C O M M E N T S

2009: A Year of Significant CAA Developments on All Fronts

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2009 was a dramatic year for the Clean Air Act (CAA).[1] Under the Obama Administration, the U.S. Environmental Protection Agency (EPA) took significant steps on many fronts. As widely expected, it issued an endangerment finding with respect to greenhouse gases (GHGs) and granted California's waiver request. However, less expected, was the new national automobile GHG emissions standard that managed to garner the auto industry's support. EPA also finalized its Mandatory Reporting of Greenhouse Gases Rule, which provided an important foundation for regulating GHGs under both the CAA and any future climate change legislation. The Agency, in fact, delivered its draft rule on regulating stationary sources under the CAA late in 2009.

In addition to addressing climate change, EPA has taken the bold step of promising to review all six of the national ambient air quality standards (NAAQS) by 2011. While the CAA requires that these standards be reviewed every five years, some of them have not been revised since they were first established in 1971. EPA is also working to rewrite several regulations that were struck down by the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit. Shortly after President Obama took office, the Agency also withdrew or began reconsideration of a number of George W. Bush Administration rulemakings, particularly with respect to new source review (NSR).

The year 2009 did not see as many challenges to existing regulation under the CAA as in past years. However, there was a continued level of activity in regard to climate change lawsuits. 2010 will likely see an upward trend in such litigation. For example, the proposed rulemakings on GHG emissions and NAAQS will have significant impacts on a variety of interest groups. With the stakes raised and a wide variety of regulatory proposals on the table, 2010 should be another year of significant CAA developments.

I. Climate Change

EPA, President Obama, the U.S. Congress, and industry all appear to prefer legislation regulating climate change to a patchwork of EPA regulations attempting to achieve similar goals. EPA expressed this sentiment when it issued both the proposed and final endangerment findings. EPA emphasized that it still believes that legislation is the appropriate means for regulating climate change.[2] Specifically, when issuing the proposed rulemaking, EPA released the following statement: "Notwithstanding this required regulatory process, both President Obama and Administrator [Lisa] Jackson have repeatedly indicated their preference for comprehensive legislation to address this issue and create the framework for a clean energy economy."[3] The Edison Electric Institute voiced the concerns of industry groups, stating: "We may not know for years the precise impact this would have on new and existing power plants. This is a road we'd rather not go down, but only Congress can steer things in a better direction."[4] After the proposed rule was announced, Chairman Edward J. Markey (D-Mass.) of the House Energy and Environment Subcommittee underlined these options when stating "it is no longer a choice between doing a bill and doing nothing. It is now a choice between regulation and legislation. EPA will have to act if Congress does not."[5]

While regulating climate change under the CAA may be a viable option, and EPA appears committed to moving forward on this front, legislation would provide more flexibility to address both the complexity of the problem and to give a voice to all the different interest groups involved. In 2009, Congress took its boldest steps yet to passing such legislation.

1. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.

2. *EPA Risk Finding Could Spur Rules to Target Threat From Multiple GHGs*, InsideEPA.com, Apr. 17, 2009 [hereinafter *EPA Risk Finding*].
3. News Release, U.S. Envtl. Prot. Agency, EPA Finds Greenhouse Gases Pose Threat to Public Health, Welfare/Proposed Finding Comes in Response to 2007 Supreme Court Ruling (Apr. 17, 2009), *available at* http://yosemite.epa.gov/opa/admpress.nsf/0/0EF7DF675805295D8525759B00566924.
4. *Id.*
5. *EPA Risk Finding*, *supra* note 2.

