

## REPORT OF THE ENVIRONMENTAL REGULATION COMMITTEE

The following is the report of the Energy Bar Association’s Environmental Regulation Committee. In this report, the Committee summarizes key development in Federal and State environmental regulation from July 2012 to June 2013.\*

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\* Special thanks are due to the following Committee members for their efforts in contributing to the Committee report: Harold Blinderman, Barclay Gibbs, Diana Jeschke, Gregory Jones, John Valeri, Kyle Wamstad, and Desmarie Waterhouse.

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## I. OIL AND GAS SECTOR

### A. Hydraulic Fracturing

Hydraulic fracturing is a process that stimulates production of oil and natural gas from unconventional sources such as shale, coal beds, and tight gas using underground oil and gas wells.<sup>1</sup> During the hydraulic fracturing process, water is typically mixed with sand and chemicals, and the resulting fluid mixture is pumped at high pressure into a well to create fractures that allow oil and gas to escape and flow to the well.<sup>2</sup> Because this process has rapidly expanded in recent years, there has been growing interest in a variety of environmental, health, and safety issues, including whether the chemicals used in the hydraulic fracturing process should be subject to public disclosure, whether the process contaminates underground water sources, and “whether there is adequate management of well integrity and the ‘flowback’ fluids that return to the surface during and after fracturing operations.”<sup>3</sup> At the federal level, these concerns have resulted in proposed hydraulic fracturing regulations on federal and Indian lands, as well as studies and investigations by the United States Environmental Protection Agency (EPA) regarding environmental impacts resulting from hydraulic fracturing activities.<sup>4</sup>

#### 1. BLM: Draft Fracking Regulations

According to the United States Bureau of Land Management (BLM), while approximately 90% of wells drilled on Federal and Indian lands use hydraulic fracturing techniques, the regulations that govern these operations are more than thirty years old and were written long before modern hydraulic fracturing techniques became widely used.<sup>5</sup> On May 11, 2012, after soliciting public comment, the BLM published a proposed rule entitled *Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands* to “modernize BLM’s management of hydraulic fracturing operations, and help to establish baseline environmental safeguards for these operations across all public

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1. *The Process of Hydraulic Fracturing*, EPA, <http://www2.epa.gov/hydraulicfracturing/process-hydraulic-fracturing> (last updated May 21, 2013).

2. *Id.*

3. Oil and Gas; Well Stimulation, Including Hydraulic Fracturing, on Federal and Indian Lands, 77 Fed. Reg. 27,691 (proposed May 11, 2012) (to be codified at 43 C.F.R. pt. 3160) [hereinafter Oil and Gas Proposed Rule].

4. *Id.* at 27,692.

5. *Id.* at 27,694. See also Press Release, U.S. Dep’t of the Interior, Bureau of Land Mgmt., Interior Releases Updated Draft Rule for Hydraulic Fracturing on Public and Indian Lands for Public Comment: Commonsense Measure Will Support Safe and Responsible Production of America’s Domestic Energy Resources (May 16, 2013) [hereinafter Press Release, Updated Draft Rule], available at <http://www.interior.gov/news/pressreleases/interior-releases-updated-draft-rule-for-hydraulic-fracturing-on-public-and-indian-lands-for-public-comment.cfm>.

and Indian lands.”<sup>6</sup> Since the initial draft was released, the BLM “received extensive feedback, including over 177,000 public comments,” which it then used to consider revisions to its proposed rule.<sup>7</sup>

On May 24, 2013, BLM released a revised proposal focused on adopting “commonsense safety standards for hydraulic fracturing on public and Indian lands,” “improv[ing] integration with existing state and tribal standards, and increas[ing] flexibility for oil and gas developers.”<sup>8</sup> The original proposed rule and the revised proposed rule both require the BLM approval of new hydraulic fracturing activities on federal and Indian lands.<sup>9</sup> Both have three main components: (1) requiring operators to disclose to the public chemicals used in hydraulic fracturing activities on public and Indian lands; (2) confirming that wells used in hydraulic fracturing activities meet certain engineering and construction standards; and (3) requiring that operators have a water management plan in place for handling fluids that flow back to the surface.<sup>10</sup> Responding to the comments received since issuance of the original proposed rule, the revised proposed rule additionally proposes to: (1) create a mechanism to reduce overlap between BLM’s regulations and state and tribal regulations that are similar or more protective; (2) address the disclosure of chemicals by enabling use of an existing database and by providing additional guidance as to how trade secrets will be handled; and (3) assure well integrity through cement evaluation tools to ensure that usable water zones are protected from contamination.<sup>11</sup> The comment period on the revised proposed rule closed on August 23, 2013.<sup>12</sup>

## 2. EPA: Study of Potential Impacts of Hydraulic Fracking on Drinking Water Resources

In response to a request from Congress, in March 2010, the EPA announced plans to assess “potential impacts of hydraulic fracturing on drinking water resources.”<sup>13</sup> On November 3, 2011, the EPA released its final research study

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6. *Id.* BLM hosted the first public forum on hydraulic fracturing in November 2010. *See generally* Press Release, U.S. Dep’t of the Interior, Bureau of Land Mgmt., BLM to Hold Regional Forums on Hydraulic Fracturing in Natural Gas Production (Apr. 1, 2011), *available at* [http://www.blm.gov/wo/st/en/info/newsroom/2011/april/NR\\_04\\_01\\_2011.html](http://www.blm.gov/wo/st/en/info/newsroom/2011/april/NR_04_01_2011.html). Following that meeting and several others with tribal representatives, industry, and others, the BLM released its initial proposed rules in May 2012.

7. Press Release, Updated Draft Rule, *supra* note 5.

8. *Id.*; Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 31,636 (proposed May 24, 2013) (to be codified at 43 C.F.R. pt. 3160) [hereinafter Oil and Gas Proposed Revised Rule].

9. Oil and Gas Proposed Rule, *supra* note 3, at 27,700; Oil and Gas Proposed Revised Rule, *supra* note 8, at 31,636-37.

10. Oil and Gas Proposed Rule, *supra* note 3, at 27,691; Oil and Gas Proposed Revised Rule, *supra* note 8, at 31,636.

11. Oil and Gas Proposed Revised Rule, *supra* note 8, at 31,637-38.

12. Oil and Gas; Hydraulic Fracturing on Federal and Indian Lands, 78 Fed. Reg. 34,611 (June 10, 2013) (to be codified 43 C.F.R. pt. 3160) (Supplemental Notice). The BLM extended the public comment period by 60 days from June 24, 2013 to August 23, 2013.

13. Press Release, U.S. Env’tl. Prot. Agency, EPA Initiates Hydraulic Fracturing Study: Agency Seeks Input from Science Advisory Board (Mar. 18, 2010), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/e77fdd4f5afd88a3852576b3005a604f/ba591ee790c58d30852576ea004ee3ad!topendocument>.

plan.<sup>14</sup> Subsequently on December 21, 2012, the EPA issued a progress report which outlined the status of the study including specific updates relative to eighteen separate research projects designed to assess the five stages of the hydraulic fracturing water cycle: water acquisition, chemical mixing, well injection, flowback and produced water, and wastewater treatment and waste disposal.<sup>15</sup>

In March 2013, the EPA's Science Advisory Board announced the formation of a Hydraulic Research Advisory Panel.<sup>16</sup> Comprised of thirty-one independent experts, the purpose of the Hydraulic Research Advisory Panel is to provide scientific feedback on the EPA's research and to peer review the draft study once released for public review.<sup>17</sup> In April 2013, the EPA extended the "deadline for the public to submit data and scientific literature" in connection with the EPA's hydraulic fracturing study from April 30, 2013, to November 15, 2013.<sup>18</sup> The EPA's current estimate to release the draft report for public comment and peer review is 2014.<sup>19</sup>

### 3. EPA Investigation of Groundwater Contamination near Pavillion, Wyoming

On December 8, 2011, the EPA released a draft report detailing its initial findings from an investigation into alleged groundwater contamination from hydraulic fracturing operations near Pavillion, Wyoming.<sup>20</sup> The draft report identified hydraulic fracturing practices for the pollution of an aquifer used for

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14. Press Release, U.S. Env'tl. Prot. Agency, EPA Announces Final Study Plan to Assess Hydraulic Fracturing (Nov. 3, 2011), available at <http://yosemite.epa.gov/opa/admpress.nsf/48f0fa7dd51f9e9885257359003f5342/197771b608adfd8525793d005379c9!OpenDocument>.

15. U.S. ENVTL. PROT. AGENCY, STUDY OF THE POTENTIAL IMPACTS OF HYDRAULIC FRACTURING ON DRINKING WATER RESOURCES: PROGRESS REPORT 1 (Dec. 2012) [hereinafter EPA STUDY OF HYDRAULIC FRACTURING], available at <http://www2.epa.gov/sites/production/files/documents/hf-report20121214.pdf>. Each stage of the water cycle has its own research question:

*Water acquisition:* What [possible impact will] large volume water withdrawals from ground and surface waters [have] on drinking water resources? *Chemical mixing:* What [possible impact will] hydraulic fracturing fluid surface spills on or near well pads [have] on drinking water resources? *Well injection:* What [possible impact will] the injection and fracturing process [have] on drinking water resources? *Flowback and produced water:* What [possible impact will] flowback and produced water (. . . "hydraulic fracturing wastewater") surface spills on or near well pads [have] on drinking water resources? *Wastewater treatment and waste disposal:* What [possible impact will] inadequate treatment of hydraulic fracturing wastewater [have] on drinking water resources?

*Id.*

16. Press Release, U.S. Env'tl. Prot. Agency, EPA's Science Advisory Board Announces Independent Panel to Peer Review Agency's Hydraulic Fracturing Research (Mar. 25, 2013), available at <http://yosemite.epa.gov/opa/admpress.nsf/0/bc39e20974be4ed485257b3900707c0d>.

17. *Id.*

18. Request for Information to Inform Hydraulic Fracturing Research Related to Drinking Water Resources, 78 Fed. Reg. 25,267 (Apr. 30, 2013).

19. EPA's Study of Hydraulic Fracturing and Its Potential Impact on Drinking Water Resources, EPA, <http://www2.epa.gov/hfstudy> (last updated Sept. 20, 2013).

20. Pavillion: Groundwater Investigation, EPA, <http://www2.epa.gov/region8/pavillion> (last updated Sept. 11, 2013) [hereinafter Pavillion]. U.S. ENVTL. PROT. AGENCY, INVESTIGATION OF GROUND WATER CONTAMINATION NEAR PAVILLION, WYOMING (Dec. 2011) [hereinafter INVESTIGATION OF PAVILLION], available at [http://www2.epa.gov/sites/production/files/documents/EPA\\_ReportOnPavillion\\_Dec-8-2011.pdf](http://www2.epa.gov/sites/production/files/documents/EPA_ReportOnPavillion_Dec-8-2011.pdf).

Pavillion's water supply.<sup>21</sup> The draft report drew heated criticism over its methodology.<sup>22</sup> On June 20, 2013, the EPA announced that it had abandoned its investigation and instead, would support the efforts of the State of Wyoming to further investigate drinking water quality in the rural area east of Pavillion, Wyoming.<sup>23</sup> In making the announcement, the EPA stated that it would not finalize or seek peer review of its draft report.<sup>24</sup> Further, the EPA stated that it would not "rely upon the conclusions in the draft report."<sup>25</sup> "The Wyoming Department of Environmental Quality . . . and the Wyoming Oil and Gas Conservation Commission intend . . . to conclude [the state's] investigation and release a final report by September 30, 2014."<sup>26</sup>

## B. Pipelines

### 1. Update on Keystone XL Pipeline Project

TransCanada Keystone Pipeline, L.P.'s (TransCanada) proposed Keystone XL pipeline project (Keystone XL), a new pipeline extending from Alberta, Canada to Steele City, Nebraska for onward delivery through existing infrastructure to Cushing, Oklahoma and refineries in the Gulf Coast area, continued to work its way through the federal environmental review process.<sup>27</sup> The period covered by this writing saw significant developments related to the review under the National Environmental Policy Act (NEPA) and Executive Order No. 13,337 by the U.S. State Department<sup>28</sup> of TransCanada's May 4,

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21. INVESTIGATION OF PAVILLION, *supra* note 20, at 33.

