub>) emissions (or CO<sub>2</sub> equivalents) of affected sources during the highest three years between 2000 and 2004. Each state has been given an initial CO<sub>2</sub> emissions budget that reflects CO<sub>2</sub> emissions from affected sources in the state during the baseline years.

Each participating state is in the process of using the model rule as the basis for its own regulatory and/or statutory proposals to implement the program. The states, however, plan to cooperate in holding regional auctions for allowances on Sept. 10, 2008, and Dec. 17, 2008. For more information on the auctions, see [http://www.rggi.org/docs/20080317auction\\_design.pdf](http://www.rggi.org/docs/20080317auction_design.pdf).

The status of RGGI in each of the Region 1 states as of this writing is as follows:

#### A. Connecticut

The Connecticut General Assembly adopted legislation (H.B. 7432) last summer to authorize participation in RGGI. Connecticut's statute provides that allowances may be auctioned off, rather than given to generators, with the proceeds going to energy conservation, load management, renewable energy programs, and administration.

The Connecticut Department of Environmental Protection (CTDEP) has proposed two new regulations, Section 31—Control of Carbon Dioxide Emissions/Carbon Dioxide Budget Trading Program and Section 31a—Greenhouse Gas Emission Offset Projects, to implement RGGI. Section 31 will govern the control of emissions and create a budget trading program, while Section 31a is intended to regulate GHG offset projects. The comment period for these proposed rules ended on Feb. 8, 2008.

For more information, see [http://www.ct.gov/dep/cwp/view.asp?a=2684&q=332278&depNav\\_GID=1619](http://www.ct.gov/dep/cwp/view.asp?a=2684&q=332278&depNav_GID=1619).

#### B. Maine

Maine enacted new legislation in 2007 to authorize implementation of the RGGI program. P.L. 2007, c. 317. Maine's version of the legislation requires that all of the allowances be sold at auction.

The Maine Department of Environmental Protection (MEDEP) has since proposed two new rules to carry out RGGI, Chapter 156: CO<sub>2</sub> Budget Trading Program and Chapter 157: CO<sub>2</sub> Budget Trading Program Waiver and Suspension. Chapter 156 establishes the Maine component of the CO<sub>2</sub> Budget Trading Program, which is designed to stabilize and then reduce anthropogenic emissions of CO<sub>2</sub> from budget trading sources. Chapter 157 would grant the MEDEP the authority in exceptional circumstances to waive or suspend requirements of the Budget Trading Program. The comment period for both proposed rules closed on Sept. 20, 2007.

For more information, see <http://www.maine.gov/dep/air/greenhouse/rggi.htm>.

#### C. Massachusetts

Although Massachusetts was one of the founding members of the RGGI group, it initially declined under Gov. Mitt Romney to participate in the initiative. Massachusetts ultimately joined in January 2007 as a member following the election of Gov. Deval Patrick.

Despite being one of the last states to join, the Massachusetts Department of Environmental Protection (MADEP) and Division of Energy Resources have already promulgated final rules to implement RGGI, the first member state to do so. *See* 310 CMR 7.00 (Appendix B), 310 CMR 7.29, 310 CMR 7.70 & 225 CMR 13.00. The rules require auctioning off all of the allowances, with proceeds going to reduce energy use and electric bills, and build upon an existing program that already restricted GHG emissions from the six largest power plants in the state. In late January, Massachusetts also published offset and trust trigger prices for 2008 (\$6.90 and \$11.40 per ton of CO<sub>2</sub>, respectively).

For more information, see <http://www.mass.gov/dep/air/climate/index.htm#rggi>.

#### D. New Hampshire

New Hampshire, which was one of the first states to join RGGI, is the only state yet to approve any legislation or rules to carry out the program. The legislature is in the process, however, of considering a bill (H. 1434) authorizing New Hampshire's participation, and approval appears to be imminent.

For more information, see [www.des.state.nh.us/ARD/ClimateChange/rggi.htm](http://www.des.state.nh.us/ARD/ClimateChange/rggi.htm).

#### E. Rhode Island

As with Massachusetts, Rhode Island initially declined to participate in RGGI, but has since enacted a bill, codified at Chapter 23-82 of the General Laws, that authorizes participation in RGGI and directs the Rhode

Island Department of Environmental Management (RIDEM) to draft regulations to establish the program. In addition, similar to the way other states have addressed the issue, the new legislation requires that all of the allowances will be auctioned off. The RIDEM has convened a stakeholder group to begin that process.

For more information, see <http://www.dem.ri.gov/rggi/index.htm>.

#### F. Vermont

The Vermont Agency of Natural Resources (VTANR) has issued a pre-proposal draft rule, the Vermont CO<sub>2</sub> Budget Trading Program, to implement RGGI. The comment period ended on April 16, 2007. Under the Vermont version of the rule, all of the state's CO<sub>2</sub> allowances will be allocated to a consumer benefit or strategic purpose set-aside account in accordance with 30 V.S.A. § 255(c)(2). The account will be managed by trustees, appointed by the Public Service Board, to provide the maximum long-term benefit to Vermont electric consumers.

For more information, see [www.anr.state.vt.us/air/html/RGGI.htm](http://www.anr.state.vt.us/air/html/RGGI.htm).

## II. Regional Haze

Another key regional initiative is implementation of the Regional Haze Rule, 64 Fed. Reg. 35,714 (July 1, 1999), which requires states and interested tribes to take steps to reduce emissions of haze-causing pollution from numerous sources to protect national parks and wilderness areas (known as Class I areas). Under the rule, all states were required to identify key sources of haze-causing pollution, develop plans to reduce emissions from these sources, and submit those plans to EPA by Dec. 17, 2007.

To facilitate this process, EPA established five regional planning organizations across the nation. All of the Region 1 states, as well as Delaware, the District of Columbia, Maryland, New Jersey, New York, Pennsylvania, the Penobscot tribe, and the St. Regis Mohawk tribe, as well as federal environment, forest,

park and wildlife agencies, belong to a regional planning organization known as MANE-VU, which stands for the Mid-Atlantic/Northeast Region Visibility Union.

There are seven Class I areas in the MANE-VU region: Moosehorn Wilderness Area, Roosevelt Campobello International Park, and Acadia National Park in Maine; Great Gulf Wilderness Area and Presidential Range-Dry River Wilderness Area in New Hampshire; Lye Brook Wilderness Area in Vermont; and Brigantine Wilderness Area in New Jersey.

Most recently, members of MANE-VU, as well as other states and stakeholders, were invited to comment on MANE-VU's 2018 Visibility Draft Projections Report, which is available at <http://www.nescaum.org/topics/regional-haze/regional-haze-documents>. The Draft Report was prepared to quantify those efforts being considered by MANE-VU states. The comment period closed on April 25, 2008.

### III. State Updates

#### A. Connecticut

The Connecticut Department of Environmental Protection (CTDEP) has issued for public review the 2008 Annual Air Monitoring Network Plan. The primary objective of the network is to adequately and efficiently characterize and measure ozone and its precursors, as well as PM<sub>2.5</sub> and the precursors and chemical components of fine particulate matter (PM). Among other changes, the CTDEP plans to add two new monitoring sites, Criscuolo Park in New Haven and Mohawk Mountain in Cornwall, to monitor for PM coarse (PM between 10 and 2.5 microns in diameter) to gather data for potential future rulemaking. Comments are on the plan due by June 15, 2008.

For more information, see [http://www.ct.gov/dep/lib/dep/air\\_monitoring/2008ctairmonitoringnetworkplan.pdf](http://www.ct.gov/dep/lib/dep/air_monitoring/2008ctairmonitoringnetworkplan.pdf).

#### B. Maine

The MEDEP is proposing to create a general permit for air emissions from non-metallic mineral processing

plants subject to federal New Source Performance Standards. The general permit would allow most such plants, defined as any combination of a stationary engine and a rock crusher, to obtain a permit without going through the individual permitting process currently required by Chapter 115, Major and Minor Source Air Emission License Regulation. The general permit will require facilities seeking coverage under Chapter 149 to agree in advance to certain performance standards, including opacity standards and control equipment requirements. Comments are due by May 27, 2008.

For more information, see <http://www.maine.gov/dep/air/regulations/proposed.htm>.

#### C. Massachusetts

The Massachusetts Department of Environmental Protection has proposed to create performance standards that manufacturers would have to meet in order to sell outdoor wood boilers, known as outdoor hydronic heaters (OOHs), in Massachusetts. The new rules would be phased in based on the heat input of the particular unit. The proposed Phase I emission standard for PM is 0.44 pounds per million Btus (lb/MMBtu) heat input for units to be sold after Oct. 1, 2008. The proposed Phase II emission standard for PM is 0.32 lb/MMBtu heat output for units to be sold after March 31, 2010. In addition, Phase II limits total PM emitted to 15 grams per hour for residential units and 20 grams per hour for commercial size units. The new rules would also provide setback and stack height requirements for new units, as well as operational standards for all OOHs, regardless of age. Comments on the proposed rule are due by July 3, 2008.

For more information, see <http://www.mass.gov/dep/public/hearings/owbphn.htm>.