A. Proposed Climate Change Legislation Within the CAA Statutory Framework

After years of stalled attempts in both houses of Congress to pass climate legislation, on June 26, 2009, the U.S. House of Representatives approved, by a vote of 219-212, the American Clean Energy and Security Act (H.R. 2454). The climate bill, sponsored by Reps. Henry Waxman (D-Cal.) and Senator Markey, would impose a cap on U.S. GHG emissions and establish a trading program for GHG emissions to meet the targets under the cap. It would set the following emissions reductions goals, using 2005 as a baseline: 3% by 2012, 17% by 2020, 42% by 2030, and 83% by 2050. The cap would affect not only carbon dioxide (CO_2) emissions but also those of other potent GHGs, including methane and nitrous oxide. All emissions sources emitting more than 25,000 tons per year (tpy) of CO_2 equivalent would be required to participate in the trading program. Bowing to substantial industry pressure, 85% of trading allowances would be distributed for free, with 55% going to electric utilities and 30% used to promote energy efficiency, renewable energy, and carbon capture technology, as well as to protect vulnerable energy-intensive industries. The bill would also require EPA to establish new source performance standards (NSPS) for sources over 10,000 tpy and under 25,000 tpy. In an attempt to avoid a potential conflict regarding the use of the CAA to regulate GHGs, the bill would prohibit the application of the CAA's NSR and prevention of significant deterioration (PSD) provisions to regulate climate change. Likewise, it would dictate that EPA not set a national ambient air quality standard for GHGs, regulate GHGs as hazardous air pollutants, or regulate GHGs under Title V operating permits.[6] Some critics have noted that the sweeping changes contemplated by the House climate bill would require no fewer than 31 rulemakings by EPA, and the delay and judicial review that might ensue could jeopardize the effectiveness of the bill.[7]

A draft U.S. Senate bill sponsored by Sens. John Kerry (D-Mass.) and Barbara Boxer (D-Cal.), entitled the Clean Energy Jobs and American Power Act (S. 1733), largely mirrors the House bill.[8] One subtle but key difference is that S. 1733 calls for an emissions reduction of 20% by 2020, rather than the 17% called for in the House bill, bringing S. 1733 more in line with President Obama's stated goals. However, an effort to pass S. 1733 through the Senate stalled during the fall of 2009, as continuing economic pressures and the health care debate drew senators away from negotiating a climate bill before the end of the year.

Many environmentalists had been hopeful that climate change legislation would be passed prior to the international climate negotiations that took place in Copenhagen in December 2009, as this might have helped shape negotiations in Copenhagen. However, this did not transpire. Likewise, the outcome of the climate negotiations in Copenhagen left some observers disappointed, as, despite President Obama's personal intervention in the negotiations, a binding treaty was not achieved. Instead, all but a few of the 193 nations gathered at the talks agreed to an interim accord, referred to as the Copenhagen Accord, acknowledging a separate agreement by major emitters to curb GHGs, help developing nations build clean energy economies, and provide financial support to vulnerable states.[9]

B. Regulating Climate Change Under the CAA

In the absence of binding national legislation, the Obama EPA has proceeded to begin the process of regulating GHGs under the CAA. It is a direction that the Bush EPA tried extraordinarily hard to avoid, going so far as to significantly delay a response to the U.S. Supreme Court's mandate that it issue an endangerment finding regarding the risk of GHGs to human health and the environment. Work on this finding took center stage once President Obama took office, and will likely set the tone for regulation of GHGs under the CAA by EPA.

1. Endangerment Finding

The Supreme Court's decision in *Massachusetts v. EPA*[10] required EPA to either make an endangerment finding with respect to GHGs or provide a reasoned, statutory basis for its inaction. On April 24, 2009, shortly after the two-year anniversary of the decision, EPA published the "Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the CAA" in the *Federal Register*.[11] It proposed to "find that atmospheric concentrations of GHGs endanger public health and welfare within the meaning of Section 202(a) of the CAA and combined emissions from new motor vehicles and new motor vehicle engines are contributing to this mix of GHGs in the atmosphere."[12] The proposed rule received close to 400,000 comments during the 60-day public comment period, both critical and supportive.[13] EPA issued the final rule on December 7, 2009.[14]