22. Mark Drajem, *Fracking Pollution Probe in Wyoming Cast in Doubt by EPA*, BLOOMBERG (June 20, 2013), <http://www.bloomberg.com/news/2013-06-20/wyoming-replaces-u-s-to-study-water-woes-tied-to-fracking-1-.html>.

23. Press Release, U.S. Env'tl. Prot. Agency Region 8, Wyoming to Lead Further Investigation of Water Quality Concerns Outside of Pavillion with Support of EPA (June 20, 2013), *available at* <http://yosemite.epa.gov/opa/admpress.nsf/0/DC7DCDB471DCFE1785257B90007377BF>.

24. *Id.*

25. *Id.*

26. *Id.*

27. As currently proposed, the Keystone XL project would consist of approximately 1,204 miles of new 36 inch diameter pipeline, with approximately 329 miles of pipeline in Canada and approximately 875 miles of pipeline in the United States. The proposed project would have the capacity to support 830,000 barrels per day (bpd) of crude oil produced from the Western Canadian Sedimentary Basin in Alberta, Canada and from the Bakken Shale Formation in the United States to U.S. Gulf Coast refineries. U.S. DEP'T OF STATE, DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE KEystone XL PROJECT 1.2-.1 (2013) [hereinafter 2013 DRAFT SEIS], *available at* <http://keystonepipeline-xl.state.gov/draftseis/index.htm>.

28. Under NEPA and Executive Order No. 13,337 and because the proposed Keystone XL pipeline would cross international borders, TransCanada must obtain from the State Department a presidential permit authorizing construction and operation of the pipeline. National Environment Policy Act, 42 U.S.C. §§ 4321-70h (2012); Exec. Order No. 13,337, 69 Fed. Reg. 25,299 (May 5, 2004); Delegation by the Secretary of State for Political, Economic, Business, and Agricultural Affairs of Authorities Regarding Border Facilities and Crossings, 71 Fed. Reg. 8629 (Feb. 17, 2006) [hereinafter Delegation of Authority of Border Facilities and Crossings]. The State Department reviews the application to determine whether the proposed pipeline is in "the national interest." Notice of Intent to Prepare a Supplemental Environmental Impact Statement (SEIS) for the Proposed TransCanada Keystone XL Pipeline, 77 Fed. Reg. 36,032 (June 15, 2012).

2012, re-application for a presidential permit to construct and operate the trans-border pipeline.<sup>29</sup>

TransCanada's re-application for a presidential permit to build Keystone XL initiated a new NEPA review process.<sup>30</sup> On September 5, 2012, TransCanada submitted to the Nebraska Department of Environmental Quality its preferred alternative route for the Keystone XL Pipeline in Nebraska.<sup>31</sup> On September 7, 2012, TransCanada sent the Department of State its own environmental report analyzing the relevant environmental issues related to its proposed pipeline.<sup>32</sup> On January 22, 2013, Nebraska's governor notified the Department of State "that he accepted the route recommended by the Nebraska state route review process" and requested that "Nebraska's evaluation be included in the Department of State's Supplemental Environmental Impact Statement."<sup>33</sup>

In March 2013, the Department of State released to the public materials pertaining to the pipeline, including the 2013 Draft SEIS.<sup>34</sup> The 2013 Draft SEIS discussed "[the] economic effects of the proposed project, impacts from potential releases or spills, impacts related to climate change, and cumulative effects from the proposed project in combination with other projects."<sup>35</sup>

On March 8, 2013, the EPA announced the availability of the 2013 Draft SEIS on its website, and commenced a forty-five day public comment period.<sup>36</sup>

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29. TransCanada first applied to the U.S. Department of State for a permit to build Keystone XL in 2008. *Keystone XL: Time to Build*, ENERGY & COMMERCE COMMITTEE, <http://energycommerce.house.gov/content/keystone-xl> (last visited Oct. 4, 2012). On January 18, 2012, the State Department denied the Keystone XL permit. Press Release, U.S. State Dep't, Denial of the Keystone XL Pipeline Application (Jan. 18, 2012), available at <http://www.state.gov/t/pa/prs/ps/2012/01/181473.htm>. TransCanada then reapplied to the State Department in May 2012 for a presidential permit to build the Keystone XL project. The new application removed the southern segment of the original Keystone XL proposal, terminated the proposed pipeline at Steele City, Nebraska and contained a commitment by TransCanada to accept a route through Nebraska as recommended by the State of Nebraska. *New Keystone XL Pipeline Application*, U.S. DEP'T STATE, <http://www.keystonepipeline-xl.state.gov/> (last visited Oct. 4, 2013) [hereinafter *Keystone XL Application*].

30. 2013 DRAFT SEIS, *supra* note 27, at 3.0 EXECUTIVE SUMMARY ES.1.

31. EXP ENERGY SERVS., INC., TRANSCANADA KEYSTONE XL PIPELINE PROJECT: SUPPLEMENTAL ENVIRONMENTAL REPORT FOR THE NEBRASKA REROUTE (2012), available at [http://boldnebraska.org/uploadedpdf/pdf\\_tc.pdf](http://boldnebraska.org/uploadedpdf/pdf_tc.pdf).

32. See generally *Keystone XL Application*, *supra* note 29.

33. Letter from Dave Heineman, Governor of Nebraska, to President Barack Obama and Secretary of State Hillary Rodham Clinton (Jan 22, 2013), available at [http://www.governor.nebraska.gov/news/2013/01/docs/0122\\_Pipeline\\_Approval.pdf](http://www.governor.nebraska.gov/news/2013/01/docs/0122_Pipeline_Approval.pdf).

34. See generally 2013 DRAFT SEIS, *supra* note 27. The comment period closed on April 22, 2013. U.S. DEP'T OF STATE, COMMENTS RECEIVED BY THE U.S. DEPARTMENT OF STATE ON THE DRAFT SUPPLEMENTAL ENVIRONMENTAL IMPACT STATEMENT FOR THE PROPOSED KEYSTONE XL PROJECT (2013) [hereinafter COMMENTS TO U.S. DEP'T OF STATE], available at <http://www.regulations.gov/#!documentDetail;D=DOS-2013-0011-0001>. *Keystone XL Application*, *supra* note 29. See also U.S. DEP'T OF STATE, KEYSTONE XL PIPELINE EVALUATION PROCESS FACTSHEET 2013 (2013), available at <http://keystonepipeline-xl.state.gov/draftseis/205549.htm>.

35. 2013 DRAFT SEIS, *supra* note 27, at 3.0 EXECUTIVE SUMMARY ES.1.1. See also Press Release, U.S. Dep't of State, State Department Releases Draft Supplemental Environmental Impact Statement on the Proposed Keystone XL Pipeline (Mar. 1, 2013) [hereinafter Press Release, DSEIS], available at <http://www.state.gov/t/pa/prs/ps/2013/03/205548.htm>.

36. Press Release, DSEIS.

On April 22, 2013, the EPA sent the Department of State a letter formally indicating that it had “environmental objections” regarding the project’s impacts, and that the draft SEIS contained “insufficient information.”<sup>37</sup> The EPA recommended that the State Department mitigate those deficiencies by including additional analysis and addressing the project’s impacts in the final EIS.<sup>38</sup>

Currently, in addition to the federal agency review process, the State Department is in the process of reviewing all of the comments received from the public during the public comment period.<sup>39</sup> Once all comments received are reviewed, the Department will prepare a Final SEIS and, subsequently, issue a National Interest Determination (NID).<sup>40</sup> The NID period will begin following the release of the Final SEIS, during which time the Department will obtain the views of other agencies about whether to grant or deny the permit.<sup>41</sup> This is in addition to the federal agency review process, in which the U.S. Fish and Wildlife Service (USFWS), on May 15, 2013, provided the Department with its Biological Opinion of the effects the proposed pipeline would have on threatened and endangered species.<sup>42</sup>

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37. Letter from Cynthia Giles, Assistant Adm’r for Enforcement & Compliance Assurance, U.S. Env’tl. Prot. Agency, to Jose W. Fernandez, Assistant Sec’y for Econ., Energy & Bus. Affairs, U.S. Dep’t of State, and Dr. Kerri-Ann Jones, Assistant Sec’y for Oceans & Int’l Env’tl. & Scientific Affairs, U.S. Dep’t of State (Apr. 22, 2013) [hereinafter EPA Letter], available at <http://www.epa.gov/compliance/nepa/keystone-xl-project-epa-comment-letter-20130056.pdf>. The letter recommended that more studies be performed as the EPA contended that the information provided in the SEIS was insufficient and did not adequately consider other environmental issues. *Id.* See also John M. Broder, *State Department Criticized by E.P.A. on Pipeline Report*, N.Y. TIMES (Apr. 22, 2013), [http://www.nytimes.com/2013/04/23/us/politics/state-department-criticized-by-epa-on-pipeline-report.html?\\_r=0](http://www.nytimes.com/2013/04/23/us/politics/state-department-criticized-by-epa-on-pipeline-report.html?_r=0). See also Editorial Board, *E.P.A.’s Keystone Report Card*, N.Y. TIMES (Apr. 26, 2013), <http://www.nytimes.com/2013/04/27/opinion/the-epas-keystone-report-card.html>.

38. The EPA’s citation of “environmental objections” means, the agency explained, that it has “identified significant environmental impacts that must be avoided in order to provide adequate protection for the environment. Corrective measures may require substantial changes.” EPA Letter, *supra* note 37. See also John H. Cushman Jr., *EPA Deems Keystone Review ‘Insufficient’ as Green Groups Hint at Lawsuit*, INSIDECLIMATE NEWS (Apr. 23, 2013), <http://insideclimatenews.org/news/20130423/epa-deems-keystone-review-insufficient-green-groups-hint-lawsuit>.

39. COMMENTS TO U.S. DEP’T OF STATE, *supra* note 34. The public comment period extended from March 8, 2013 to April 22, 2013. *Id.*

40. PAUL W. PARFOMAK ET AL., CONG. RESEARCH SERV., R41669, KEYSTONE XL PIPELINE PROJECT: KEY ISSUES 14 (2013) [hereinafter KEYSTONE XL ISSUES], available at <http://www.fas.org/sgp/crs/misc/R41668.pdf>. The National Interest Determination period is a review period when the Department of State determines whether a proposed project is in the national interest. *Id.* “[F]or a [p]residential [p]ermit, issuance of the final EIS represents the beginning of a [ninety]-day public review period during which the State Department gathers information from those necessary to inform its national interest determination.” *Id.*

41. *Id.*

42. Letter from Michael George, Neb. Fish & Wildlife Serv., to K. Nichole Gibson, Endangered Species Act Lead, U.S. Dep’t of State (May 15, 2013), available at <http://keystonepipelinexl.state.gov/documents/organization/209745.pdf>. “The Act requires Federal agencies to consult with the USFWS to ensure that any action authorized, funded, or carried out is not likely to jeopardize the continued existence of any federally listed species nor destroy or adversely modify critical habitat.” *Id.* at 1. The USFWS believed that the proposed project was likely to adversely affect the American burying beetle [ABB] (*Nicrophorus americanus*). *Id.* at 10. At the conclusion of its Biological Opinion, USFWS wrote “[a]fter reviewing the current status of the ABB, the environmental baseline for the action area, the effects of the proposed action, and the cumulative effects, it is the USFWS’s opinion that the proposed Project is not likely to jeopardize the continued existence of the ABB.” *Id.* at 70.