#### D. New Hampshire

EPA has designated a portion of southeastern New Hampshire as the Boston-Manchester-Portsmouth (Southeast) New Hampshire moderate non-attainment area for the 8-hour ozone National Ambient Air Quality Standard. The non-attainment area consists of portions of Hillsborough, Merrimack, Rockingham,

and Strafford counties. The New Hampshire Department of Environmental Services has prepared an early interim motor vehicle emissions budget for the entire 8-hour ozone non-attainment area based on data developed in a draft attainment demonstration for the Southeast New Hampshire Moderate 8-Hour Ozone Non-Attainment Area. The intent is to show that emissions from on-road vehicles will be considerably lower in the attainment year of 2009 than in the baseline year of 2002. Comments were due by April 28, 2008.

For more information, see <http://www.des.state.nh.us/ard/conformity.htm>.

#### E. Rhode Island

The Rhode Island Department of Environmental Management recently proposed amendments to the Rhode Island Vehicle Inspection/Maintenance Program in Air Pollution Control Regulation 34. The proposal is intended to align the testing standards for the program with the EPA standards for on-board diagnostics (OBD) inspections for model year (MY) 2001 and newer vehicles. Additionally, the proposal would also amend the regulations to require that the vehicle's malfunction indicator light functionality be checked visually as well as electronically through the OBD computer, as required in the EPA standards. When APC Reg. No. 34 was last amended in 2002, the inspection/maintenance program was only beginning to address cars with OBD computers pursuant to EPA standards vehicles manufactured during MYs 1996-2000. The EPA standards for vehicles of MY 2001 and newer are now more restrictive in that the EPA standards allow the inspection to be conducted on the OBD system only if the OBD computer indicates that no more than one monitor is signifying a "not ready" code. The comment period closed on March 9, 2007.

For more information, see <http://www.dem.ri.gov/programs/benviron/air/drft341.htm>.

#### F. Vermont

The Vermont Governor's Commission on Climate Change has issued a report that sets forth a strategy to

address climate change. Among other things, the report focuses on promoting efficiency through demand-side management, expanding the use of renewables in electric generation, preserving farms and forests to act as carbon sinks, and strengthening public transportation.

To carry out the plan, the commission proposes a formal, long-term partnership between the state and its higher education community, led by the University of Vermont, to coordinate the Vermont Agency of Natural Resources with other partners, including the General Assembly, other elected officials, and federal partners, as well as the business community and general public.

For more information, see <http://www.anr.state.vt.us/air/cfm/AirWhatsNew.cfm#General>.

#### **EPA Region 2**

No report for this edition.

#### **EPA Region 3**

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

##### I. EPA Region 3 Developments

EPA Region 3 has the highest number of audit disclosures in the country. Although EPA Region 3 does not have many self-audits that are related solely to air issues, air disclosures are part of multi-media and sector-specific audits. None of the disclosures concern Title V issues, however. The high number of self-audits in Region 3 results in part from EPA taking enforcement actions against a few entities which encourages other similarly situated entities to make voluntary disclosures. In addition, Region 3 will negotiate to relieve reporting entities of the requirement that the self-audit be completed within 21 days of a finding, especially in cases involving multiple facilities or takeovers of other companies.

## II. State Developments

### A. Delaware

1. Climate Change: The Delaware RGGI Workgroup is working on the development of Delaware's Regulation No. 1147 RGGI Rule. Delaware is also a member of the Climate Registry, which announced in April the agreement of a common greenhouse gas (GHG) reporting standard, The Climate Registry's General Reporting Protocol. The protocol defines the methodology for corporations, organizations, and government entities to calculate, verify, and publicly report GHG emissions. The registry is developing additional industry-specific protocols that will provide greater clarity and specificity for GHG reporting in sectors with specialized sources, *e.g.*, electric utilities and oil and gas companies.

2. NAAQS: On March 5, EPA published a proposed rule (73 Fed. Reg. 11,845) proposing to approve Delaware's regulation to control emissions from stationary generators. Comments were due April 4.

On March 27, EPA published a final rule (73 Fed. Reg. 16,205) finding that Delaware failed to submit a complete 8-hour ozone state implementation plan (SIP) addressing changes to its part C PSD permit program as required by § 110(a)(2)(C) and (J) of the Clean Air Act (CAA). The finding of failure to submit starts a 24-month deadline for EPA to promulgate a federal implementation plan (FIP) to address the outstanding SIP elements unless, before then, Delaware submits, and EPA approves, the required SIP. The final rule took effect April 28.

On April 1, Delaware Department of Natural Resources and Environmental Control (DE DNREC) Secretary John A. Hughes signed two orders for the final plan approvals of Delaware's PM<sub>2.5</sub> SIP and 2002 base-year PM<sub>2.5</sub> SIP emission inventory. The SIP revisions are in response to U.S. EPA's designation of the Philadelphia-Wilmington, PA-NJ-DE area as non-attainment for PM<sub>2.5</sub> in April 2005. The area includes New Castle County in Delaware and is required to attain the PM<sub>2.5</sub> standard by April 2010.

On April 22, EPA published a final rule (73 Fed. Reg. 21,538) approving a Delaware SIP revision establishing the state's transportation conformity requirements. The revision addresses the following three provisions of the federal transportation conformity rule required under the Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy For Users: (1) consultation procedures, (2) control measures, and (3) mitigation measures. The final rule took effect May 22.

On April 28, EPA published a proposed rule (73 Fed. Reg. 22,896) proposing to determine that the Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD severe 1-hour ozone nonattainment area (NAA) attained the 1-hour ozone National Ambient Air Quality Standards (NAAQS) by the applicable attainment date of Nov. 15, 2005. In addition, EPA is proposing to find that this area is not subject to imposition of the penalty fees under Clean Air Act (CAA) § 185. This proposed determination of attainment is not a redesignation to attainment for this area. Comments were due May 28.

On April 29, EPA published a final rule (73 Fed. Reg. 23,101) approving a Delaware SIP revision containing provisions to control emissions from stationary generators. The final rule took effect May 29.

3. Regulations: On May 11, DE DNREC gave notice that Secretary John A. Hughes signed an order amending Subpart M of Regulation No. 1138—Emission Standards for Hazardous Air Pollutants for Source Categories. The amendments make Delaware's regulation consistent with recent changes to the federal rule requiring additional perchloroethylene emission reductions from dry-cleaning facilities. In addition to tightening the emission control requirements, the amendments permanently exempt area source dry-cleaning facilities from Title V permitting requirements. The amendments take effect July 28.

### B. District of Columbia

1. NAAQS: On March 27, EPA published a final rule (73 Fed. Reg. 16,205) finding that the District of Columbia failed to submit a § 110(a)(2) 8-hour ozone SIP addressing ambient air quality monitoring/data

system, the part C Prevention of Significant Deterioration (PSD) permit program, the public availability of reports, and public notification. The part C PSD permit program requirement for the District of Columbia has already been addressed by a FIP that remains in place, and therefore EPA's finding of non-submittal will not trigger any additional FIP obligation with respect to this requirement for the District of Columbia. The final rule took effect April 28, 2008.

On April 28, 2008, EPA published a proposed rule (73 Fed. Reg. 22,896) proposing to determine that the Metropolitan Washington, DC-MD-VA, severe 1-hour ozone NAA, attained the 1-hour ozone NAAQS by the applicable attainment date of Nov. 15, 2005. In addition, EPA is proposing to find that the Metropolitan Washington area is not subject to the imposition of the penalty fees under CAA § 185. The comment period closed on May 28, 2008.

## C. Maryland

1. Climate Change: The only GHG cap and trade program Maryland will be required under law to participate in will be RGGI, a trading program that will cut the Northeast's GHG emissions 10 percent below current levels by 2015. The Maryland House Economic Matters Committee rejected the Maryland Global Warming Solutions Act, which would have required the state to cut GHG emissions to 2 percent below 2006 levels by 2020 and 90 percent below 2006 levels by 2050. In June 2008, the Maryland Climate Change Commission is expected to issue its final recommendations for further GHG emissions reductions.

2. NAAQS: On Feb. 28, 2008, EPA published a proposed rule (73 Fed. Reg. 10,730) and a direct final rule (73 Fed. Reg. 10,673) approving a Maryland SIP revision allowing Maryland to incorporate prospectively EPA's definition of volatile organic compounds (VOCs) as amended. Because EPA did not receive adverse written comment by March 31, 2008, the rule automatically took effect April 28, 2008.

On March 11, 2008, EPA published a final rule (73 Fed. Reg. 12,895) correcting an omission in the

Part 52 Identification of Plan table for Maryland which summarizes the applicable source-specific requirements which comprise the current EPA-approved Maryland SIP. EPA inadvertently omitted an entry describing the EPA-approved Amended Consent Order for the Potomac Electric Power Company-Dickerson Plant. The final rule took effect March 11, 2008.

On March 27, 2008, EPA published a final rule (73 Fed. Reg. 16,205) finding that Maryland failed to submit a SIP addressing changes to its part C PSD permit program as required by CAA § 110(a)(2)(C) and (J). The finding of failure to submit started a 24-month clock for EPA to promulgate a FIP to address the outstanding SIP elements. The FIP clock will stop if Maryland submits, and EPA approves, the required SIP. The final rule took effect April 28, 2008.

On April 8, 2008, EPA published a proposed rule (73 Fed. Reg. 19,035) and a direct final rule (73 Fed. Reg. 18,968) approving Maryland's large municipal waste combustor (LMWC) plan revision for implementing emission guideline amendments promulgated by EPA on May 10, 2006. The plan revision establishes revised emission limits, and monitoring and record-keeping requirements for existing LMWC units with a unit capacity greater than 250 tons per day. The revisions apply to LMWC units for which construction commenced on or before Sept. 20, 1994. Because EPA did not receive adverse written comment by May 8, 2008, the final rule automatically took effect June 9, 2008.