6. Steven D. Cook, *Climate Bill Imposes Emissions Trading, Energy-Efficiency, Renewables Requirements*, Daily Env't Rep. (BNA), June 30, 2009.
7. Richard G. Stoll, *House Climate Bill Mandates Many EPA Rulemakings With Tight Deadlines*, Env't Rep. (BNA), No. 40, at 1672, July 10, 2009.
8. Dean Scott, *Bill Maintains Emissions Cuts, EPA Authority, Leaves Negotiating Room for Senate Debate*, Daily Env't Rep. (BNA), Oct. 1, 2009.
9. Andrew C. Revkin & John M. Broder, *A Grudging Accord in Climate Talks*, N.Y. Times, Dec. 19, 2009.
10. Massachusetts v. EPA, 549 U.S. 497, 37 ELR 20075 (2007).
11. Proposed Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the CAA, 74 Fed. Reg. 18886 (proposed Apr. 24, 2009) (to be codified at 40 C.F.R. pt. 1).
12. *Id.* The six greenhouse gases at issue are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride.
13. Lisa Jackson, Adm'r, U.S. EPA, Remarks to the 2nd Annual Governors' Global Climate Summit (Sept. 30, 2009).
14. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the CAA, 74 Fed. Reg. 66496 (Dec. 15, 2009) (to be

Although the endangerment finding itself does not impose any requirements, it carries significant weight because many view it as the linchpin that could trigger other agency actions on GHG emissions.[15] For example, the endangerment finding was a prerequisite to the national GHG-emission rules for vehicles under the CAA.[16] Activists are also expected to file petitions under §111 of the CAA, which requires EPA to set NSPS for any category of sources that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare."[17] The U.S. Chamber of Commerce has also voiced its concern that "[a]n endangerment finding from EPA could result in a top-down command-and-control regime that will choke off growth by adding new mandates to virtually every major construction and renovation project."[18] The organization notes that the CAA would require that PSD standards be applied to any source that emits more than 250 tons of CO_2 and does not agree that tailoring the rule to work around this hurdle, as described below, would stand up in court.[19]

EPA disagrees with this analysis and addressed it in the document setting forth the final endangerment finding. Its current position is that "these Final Findings do not make well-mixed greenhouse gases 'subject to regulation' for purposes of the CAA's Prevention of Significant Deterioration (PSD) and Title V programs," citing EPA Administrator Stephen Johnson's Dec. 18, 2008, memorandum entitled "EPA's Interpretation of Regulations That Determine Pollutants Covered by Federal Prevention of Significant Deterioration (PSD) Permit Program" (commonly known as the Johnson Memo).[20] The Johnson Memo determined that PSD permits are only required for pollutants that are actually *regulated* under the Act.[21] EPA is currently seeking public comment on a proposal to reconsider the Johnson Memo. In the reconsideration proposal, "EPA is requesting comment on various interpretations of when a pollutant is "subject to regulation" under the CAA for the purposes of triggering the requirements to get a PSD permit."[22] However, this may become a moot issue once the GHG vehicle emissions rule is issued, as this would *regulate* GHGs under the CAA. Furthermore, as described in more detail below, EPA plans to implement a tailoring rule, which would limit PSD's application to facilities that emit 25,000 tpy of GHGs, measured in CO_2-equivalent emissions.

2. GHG Vehicle Emissions Rule and the California Waiver

In May 2009, the federal government, California officials, and the auto industry came to an agreement over fuel standards and GHG emissions. Shortly after entering office, President Obama moved forward in two directions with respect to vehicle fuel efficiency and GHG emissions. He directed EPA to reconsider its denial of California's waiver request, by which the state could implement its own GHG emissions standards, and directed the U.S. Department of Transportation to accelerate its work in drafting more stringent national fuel efficiency standards.[23] This spurred discussions between the federal government, California officials, and the auto industry to set national GHG vehicle emission standards.[24] Automakers were drawn to the table by a desire to avoid a patchwork of state regulations and to prevent any obstacles in their corporate restructuring.[25]