Due to the lengthy review process by the State Department, there have been efforts in Congress to bypass the executive review process. Recently, on May 22, 2013, the U.S. House of Representatives approved H.R. 3, the Northern Route Approval Act, a bill that would enable Congress to allow TransCanada to construct Keystone XL without a presidential permit.<sup>43</sup> In a 241 to 175 vote, the House voted in favor of the Act, which is now before the Senate for consideration.<sup>44</sup>

## 2. FERC: Scope of NEPA Review with Regard to Natural Gas Production

Over the past annual report year, the Federal Energy Regulatory Commission (FERC) has issued a number of decisions providing guidance as to how the Commission interprets its role in the NEPA process. In *Sabine Pass Liquefaction, LLC*, the FERC granted Sabine Pass authorization “to site, construct, and operate facilities for the liquefaction and export of domestically produced natural gas at the existing Sabine Pass Liquefied Natural Gas (LNG) terminal.”<sup>45</sup> In its request for rehearing, Sierra Club argued the FERC should not have authorized the Liquefaction Project because it did not “consider the Liquefaction Project’s reasonably foreseeable indirect effect of inducing additional shale natural gas production and the associated environmental impacts.”<sup>46</sup> The FERC stated that “[w]hile . . . NEPA requires agencies to engage in ‘reasonable forecasting,’ . . . NEPA does not require an agency to ‘engage in speculative analysis’ or ‘to do the impractical, if not enough information is available to permit meaningful consideration.’”<sup>47</sup> The FERC further explained in *Cheniere Creole Trail Pipeline, L.P.*, approving Cheniere Creole Trail Pipeline’s application to construct and operate new interstate natural gas pipeline, compression, and related facilities, that it is not required to consider “any environmental impacts from the additional gas production induced by gas export” as “incremental impacts and consider them as part of the cumulative

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43. 159 CONG. REC. H2841, H2845 (2013).

44. 159 CONG. REC. H2841. The Office of Management and Budget (OMB) recommended that if passed by the House and Senate, the President veto the bill. OMB stated that the bill “conflicts with longstanding [e]xecutive branch procedures regarding the authority of the President, the Secretaries of State, the Interior, and the Army, and the EPA Administrator. In addition, the bill is unnecessary because the Department of State is working diligently to complete the permit decision process for the Keystone XL pipeline.” OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY: H.R. 3 – NORTHERN ROUTE APPROVAL ACT (May 21, 2013), available at [http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr3r\\_20130521.pdf](http://www.whitehouse.gov/sites/default/files/omb/legislative/sap/113/saphr3r_20130521.pdf).

45. *Sabine Pass Liquefaction*, 140 F.E.R.C. ¶61,076 (2012).

46. *Id.* at P 7.

47. *Id.* at P 17 (citing *Northern Plains Res. Council v. Surface Transp. Bd.*, 668 F.3d 1067 (9th Cir. 2011)). The facilities would enable the companies to liquefy and export domestically produced natural gas by “acquir[ing] gas supplies, arrang[ing] for transportation to the liquefaction facilities, liquefy[ing] the gas feedstock, stor[ing] the LNG in the terminal’s storage facilities, and deliver[ing] LNG from the storage tanks into marine vessels for export.” *Id.* at P 2. Requesting rehearing, the Sierra Club argued the FERC should not have authorized the Liquefaction Project because it did not “consider the Liquefaction Project’s reasonably foreseeable indirect effect of inducing additional shale natural gas production and the associated environmental impacts.” *Id.* at P 7.



impact of past, present[,] and reasonably foreseeable future actions by federal and non-federal agencies.”<sup>48</sup>

Similarly, in *Transcontinental Pipe Line Co., LLC*, the FERC granted Transcontinental Gas Pipe Line Company “a certificate of public convenience and necessity . . . authorizing it to construct, operate, and abandon pipeline, compression, and meter facilities in Pennsylvania, New Jersey, and New York.”<sup>49</sup> In a request for rehearing, the Eastern Environmental Law Center on behalf of the New Jersey Highlands Coalition, New Jersey Sierra Club, Food & Water Watch, Fight the Pipe, and Clinton Township claimed that the proposed project would have significant cumulative impacts on the environment and that the FERC “erred in considering only the general development” of the project and thus did not meet its NEPA requirement to include detailed information on cumulative impacts.<sup>50</sup> The FERC stated that “NEPA does not require an agency to ‘engage in speculative analysis’ or ‘do the impractical, if not enough information is available to permit meaningful consideration.’”<sup>51</sup>

In *Texas Eastern Transmission, LP*, the FERC granted Texas Eastern Transmission, LP (Texas Eastern) a certificate authorizing Texas Eastern to construct pipeline facilities in Connecticut, New Jersey, and New York called the New Jersey-New York Expansion Project.<sup>52</sup> The New Jersey and the Atlantic Sierra Club, Food & Water Watch, and No Gas Pipeline requested rehearing, arguing that the FERC did not adequately assess cumulative impacts because it only considered cumulative impacts to the environment that were “causally related” to the proposed project.<sup>53</sup> In response, the FERC rejected the argument that the scope of a cumulative impact analysis is not limited by a requirement of causality, and observed that:

[t]o assess cumulative effects, [it must] consider (1) the direct and indirect effects on the environment expected to result from the proposed project and its alternatives and (2) present effects of past actions we find relevant and useful because of a significant cause-and-effect relationship with the direct and indirect environmental impacts of the project and its alternatives.<sup>54</sup>

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48. *Cheniere Creole Trail Pipeline, L.P.*, 142 F.E.R.C. ¶ 61,137 at P 59 (2013). Since Creole Trail is a wholly-owned subsidiary of Cheniere Pipeline Company, which is wholly owned by Cheniere Energy, Inc. (a company that also owns the *above-mentioned* Sabine Pass LNG, L.P.), Creole Trail’s old natural gas transmission system was connected with Sabine Pass’s terminal. Creole’s new pipeline would create a “bi-directional natural gas flow on Creole Trail’s pipeline system,” which would enable domestic gas to be delivered to Sabine Pass’s Liquefaction Project. *Id.* at P 1-3.

49. *Transcontinental Pipe Line Co.* 143 F.E.R.C. ¶ 61,132 (2013).

50. *Id.* at P 49.

51. *Id.* at P 60. Ultimately, the FERC concluded that “given the significant uncertainties with respect to the timing and location of wells which may ultimately be drilled, a quantitative analysis of potential impacts from the wells and associated facilities would require considerable speculation and hypothesizing.” *Id.* at P 49. In an earlier iteration of the case, the FERC noted that it is “not required to undertake an in-depth assessment of the impacts” of a development when that “project and such development do not have a reasonably close causal connection” and they are “not reasonably foreseeable.” *Transcontinental Gas Pipe Line Co., LLC*, 141 F.E.R.C. ¶ 61,091 at P 141 (2012).

52. *Texas E. Transmission, LP*, 141 F.E.R.C. ¶ 61,043 at P 37 (2012).

53. *Id.* at P 36.

54. *Id.* at P 37.

Finally, the FERC discussed the limits to its cumulative impact analysis in *Eastern Shore Natural Gas Co.*, where the FERC granted Eastern Shore Natural Gas Company's (Eastern Shore) application for a certificate of public convenience and necessity authorizing it to expand a natural gas pipeline system.<sup>55</sup> The Delaware Riverkeeper Network (DRN) argued that since there were twelve separate transmission pipeline projects that crossed or planned to cross the Delaware River Basin, the FERC's analysis of cumulative impacts analysis "[fell] short of what NEPA requires by failing to consider the full scope of impacts of the project" because it failed to evaluate functionally dependent projects together.<sup>56</sup> DRN argued that since there were twelve separate transmission pipeline projects that crossed or planned to cross the Delaware River Basin, they all should have been included in the cumulative impacts analysis because they cumulatively affect the Delaware River.<sup>57</sup> The FERC held that

[i]n evaluating cumulative impacts, Commission staff generally follows the methodology set forth in relevant guidance (CEQ, 1993; USEPA, 1999). Under these guidelines, inclusion of other projects within the cumulative impacts analysis is based on identifying commonalities of impacts from other projects with impacts that would result from the proposed [p]roject.<sup>58</sup>

The FERC further held that the project was limited and "confined . . . within the Atlantic Coastal Plain," and in considering "both the spatial and temporal extent of the [p]roject's impacts," it only "considered the [p]roject's effects to the Delaware River Basin, limiting the geographic scope for analysis to incorporate New Castle and Kent Counties, Delaware."<sup>59</sup>

## II. ELECTRIC POWER

### A. Air: Criteria and Toxics

#### 1. Utility MATS

The EPA's Utility Mercury and Air Toxics Standards (MATS) became effective on April 16, 2012.<sup>60</sup> The MATS rule established national emission standards for hazardous air pollutants (HAPs) and revised new source performance standards (NSPS).<sup>61</sup> For coal-fired generators, the regulated HAPs are hydrogen chloride as a surrogate for acid gases (with a sulfur dioxide alternative standard), mercury, other toxic metals besides mercury, and organic hazardous air pollutants.<sup>62</sup> The non-mercury toxic metals requirements designate filterable particulate matter (PM) as a surrogate but can equivalently

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55. *East Shore Natural Gas Co.*, 142 F.E.R.C. ¶ 61,124 (2013).

56. *Id.* at P 91.

57. *Id.* at P 98.

58. *Id.* at P 100.

59. *Id.*

60. National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility Units, 77 Fed. Reg. 9304 (Feb. 16, 2012) (codified at 40 C.F.R. pts. 60, 63).

61. *Id.*

62. *Id.* at 9367.

be met through limitations on total non-mercury toxic metals in combination with limitations on individual toxic metal species' emissions.<sup>63</sup> For oil-fired generators, the regulated HAPs are hydrogen chloride and hydrogen fluoride, filterable PM as a surrogate for total HAP metals, and organic HAPs.<sup>64</sup> The HAP metals standards can equivalently be met through limitations on individual species' emissions.<sup>65</sup> The MATS rule regulates the organic HAPs through work practice standards rather than numerical limits.<sup>66</sup>

Compliance under the MATS rule will be required three years after the effective date, implying a compliance date in April 2015.<sup>67</sup> Generally, a fourth year for compliance will be made available to generators through application to the permitting authorities, and under extraordinary circumstances, a fifth year will be available for reliability critical units.<sup>68</sup>

On March 28, 2013, the EPA took final action to revise the numerical standards in the MATS rule for new sources of HAPs.<sup>69</sup> This final action revised some definitional and monitoring provisions that are part of the MATS NSPS.<sup>70</sup> The final rule also issued technical corrections to both the HAPs standards and the revised NSPS.<sup>71</sup> The revised numerical HAP standards affected units designed for low-rank virgin coal (e.g., lignite), coal units not designed for low-rank virgin coal, coal integrated gasification combined cycle (IGCC) units, and oil-fired units.<sup>72</sup> For the coal-fired units, revisions affected the emissions limits for hydrogen chloride, filterable PM, and mercury, with the exception of mercury released by the units designed for low-rank virgin coal.<sup>73</sup> For oil-fired units, the revisions affected only the emissions limit for filterable PM.<sup>74</sup> Some of the alternate emission limitations were also amended.<sup>75</sup> In the March 28, 2013, final action, the EPA deferred final action with respect to startup and shutdown provisions.<sup>76</sup> In the proposed rule for reconsideration, the EPA proposed new provisions related to startup and shutdown emissions under the PM NSPS and the HAP standards.<sup>77</sup> Finalization of the startup and shutdown provisions is pending.