On April 15, 2008, EPA published a proposed rule (73 Fed. Reg. 20,234) proposing to approve a Maryland SIP revision establishing volatile organic compound reasonably available control technology (VOC RACT) requirements for marine vessel and barge loading. Comments were due May 15, 2008.

On April 28, 2008, EPA published a proposed rule (73 Fed. Reg. 22,896) proposing to determine that the Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD severe 1-hour ozone NAA attained the 1-hour ozone NAAQS by the applicable attainment date of Nov. 15, 2005. In addition, EPA is proposing to find that this area is not subject to imposition of the penalty fees

under CAA § 185. Comments were due on May 28, 2008.

#### D. Pennsylvania

1. Climate Change: On April 18, 2008, the Pennsylvania Department of Environmental Protection (PA DEP) announced that Bucks County has joined the Sierra Club's Cool Counties Initiative, pledging to reduce global warming emissions 80 percent by 2050. Bucks County is the first county in Pennsylvania to make that pledge.

2. New Source Review: On Feb. 26, 2008, the PA DEP announced that the emission reduction credit (ERC) application amnesty period expires May 19, 2008. The amnesty period for the submission of ERC registry applications for emission reductions generated from stationary or mobile air contamination sources was included in amendments to the nonattainment new source review and ERC registry regulations that the Pennsylvania Environmental Quality Board published on May 19, 2007 in the *Pennsylvania Bulletin* (37 PA. B. 2365).

3. NAAQS: On March 4, 2008, EPA published a final rule (73 Fed. Reg. 11,560) correcting an error in the preamble of the final rules pertaining to EPA's approval of the redesignation of the Erie, Youngstown, and Cambria 8-hour ozone NAAs to attainment, maintenance plans, and 2002 base-year inventories submitted by Pennsylvania. In these final rules, EPA inadvertently printed the incorrect categories of VOC and NO<sub>x</sub> in a table regarding the motor vehicle emission budgets (MVEBs). The March 4, 2008 final rule corrects the tables and the final rulemaking actions in the categories of VOC and NO<sub>x</sub> for the MVEBs.

On March 4, 2008, EPA published a final rule (73 Fed. Reg. 11,553) approving a Pennsylvania SIP revision establishing and requiring reasonably available control technology (RACT) for Merck and Co., Inc., a major source of VOC and NO<sub>x</sub> pursuant to Pennsylvania's SIP-approved generic RACT regulations. The final rule took effect March 4, 2008.

On March 4, 2008, EPA published a final rule (73 Fed. Reg. 11,557) approving a request by

Pennsylvania to redesignate the Allentown-Bethlehem-Easton ozone NAA as attainment for the 8-hour ozone NAAQS. The area includes Carbon, Lehigh, and Northampton counties. In addition, EPA is approving the 8-hour ozone maintenance plan, 2002 base-year inventory, adequacy determination for the MVEBs, and the MVEBs. The final rule took effect April 3, 2008.

On March 27, 2008, EPA published a final rule (73 Fed. Reg. 16,205) finding that Pennsylvania failed to submit a SIP for 8-hour ozone addressing its part C PSD permit program for the Allegheny County portion of the commonwealth as required by CAA §110(a)(2)(C). The part C PSD permit program requirement for the Allegheny County portion of Pennsylvania has already been addressed by a FIP that remains in place, and therefore EPA's finding of non-submittal will not trigger any additional FIP obligation with respect to this requirement for Pennsylvania. The final rule took effect April 28, 2008.

On April 14, 2008, EPA published a proposed rule (73 Fed. Reg. 20,002) proposing to approve a SIP revision submitted by Pennsylvania consisting of a maintenance plan that provides for continued attainment of the 8-hour ozone NAAQS for at least 10 years after the April 30, 2004 designations and a 2002 base-year inventory for the Wayne County Area. Comments were due May 14, 2008.

On April 28, 2008, EPA published a proposed rule (73 Fed. Reg. 22,896) proposing to determine that the Philadelphia-Wilmington-Trenton, PA-NJ-DE-MD severe 1-hour ozone NAA attained the 1-hour ozone NAAQS by the applicable attainment date of Nov. 15, 2005. In addition, EPA is proposing to find that this area is not subject to the imposition of the penalty fees under CAA § 185. Comments are due May 28, 2008.

On May 1, 2008, EPA published a proposed rule (73 Fed. Reg. 23,998) proposing to approve the 8-hour ozone maintenance plan and 2002 base-year inventory for the Warren County Area. The comment period closed on due June 2, 2008.

On May 14, 2008, EPA published four proposed rules proposing to approve the 8-hour ozone maintenance

plans and 2002 base-year inventories for the Columbia County (73 Fed. Reg. 27,783), Somerset County (73 Fed. Reg. 27,786), Susquehanna County (73 Fed. Reg. 27,788), and Crawford County areas (73 Fed. Reg. 27,791). Comments were due June 13, 2008.

4. Regulations: On Feb. 12, 2008, the Pennsylvania Environmental Quality Board (PA EQB) approved proposed regulations pertaining to the control of NO<sub>x</sub> emissions from cement kilns and glass melting furnaces. The proposed regulations will be published in the *Pennsylvania Bulletin* and open for public comment. Also, on Feb. 19, 2008, the PA EQB approved Pennsylvania's final Air Quality Permit Streamlining regulation. The final regulations were submitted to the House Environmental Resources and Energy Committee, the Senate Environmental Resources and Energy Committee, and the Independent Regulatory Review Commission (IRRC) pursuant to the Regulatory Review Act. The IRRC approved the regulations on April 17, 2008. In addition, on March 6, 2008, the IRRC approved Pennsylvania's Clean Air Interstate Rule.

On April 29, 2008, the PA DEP opened the public comment period on Pennsylvania's updated Ambient Air Monitoring Network Plan for 2009. The plan is required by EPA's amendments to the national ambient air monitor regulations which took effect in October 2006. Pennsylvania's plan includes a statement of purpose for each air monitor and evidence that siting and operation of each monitor meets federal requirements. The federal amendments eliminate the requirements for a minimum number of monitors for CO, SO<sub>2</sub>, and NO<sub>2</sub> and reduce the requirements for a minimum number of PM<sub>10</sub> monitors based on pollution. Consistent with the federal amendments, Pennsylvania is proposing a reduction in the monitoring network for 2009.

## E. Virginia

1. Air Toxics: On March 20, the Virginia Air Pollution Control Board voted to assume authority over the mercury Maximum Achievable Control Technology (MACT) and PSD permits for Dominion's proposed 585 MW hybrid coal plant, which is designed to burn

coal, coal waste, and up to 20 percent biomass. In assuming authority, some members of the board stated that additional information was needed before any final action could be taken on the permits. The board's additional information requests will be made public and subject to public comment. Dominion's case-by-case MACT permit is one of the first in the country following the Feb. 8, 2008 ruling by the United States Court of Appeals for District of Columbia Circuit vacating EPA's Clean Air Mercury Rule, making case-by-case mercury MACT permits required for all new power plants.

2. Climate Change: On March 27, the Virginia Commission on Climate Change (Commission) met in Charlottesville, Virginia. The meeting included presentations on the Intergovernmental Panel on Climate Change, a summary of local, state, regional, and federal approaches to address climate change, and natural sequestration: the role of natural sinks (forest, ocean) in capturing and storing carbon emissions. On April 22, 2008, Dominion Virginia Power and other entities to be covered by Virginia's plan to cut GHGs 30 percent by 2025 testified before the Commission. Dominion urged the Commission to include a "safety valve" to protect consumers against rate hikes. Dominion also argued that Virginia's plan should be economy-wide as opposed to utility-only under RGGI. The Commission met May 13 to hear about potential economic effects and meets on June 17 to hear about land use and adaptation. In August, the Commission will hold a broad stakeholder hearing. Virginia's Commission is expected to issue a report by Dec. 15, 2008 on the steps Virginia needs to take to achieve a 30 percent reduction in GHG emissions by 2025.

3. NAAQS: On Feb. 26, 2008, EPA published a proposed rule (73 Fed. Reg. 10,201) proposing to approve a Virginia SIP revision pertaining to a 10-year maintenance plan for the White Top Mountain 1-hour ozone NAA located in Smyth County, Virginia. Comments were due March 27, 2008.

On Feb. 28, 2008, EPA published a proposed rule (73 Fed. Reg. 10,731) and a direct final rule (73 Fed. Reg. 10,670) approving Virginia SIP revisions pertaining to administrative amendments to the commonwealth's

regulation governing source-specific NO<sub>x</sub> RACT. Because EPA did not receive any adverse written comment by March 31, 2008, the rule automatically took effect April 28, 2008.

On March 6, 2008, EPA published a final rule (73 Fed. Reg. 12,011) correcting errors in the final rule chart listing Virginia regulations governing Kraft Pulp and Paper Mills which EPA has incorporated by reference into the Virginia SIP. The final took effect March 6, 2008.

Beginning March 17, 2008, the Virginia Department of Environmental Quality (VADEQ) will have for public inspection a copy of the 2008 proposed Air Quality Monitoring Network Review. The document will contain a discussion of the proposed changes to the Air Quality Monitoring Network projected for fiscal year 2008 as well as a description of the existing monitors in the network. The Monitoring Network Review is a federal requirement and is specifically cited in 40 CFR § 58.10 (a)(1).