In a compromise between the parties, automakers agreed to drop their lawsuits challenging the regulation of GHG emissions from vehicles, while California agreed to defer to national standards until 2016 and allow automakers to meet its standards by averaging GHG emissions from their nationwide vehicle fleets rather than on a per-state basis.[26] This is important in an industry where the types of vehicles sold can vary dramatically from state to state. The compromise also included a plan for EPA and the National Highway Traffic Safety Administration (NHTSA) to work together over the next several months to promulgate a new national GHG vehicle emissions standard.[27]

The first step of this compromise was formally announced on May 19, 2009, when President Obama presented the National Fuel Efficiency Policy. On September 29, 2009, EPA and the NHTSA followed with a joint rulemaking proposal "to establish a National Program consisting of new standards for light-duty vehicles that will reduce GHG emissions and improve fuel economy."[28] The new standards, covering model years 2012-2016, impose a 5% increase each year, ultimately requiring a Corporate Average Fuel Economy (CAFE) standard of 35.5 miles per gallon (mpg) in 2016.[29]

codified at 40 C.F.R. pt. 1) [hereinafter Endangerment Finding].

15. Steven D. Cook, *Climate Change: Obama Administration Expected to Act Early on Endangerment From Greenhouse Gases*, Daily Env't Rep. (BNA), Feb. 27, 2009.
16. Curt Barry, *Upcoming California Vehicle GHG Rules May Thwart National Solution*, InsideEPA.com, Feb. 12, 2009.
17. 42 U.S.C. §7411(b)(1)(A).
18. Bryan Walsh, *EPA Moves to Regulate CO_2 as a Hazard to Health*, Time Mag., Dec. 7, 2009, *available at* http://www.time.com/time/health/article/0,8599,1946095,00.html.
19. Steven D. Cook, *Obama Administration Expected to Act Early On Endangerment From Greenhouse Gases*, Daily Env't Rep. (BNA), Feb. 27, 2009.
20. U.S. EPA, Supplementary Information to Final Rule Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the CAA 115 (2009).
21. Memorandum from Stephen L. Johnson, Administrator, EPA, to Regional Administrators, EPA (Dec. 18, 2008):

    > As of the date of this memorandum, EPA will interpret this definition of "regulated NSR pollutant" to exclude pollutants for which EPA regulations only require monitoring or reporting but to include each pollutant subject to either a provision in the Clean Air Act or regulation adopted by EPA under the Clean Air Act that requires actual control of emissions of that pollutant.

22. U.S. EPA, Fact Sheet—Reconsideration of Former Administrator Johnson Interpretive Memo on Definition of Pollutants Covered Under the CAA.
23. Dean Scott, *Obama Directs EPA to Review Waiver Ruling; Orders Action on Vehicle Efficiency Standards*, Daily Env't Rep. (BNA), Jan. 27, 2009.
24. Curt Barry, *Upcoming California Vehicle GHG Rules May Thwart National Solution*, InsideEPA.com, Feb. 12, 2009.
25. *Automakers to Drop GHG Litigation in Deal Over California Emissions Rules*, InsideEPA.com, May 19, 2009.
26. *Id.*
27. *Id.*
28. Proposed Rulemaking to Establish Light-Duty Vehicle Greenhouse Gas Emissions Standards and Corporate Average Fuel Economy Standards, 74 Fed. Reg. 49454 (proposed Sept. 28, 2009) (to be codified at 40 C.F.R. pt. 86 and 600 and 49 C.F.R. pt. 531, 533, 537, and 538).
29. The White House Office of the Press Secretary, Press Release, *President Obama Announces Federal Fuel Efficiency Standard*, May 19, 2009, http://www.