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63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 9369.

67. *Id.* at 9426.

68. *Id.* at 9407.

69. Reconsideration of New Source Issues: National Emission Standards for Hazardous Air Pollutants from Coal- and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility Units, 78 Fed. Reg. 24,073, 24,075 (Apr. 24, 2013) (codified at 40 C.F.R. pts. 60, 63).

70. *Id.*

71. *Id.*

72. *Id.* at 24,074.

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.* at 24,075.

77. Reconsideration of Certain New Source and Startup/Shutdown Issues: National Emission Standards for Hazardous Air Pollutants From Coal and Oil-Fired Electric Utility Steam Generating Units and Standards

Numerous parties, including attorney generals for nearly half of the states, filed petitions with the D.C. Circuit challenging the EPA's MATS rule.<sup>78</sup> The individual petitions were initially consolidated under the lead case *White Stallion Energy Center, LLC v. EPA*.<sup>79</sup> However, the D.C. Circuit subsequently severed and consolidated some of the issues raised in the petitions for review.<sup>80</sup> The central challenge of the petitioners is that the MATS standard does not meet the "appropriate and necessary" criteria set forth in the language of Clean Air Act (CAA) section 112(n)(1)(A) and the EPA's contemporaneous interpretations of that provision.<sup>81</sup> The petitioners claim the EPA's flawed interpretation of section 112(n)(1)(A) is most evident in its regulation of hydrogen chloride emissions, for which the EPA has purportedly never claimed any health hazard.<sup>82</sup>

## 2. Cross-State Air Pollution Rule

On July 11, 2011, the EPA finalized the Cross-State Air Pollution Rule (CSAPR), to reduce power plant emissions that contribute to ozone and/or fine

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of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 71,323 (Nov. 30, 2012).

78. Petition, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-01100 (D.C. Cir. Feb. 16, 2012); Petition, *National Mining Ass'n v. EPA*, No. 12-01101 (D.C. Cir. Feb. 16, 2012); Petition, *National Black Chamber of Commerce v. EPA*, No. 12-01102 (D.C. Cir. Feb. 16, 2012); Petition, *Air Regulatory Grp. v. EPA*, No. 12-01147 (D.C. Cir. Mar. 16, 2012); Petition, *Utility Air Regulatory Grp. v. EPA*, No. 12-01166 (D.C. Cir. Apr. 09, 2012); Petition, *Eco Power Solutions (USA) Co. v. EPA*, No. 12-01170 (D.C. Cir. Apr. 12, 2012); Petition, *Midwest Ozone Grp. v. EPA*, No. 12-01172 (D.C. Cir. Apr. 12, 2012); Petition, *American Pub. Power Ass'n v. EPA*, No. 12-01173 (D.C. Cir. Apr. 13, 2012); Petition, *Julander Energy Co. v. EPA*, No. 12-01174 (D.C. Cir. Apr. 13, 2012); Petition, *Peabody Energy Corp. v. EPA*, No. 12-01175 (D.C. Cir. Apr. 13, 2012); Petition, *Deseret Power Elec. Coop. v. EPA*, No. 12-01176 (D.C. Cir. Apr. 13, 2012); Petition, *Sunflower Elec. Power Corp. v. EPA*, No. 12-01177 (D.C. Cir. Apr. 13, 2012); Petition, *Tri-State Generation and Transmission Ass'n v. EPA*, No. 12-01178 (D.C. Cir. Apr. 13, 2012); Petition, *Tenaska Trailblazer Partners v. EPA*, No. 12-01180 (D.C. Cir. Apr. 16, 2012); Petition, *ARIPPA v. EPA*, No. 12-01181 (D.C. Cir. Apr. 16, 2012); Petition, *WV Chamber of Commerce v. EPA*, No. 12-01182 (D.C. Cir. Apr. 16, 2012); Petition, *United Mine Workers of Am. v. EPA*, No. 12-01183 (D.C. Cir. Apr. 13, 2012); Petition, *Power4Georgians, LLC v. EPA*, No. 12-01184 (D.C. Cir. Apr. 13, 2012); Petition, *State of Texas v. EPA*, No. 12-01185 (D.C. Cir. Apr. 16, 2012); Petition, *Kansas City Bd. of Pub. Util. v. EPA*, No. 12-01186 (D.C. Cir. Apr. 16, 2012); Petition, *Oak Grove Mgmt. Co. v. EPA*, No. 12-1186 (D.C. Cir. Apr. 16, 2012); Petition, *Gulf Coast Lignite Coal. v. EPA*, No. 12-01188 (D.C. Cir. Apr. 16, 2012); Petition, *Puerto Rico Elec. Power Auth. v. EPA*, No. 12-01189 (D.C. Cir. Apr. 16, 2012); Petition, *State of Arkansas v. EPA*, No. 12-01190 (D.C. Cir. Apr. 16, 2012); Petition, *Chase Power Dev., L.L.C. v. EPA*, No. 12-01191 (D.C. Cir. Apr. 16, 2012); Petition, *FirstEnergy Generation Corp. v. EPA*, No. 12-01192 (D.C. Cir. Apr. 16, 2012); Petition, *Edgecombe Genco, LLC v. EPA*, No. 12-01193 (D.C. Cir. Apr. 16, 2012); Petition, *Chesapeake Climate Action Network v. EPA*, No. 12-01194 (D.C. Cir. Apr. 16, 2012); Petition, *Wolverine Power Supply Coop. v. EPA*, No. 12-01195 (D.C. Cir. Apr. 16, 2012); Petition, *Michigan v. EPA*, No. 12-01196 (D.C. Cir. Apr. 16, 2012).

79. Order Consolidating Cases, *White Stallion Energy Ctr., LLC v. EPA*, No. 12-1100, 2012 U.S. App. LEXIS 7175 (D.C. Cir. Apr. 10, 2012).

80. *Id.*

81. Joint Reply Brief of State, Industry, and Labor Petitioners at 1, *White Stallion*, No. 12-1100 (D.C. Cir. Mar. 25, 2013). The EPA made its original "appropriate and necessary" determination in December 2000. Regulatory Finding on the Emissions of Hazardous Air Pollutants from Electric Utility Steam Generating Units, 65 Fed. Reg. 79,825 (Dec. 20, 2000). The determination relied on the so-called Utility Study. U.S. ENVTL. PROT. AGENCY, STUDY OF HAZARDOUS AIR POLLUTANT EMISSIONS FROM ELECTRIC UTILITY STEAM GENERATING UNITS (1998), available at <http://www.epa.gov/ttn/oarpg/t3/reports/eurtc1.pdf>.

82. Joint Reply Brief, *supra* note 81, at 4.

particle pollution in other states.<sup>83</sup> The rule was a replacement for the Clean Air Interstate Rule (CAIR), which was remanded to the EPA in December 2008 by the D.C. Circuit Court of Appeals.<sup>84</sup> Under CSAPR, twenty-eight states were required to reduce their annual sulfur dioxide (SO<sub>2</sub>), annual nitrogen oxides (NO<sub>x</sub>), and/or ozone season NO<sub>x</sub> emissions to help achieve the 1997 ozone and fine particulate matter National Ambient Air Quality Standards.<sup>85</sup>

On August 21, 2012, the U.S. Court of Appeals for the D.C. Circuit held, in *EME Homer City Generation, L.P. v. EPA* that the EPA exceeded its statutory authority in two independent respects when it adopted CSAPR.<sup>86</sup> First, although the statute gave the EPA authority to require upwind states to reduce their significant contributions to a downwind state's nonattainment, the court found that CSAPR may require upwind states to reduce their emission by more than their own significant contribution.<sup>87</sup> Second, states have an initial opportunity to implement required reduction under the CAA "good neighbor provision,"<sup>88</sup> but here the court found that the EPA quantified the states' good neighbor obligations and simultaneously set forth EPA-designed plans to implement those obligations without first affording the state the initial opportunity to implement the required reductions.<sup>89</sup> Therefore, the court remanded CSAPR back to the EPA and temporarily reinstated CAIR until the agency repromulgates CSAPR to comply with the requirements of the CAA.<sup>90</sup> EPA petitioned the court for an en banc rehearing of the case on October 5, 2012,<sup>91</sup> which the court of appeals denied on January 24, 2013.<sup>92</sup> The EPA then petitioned the U.S. Supreme Court to review the decision, and on June 24, 2013, the U.S. Supreme Court granted the EPA's petition for certiorari and agreed to hear the case during its October 2013 term.<sup>93</sup>

### 3. Fine Particulate Matter (PM2.5)

In 2007 and 2008, the EPA promulgated two final rules governing implementation of the NAAQS for fine particulate matter.<sup>94</sup> In *Natural Resources Defense Council v. EPA*, the Petitioners challenged the two rules on the grounds that they were promulgated pursuant to the general implementation

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83. Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011).

84. *Id.* at 48,211.

85. *Id.* at 48,210.

86. *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

87. *Id.* at 11.

88. Clean Air Act, 42 U.S.C. § 7410(a)(1), (a)(2)(D)(i)(I) (2012).

89. *EME Homer City*, 696 F.3d at 11-12.

90. *Id.* at 38.

91. Petition for Rehearing En Banc, *EME Homer City*, 696 F.3d 7 (No. 11-1302), 2012 WL 4748805 (D.C. Cir. Oct. 5, 2012).

92. *EME Homer City Generation, L.P. v. EPA*, No. 11-1302, 2013 WL 656247 (D.C. Cir. Jan. 24, 2013) (per curiam) (denying petition for rehearing).

93. *American Lung Ass'n v. EME Homer City Generation, L.P.*, 133 S. Ct. 2857 (2013) (mem.), *granting cert.* *EME Homer City Generation, L.P. v. EPA*, 696 F.3d 7 (D.C. Cir. 2012).

94. Clean Air Fine Particle Implementation Rule, 72 Fed. Reg. 20,586 (Apr. 25, 2007) (codified at 40 C.F.R. pt. 51); Implementation of the New Source Review (NSR) Program for Particulate Matter Less Than 2.5 Micrometers (PM<sub>2.5</sub>), 73 Fed. Reg. 28,321 (May 16, 2008) (codified at 40 C.F.R. pts. 51, 52).

provisions of subpart 1 of part D of title I of the Act (subpart 1),<sup>95</sup> rather than the particulate-matter-specific provisions of subpart 4 of part D of Title I (subpart 4).<sup>96</sup> On January 4, 2013, the court agreed with Petitioners, stating that the EPA erred in applying the provisions of subpart 1 rather than subpart 4, and remanded the rules to the EPA to repromulgate pursuant to subpart 4.<sup>97</sup>

On December 14, 2012, the EPA took final action to modify the annual NAAQS for fine particle matter from 15.0 micrograms per cubic meter ( $\mu\text{g}/\text{m}^3$ ) to 12.0 ( $\mu\text{g}/\text{m}^3$ ) and to retain the twenty-four hour fine particle standard of 35  $\mu\text{g}/\text{m}^3$ .<sup>98</sup> The EPA also retained the existing standards for coarse particle pollution (PM 10).<sup>99</sup> On March 15, 2013, the National Association of Manufacturers sought review of the final action.<sup>100</sup> On March 18, 2013 the Utility Air Regulatory Group similarly sought review of the final action.<sup>101</sup> These cases were consolidated on April 25, 2013, and briefing is scheduled to occur in the near future.<sup>102</sup>

## B. Air: Greenhouse Gases

### 1. Judicial Challenges to EPA Greenhouse Gas (GHG) Regulations

On December 20, 2012, the U.S. Court of Appeals for the D.C. Circuit denied a petition for rehearing en banc of its June 26, 2012 decision upholding four EPA rulemakings.<sup>103</sup> The D.C. Circuit's prior ruling affirmed the Endangerment Finding,<sup>104</sup> the Tailpipe Rule,<sup>105</sup> the Timing Rule,<sup>106</sup> and the

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95. Public Health and Welfare Act, 42 U.S.C. §§ 7501-7509a (2012); *Natural Res. Def. Council v. EPA*, 706 F.3d 428, 429 (D.C. Cir. 2013).