On March 24, 2008, EPA published a final rule (73 Fed. Reg. 15416) finding that Virginia failed to submit its RACT SIP for the 1997 8-hour ozone standard for Stafford County. Because Stafford County is part of the Ozone Transport Region (OTR), Virginia was required to submit an 8-hour ozone RACT SIP for Stafford County by Sept. 15, 2006, under EPA's Phase 2 8-Hour Ozone Implementation Rule. EPA's finding starts the 18-month clock for emissions offset sanctions and 24-month FIP clock. Virginia is working on a certification that the RACT rules it adopted and EPA approved under the 1-hour ozone standard meet the RACT requirements applicable for the 8-hour ozone standard. Virginia is expected to complete its notice-and-comment process and submit its RACT SIP in time for EPA to take rulemaking action before the 24-month FIP clock expires. Because Stafford County is part of the OTR, it is subject to nonattainment new source review and, therefore, would be subject to the 2:1 emission offset sanction if Virginia fails to submit RACT rules EPA affirmatively determines are complete within 18 months of the finding of failure to submit. Because Stafford County is in attainment, the highway funding sanction would not apply. The final rule took effect March 24, 2008.

On March 26, 2008, the VA DEQ announced a public hearing on Virginia's PM<sub>2.5</sub> SIP on April 30, 2008. The public comment period began March 31, 2008 and ended May 1, 2008. The SIP revision addresses those requirements of CAA § 110(a)(2)(A) through (M) for PM<sub>2.5</sub> which have not been addressed in other SIP revisions. It describes how Virginia will demonstrate that the PM<sub>2.5</sub> NAAQS is being implemented, maintained, and enforced.

On March 27, 2008, EPA published a final rule (73 Fed. Reg. 16,205) finding that Virginia failed to submit a § 110(a)(2) SIP for 8-hour ozone addressing the part C PSD permit program. The finding of failure to submit starts a 24-month clock for EPA to promulgate a FIP. The final rule took effect April 28, 2008.

On April 2, 2008, EPA published a final rule (73 Fed. Reg. 17,897) designating Early Action Compact (EAC) areas in Virginia as attainment for the 8-hour ozone NAAQS. The EAC areas in Virginia are: (1) the Northern Shenandoah Valley Region (Frederick County, VA), (2) the Roanoke area, consisting of Roanoke and Botetourt Counties and Roanoke and Salem Cities, and (3) Washington County (Hagerstown, MD). These areas agreed to reduce ground-level ozone pollution earlier than required by the CAA and to demonstrate attainment with the 8-hour ozone NAAQS by Dec. 31, 2007. Pursuant to EPA's implementing regulations, the 1-hour ozone NAAQS will no longer apply in these areas as of April 15, 2009. The final rule took effect April 15, 2008.

On April 15, 2008, EPA published a final rule (73 Fed. Reg. 20,175) approving a Virginia SIP revision pertaining to a federally enforceable state operating permit containing terms and conditions for the control of VOC emissions from the Kraft Foods Global, Inc.—Richmond Bakery located in Henrico County, Virginia. The final rule took effect May 15, 2008.

On April 22, 2008, EPA published a final rule (73 Fed. Reg. 21,540) approving a Virginia SIP revision pertaining to the incorporation of on-board diagnostic testing and other amendments to the Motor Vehicle Emission Inspection Program for the Northern Virginia area. The final rule takes effect May 22, 2008.

On April 28, 2008, EPA published a final rule (73 Fed. Reg. 22,818) withdrawing the FIP for the Clean Air Interstate Rule (CAIR) in Virginia because Virginia has submitted and received EPA approval of its full CAIR SIP. The final rule took effect April 28, 2008.

On April 29, 2008, U.S. EPA published a final rule (73 Fed. Reg. 23,103) approving the 8-hour ozone maintenance plan for the White Top Mountain, Smyth County, Virginia 1-hour ozone NAA. The final rule takes effect May 29, 2008.

On May 2, 2008, the VA DEQ opened the comment period on proposed revisions to the Virginia SIP pertaining to maintenance areas and NAAs. The proposed revision consists of amendments to existing regulations concerning the redesignation of 8-hour ozone NAAs to maintenance areas. Under the proposal, the Hampton Roads 8-hour ozone NAA would be replaced by the Hampton Roads 8-hour ozone maintenance area and the Richmond 8-hour ozone NAA would be replaced by the Richmond 8-hour ozone maintenance area. The comment period closes June 2, 2008.

## F. West Virginia

1. Citizen Suits: On March 26, 2008, the West Virginia Highlands Conservancy filed a petition in the Circuit Court of Kanawha County, West Virginia, to overturn a PSD construction permit for Western Greenbrier Co-Generation's proposed 98 MW coal-waste-fired plant planned for Rainelle, West Virginia. The petition alleges that construction did not begin within 18 months of granting of the PSD permit and that therefore a new analysis of best available control technology for the plant is required. The plant would burn 3,000 to 4,000 tons per day of bituminous coal refuse from an abandoned surface mine and other locations in the vicinity.

2. Climate Change: By letter dated Feb. 19, 2008, the West Virginia Manufacturers Association and the West Virginia Oil & Natural Gas Association requested that the West Virginia Department of Environmental Protection (WV DEP) delay implementation of West Virginia's GHG Emissions Rule, 45 CSR 42. The

industry letter expressed concern that potential federal mandatory GHG reporting might conflict with reporting requirements contained in 45 CSR 42. The WV DEP, however, declined to delay implementation of the rule or to ask the Legislature to postpone action on the related House and Senate bills. The WV DEP explained in a letter dated Feb. 26, 2008, that the Legislature in 2007 had authorized and directed the WV DEP to adopt a rule that would establish a GHG emissions inventory program in West Virginia. The letter asserts that because of potential national and international caps on GHG emissions, it is "imperative that actual baseline emissions be determined" so that "West Virginia gets a realistic baseline and fair reduction targets." The letter notes that unlike West Virginia, "most of the states that have joined a climate registry or taken proactive stances on GHG issues do not have large coal-fired electricity generation base." The letter further notes that these states are heavily involved with GHG initiatives and "are making concentrated efforts to influence EPA's GHG rule and policy." The letter maintains that "West Virginia must take definitive action to be regarded seriously by federal policy makers and be given a seat at the table in the federal GHG rule. The letter concludes that the WV DEP is "not insensitive to ... concerns regarding potentially duplicative or inconsistent requirements" and states "the reporting requirements in section 4 of the proposed rule have been carefully crafted to recognize both existing and emerging inventory programs, and will allow the agency to coordinate its requirements with any that may ultimately be adopted at the federal level."

3. New Source Review: On March 8, 2008, the West Virginia Legislature passed legislation (H.B. 4438) modifying the minor source air permitting rule (45 CSR 13). The bill shortens the time period for the WV DEP to take action on air permit applications for new sources and for modifications on existing sources and allows certain construction activities to occur before permit issuance. The bill amends the West Virginia Air Pollution Control Act to state expressly that the purpose of that act is "to assure the economic competitiveness of the State by providing for the timely processing of permit applications and other authorizations." W. VA. CODE § 22-5-1. With respect

to permitting deadlines, the bill reduces many of the current permit deadlines set forth in both statute and regulation. The shortened deadlines include the following: (1) construction permits (from 180 to 90 days, with an additional 30 days allowed if a public meeting is required), (2) Class II general permits (from 90 to 45 days), (3) temporary permits (from 60 to 45 days), and (4) Class II administrative update (from an unspecified time period to 60 days). Further, the bill amends the statute to require that all deadlines be counted based upon calendar days rather than working days. In addition, the legislation codifies the current deadlines with respect to relocation and Class I general permits (45 days) and Class I administrative updates (60 days). The legislation also amends the statute to identify two significant circumstances under which activities are allowed to occur in advance of the issuance of a permit. These include: (1) receiving or storing equipment on site, W. VA. CODE § 22-5-11a(a)(1), and (2) construction (but not operation) of new emission units at an existing, permitted source, *Id.* § 22-5-11a(a)(2). Any construction activities undertaken before permit issuance are at the sole risk of the permittee, without any assurance that the permit would ultimately be granted, and only construction and not operation of the source is authorized before permit issuance. The bill takes effect 90 days from passage.

4. **NAAQS:** On March 27, 2008, EPA published a final rule (73 Fed. Reg. 16,205) finding that West Virginia failed to make its 8-hour ozone SIP submittal with respect to ambient air quality monitoring/data system, adequate resources, emergency power, future SIP revisions, public notification, and consultation/participation by affected units as required by CAA § 110(a)(2). The finding of failure starts a 24-month clock for EPA to promulgate a FIP to address the outstanding SIP elements. The clock stops if the state submits, and EPA approves, the required SIPs. The final rule took effect April 28, 2008.

On April 2, 2008, EPA published a final rule (73 Fed. Reg. 17,897) designating the Eastern Panhandle Region (Berkeley and Jefferson Counties, WV), as attainment for the 8-hour ozone NAAQS. Berkeley and Jefferson Counties agreed to reduce ground-level ozone pollution earlier than the CAA required and to

demonstrate attainment with the 8-hour ozone NAAQS by Dec. 31, 2007. Pursuant to EPA's implementing regulations, the 1-hour ozone NAAQS will no longer apply in Berkeley and Jefferson Counties as of April 15, 2009. The final rule took effect April 15, 2008.