This surpasses the change to CAFE passed by Congress in 2007, which required an average fuel economy of 35 mpg in 2020.[30] However, the ramp up is slower and the target of 35.5 mpg is slightly lower than what California had proposed.[31] The proposal also imposes a CO_2 emissions standard of 250 grams per mile and is estimated to avoid 950 million tons of GHG emissions over its duration.[32]

EPA granted California's waiver on June 30, 2009. Although this decision was preceded by a drawn-out legal battle, it was announced with little fanfare, as its impact was significantly lessened by the National Fuel Efficiency Policy and California's agreement to abide by the national policy. However, the national standards will not be put in place until 2012, "meaning the waiver will allow California and other states that choose to enforce their own emissions standards to begin with this year's models."[33]

3. Tailoring Rule

Until sweeping climate change legislation is passed, EPA will continue to implement the regulation of GHG emissions under existing law, as shown by the discussion above on automobile emissions. The application of the CAA to regulate GHG emissions from stationary sources, however, will be even more complicated. The text of the CAA's Title I on Stationary Sources was designed with pollutants other than GHGs in mind, and a literal application of its standards does not make sense for GHGs, particularly because the applicable threshold of 250 tons is very low in the GHG emissions context. Therefore, EPA will need to "tailor" its approach and use the regulatory flexibility that some believe exists within the current CAA to do so.

EPA has started down this road with the use of PSD, as well as the permit provisions under Title V of the CAA. GHGs will likely require regulation under the PSD and Title V programs as early as 2010 or shortly thereafter. GHGs are not currently regulated pollutants, but they would be—according to EPA—if EPA finalizes its proposal in 2010 to control GHG emissions from vehicles.[34] If GHGs are considered regulated pollutants, the Title V permitting and PSD requirements would apply. The PSD program currently requires facilities that emit over 250 tons of a regulated pollutant to install the best available control technology (BACT).[35]

Therefore, regulating GHGs with the current PSD thresholds would result in what many believe is an unintended and expensive proposition. Under the current 250-ton threshold, regulating GHGs would regulate six million facilities, with a cost of more than $38 billion.[36] Facilities, such as office and apartment buildings, schools, hospitals, and even some individual residencies, would become regulated facilities.[37] Few believe that Congress foresaw this magnitude of costs or the regulation of small facilities under the PSD program.

EPA believes an alternative approach is needed to tailor the applicable threshold for GHG regulation. EPA argues that it has discretion to exclude some sources from such regulation and has proposed a higher GHG emissions threshold.[38] As such, on October 27, 2009, EPA opened a 60-day comment period on a proposed Tailoring Rule for how GHG emissions will be applied under the PSD program.[39] EPA proposes to set a major source threshold of 25,000 tpy of GHGs, measured in CO_2-equivalent emissions.[40] The proposal would affect about 400 PSD sources each year at an estimated cost of $84,000 per source.[41] Additionally, the threshold would apply to the Title V operating permit requirements capturing roughly another 14,000 sources at an estimated cost of $46,400 per permit.[42]

4. GHG Reporting Rule

In 2009, EPA also proposed and finalized its Mandatory Reporting of Greenhouse Gases Rule, a regulation creating a nationwide system for reporting of GHG emissions.[43] Starting on January 1, 2010, facilities that are suppliers of certain products (such as petroleum products and industrial GHGs), facilities in particular source categories, and facilities that emit 25,000 metric tpy or more of CO_2-equivalent[44] are required to submit annual reports to EPA.[45] Industries affected by this proposal include, but are not limited to, industrial chemical producers and suppliers, manufacturers of finished engines and vehicles, electricity generators, municipal solid waste facilities (but not industrial landfills), iron and steel producers, glass manufacturers, and cement producers.[46] The final rule applies to 31 of the 42 industries originally proposed to be regulated, with the remaining categories still under review.[47] EPA expects that this new program will cover approximately 85% of GHG emissions in

whitehouse.gov/the_press_office/President-Obama-Announces-National-Fuel-Efficiency-Policy/.