96. 42 U.S.C. §§ 7513-7513b; *Natural Res. Def. Council*, 706 F.3d at 437.

97. *Natural Resources Def. Council*, 706 F.3d at 437.

98. National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3086 (Jan. 15, 2013) (to be codified at 40 C.F.R. pts. 50-53, 58). The EPA stated that it does not believe the Court's decision in *Natural Resources Defense Council v. Environmental Protection Agency* affects the EPA's final action to modify the NAAQS for fine particulate matter, and the EPA intends to address the Court's decision as it develops a proposed rule for implementing the new annual standard. U.S. ENVTL. PROT. AGENCY, DC CIRCUIT DECISION ON FINE PARTICLE NATIONAL AMBIENT AIR QUALITY STANDARDS IMPLEMENTATION RULE AND NEW SOURCE REVIEW/PREVENTION OF SIGNIFICANT DETERIORATION RULE (2013), available at <http://www.epa.gov/pm/2013/20130104dcdecision.pdf>.

99. National Ambient Air Quality Standards for Particulate Matter, 78 Fed. Reg. 3085.

100. Petition for Review, *National Ass'n of Mfrs. v. EPA*, No. 13-1069 (D.C. Cir. Mar. 15, 2013).

101. Petition for Review, *Utility Air Regulatory Grp. v. EPA*, No. 13-1071 (D.C. Cir. Mar. 18, 2013).

102. Order Granting Motion to Consolidate, *National Ass'n of Mfrs.*, No. 13-1069 (D.C. Cir. Apr. 25, 2013).

103. *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785 (D.C. Cir. Dec. 20, 2012), *reh'g denied*, 684 F.3d 102 (D.C. Cir. 2012).

104. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (to be codified at 40 C.F.R. ch. 1) [hereinafter Endangerment Finding].

105. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) (to be codified at 40 C.F.R. pts. 85, 86, 600) [hereinafter Tailpipe Rule].

106. Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) (to be codified at 40 C.F.R. pts. 50, 52, 70, 71) [hereinafter Timing Rule].

Tailoring Rule.<sup>107</sup> Specifically, the D.C. Circuit held that the Endangerment Finding and Tailpipe Rule were not arbitrary and capricious, that the EPA's rulemakings were consistent with the Supreme Court's ruling in *Massachusetts v. EPA*,<sup>108</sup> and that the petitioners did not have standing to challenge the Timing Rule or Tailoring Rule.<sup>109</sup> In its decision denying rehearing en banc, the D.C. Circuit's Chief Judge issued a concurring opinion stating that the panel decision correctly deferred to the EPA and "gave effect to the [CAA's] plain meaning"<sup>110</sup> whereas two judges issued dissenting opinions that criticized the denial on the grounds that the court should not extend the *Massachusetts* ruling to Title V and the Prevention of Significant Deterioration (PSD) program<sup>111</sup> and that the EPA's broad interpretation of "air pollutant" for the PSD program produces "absurd consequences."<sup>112</sup> Numerous petitioners have filed for the U.S. Supreme Court to grant certiorari to review the case.<sup>113</sup>

Additionally, various states and industry groups have challenged the EPA's State Implementation Plan (SIP) Call,<sup>114</sup> which found the SIPs of thirteen states to be "substantially inadequate" and proposed a Federal Implementation Plan (FIP) to apply to those states in the event they did not reinterpret their SIPs to impose the Tailoring Rule.<sup>115</sup> The EPA's greenhouse gas SIP Call requires states to revise their SIPs to allow them to "assure that their PSD programs will apply to GHG-emitting sources."<sup>116</sup> The State of Texas filed suit to challenge the EPA's issuance of an interim final rule that partially disapproved Texas's SIP and imposed the greenhouse gas FIP.<sup>117</sup> The Interim Final Rule found that the EPA "erred in fully approving Texas's PSD program in 1992 because at that time, the program had a gap," and that EPA has authority to "revise" its prior approval of Texas's SIP through CAA section 110(k)(6).<sup>118</sup> The EPA stated that section 110(k)(6) confers "broad discretion upon [the] EPA to make decisions as

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107. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) [hereinafter Tailoring Rule].

108. *Massachusetts v. EPA*, 549 U.S. 497 (2007).

109. *Coalition for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012).

110. *Coalition for Responsible Regulation, Inc. v. EPA*, No. 09-1322, 2012 WL 6621785, at \*2 (D.C. Cir. Dec. 20, 2012) (Sentelle, J., concurring).

111. *Id.* at \*3-4 (Brown, J., dissenting).

112. *Id.* at \*18 (Kavanaugh, J., dissenting).

113. *Petition for a Writ of Certiorari, American Chemistry Council v. EPA*, No. 12A876, 2013 WL 1697570 (Apr. 18, 2013) [hereinafter *Petition for Certiorari*].

114. *Action to Ensure Authority to Issue Permits Under the Prevention of Significant Deterioration Program to Sources of Greenhouse Gas Emissions: Finding of Substantial Inadequacy and SIP Call*, 75 Fed. Reg. 77,698 (Dec. 13, 2010) (to be codified at 40 C.F.R. pt. 52) [hereinafter *SIP Call*].

115. *Final Opening Brief for Petitioners at 14, Texas v. EPA*, No. 10-1425 (D.C. Cir. Oct. 12, 2012).

116. *SIP Call*, *supra* note 114, at 77,700.

117. *Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas Prevention of Significant Deterioration Program*, 75 Fed. Reg. 82,430 (Dec. 30, 2010) [hereinafter *Interim Final Rule*].

118. *Id.* at 82,431-32; *see also* 42 U.S.C. § 7410(k)(6) (2012) ("Whenever the Administrator determines that the Administrator's action approving, disapproving, or promulgating any plan or plan revision (or part thereof), area designation, redesignation, classification, or reclassification was in error, the Administrator may in the same manner as the approval, disapproval, or promulgation revise such action as appropriate without requiring any further submission from the State. Such determination and the basis thereof shall be provided to the State and public.").

to when it erred in approving an SIP revision.”<sup>119</sup> The EPA then published a final rule that reaffirmed the interim final rule.<sup>120</sup> In its pending appeal, Texas challenged both EPA rulemakings by arguing, in part, that CAA Section 110(k)(6) merely allows the EPA to correct clerical or other technical errors and does not provide the EPA with broad discretion to override an SIP that it previously approved.<sup>121</sup> Oral argument was held in this proceeding on May 7, 2013.<sup>122</sup>

## 2. Common Law GHG Litigation

In *Comer v. Murphy Oil*, a group of Mississippi Gulf Coast residents and property owners alleged that greenhouse gas emissions by numerous energy companies contributed to global warming, which intensified Hurricane Katrina, which, in turn, damaged their property.<sup>123</sup> The district court dismissed plaintiffs’ claims with prejudice, holding that plaintiffs lacked standing and their claims were not justiciable under the political question doctrine.<sup>124</sup> A Fifth Circuit panel reversed, in part, the district court’s dismissal, but before the mandate could issue, a majority of the Fifth Circuit’s active, unrecused judges voted for rehearing en banc.<sup>125</sup> After the en banc vote, but before rehearing, an additional judge was recused leaving the Fifth Circuit without a quorum, and the appeal was then dismissed.<sup>126</sup> Plaintiffs filed a petition for a writ of mandamus, seeking review of the Fifth Circuit’s dismissal of the appeal, which was denied.<sup>127</sup>

The plaintiffs subsequently filed several of the same claims, against many of the same energy companies, in the same district court.<sup>128</sup> The district court held, among other things, that the doctrine of res judicata barred their claims, and on May 14, 2013, the Fifth Circuit affirmed on the basis of res judicata.<sup>129</sup>

In *Native Village of Kivalina v. ExxonMobil Corp.*, the Native Village of Kivalina and the City of Kivalina (Kivalina) appealed the district court’s dismissal of their action for damages against multiple oil, energy, and utility companies.<sup>130</sup> Kivalina argued that, by contributing to global warming, the defendants’ emissions of greenhouse gases “constitute a substantial and unreasonable interference with public rights, including the rights to use and enjoy public and private property in Kivalina.”<sup>131</sup> The district court dismissed

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119. Interim Final Rule, *supra* note 117, at 82,433.

120. Determinations Concerning Need for Error Correction, Partial Approval and Partial Disapproval, and Federal Implementation Plan Regarding Texas’s Prevention of Significant Deterioration Program, 76 Fed. Reg. 25,178 (May 3, 2011) (to be codified at 40 C.F.R. pt. 52).

121. Final Opening Brief for Petitioners, *supra* note 115, at 13-14.

122. *See generally* Scheduling Order, *Texas v. EPA*, No. 10-1425 (D.C. Cir. Oct. 12, 2012).

123. *Comer v. Murphy Oil USA, Inc.*, 718 F.3d 460, 465 (5th Cir. 2013).

124. *Id.*

125. *Id.* (citing *Comer v. Murphy Oil USA, Inc.*, 585 F.3d 855, 879–80 (5th Cir. 2009)).

126. *Id.* (citing *Comer v. Murphy Oil USA, Inc.*, 607 F.3d 1049, 1053–55 (5th Cir. 2010)).

127. *In re Comer*, 131 S. Ct. 902 (2011).

128. *Comer v. Murphy Oil USA, Inc.* 718 F.3d 460, 466 (5th Cir. 2013).

129. *Id.* at 469.

130. *Native Village of Kivalina v. ExxonMobil Corp.*, 696 F.3d 849, 853 (9th Cir. 2012).

131. *Id.* at 854.



for lack of subject-matter jurisdiction over Kivalina's federal public nuisance claim.<sup>132</sup>

On review, the Ninth Circuit applied reasoning from *American Electric Power Co. v. Connecticut*, where the Supreme Court determined that “the Clean Air Act and the EPA actions it authorizes displace any federal common law right to seek abatement of such emissions.”<sup>133</sup> The Ninth Circuit affirmed the dismissal, holding that all remedies sought under the federal common law nuisance cause of action are displaced, and the fact that the damage alleged occurred before the EPA acted to establish greenhouse gas standards did not alter the displacement analysis.<sup>134</sup>

### C. Water: Cooling Water Intake Structures Rule

Cooling water is used to remove waste heat from the generation of power deriving from steam electric generating plants.<sup>135</sup> Section 316(b) of the Clean Water Act (CWA) requires that the “location, design, construction[,] and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.”<sup>136</sup> In 2011, the EPA proposed new regulations for cooling water intake structures (CWIS).<sup>137</sup> In addition, the California State Water Resources Control Board (SWRCB) continued with implementation of regulations addressing the intake and use of cooling water.<sup>138</sup>

After years of litigation that largely overturned the EPA's original rule from 2004 governing CWIS, the EPA entered into a settlement agreement under which it committed to propose a rule implementing section 316(b) of the CWA for existing facilities.<sup>139</sup> Under the settlement, as modified on April 20, 2011, the EPA proposed regulations pursuant to section 316(b) of the CWA.<sup>140</sup> On June 11, 2012, and June 12, 2012, the EPA published two Notices of Data

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132. *Id.* at 854-55.