West Virginia failed to submit its PM<sub>2.5</sub> SIP by EPA's April 5, 2008 deadline. Instead, West Virginia has worked out an arrangement with EPA Region 3 whereby West Virginia will be submitting its PM<sub>2.5</sub> SIP in stages beginning in June and continuing thereafter every month through November 2008. West Virginia has submitted its proposed Regional Haze SIP but has not yet submitted the final version. Adverse comments were filed by New Jersey, and West Virginia is working on addressing those comments.

On May 2, 2008, EPA published a proposed rule (73 Fed. Reg. 24,187) and a direct final rule (73 Fed. Reg. 24,175) approving revisions to the West Virginia SIP establishing state transportation conformity requirements. Unless EPA receives adverse written comment by June 2, 2008, the rule automatically takes effect July 1, 2008.

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## Region 4

**Angela Morrison Uhland**  
**Paula L. Cobb**  
**Hopping Green & Samss, P.A.**  
**Tallahassee, FL**  
**auhland@hgslaw.com**

**Alexia Borden**  
**Balch & Bingham LLP**  
**Birmingham, AL**  
**aborden@balch.com**

### I. Enforcement Issues in Region 4

As a result of agreements and finalized enforcement actions in fiscal year 2007, the U.S. Environmental Protection Agency's (EPA's) Region 4 enforcement program will reduce, treat, or eliminate 167 million pounds of pollution in the Southeast region (this figure includes non-air quality reductions). It is estimated that the value of these corrective actions and cleanups required by Region 4 will total more than \$2 billion.

On Dec. 17, 2007, EPA and the Mississippi Commission on Environmental Quality announced a settlement with Georgia Gulf Chemicals and Vinyls, LLC (Georgia Gulf). Among other things, Georgia Gulf will revise its Clean Air Act Leak Detection and Elimination Plan and will also install a VOC Air Stripper and an Above-Ground Solids Removal System to reduce volatile organic compounds (VOCs), including vinyl chloride. *See* 73 Fed. Reg. 1231 (Jan. 7, 2008).

On Dec. 20, 2007, the U.S. District Court for the Northern District of Alabama entered a Consent Decree naming Hunt Refining Company and its subsidiary. The scope of the settlement covers three of Hunt's petroleum refineries in Alabama and Mississippi and addresses issues such as Leak Detection and Repair, Benzene National Emission Standard for Hazardous Air Pollutants, Prevention of Significant Deterioration (PSD) and New Source Review (NSR), and New Source Performance Standards applicability to sulfur dioxide (SO<sub>2</sub>) and nitrogen oxide (NO<sub>x</sub>) emissions from Claus Recovery Plants and Heaters and Boilers and Flares. Pursuant to the Consent

Decree, Hunt will pay a \$400,000 penalty and will spend more than \$48.5 million in new and upgraded pollution controls at its refineries. The states of Alabama and Mississippi are co-plaintiffs in this action and will receive shares of the civil penalty. Hunt will also spend \$475,000 on Supplemental Environmental Projects (SEPs) to upgrade controls that reduce VOC emissions from the wastewater system at the Tuscaloosa refinery and purchase emergency preparedness equipment for the aid responders in Vicksburg, Mississippi, and Choctaw County, Alabama.

On Feb. 6, 2008, EPA Region 4 filed a Consent Agreement and Final Order (Order) resolving Title V violations at the U.S. Naval Air Station in Jacksonville, Florida. This Order resolves the underlying violations at issue in *City of Jacksonville v. Department of Navy*, 348 F.3d 1307 (11th Cir. 2003), where the 11th Circuit Court of Appeals held that the City of Jacksonville could not sue the U.S. Navy to collect punitive penalties under the Clean Air Act (CAA). After this decision, the City of Jacksonville referred the issue to Region 4. Pursuant to the ensuing Region 4 enforcement action, the Naval Air Station agreed to pay \$20,888 in civil penalties and perform a SEP in the amount of \$95,000.

On April 18, 2008, EPA Office of Enforcement and Compliance Assurance issued a § 114 letter to the Tennessee Valley Authority (TVA) seeking information about fourteen of TVA's plants located in Alabama, Kentucky and Tennessee to evaluate compliance with provisions of the CAA.

In 2001, the National Parks Conservation Association (NPCA) and the Sierra Club filed two citizen suits, one in Alabama and one in Tennessee, against the TVA for illegally emitting thousands of tons of SO<sub>2</sub> and NO<sub>x</sub> every year. The groups alleged that TVA made major modifications at two power plants—Bull Run in Clinton, Tennessee, and Colbert in Tuscumbia, Alabama—without bringing pollution controls up to required standards. The case in Tennessee is currently set for trial on Sept. 2, 2008. In the Alabama suit, NPCA and Sierra Club have filed a writ of certiorari with the U.S. Supreme Court asking the court to decide whether the Eleventh Circuit decision conflicts

with decisions of other circuits, where the Eleventh Circuit ruled that the suit was barred on statute of limitations and notice grounds. The U.S. Solicitor General filed a brief in opposition on May 23, 2008 arguing that although the Eleventh Circuit was wrong on the statute of limitations, the basis of the Eleventh Circuit's decision was narrow and did not warrant further review.

Since December 2007 to the present, Georgia Environmental Protection Division has executed over thirty enforcement orders under the authority of the Air Quality Act. The subject of these orders range from violations associated with air operating permit to the failure to maintain monitoring data, performance testing, air pollution control equipment, or continuous monitoring system records. Most of these orders require payment of a civil penalty ranging from \$1,000 to \$44,000.

Currently, Friends of the Chattahoochee and the Georgia Chapter of the Sierra Club are challenging Dynegy's proposed Longleaf coal-fired power plant. The environmental groups have opposed the 1,200-megawatt plant because they claim the plant would emit 9 million tons of carbon dioxide annually, equal to putting 1.3 million new motor vehicles on Georgia's roads each year. In addition, in January 2008 it was announced that ten electric co-operatives serving fast-growing areas of Georgia plan to seek permits to build a \$2 billion, coal-fired power plant in Washington County, Georgia, and once the permits are filed, it is expected that environmental groups will challenge that proposal as well.

## II. Other Developments in Region 4 States

On April 28, 2008, EPA withdrew the Federal Implementation Plan (FIP) for the Clean Air Interstate Rule (CAIR) program in Alabama, Georgia, Florida, Kentucky, and Mississippi, because the states' CAIR State Implementation Plans (SIP) corrected the deficiencies which originally provided EPA with a basis to promulgate the FIP. *See* 73 Fed. Reg. 22,818 (Apr. 28, 2008).

Eight Early Action Compact areas in Region 4 have attained the 1997 8-hour ozone standard ahead of schedule: in North Carolina, the Hickory area, the Greensboro area, and Fayetteville; in South Carolina, the Greenville-Spartanburg-Anderson area and the Columbia area; and in Tennessee, the Chattanooga area, the Nashville area, and the Johnson City-Kingsport-Bristol area.

### A. Alabama

1. SIP: On May 1, EPA finalized Alabama's SIP revisions that modify Alabama's PSD regulations in the state's SIP that address changes to the federal 2002 NSR Reform Rules. The revisions include provisions for baseline emissions calculations, an actual-to-projected actual methodology for calculating emissions changes, options for plantwide applicability limits, and recordkeeping and reporting requirements. *See* 73 Fed. Reg. 23,957 (May 1, 2008).

2. NAAQS: Today all sixty-seven of Alabama's counties are designated attainment for ozone. However, on March 27, EPA issued its final rule revising both the 8-hour primary and secondary National Ambient Air Quality Standards (NAAQS) for ozone to 0.075 parts per million (ppm) (expressed to three decimal places-no rounding). Using 2004-2006 data, six counties in Alabama exceed this revised standard: Mobile, Baldwin, Jefferson, Shelby, Morgan, and Madison. It is still unclear what years will be used to calculate whether a state is in compliance with the revised standards; therefore, it is not yet official whether these counties will actually be classified as nonattainment. *See* 73 Fed. Reg. 16,436 (Mar. 27, 2008).

### B. Georgia

On March 6, EPA issued a rule finalizing its previous finding that the Atlanta, GA marginal 8-hour ozone nonattainment area failed to attain the 8-hour ozone NAAQS by June 15, 2007. By operation of law, the Atlanta Area will be reclassified from a marginal to moderate nonattainment area. This reclassification will require revisions to the state's SIP no later than Dec. 31, 2008. *See* 73 Fed. Reg. 12,013 (Mar. 6, 2008).

On May 5, EPA issued a direct final rule approving minor revisions to Georgia's SIP regarding the state's rules for Enhanced Inspection and Maintenance (I/M). The I/M program reduces vehicle-related emissions by ensuring that vehicles are properly maintained and that their emission control systems are functioning correctly. The rule will be effective July 7, 2008 unless EPA receives adverse comment by June 4, 2008. *See* 73 Fed. Reg. 24,500 (May 5, 2008).

### C. Florida

1. NAAQS: Currently, the entire state of Florida is in attainment. However, with the March 27 revision to both the 8-hour primary and secondary NAAQS for ozone, ten counties in Florida exceed this revised standard (using 2005-2007 data): Escambia, Santa Rosa, Bay, Duval, Lake, Orange, Pasco, Hillsborough, Manatee, and Sarasota. It is still unclear what years will be used to calculate whether a state is in compliance with the revised standards, therefore it is not yet official whether these counties will actually be designated as nonattainment.