30. *Id.*
31. *Upcoming GHG Waiver Approval*, InsideEPA.com, May 20, 2009.
32. Steven D. Cook, *Administration Proposes 40 Percent Increase in Auto Fuel Economy, First Greenhouse Rule*, Daily Env't Rep. (BNA), Sept. 16, 2009.
33. *EPA Grants California's Waiver*, E&E Greenwire, June 30, 2009.
34. *EPA May Delay Trigger for GHG Limits in Air Permits Past Mid-2010 Goal,* InsideEPA.com, Nov. 20, 2009.
35. Steven D. Cook, *Comment Period Opens on EPA Plan to Limit Stationary Source Emissions*, Daily Env't Rep. (BNA), Oct. 27, 2009.
36. *Id.*
37. Steven D. Cook & Carolyn Whetzel, *EPA Proposal Would Require Large Sources to Control Their Greenhouse Gas Emissions*, Daily Env't Rep. (BNA), Oct. 1, 2009.
38. Anthony Lacey, *Jackson Sees EPA Flexibility When Crafting GHG Rules Under Air Act*, InsideEPA.com, Feb. 20, 2009.
39. Cook, *Comment Period Opens on EPA Plan*, *supra* note 35.
40. *Id.*
41. *Id.*
42. *Id.* There is some debate about when these PSD and Title V requirements would be triggered. Some have argued for the trigger to be the promulgation of the vehicle rule. Others have argued for the effective date of the vehicle rule, which will likely be sometime in 2011. Regardless of which time frame is accepted, GHG emissions will likely be incorporated into the PSD and Title V programs sometime in 2010.
43. Mandatory Reporting of Greenhouse Gases, 74 Fed. Reg. 56260 (Oct. 30, 2009).
44. The gases covered by the proposed rule are carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, sulfur hexafluoride, and other fluorinated gases, including nitrogen trifluoride, and hydrofluorinated ethers.
45. Mandatory Reporting of Greenhouse Gases, *supra* note 43, at 56266-67.
46. *Id.* at 56260-62.
47. *Id.* at 56270. *See* http://www.epa.gov/climatechange/emissions/ghgrulemaking.html, for updates on the latest status of EPA's review of remaining source categories.

the United States and apply to about 10,000 facilities.[48] The first annual reports for the largest emitting facilities, covering calendar year 2010, must be submitted to EPA by March 31, 2011.[49] Vehicle and engine manufacturers outside of the light-duty sector are required to begin phasing in GHG reporting with model year 2011.[50]

Under the rule, reports must generally include facility emissions from operations and projected emissions from products sold into the market.[51] Data will be self-certified and not subject to any third-party oversight, but would be subject to EPA verification.[52] Information collected under the program will be made available to the public, with the exception of information asserted to be confidential business information (which cannot include that which is deemed "emissions data").[53] Failure to report GHG emissions in accordance with the rule could lead to enforcement actions by EPA under the CAA, including criminal penalties, injunctive relief, and civil and administrative penalties. At this time, EPA anticipates directly enforcing the rule, rather than delegating such to state authorities.[54]

The rule creates only an information-gathering program to monitor GHG emissions and does not contain any incentives or mandates to reduce or control emissions. The rule also does not address any real-world carbon offsets or credits that a reporting entity might have. Nevertheless, according to EPA, the information gathered under the new reporting rule will be used to help inform future climate change policy decisions, such as research and development initiatives, economic incentives, new or expanded voluntary programs, adaptation strategies, emission standards, a carbon tax, or a cap-and-trade program.

C. Voluntary Carbon Market

While EPA implements its new GHG reporting rule with an eye toward future regulation of GHG emissions, interest in voluntary programs and the voluntary markets also continues to develop. The precompliance voluntary market has largely been driven by speculation about the implementation of a mandatory cap-and-trade system in the United States that would allow industry to comply, at least in part, through purchasing carbon credits (or offsets). Some businesses that are expecting to be regulated should a U.S. cap-and-trade program come into play are taking early action by purchasing carbon credits now, driving the market for such credits.[55] Interest has particularly been on the rise for the purchase of reliable and verifiable offsets that would likely be counted in a federal cap-and-trade system.[56] A key challenge with such voluntary programs is verification to ensure that any GHG offsets generated are permanent and represent real reductions that would not have occurred anyway under existing legal requirements or otherwise. The more credible such credits are today, the more likely they will be honored under a federal cap-and-trade program in the future.