133. *Id.* at 857 (citing *American Elec. Power Co. v. Connecticut*, 131 S. Ct 2527, 2537 (2011)).

134. *Id.* at 857.

135. *Water Discharge*, EPA, <http://www.epa.gov/cleanenergy/energy-and-you/affect/water-discharge.html> (last visited Oct. 3, 2013).

136. 33 U.S.C. § 1326 (2012).

137. National Pollutant Discharge Elimination System-Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22,174 (Apr. 20, 2011) (to be codified at 40 C.F.R. pts. 122, 125).

138. ELEC. POWER RESEARCH INST., CAL. STATE WATER RES. CONTROL BD., ASSESSMENT OF ONCE-THROUGH COOLING SYSTEM IMPACTS TO CALIFORNIA COSTAL FISH AND FISHERIES (2007), available at [http://www.swrcb.ca.gov/water\\_issues/programs/ocean/cwa316/docs/epri\\_assessment\\_impacts.pdf](http://www.swrcb.ca.gov/water_issues/programs/ocean/cwa316/docs/epri_assessment_impacts.pdf).

139. *Riverkeeper, Inc. v. EPA*, 475 F.3d 83 (2d Cir. 2007); *rev'd in part sub nom. Entergy Corp. v. Riverkeeper, Inc.* 556 U.S. 208, 225-27 (2009). U.S. ENVTL. PROT. AGENCY, SETTLEMENT AGREEMENT AMONG THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, PLAINTIFFS IN *CRONIN, ET AL. V. REILLY*, 93 CIV. 314 (LTS) (SDNY), AND PLAINTIFFS IN *RIVERKEEPER, ET AL. V. EPA*, 06 CIV. 12987 (PKC) (SDNY) (2010), available at <http://water.epa.gov/lawsregs/lawguidance/cwa/316b/phase2/upload/316bsettlement.pdf>.

140. U.S. ENVTL. PROT. AGENCY, AMENDMENT TO SETTLEMENT AGREEMENT AMONG THE ENVIRONMENTAL PROTECTION AGENCY, PLAINTIFFS IN *CRONIN, ET AL. V. REILLY*, 93 CIV. 314 (LTS) (SDNY), AND PLAINTIFFS IN *RIVERKEEPER, ET AL. V. EPA*, 06 CIV. 12987 (PKC) (SDNY) (2011), available at [http://water.epa.gov/lawsregs/lawguidance/cwa/316b/upload/amendment\\_riverkeeper\\_settlement.pdf](http://water.epa.gov/lawsregs/lawguidance/cwa/316b/upload/amendment_riverkeeper_settlement.pdf) [hereinafter FIRST SETTLEMENT AMENDMENT]; see also, National Pollutant Discharge Elimination System—Cooling Water Intake Structures at Existing Facilities and Phase I Facilities, 76 Fed. Reg. 22,174 (proposed Apr. 20, 2011) (to be codified at 40 C.F.R. pts. 122, 125).

Availability (NODA) supplementing the proposed rule.<sup>141</sup> In the first NODA, the EPA published new information it had received related to impingement mortality controls, as well as responded to questions and concerns regarding through-screen intake velocity.<sup>142</sup> The second NODA summarized a “stated preference survey” performed by the EPA to estimate the willingness to pay for the preservation of aquatic life<sup>143</sup> and added that the survey may be used as part of the EPA’s benefit analysis for the final rule.<sup>144</sup>

On June 27, 2013, the EPA signed a third amendment to its settlement agreement with the Riverkeeper,<sup>145</sup> again extending the deadline for the EPA to issue final rules pertaining to the requirements of regulating cooling water intake structures for large power plants and other industrial facilities.<sup>146</sup> Under the amended settlement agreement, the EPA Administrator must sign a final rule on or before November 4, 2013.<sup>147</sup> During the extension EPA will obtain peer review of the results of a stated preference survey previously published on June 12, 2012.<sup>148</sup> EPA has requested this review from the EPA Science Advisory Board.<sup>149</sup> In addition, pursuant to the Endangered Species Act,<sup>150</sup> EPA has requested formal consultation with the National Marine Fishery Service and the U.S. Fish & Wildlife Service on the final requirements for implementing 316(b).<sup>151</sup>

#### D. Coal Combustion Residuals

In June 2010, the EPA proposed two approaches to change the regulatory treatment of coal combustion residuals: (1) regulate coal combustion residuals (CCRs) under a strict hazardous handling regime under Resource Conservation Waste Disposal Act (RCRA) subtitle C or (2) make changes to the existing non-

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141. National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities; Notice of Data Availability Related to Impingement Mortality Control Requirements, 77 Fed. Reg. 34,315 (June 11, 2012) [hereinafter Impingement NODA]; National Pollutant Discharge Elimination System—Proposed Regulations to Establish Requirements for Cooling Water Intake Structures at Existing Facilities; Notice of Data Availability Related to EPA’s State Preference Survey, 77 Fed. Reg. 34,927 (June 12, 2012) [hereinafter Survey NODA].

142. Impingement NODA, *supra* note 141, at 34,317, 34,322.

143. Survey NODA, *supra* note 141, at 34,928.

144. *Id.* at 34,930.

145. “Riverkeeper is a member-supported watchdog organization dedicated to defending the Hudson River and its tributaries and protecting the drinking water supply of nine million New York City and Hudson Valley residents.” *Our Story*, RIVERKEEPER, <http://www.riverkeeper.org/about-us/our-story/> (last visited Oct. 4, 2013).

146. U.S. ENVTL. PROT. AGENCY, THIRD AMENDMENT TO SETTLEMENT AGREEMENT AMONG THE ENVIRONMENTAL PROTECTION AGENCY, THE PLAINTIFFS IN *CRONIN, ET AL. V. REILLY*, 93 CIV. 314 (LTS) (SDNY) AND THE PLAINTIFFS IN *RIVERKEEPER, ET AL. V. EPA*, 06 CIV. 12987 (PKC) (SDNY), (2013), available at <http://water.epa.gov/lawsregs/lawsguidance/cwa/316b/upload/amendment3rd.pdf> [hereinafter THIRD SETTLEMENT AMENDMENT].

147. *Id.* at 2.

148. *Id.*

149. *Id.*

150. 16 U.S.C. § 1536(a)(2) (2012).

151. *Id.*

hazardous program under RCRA subtitle D.<sup>152</sup> On April 5, 2012, environmental groups filed a lawsuit in the District Court for the District of Columbia, seeking to compel the EPA to regulate the disposal of CCRs.<sup>153</sup> This suit was consolidated with actions brought by recyclers of coal ash.<sup>154</sup> The court ruled on the motions and cross-motions for summary judgment on September 30, 2013.<sup>155</sup>

On April 11, 2013, the House Subcommittee on Environment and the Economy held a hearing on a “Discussion Draft, the Coal Ash Recycling and Oversight Act of 2013.”<sup>156</sup> Representative David McKinley introduced the Coal Residuals Reuse and Management Act of 2013 (H.R. 2218) on June 3, 2013, and it was considered by the full Committee on Energy and Commerce on June 18 and 19, 2013.<sup>157</sup> H.R. 2218 would establish federal minimum requirements for the management and disposal of CCR and allows states to develop CCR or “coal ash” permit programs, as long as they meet the federal minimum requirements provided in the bill, or a state may choose to allow the EPA to administer its CCR permit program.<sup>158</sup>

### III. STATE AND REGIONAL DEVELOPMENTS

#### A. *Oil and Gas*

Efforts to regulate hydraulic fracturing at the state level during the past year have been in three primary areas: disclosure of fracturing fluid chemicals, water use and disposal, and litigation over the preemption of local ordinances. The state regulations discussed below address these developments that have taken effect over the past year, first by looking at changes in the disclosure of chemicals used in hydraulic fracturing, and then by providing a brief summary of issues in several key states.

##### 1. Disclosure of Chemicals Used

On June 19, 2012, the Congressional Research Service published a report that included a summary of chemical disclosure laws in the fifteen states that required disclosure of the components of fluid used in hydraulic fracturing at the time the report was issued.<sup>159</sup> Since July 1, 2012, regulations requiring chemical

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152. Hazardous and Solid Waste Management System; Identification and Listing of Special Wastes; Disposal of Coal Combustion Residuals from Electric Utilities, 75 Fed. Reg. 35,127 (June 21, 2010) (to be codified at 40 C.F.R. pts. 257, 261, 264); Notice of Data Availability, 76 Fed. Reg. 63,252 (Oct. 11, 2011) (to be codified at 40 C.F.R. pt. 257).

153. Complaint for Declaratory and Injunctive Relief, *Appalachian Voices v. Jackson*, No. 1:12-cv-00523 (D.D.C. Apr. 5, 2012).

154. Complaint for Declaratory and Injunctive Relief, *Boral Material Techns. Inc. v. Jackson*, No. 1:12-cv-00629 (D.D.C. Apr. 20, 2012); Complaint for Declaratory and Injunctive Relief, *Headwaters Res., Inc. v. Jackson*, No. 1:12-cv-00585 (D.D.C. Apr. 13, 2012).

155. Summary Judgment Order, *Appalachian Voices v. Jackson*, No. 1:12-cv-00523 (D.D.C. Sept. 30, 2013) (each party’s motion for summary judgment was granted in part and denied in part).

156. H.R. REP. NO. 113-148, at 15 (2013).

157. *Id.*

158. *Id.* at 13.

159. BRANDON J. MURRILL & ADAM VANN, CONG. RESEARCH SERV., R42461, HYDRAULIC FRACTURING: CHEMICAL DISCLOSURE REQUIREMENTS 14-20 (2012). The chart lists by state who must disclose, what must be disclosed, when disclosures must be made, and trade secret protections allowed. *Id.*

disclosure of hydraulic fracturing fluids similar to the regulations of other states have taken effect in Indiana<sup>160</sup> and Utah.<sup>161</sup> Alaska and California are in the advanced stages of establishing chemical disclosure laws.<sup>162</sup>

The Alaska Oil and Gas Conservation Commission (AOGCC) proposed regulations in January 2013 that would require disclosure of the types and total amounts of the material pumped during hydraulic fracturing.<sup>163</sup> As proposed, disclosure of the identity and volume of chemicals used in the fracturing fluid does not allow for a trade secret or confidential business exemption.<sup>164</sup>

In California, Senate Bill (SB) 4 was introduced on December 3, 2012, and was amended four times prior to passing the Senate on May 29, 2013.<sup>165</sup> The bill was re-referred to the California Assembly's Committee on Natural Resources on June 25, 2013, following amendment.<sup>166</sup> As amended, SB 4 would require a permit application that contains details about the well stimulation planned, including the name, number, and estimated concentrations of each chemical constituent in the well stimulation fluid to be used.<sup>167</sup> Applicants seeking to protect trade secret information must disclose the information to the responsible state division, but public disclosure of the information would not be required.<sup>168</sup> In addition, the Division of Oil and Gas of California's Department of Conservation is developing draft hydraulic fracturing regulations that would require disclosure of chemicals in fracturing fluid within sixty days following cessation of fracturing operations.<sup>169</sup> These draft regulations include a trade secret information exemption from public disclosure and may potentially overlap with the proposed legislation of SB 4.<sup>170</sup>

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160. IND. CODE § 14-37-3-8(b) (2012).

161. UTAH ADMIN. CODE r. 649-3-39 (2012).

162. Yereth Rosen, *Alaska Fracking Rules would Boost Public Notice, Disclosure*, REUTERS (Sept. 23, 2013), <http://www.reuters.com/article/2013/09/23/us-alaska-fracking-idUSBRE98M1BT20130923>.