2. SIP: On April 4, EPA issued its proposed conditional approval of Florida's SIP revisions modifying the State's PSD permitting regulations that address changes to the PSD program made by the federal 2002 NSR Reform Rules. Florida will have twelve months from the date of final conditional approval to revise its PSD recordkeeping requirements as well as certain definitions, in order to be consistent with federal law. Additionally, EPA is proposing approval of Florida's request to make the state's PSD permitting program applicable to electric power plants, which are subject to the Florida Electrical Power Plant Siting Act (PPSA). This proposed approval follows EPA's withdrawal (after receiving adverse comments) of its May 25, 2007 direct final rule granting full approval to Florida to implement its PSD permitting program for sources subject to the PPSA. *See* 73 Fed. Reg. 18,466 (Apr. 4, 2008).

3. Climate Change: Typical of the last year, Florida has been tackling energy and climate change issues. During the 2008 Session, the Florida Legislature passed "The Florida Climate Protection Act," (Legislation) a comprehensive energy bill that addresses a range of

issues. The Legislation, which has not yet been signed by Gov. Charlie Crist, would authorize a market-based cap and trade program to reduce greenhouse gas (GHG) emissions from electric utilities. The cap and trade program described in the Legislation includes a state-wide cap, the use of "allowances" as authority to emit GHGs, and the market-based trading of allowances among sources as a means of compliance with the cap. The Legislation provides that the Department of Environmental Protection (DEP) "may" adopt rules (although such rules are not to be adopted until after Jan. 1, 2010) in consultation with the Florida Energy Commission (restructured in the Legislation as the Florida Energy and Climate Commission), the Public Service Commission (PSC), and the Governor's Action Team on Energy and Climate Change. Pursuant to the Legislation, such rules require ratification by the Legislature before becoming effective, and once effective, they are to be implemented for a trial period before being fully implemented.

Additionally, the PSC initiated rulemaking to develop a Renewable Portfolio Standard (RPS) but no rule has yet been proposed. The Legislation requires the PSC to develop a draft RPS rule by Feb. 1, 2009. In this rulemaking, the PSC must consider current and forecasted levelized costs and installed capacity for each renewable energy generation method through the year 2020. The PSC must also include methods of managing RPS compliance costs, whether through direct supply or procurement of renewable power or through the purchase of renewable energy credits, and the PSC may give preference to wind and solar forms of energy. Interestingly, the legislation did not mandate a 20 percent level for renewable energy sources as suggested in the governor's Executive Order No. 07-127 aimed at reducing GHG emissions.

The Legislature also passed the "Florida Renewable Fuel Standard Act," which requires that after Dec. 31, 2010, all gasoline sold in the state must be blended with at least 9 to 10 percent fuel ethanol (produced by the conversion of carbohydrates). Also by that date, the commission must conduct a study that will evaluate and recommend lifecycle GHG emissions associated with all renewable fuels (including biodiesel and ethanol), make recommendations to ensure a reduction

GHG emissions, and consider a banking and trading program for credits among refiners, blenders, and importers.

Despite EPA's denial of California's waiver request for its GHG motor vehicle emission standards, DEP is moving forward with rulemaking to adopt the California emission standards (LEV II, GHG, and ZEV) and has joined California's lawsuit seeking to overturn denial of the waiver request. Rule language has not been proposed, but it is anticipated that the department will present its rule to Florida's Environmental Regulation Commission (ERC), the department's standard-setting body, sometime in 2008. DEP's conceptual proposal for adoption of the program sets commencement of the California program in Florida for two model years after EPA's approval of the waiver. The Florida Climate Protection Act requires ratification by the Florida Legislature before the emission standards may be implemented or modified.

DEP has also initiated rulemaking to adopt a Diesel Engine Idle Standard. The standard is currently targeted to commercial diesel vehicles with a gross vehicle weight (GVW) of 8,500 pounds or greater, such as delivery vans and transit and excursion buses, but this could change over time, as the department has indicated this will be a "phased" program. Rule language is expected in May 2008, with presentation to the ERC in June.

The governor's next Climate Change Summit was scheduled for June 25-26, 2008. The Action Team's Phase II Report is due Oct. 1, 2008, and the Florida Energy Commission is also expected to issue another report in 2008 with additional legislative proposals for the 2009 Legislative Session.

A copy of Florida's Climate Protection Act (HB 7135) can be found at: <http://www.flsenate.gov/data/session/2008/House/bills/billtext/pdf/h713502e2.pdf>.

4. Kentucky: On April 29, EPA issued a final rule approving the state's source specific SIP revision regarding TVA's Paradise Steam Plant. The revision includes more stringent SO<sub>2</sub> limits than the statewide limit (3.1 lbs/mmBTU) currently applicable to electric

generating units. This revision sets a limit of 1.2 lbs/mmBTU for all three units at the Paradise Plant, with limited bypass emissions of 3.1 lbs/mmBTU for scrubber maintenance on the third unit. *See* 73 Fed. Reg. 23,105 (Apr. 29, 2008).

5. North Carolina: On Dec. 26, 2007, EPA issued a final rule redesignating the Raleigh-Durham-Chapel Hill 8-hour ozone nonattainment area to attainment. Additionally, EPA is approving a revision to North Carolina's SIP that contains the new subarea 2008 and 2017 motor vehicle emission budgets (MVEBs) for NO<sub>x</sub> and an insignificance determination for VOCs contribution from motor vehicles to ozone pollution in the Triangle Area. EPA also found these revisions adequately address transportation conformity. *See* 72 Fed. Reg. 72,948 (Dec. 26, 2007).

On April 8, 2008, EPA issued a direct final rule approving a revision to the state's SIP regarding the 1-Hour Ozone Maintenance Plan for the Raleigh/Durham and Greensboro/Winston-Salem/High Point Areas. The revision addresses the subarea MVEBs for the Greensboro/Winston-Salem/Highpoint area. EPA approved the revision, because an available safety margin for VOCs and NO<sub>x</sub> exists in this area. The rule is effective June 9, 2008 unless EPA receives adverse comment by May 8, 2008. *See* 73 Fed. Reg. 18,963 (Apr. 8, 2008).

## **EPA Region 5 – Report on Developments at Regional Level**

**Harvey M. Sheldon**  
***Hinshaw & Culbertson LLP***  
***Chicago, Illinois***  
***hsheldon@hinshawlaw.com***

Region 5's Air and Radiation Division continues to carry on as a relatively active division among the various regions. In December, the staff lost the leadership of Steve Rothblatt, who had inspired many of them for years, not only with a sense of dedication to good science and priorities, but, in his last two years, with a valiant fight against an insidious disease. He was much beloved. Cheryl Newton is now leading the division as acting director.

The Division has a number of priorities. A review of their press releases over the past few months shows serious effort toward funding school bus and other “clean diesel” fleet retrofits and other efficiency measures. They expect to award over \$5 million to various municipal and local efforts. They have already done so in Cincinnati, Chicago, Cook County, Detroit, and elsewhere.

The Division is also charged as the “lead office” for climate change efforts within U.S. EPA, per Cheryl Newton. The news releases of the last few months indicates that in part this involves partnering with the states and the private sector on “Energy Star” and other clean building and green building efforts. Seventy-six buildings in the six state region achieved “energy star” status in 2007. Nationally over 4,100 buildings have that status. their challenge includes cooperating with carbon credit market efforts at the State and private levels, as well. The agency’s direct regulatory greenhouse gas efforts are for the most part still in formulation at the Washington level.

With respect to the Clean Air Act focus on criteria pollutants, especially ozone and fine particulates, the region has told the states that the region is going to improve the EPA response time on submittals, so that the delays that have been too often the pattern in the past do not recur. This will not relieve states of having to cope with new standards even as they are still implementing regulations under the old. However, it should lessen the frustrations. New standards are anticipated for lead, SO<sub>2</sub>, and CO, and this sort of administrative expedition will be applied to the state/federal interchanges respecting those anticipated new standards.

On the enforcement front, individual case activity continues to occur, with settlements being reached on a variety of substantive and record-keeping violations during the last three months. NSR is a continued subject of review for the enforcement effort, including especially attention to leak detection issues (LDAR). Another major challenge will result from the promulgation of Area Source MACT standards that will affect a variety of smaller businesses, many of which will likely be caught somewhat by surprise.

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

### ***Calendar of Section Events***

#### **ABA Annual Meeting**

Aug. 7-12, 2008  
New York, New York

#### **16th Section Fall Meeting**

Sept. 17-20, 2008  
Phoenix, Arizona

#### **The Basic Practice Series**

Sept. 19-20, 2008  
Phoenix, Arizona

#### **Interdisciplinary Solutions to Instream Flow Problems**

Oct. 7-9, 2008  
San Antonio, Texas  
(Cosponsored with the Instream Flow  
Council)

#### **23rd Annual Petroleum Refining and Marketing Roundtable**

Oct. 15, 2008  
Austin, Texas  
(In conjunction with the 31st Annual  
ABA Forum on Franchising)

#### **27th Annual Water Law Conference**

Feb. 19-20, 2009  
San Diego, California

#### **38th Conference on Environmental Law**

March 12-15, 2009  
Keystone, Colorado

***For more information, see the  
Section Web site at  
[www.abanet.org/environ](http://www.abanet.org/environ) or  
contact the Section at 312/988-5724.***

## EPA Region 6

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

### I. EPA Region 6

Effective April 28, 2008, EPA withdrew federal implementation plans (FIPs) for the Clean Air Interstate Rule (CAIR) program in twelve states, including two states in Region 6—Arkansas and Louisiana. EPA implemented the FIPs in May of 2005 based upon findings that these twelve states failed to submit state implementation plans (SIPs) to address interstate transport with respect to the PM<sub>2.5</sub> and 8-hour ozone National Ambient Air Quality Standards (NAAQS). EPA also issued the CAIR in May 2005. States included in CAIR had to submit CAIR SIPs by Sept. 11, 2006. As provided in the FIP preamble, an approved CAIR SIP will cure the above-referenced interstate transport SIP deficiencies. EPA has withdrawn the FIPs for these twelve states based upon EPA's approval of their CAIR SIPs.