163. Notice of Proposed Changes in the Regulations of the Alaska Oil and Gas Conservation Commission (Alaska Oil & Gas Conservation Comm'n Dec. 20, 2012) [hereinafter Alaska Notice of Proposed Changes], available at <http://doa.alaska.gov/ogc/hear/HydraulicFrac.pdf>.

164. *Id.*

165. *SB 4 Senate Bill - History*, OFFICIAL CAL. LEGISLATIVE INFO, [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0001-0050/sb\\_4\\_bill\\_20130920\\_history.html](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0001-0050/sb_4_bill_20130920_history.html) (last visited Oct. 27, 2013).

166. *Id.*

167. *SB 4 Senate Bill - Chaptered*, OFFICIAL CAL. LEGIS. INFO, [http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb\\_0001-0050/sb\\_4\\_bill\\_20130920\\_chaptered.htm](http://www.leginfo.ca.gov/pub/13-14/bill/sen/sb_0001-0050/sb_4_bill_20130920_chaptered.htm) (last visited Oct. 27, 2013). The text and status of the bill is available from the Official California Legislative Information website. *Bill Documents*, OFFICIAL CAL. LEGIS. INFO., [http://www.leginfo.ca.gov/cgi-bin/postquery?bill\\_number=sb\\_4&sess=CUR](http://www.leginfo.ca.gov/cgi-bin/postquery?bill_number=sb_4&sess=CUR) (last visited Oct. 28, 2013).

168. *SB 4*, *supra* note 167.

169. CAL. DEP'T OF CONSERVATION, PRE-RULEMAKING DISCUSSION DRAFT § 1788 (2013), available at [http://www.conservation.ca.gov/dog/general\\_information/Documents/121712DiscussionDraftofHFRegs.pdf](http://www.conservation.ca.gov/dog/general_information/Documents/121712DiscussionDraftofHFRegs.pdf).

170. *Id.* § 1788.1.

## 2. State Developments

### a. Alaska

As noted above, the AOGCC proposed new regulations that would apply broadly to hydraulic fracturing in the state.<sup>171</sup> If enacted, the regulations would amend Alaska Administrative Code (AAC) title 20, section 25.990, and add AAC title 20, section 25.283, to define hydraulic fracturing, require notice to nearby owners and operators prior to commencement of hydraulic fracturing, require pre- and post-fracturing water sampling and analysis, require disclosure of the components of fluids used in hydraulic fracturing, and various other efforts to assure fracturing fluids are contained.<sup>172</sup> The first draft of AOGCC's proposed regulations were made available on December 20, 2012, revised on January 17, 2013, noticed for comment, and discussed during a public hearing held on April 4, 2013.<sup>173</sup> On June 19, 2013, the AOGCC provided a second draft of the proposed hydraulic fracturing regulations for comment and a notice of a hearing to take place on August 15, 2013.<sup>174</sup> The second draft of the proposed regulations focus on AAC title 20, section 25.283, by increasing the parameters for water sampling, as well as the information that must be disclosed in association with a proposed hydraulic fracturing program, and introducing a sub-section that allows for the AOGCC to grant variances and waivers subject to the requirements of that sub-section.<sup>175</sup>

### b. Pennsylvania

Legal challengers to Pennsylvania's Act 13, which established regulations for the development of unconventional wells in the state,<sup>176</sup> succeeded in eliminating provisions of the law that prohibited municipalities from imposing restrictive ordinances on the development of oil and gas.<sup>177</sup> In a four-three decision, the Commonwealth Court of Pennsylvania found that the provisions of Act 13 that required local units of government in Pennsylvania to allow hydraulic fracturing in all areas within their jurisdiction, regardless of zoning requirements, were unconstitutional.<sup>178</sup> Pennsylvania appealed the decision to the State Supreme Court, arguing that the provision at issue, section 3304, was a legitimate exercise of the state's broad police powers and should be granted

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171. Alaska Notice of Proposed Changes, *supra* note 163.

172. Second Revised Notice of Proposed Changes (Alaska Oil & Gas Conservation Comm'n Jan. 17, 2013) [hereinafter Alaska Second Proposed Changes], available at <http://doa.alaska.gov/ogc/hear/HydraulicFrac3.pdf>.

173. Alaska Notice of Proposed Changes, *supra* note 163; Alaska Second Proposed Changes, *supra* note 172; Supplemental Notice: Change in Location of April 4, 2013 Public Hearing on Proposed Changes (Alaska Oil & Gas Conservation Comm'n Mar. 11, 2013) [hereinafter April 4 Public Hearing], available at [http://doa.alaska.gov/ogc/frac/07\\_Revised%20Fracturing%20Public%20Notice%20and%20Additional%20Information.pdf](http://doa.alaska.gov/ogc/frac/07_Revised%20Fracturing%20Public%20Notice%20and%20Additional%20Information.pdf).

174. April 4 Public Hearing, *supra* note 173.

175. *Id.*

176. *Robinson Township v. Commonwealth of Pa.*, 52 A.3d 463, 468 (Pa. Commw. Ct. 2012).

177. *Id.* at 494.

178. *Id.*

supreme authority over local ordinances.<sup>179</sup> The court heard oral arguments in October 2012, but as of June 30, 2013, had not issued a decision.<sup>180</sup>

c. New York

In December 2010, then-Gov. David Paterson of New York prohibited hydraulic fracturing in the state until an environmental review of the practice by the New York State Department of Environmental Conservation (NYSDEC) was completed.<sup>181</sup> The NYSDEC has continued to delay its review of hydraulic fracturing activities pending completion of a study by New York's Commissioner of Health and outside consultants on the potential impacts to public health of fracturing.<sup>182</sup> The hydraulic fracturing regulations first proposed in 2011 by the NYSDEC were temporarily extended in November 2012,<sup>183</sup> but lapsed on February 27, 2013, due to the failure of the agency to issue final regulations.<sup>184</sup>

d. Colorado

The Colorado Oil and Gas Conservation Commission is involved in two suits against the City of Longmont, Colorado. First, it has sought to overturn a ban issued by the city council that prohibits drilling in residential areas of the city,<sup>185</sup> and, second, it joined a suit to overturn a referendum by the city's voters prohibiting the general use of hydraulic fracturing within city limits.<sup>186</sup> The litigations focus on whether the state may preempt local ordinances.<sup>187</sup>

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179. Brief of Appellants, *Robinson Township v. Commonwealth of Pa.*, No. 63 MAP 2012, at 16-17 (Pa. Sept. 4, 2012).

180. *Oral Arguments on PA Act 13 in PA Supreme Court*, MARCELLUS DRILLING NEWS (Oct. 17, 2012), <http://marcellusdrilling.com/2012/10/2012-10-17-oral-arguments-on-pa-act-13-in-pa-supreme-court-pittsburgh-pa/>.

181. Sarah Hoyer, *New York Governor Pauses 'Fracking'*, CNN (Dec. 13, 2010), <http://www.cnn.com/2010/US/12/13/new.york.fracking.moratorium/index.html>. See also STATE OF NEW YORK, EXECUTIVE CHAMBER, EXECUTIVE ORDER NO. 41: REQUIRING FURTHER ENVIRONMENTAL REVIEW (2010), available at <http://www.governor.ny.gov/archive/paterson/executiveorders/EO41.html> (providing the vehicle in which the Governor prohibited this activity).

182. See generally *High Volume Fracturing Proposed Regulations*, N.Y. DEPT. ENVTL. CONSERVATION, <http://www.dec.ny.gov/regulations/77353.html> (last visited Oct. 5, 2013) (describing the reasons for delay).

183. *Id.*

184. *New York Marcellus Development Still Faces Hurdles*, OIL & GAS J. (May 1, 2013), <http://www.ogj.com/articles/uogr/print/volume-1/issue-1/marcellus/new-york-marcellus-development-still.html>.

185. Scott Roach, *State Sues Longmont over Oil and Gas Drilling Regulations*, TIMES-CALL (July 30, 2012), [http://www.timescall.com/news/longmont-local-news/ci\\_21193961/colorado-files-lawsuit-against-longmont-oil-gas-drilling](http://www.timescall.com/news/longmont-local-news/ci_21193961/colorado-files-lawsuit-against-longmont-oil-gas-drilling).

186. Jack Healy, *City in Colorado is Sued over a Drilling Ban*, NY TIMES (Dec. 18, 2012), [http://www.nytimes.com/2012/12/19/us/suit-seeks-to-overturn-a-city-drilling-ban-in-colorado.html?\\_r=0](http://www.nytimes.com/2012/12/19/us/suit-seeks-to-overturn-a-city-drilling-ban-in-colorado.html?_r=0).

187. Two prior decisions that addressed the effect of Colorado's Oil and Gas Conservation Act on local governments' ability to regulate oil and gas operations and will likely guide the Colorado courts in both cases. See generally *Board of Cnty. Comm'rs, La Plata Cnty. v. Bowen/Edwards Assocs.*, 830 P.2d 1045 (Colo. 1992); *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992).

e. North Carolina

In 2012, the North Carolina legislature overrode a veto of former Governor Bev Perdue, thereby passing legislation to create the Mining and Energy Commission.<sup>188</sup> The law tasked the Mining and Energy Commission with the development of regulatory requirements for oil and gas exploration and drilling and authorized horizontal drilling and hydraulic fracturing following the development of a regulatory program and further authorization from the legislature.<sup>189</sup> Senate Bill 76, which the North Carolina Senate approved on February 27, 2013,<sup>190</sup> and the House on June 7, 2013,<sup>191</sup> originally authorized the Department of Environment and Natural Resources and the Mining and Energy Commission to issue permits for oil and gas exploration and development activities using horizontal drilling and hydraulic fracturing as of March 1, 2015.<sup>192</sup> The ratified version of the bill, however, does not include this direct authorization.<sup>193</sup> Instead, the bill allows the issuance of permits only after development of regulations and further affirmative legislative action, including repeal of section 3(d) of session law 2012-143.<sup>194</sup> Pending the development of regulations by the Mining and Energy Commission and further legislative action by the North Carolina Legislature, the moratorium on horizontal drilling and hydraulic fracturing in the state will remain in place.<sup>195</sup>

B. *Electric Power*

1. State and Regional GHG Rules

a. California

Enforceable compliance obligations under the California greenhouse gas (GHG) cap-and-trade program began on January 1, 2013.<sup>196</sup> California held its first auction of GHG allowances on November 14, 2012.<sup>197</sup> The allowances for 2013 cleared nine cents per ton above the minimum auction reserve price of ten

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188. 2012 N.C. Sess. Laws 143.

189. *Id.*

190. Holly Bannerman, *North Carolina's "Rush to Frack:" Senate Bill 725's Push to Relax Important Safeguards*, N.C. J.L. & TECH. (Mar. 19, 2013), <http://ncjolt.org/north-carolinas-rush-to-frack-senate-bill-725s-push-to-relax-important-safeguards/>.

191. *Senate Bill 76: "The Domestic Energy Jobs Act,"* RAFI-USA, <http://rafiusa.org/issues/landowner-rights-and-fracking/sb-76/> (last visited Oct. 5, 2013).

192. S. 76, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (seventh edition engrossed June 7, 2013).

193. S. 76, 2013 Gen. Assemb., Reg. Sess. (N.C. 2013) (ratified July 24, 2013).

194. *Id.*

195. See generally John Murawski, *NC House Panel Keeps Fracking Moratorium*, NEWSOBSERVER (June 5, 2013), <http://www.newsobserver.com/2013/06/05/2941050/nc-house-panel-keeps-fracking.html>.

196. CAL. CODE REGS. tit. 17, § 95840 (2011).

197. *Id.* § 95910(a)(1).

dollars per ton.<sup>198</sup> Allowances have been trading in the fourteen to fifteen dollar per ton range for the last several months.<sup>199</sup>

On November 13, 2012, the day prior to the first allowance auction, the California Chamber of Commerce filed a lawsuit with the Sacramento Superior Court claiming that the California Air Resources Board (CARB) exceeded its statutory authority when it allocated itself allowances from which it could profit by selling in an auction.<sup>200</sup> The Chamber made clear that it did not intend to challenge the merits of climate change, the legislature's authority to regulate GHGs in California, or the CARB's decision to implement a cap-and-trade program under A.B. 32.<sup>201</sup> The lawsuit only targeted what the Chamber considered to be an unconstitutional tax implemented as a GHG auction.<sup>202</sup> Another action challenging the CARB's GHG allowance auctions, also in California Superior Court, was filed on April 16, 2013 alleging that CARB's auctions constitute an illegal tax levied on Californians in violation of the California Constitution.<sup>203</sup>

On January 25, 2013, the San Francisco County Superior Court rejected a petition by the Citizens Climate Lobby and Our Children's Earth Foundation challenging CARB's GHG offset program.<sup>204</sup> The petitioners challenged the use of a standards-based approach to establishing "additionality,"<sup>205</sup> claiming that a perfect delineation between additional and non-additional offset emissions reductions was required.<sup>206</sup> The court rejected the petition and stated that the administrative record contained sufficient evidence to support the use of standardized mechanisms.<sup>207</sup>

In 2012, the CARB undertook amendments to the cap-and-trade regulation proposing linkage with the Province of Quebec.<sup>208</sup> Linkage signifies the CARB's "approval of compliance instruments from an external greenhouse gas emission trading system," in this case Quebec's, "to meet [CARB's] compliance obligations, and the reciprocal approval of compliance instruments issued by

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198. AIR RES. BD., CAL. ENVTL. PROT. AGENCY, CALIFORNIA AIR RESOURCES BOARD QUARTERLY AUCTION 1 (2013), available at [http://www.arb.ca.gov/cc/capandtrade/auction/november\\_2012/updated\\_nov\\_results.pdf](http://www.arb.ca.gov/cc/capandtrade/auction/november_2012/updated_nov_results.pdf).

199. *Carbon Market North America*, REUTERS POINT CARBON NEWS, June 28, 2013, at 2, available at [http://www.pointcarbon.com/polopoly\\_fs/1.2439189!CMNA20130628.pdf](http://www.pointcarbon.com/polopoly_fs/1.2439189!CMNA20130628.pdf).

200. Verified Petition for Writ of Mandate and Complaint for Declaratory Relief at 1, California Chamber of Commerce v. California Air Res. Bd., No. 2012-80001313 (Cal. Nov. 13, 2012).

201. Memorandum of Points and Authorities in Support of Verified Petition for Writ of Mandate and Complaint for Declaratory Relief at 4, California Chamber of Commerce v. California Air Res. Bd., No. 2012-80001313 (Cal. Nov. 13, 2012).

202. *Id.*

203. Verified Petition for Writ of Mandate and Complaint for Declaratory Relief at 2, Morning Star Packing Co. v. California Air Res. Bd., No. 2013-80001464 (Cal. Apr. 16, 2013).

204. Citizens Climate Lobby & Our Children's Earth Found. v. California Air Res. Bd., No. CGC-12-519554 (Cal. Jan. 25, 2013).

205. "Additionality refers to reductions [in GHG emissions] which would only occur due to the financial incentive provided by offset credits." *Id.* at 2.

206. *Id.* at 3.

207. *Id.* at 33-34.

208. See generally CAL. AIR RES. BD., RESOLUTION 12-28: CALIFORNIA CAP AND TRADE PROGRAM (2012), available at <http://www.arb.ca.gov/regact/2012/capandtrade12/res12-28.pdf>.



[CARB] to meet compliance obligation in an external [program].”<sup>209</sup> The amendments to this rule were finalized and approved by the California Office of Administrative Law on June 24, 2013, to become effective on October 1, 2013.<sup>210</sup>

In April of 2013, the CARB published a list of topics subject to potential regulatory amendments.<sup>211</sup> The lead topic was resource shuffling.<sup>212</sup> Resource shuffling has also been the topic of communications between FERC Commissioner Moeller and CARB Chair Mary Nichols.<sup>213</sup> In response to Commissioner Moeller’s concern that uncertainty surrounding the resource shuffling provisions would be disruptive to western power markets, CARB Chair Nichols indicated the CARB would suspend the requirement that electricity importers annually attest that they have not engaged in resource shuffling.<sup>214</sup> Suspension of the attestation requirement is in effect for eighteen months while CARB reviews the electricity trades that are taking place.<sup>215</sup>

#### b. Regional Greenhouse Gas Initiative

In recent years, the Regional Greenhouse Gas Initiative (RGGI) allowance prices have hovered around the minimum reserve price, approximately two dollars per ton.<sup>216</sup> In February 2013, an updated model rule was proposed to cut the emissions cap by 45% beginning in 2014.<sup>217</sup> The updated model rule would also establish a cost containment reserve to limit the allowance prices to four dollars per ton in 2014, rising to ten dollars per ton by 2017, and then rising at 2.5% per year in subsequent years.<sup>218</sup> RGGI allowance prices have increased

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209. CAL. CODE REGS., tit. 17, § 95840(a)(152) (2013).

210. Cap and Trade Regulation to Link the California and Quebec Cap and Trade Programs, 27-Z Cal. Regulatory Notice Reg. 1012 (July 5, 2013).

211. See generally AIR RES. BD., CAL. ENVTL. PROT. AGENCY, TOPICS SUBJECT TO POTENTIAL REGULATORY AMENDMENTS: CALIFORNIA CAP-AND-TRADE REGULATION (2013), available at <http://www.arb.ca.gov/cc/capandtrade/2013summary.pdf>.

212. “Resource Shuffling” means any plan, scheme, or artifice to receive credit based on emissions reductions that have not occurred, involving the delivery of electricity to the California grid.” CAL. CODE REGS. tit. 17, § 95802(a)(252). The CARB has since enumerated thirteen safe harbor activities that do not constitute resource shuffling. CAL. AIR RES. BD., CAP-AND-TRADE INSTRUCTIONAL GUIDANCE – APPENDIX A: WHAT IS RESOURCE SHUFFLING? (2012), available at [http://www.arb.ca.gov/cc/capandtrade/guidance/appendix\\_a.pdf](http://www.arb.ca.gov/cc/capandtrade/guidance/appendix_a.pdf).

213. Letter from Mary D. Nichols, Chairman Air Res. Bd., to Hon. Philip D. Moeller (Aug. 16, 2012), available at <http://www.arb.ca.gov/newsrel/images/2012/response.pdf>.

214. *Id.*

215. *Id.* Another regulatory program promulgated pursuant to California’s A.B. 32, the Low Carbon Fuel Standard, is being challenged and the forthcoming decision in this case could have importance for other A.B. 32 programs. See generally, *Rocky Mtn. Farmers Union v. Corey*, Nos. 12-15131, 12-15135, 2013 WL 5227091 (9th Cir. Sept. 18, 2013).

216. POTOMAC ECON., ANNUAL REPORT ON THE MARKET FOR RGGI CO2 ALLOWANCES: 2012, at 14 (2013), available at [http://www.rggi.org/docs/Market/MM\\_2012\\_Annual\\_Report.pdf](http://www.rggi.org/docs/Market/MM_2012_Annual_Report.pdf).

217. See generally REG’L GREENHOUSE GAS INITIATIVE, MODEL RULE (2013), available at [http://www.rggi.org/docs/ProgramReview/\\_FinalProgramReviewMaterials/Model\\_Rule\\_FINAL.pdf](http://www.rggi.org/docs/ProgramReview/_FinalProgramReviewMaterials/Model_Rule_FINAL.pdf).

218. REG’L GREENHOUSE GAS INITIATIVE, SUMMARY OF RGGI MODEL RULE CHANGES 3 (2013), available at [http://www.rggi.org/docs/ProgramReview/FinalProgramReviewMaterials/Model\\_Rule\\_Summary.pdf](http://www.rggi.org/docs/ProgramReview/FinalProgramReviewMaterials/Model_Rule_Summary.pdf).

into the mid-three dollar range since the announcement, as the market has priced in the proposed policy tightening.<sup>219</sup>

### C. *New Jersey Waiver Rule*

On March 21, 2013, the New Jersey Superior Court - Appellate Division upheld the New Jersey Department of Environmental Protection's (DEP) authority to promulgate a regulation enabling DEP to waive strict regulatory requirements in certain specific situations.<sup>220</sup> New Jersey's regulations, known as the Waiver Rule,<sup>221</sup> were adopted in March 2012 in response to Governor Chris Christie's Executive Order No. 2, which directed state agencies to implement common sense principles of government reform.<sup>222</sup> The Waiver Rule recognizes that rigid regulatory rules sometimes create unintended consequences, and it provides DEP with a mechanism to waive strict compliance with a rule when it would produce an unreasonable result that undermines its intended purpose.<sup>223</sup> Under the Waiver Rule, in order to apply for a waiver, a requester must demonstrate one of the following: (1) there is a public emergency that has been formally declared; (2) conflicting rules (between federal and state agencies, or between state agencies) are adversely affecting a project or activity from proceeding; (3) a net environmental benefit would be achieved by waiving the rule; or (4) undue hardship is being imposed by the rule requirements.<sup>224</sup>

Even if one of these four circumstances exists, the Waiver Rule provides thirteen specific situations which prohibit a waiver.<sup>225</sup> For example, a waiver could not be granted if it is inconsistent with a federal or state statute or federal regulation, unless that statute or regulation provides for such a waiver.<sup>226</sup>

Several environmental and labor organizations challenged DEP's promulgation of the Waiver Rule, arguing that DEP exceeded its legislative authority by promulgating the Waiver Rule and that the Waiver Rule was facially invalid due to the lack of adequate standards informing the public and guiding DEP as to how decisions to issue waivers would be made, but ultimately, the court upheld the rule, stating that the power to promulgate a regulation implies the incidental authority to suspend or waive its application in certain limited, well defined circumstances.<sup>227</sup> The court held that the Waiver Rule contains adequate standards for DEP to decide waiver applications.<sup>228</sup> However, the court found that information posted on the DEP website, including guidance documents, violated the Administrative Procedures Act (APA) because they appeared to be de facto rulemaking.<sup>229</sup> The court stated this violation did

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219. *Carbon Market North America*, *supra* note 199, at 2.

220. *In re* N.J.A.C. 7: 1B-1.1 ET SEQ, 67 A.3d 6211 (N.J. Super. Ct. App. Div. 2013).

221. N.J. ADMIN. CODE § 7:1B-1.1 (2012) (Waiver Rule).

222. Exec. Order No. 2, 42 N.J.R. 577 (Jan. 20, 2010).

223. *Id.*

224. N.J. ADMIN. CODE § 7:1B-2.1(a).

225. *Id.* § 7:1B-2.1(b).

226. *Id.* § 7:1B-2.1(b)(1).

227. *In re* N.J.A.C. 7: 1B-1.1 ET SEQ, 67 A.3d 621, 628 (N.J. Super. Ct. App. Div. 2013).

228. *Id.* at 626.

229. *Id.* at 646.

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not impact the ability of DEP to go forward in applying the Waiver Rule.<sup>230</sup> An application for certification to the Supreme Court of New Jersey has been filed, seeking to reverse the Appellate Division's decision. On October 9, 2013, the Supreme Court of New Jersey denied the request.

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230. *Id.*

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