### II. State Activities

#### A. Louisiana

EPA has approved revisions to the Louisiana SIP relating to the 8-hour ozone maintenance plans for Lafayette and Lafourche parishes, for which Louisiana had submitted maintenance plans on Oct. 13, 2006 and Dec. 19, 2006, respectively. The approved revisions will be effective on May 23, 2008.

In response to EPA lowering the primary ozone NAAQS from 80 parts per billion (ppb) to 75 ppb on March 12, 2008, the Louisiana Department of Environmental Quality (LDEQ) in April 2008 initiated a statewide effort to improve air quality. An Ozone Steering Committee will be formed. The committee will educate communities on how to organize at the local level to improve air quality and mitigate the impact of the revised ozone standard. The committee will include representatives from various stakeholder groups,

including industry, environmental groups, and governmental entities. LDEQ is implementing this statewide effort because the more stringent ozone standard could result in much of Louisiana being designated as nonattainment areas. Currently, the only nonattainment areas in the state is the five-parish Baton Rouge area.

On March 11, 2008, the U.S. District Court for the Eastern District of Louisiana denied a motion for rehearing in a lawsuit brought by the Louisiana Environmental Action Network (LEAN) and the Sierra Club against LDEQ. The plaintiffs allege that orders issued by LDEQ allowing hazardous debris resulting from Hurricane Katrina and Hurricane Rita to be sent to landfills violated federal law and caused local air and water pollution. *Louisiana Environmental Action Network v. McDaniel*, E.D. La., No. 06-4161. The court found that the plaintiffs failed to show standing for their associations in that they failed to prove that any individual member suffered injury "from any harmful pollution that was actually occurring at covered landfills" or that any increased risk of harm resulted from the hurricane orders.

#### B. New Mexico

New Mexico along with eleven other states, the District of Columbia, two cities and eleven environmental groups filed a lawsuit against EPA on April 2, 2008. The plaintiffs have requested that the U.S. Circuit Court of Appeals for the District of Columbia order EPA to respond to the U.S. Supreme Court's ruling in the case of *Massachusetts v. EPA* that EPA has authority to regulate greenhouse gas (GHG) emissions. That ruling required that EPA make a decision regarding whether to regulate GHG emissions from motor vehicles under the federal Clean Air Act. To date, EPA has not issued such a decision. The plaintiffs are requesting that the court issue an order requiring that EPA act within 60 days. The other plaintiff states are: California, Connecticut, Illinois, Maine, Massachusetts, New Jersey, New York, Oregon, Rhode Island, Vermont, Washington, Arizona, Delaware, Iowa, Maryland, and Minnesota. The two cities joining the complaint are Baltimore and New York.

### C. Oklahoma

On April 8, EPA announced its approval of a new Tulsa area air quality plan issued pursuant to an agreement made pursuant to EPA's 8-hour Ozone Flex program. That agreement involves the implementation of five projects during the next year. These projects include a Metropolitan Tulsa Transit Authority Clean Diesel Retrofit Project, a City of Tulsa energy conservation project, and a nitrogen fertilizer product manufacturer's voluntary installation of ultra-low nitrogen oxide burners on one of the ammonia reformers at the company's facility northeast of Tulsa. Other measures will provide additional NO<sub>x</sub> and volatile organic compound (VOC) reductions. The Ozone Flex Plan will remain in effect until 2013, unless EPA reclassifies the area under the 8-hour ozone standard. Next year Oklahoma will recommend to EPA which areas in the state should be classified as in nonattainment of the new ozone standard. EPA will finalize those designations in 2010. Although an Ozone Flex Program agreement will not prevent a region from being designated as a nonattainment area, such a plan is designed to expedite ozone level reductions and attainment of the 8-hour ozone standard.

### D. Texas

By letter to EPA dated April 25, Texas Gov. Rick Perry requested that EPA waive a portion of the Renewable Fuel Standard under Clean Air Act (CAA) section 211(o)(7). Specifically, the request is for a waiver of 50 percent of the mandate for the production of ethanol derived from grain. Gov. Perry indicates that the request is based upon concern that this mandate, which has significantly increased the demand for and price of corn, is harming the Texas economy (in particular, the Texas livestock industry) and driving up food prices globally. The CAA requires that EPA grant or deny such a request within 90 days of receipt. On May 16, EPA published notice of the request and opened a 30-day public comment period on the request.

On April 2, EPA published a final rule designating thirteen Early Action Compact (EAC) Areas, including the San Antonio EAC Area, in attainment of the 8-hour

ozone standard. EPA determined that these attainment designations are appropriate because each EAC area provided quality-assured data from 2005, 2006, and 2007 that demonstrated attainment of the 8-hour ozone standard by Dec. 31, 2007. Pursuant to EPA's 8-hour ozone standard implementing regulations, the 1-hour ozone standard will no longer apply in these areas one year after the effective date of the designation. These attainment designations became effective on April 15, 2008. Accordingly, the 1-hour ozone standard will no longer apply in the San Antonio area as of April 15, 2009.

At stakeholder meetings in late March, the Texas Commission on Environmental Quality (TCEQ) issued draft initial concept lists of potential control strategies for stationary sources and mobile sources for the Houston-Galveston-Brazoria (HGB) 8-hour ozone SIP. The list for stationary sources contains potential control strategies that would be implemented within the HGB nonattainment area (e.g., increasing control efficiency requirements in TCEQ's Chapter 115 VOC rules for vent gas control, loading, and storage), as well as ozone transport controls that would apply outside of the HGB nonattainment area (e.g., NO<sub>x</sub> controls on major sources and/or minor sources for selected source categories within a 200 kilometer range that impact the HGB area). The draft lists are preliminary and subject to change based upon additional analysis of the feasibility and effectiveness of the listed strategies, and consideration of additional potential strategies. TCEQ invited the submittal of informal comments by April 30, 2008 regarding the technical and economic feasibility of the listed strategies, potential modifications to those strategy concepts, and suggestions for additional control strategy concepts.

On March 18, EPA published a final rule regarding the agency's determination that the Beaumont-Port Arthur did not attain the 8-hour ozone NAAQS by the applicable June 15, 2007 attainment deadline. Although ozone monitoring data from 2005 to 2007 shows that the area met both the 8-hour ozone NAAQS and the former 1-hour standard during that time, the area narrowly missed the June 15, 2007 attainment deadline. As a result and by operation of law, EPA is reclassifying the area from "marginal" to

“moderate” nonattainment status. The redesignation requires that Texas submit a SIP revision by June 15, 2007, and that the area comply with the associated June 15, 2010 attainment deadline.

In the ongoing dialogue between EPA and TCEQ regarding Texas’ proposed flexible permit rules, EPA Region 6 issued a March 12, 2008 letter expressing concern about the proposed rules and providing specific changes and clarifications that EPA indicates will be necessary for federal approval of those rules. The numerous rule revisions described in EPA’s letter address that agency’s concerns about the applicability of major NSR program requirements and the practical enforceability of an emission limitation cap that applies to numerous emissions sources. EPA has requested TCEQ provide notification by the end of March 2008 regarding whether Texas will recommend adoption of the EPA-specified program changes.

## **EPA Regions 7 and 8**

No reports for this edition.

## **EPA Region 9**

**Eric L. Hiser**

**Todd Weaver**

**Jorden Bischoff & Hiser**

***ehiser@jordenbischoff.com***

***tweaver@jordenbischoff.com***

### **I. Arizona**

#### **A. Arizona Proposes Regulation Adopting California Low Emission Vehicle Program**

The Governor’s Arizona Climate Change Advisory Group, established to develop recommendations for reducing greenhouse gases, proposed adoption of the California Low Emission Vehicle Program. As a result, the governor signed an Executive Order in September 2006 directing the Department of Environmental Quality to adopt and implement the California program. On Feb. 1, these regulations were proposed by the Arizona Department of Environmental Quality (ADEQ).

### **B. Arizona Cities in Phoenix Nonattainment Area Adopt New Particulate Control Measures**

Municipalities in the Maricopa County nonattainment area are adopting particulate matter (PM) control measures as required by state law. The measures include a prohibition on the use of leaf blowers to blow debris into a street, or to use blowers on dirt fields, road shoulders, or loose dirt. Also, all leaf blower operators employed by Maricopa County and municipalities will be required to take mandatory training classes. In addition, cities and counties in the Phoenix metropolitan area must limit the use of recreational off-highway vehicles on days in which a high-pollution advisory is in effect. Furthermore, on high-pollution advisory days, all vehicles are prohibited from parking on and using unpaved or unstabilized vacant lots.

### **C. Delegation of New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants**

EPA updated the delegation tables to reflect the current status of the delegation of federal New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants. The Rule reflects the updated status for ADEQ and for Maricopa, Pinal, and Pima Counties.

## **II. California**

### **A. Ninth Circuit Vacates California Marine Vessels Rule—*Pacific Merchant Shipping Assoc. v. Goldstene*, 517 F.3d 1108 (9th Cir. 2008)**

On Jan. 1, 2007, the California Air Resources Board (CARB) began enforcing the state “Marine Vessels Rules” which limited PM, NOx, and SOx emissions from the auxiliary diesel engines of ocean-going vessels when those vessels were within 24 miles of the California coast. Auxiliary diesel engines are those that provide power for uses other than propulsion. The Pacific Merchant Shipping Association filed suit to enjoin enforcement of the rules. The association argued the rules were invalid because CARB failed to obtain EPA authorization prior to enforcing them and the Submerged Lands Act preempted the rules outside of

California's boundary. Section 209(e)(2) of the Clean Air Act (CAA) allows California to seek authorization from EPA to adopt standards and other requirements related to the control of emissions from nonroad vehicles other than construction equipment, farm equipment or vehicles with less than 175 horsepower or new locomotives or new engines used in locomotives. CARB did not seek authorization for the Marine Vessels Rule. CARB contended that it did not need to seek authorization under section 209(e)(2) because that section only applied to new engines and the Marine Vessels Rule governs non-new engines. The circuit court adopted the reasoning of the D.C. Circuit in *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075 (D.C. Cir. 1996) and held the implied preemption of section 209(e)(2) applied to both new and non-new engines. Furthermore, the court held the Marine Vessel Rule set forth standard relating to the control of emissions that were preempted and were not merely "in-use requirements" that are not preempted. Also the Marine Vessel Rules set forth emission limits for PM, NOx, and SOx that are susceptible to precise quantification that constitute a "standard."

#### B. Settlement of Litigation over South Coast Air Quality Management District's Fleet Rules

The South Coast Air Quality Management District (SCAQMD) adopted clean fleet rules in 2000 and 2001 that required fleets of transit buses, school buses, refuse trucks, street sweepers, city-owned utility trucks, airport shuttles, and taxi fleets that use at least fifteen vehicles to purchase a clean-fuel vehicle (e.g., natural gas fueled) whenever a vehicle is added or replaced. The Engine Manufacturers Association and the Western State Petroleum Association filed a lawsuit claiming the federal CAA preempted the SCAQMD rules. Under the settlement agreement, the SCAQMD's clean fleet rules will apply to all publicly owned fleets and to privately owned fleets operating under a contract with a public entity (e.g., private school bus companies providing services to public school districts). The rules do not apply to private fleets that are not under contract with a public entity or to the federal government.

#### C. San Joaquin Valley Nonattainment Area

On March 19, EPA finalized its determination that the San Joaquin Valley (SJV) nonattainment area attained the National Ambient Air Quality Standards (NAAQS) for particulate matter with an aerodynamic diameter less than or equal to 10 micrometers (PM<sub>10</sub>). EPA excluded several PM<sub>10</sub> exceedances that EPA determined were caused by exceptional events. EPA concurred with California's request to flag exceedances which occurred in the SJV as being caused by high winds (i.e., exceptional events). EPA also concurred with the Santa Rosa Rancheria Tribe's request to flag exceedances as an exceptional event. Specifically, the exceedances occurred while the monitor was operating in very close proximity to construction activities and, as such, the monitor was not properly sited during that time for purposes of comparison to the NAAQS. As a result, EPA affirmed its determination that the SJV has attained the PM<sub>10</sub> standard.

Furthermore, on April 25, EPA proposed to approve California's request to revise the designation for SJV serious nonattainment area for PM<sub>10</sub> by splitting the area into the San Joaquin Valley Air Basin serious PM<sub>10</sub> nonattainment area and the East Kern serious PM<sub>10</sub> nonattainment area. EPA also proposed to redesignate the San Joaquin Valley Air Basin nonattainment area to attainment and approve the PM<sub>10</sub> maintenance plan, motor vehicle emissions budgets and conformity trading mechanism for the area. EPA also proposed to approve the installation of a PM<sub>10</sub> monitor in the East Kern nonattainment area.

#### D. Nonattainment Determination and Reclassification of Imperial County 8-Hour Ozone Nonattainment Area

EPA found that Imperial County, California, failed to attain the 8-hour ozone standard. Imperial County was classified as a marginal nonattainment area and had until June 5, 2007 to attain the ozone NAAQS. Pursuant to section 181(b)(2)(A) of the CAA, Imperial County is automatically reclassified to moderate nonattainment. The deadline for attaining the ozone NAAQS is now June 15, 2010.

E. EPA Denies Waiver of the Clean Air Act Preemption for California's 2009 Greenhouse Gas Emission Standards for New Motor Vehicles

On March 6, 2008, denied CARB's request for a waiver of the CAA's prohibition on adopting and enforcing its greenhouse gas emission standards as they affect 2009 and later model year new motor vehicles. EPA determined that section 209(b) of the CAA allows California to promulgate state standards governing emissions from new motor vehicles to address local or regional problems but not global climate change problems. Furthermore, EPA held that the effects of climate change in California are not compelling and extraordinary as compared to the effects in the rest of the country.

F. Modifications of the Zero Emission Vehicle Program

On March 27, CARB approved modifications to the California Zero Emission Vehicle (ZEV) Program. CARB did not revise the requirement that manufacturers produce at least 25,000 ZEVs during 2012 to 2014 and 50,000 ZEVs from 2015 to 2017. The modifications include the creations of two new ZEV categories, Type IV and Type V (fast refueling ZEVs with a range of at least 200 and 300 miles respectively). CARB also created a new category, "advanced technology partial zero emission vehicles" or "AT PZEV" that may be used to meet a portion of the auto manufacturers' requirements. An AT PZEV is a vehicle using a fuel that would be used in a ZEV such as hydrogen or electricity (e.g., hydrogen internal combustion engines and plug-in hybrids). Specifically, auto manufacturers may meet the 2012 to 2014 requirement by producing 58,333 AT PZEV in addition to 2,500 "pure" ZEVs.

G. South Coast Air Quality Management District Reduction of NOx from Construction Vehicles

The SCAQMD adopted measures to reduce NOx emissions from diesel construction and other off road vehicles. The SCAQMD implemented a special opt-in provision known as "Surplus Off-Road Opt-in for NOx" or "SOON" that requires owners to apply for

funding to reduce diesel emission by either retrofitting engines or retiring high-pollution vehicles.

H. Pepsi Bottling Group Transporter Fined \$280,125

CARB recently fined the New Bern Transport Corporation \$280,125 for failing to inspect their heavy duty diesel trucks, resulting in increased emissions. New Bern employees are required to attend diesel education and technology classes, place emission control labels on their fleet, and bring the fleet up to federal emissions standards.

III. Nevada

A. Delegation of New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants

EPA updated the delegation tables to reflect the current status of the delegation of the federal New Source Performance Standards and National Emission Standards for Hazardous Air Pollutants. The Rule reflects the updated status for the Nevada Division of Environmental Protection and for Clark and Washoe Counties.

**EPA Region 10**

**Kirk A. Lilley**  
**K & L Gates**  
**Seattle, WA**  
***kirk.lilley@klgates.com***

The principal Clean Air Act (CAA) developments in EPA Region 10 over the past several months are as follows:

I. Citizen Suit Claims Dairy Subject to MACT

In April a citizens group filed a CAA citizen suit alleging that a Washington dairy is a major source of methanol and therefore must obtain a determination that it is using Maximum Achievable Control Technology (MACT). Methanol is on the list of hazardous air pollutants developed by EPA under Section 112 of the

CAA. Because there are no MACT standards for dairies, the complaint alleges that the dairy should have been subject to a case-by-case MACT determination under CAA 112(g) and have applied for a Title V permit. Section 112(g) is intended to address sources for which EPA has not established source-specific standards, until a source-specific standard is developed. Litigation over the claim raises two main issues. First, it is not clear how to determine whether a particular dairy exceeds the major source threshold. There are currently no settled emission factors for “concentrated animal feeding operations” (CAFOs). EPA is working with CAFOs to develop accurate factors, but the study is still underway. Second, the case will perhaps shed light on the scope of the 112(g) case-by-case MACT determination requirement. Section 112(g) applies to sources for which a source category rule has not yet been promulgated, or category not yet listed by EPA for rule development. At present, EPA has not identified dairies or CAFOs as a source category to which MACT applies.

## II. Washington to Clarify Role of Climate Change in Environmental Reviews

The Washington State Department of Ecology is launching a process to clarify how climate change considerations will be incorporated into environmental review and decision making under the State Environmental Policy Act, the state version of NEPA. Under current rules, state and local agencies already have to consider the environmental effects of climate change and air emissions that may result from their decisions, but the department believes that clarification is needed. A working group of the state’s Climate Advisory Team will be charged with clarifying how, when, and where to incorporate climate change considerations into the environmental review of a proposal, recommending changes to the states environmental review rules, and providing instructions to local and state governmental bodies on how to determine possible mitigation strategies and whether climate change impacts may affect a project over its lifetime. Changes to state regulations could be made as early as 2009.

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# Global Climate Change and U.S. Law

## Michael B. Gerrard, Editor

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