One way in which certain carbon offset projects are now being verified is through EPA's Climate Leaders program. The Climate Leaders program, which has been in place since 2002, is an industry-government partnership that works with companies to reduce their GHG emissions by completing a corporatewide inventory of their GHG emissions, setting reduction goals, and annually reporting their progress to EPA.[57] Today, about 208 companies (representing 8% of U.S. emissions) participate in the Climate Leaders program.[58] In 2009, the Climate Leaders program took a step toward recognizing the growing role of carbon credits in reducing GHG emissions by approving its first two carbon offset projects.[59] One such project involves the installation of a methane capture system at a landfill that generates five megawatts of electricity, enough to power about 5,000 homes.[60] More such Climate Leaders-endorsed carbon offset projects are expected in the near future.[61]

It is also expected that the voluntary market for carbon offsets will continue to exist and play an important role, even if a mandatory cap-and-trade system were implemented in the United States. For example, voluntary carbon offsets could be used for sectors not covered by the mandatory market or for businesses that wish to reduce emissions beyond then-existing requirements.[62]

D. Litigation

The year 2009 saw significant litigation activity in the area of climate change. On one side of the debate, environmental groups brought legal challenges to the issuance of permits and attempted to force EPA to act on climate change. On the other side of the debate, industry brought challenges to existing programs and regulations. At least one case from the D.C. Circuit arguably contracted the law of standing in the climate change context, while another case from the U.S. Court of Appeals for the Second Circuit arguably expanded it. Several cases resulted in settlements, and still others remain pending. These mixed results raise as many questions as they answer, and soundly demonstrate that the issues surrounding litigation of climate change issues remain

48. *Id.* at 56264; EPA Press Release: "EPA Finalizes the Nation's First Greenhouse Gas Reporting System/Monitoring to begin in 2010" (Sept. 22, 2009), *available at* http://www.epa.gov/climatechange/emissions/ghgrulemaking.html.
49. Mandatory Reporting of Greenhouse Gases, *supra* note 43, at 56267.
50. *Id.* at 56352.
51. *Id.* at 56268.
52. *Id.* at 56282.
53. As set forth in greater detail in the *Federal Register* notice for the final rule, EPA expects to further develop criteria for what information constitutes "emissions data" that could not be withheld as confidential business information. *Id.* at 56287.
54. *Id.* at 56360-61.
55. *Emissions: Obama's Call for Emissions Trading May Help Voluntary, Other Carbon Markets, Experts Say*, Daily Env't Rep. (BNA), Mar. 2, 2009.
56. *Id.*
57. For more information, see the EPA Climate Leaders website, at http://www.epa.gov/climateleaders.
58. Jessica Leber, *Climate Change: EPA Approves First Voluntary Carbon Offsets*, Energy & Env't Daily, Aug. 19, 2009.
59. *Id.*
60. *Id.*
61. *Id.*
62. *Obama's Call for Emissions Trading May Help Voluntary, Other Carbon Markets, Experts Say*, Daily Env't Rep. (BNA), Mar. 2, 2009.

open and contested two years after the landmark decision of the Supreme Court in *Massachusetts*.

1. Legal Challenge to the Northeast Regional Greenhouse Gas Initiative

In *Indeck Corinth, L.P. v. David A. Paterson et al.*,[63] filed in New York state court on January 29, 2009, energy producer Indeck sought invalidation of the Northeast Regional Greenhouse Gas Initiative (RGGI). Indeck argued that the state of New York's participation in the RGGI violated both state law and the U.S. Constitution, because it effectively constituted a tax on energy production but had not been approved by the state legislature.[64] Indeck also raised other arguments in opposition to the program, including asserting that the RGGI is an illegal confederacy under the Constitution, and that it imposes an unfair penalty on companies who are unable to pass along the costs of compliance to customers because they are bound by long-term contracts to sell electricity.[65] The filing of this suit had the effect of delaying New York's plans to spend the funds received from RGGI auctions on energy conservation and clean energy programs. A report released by the New York State Energy Research and Development Authority on September 17, 2009, showed that the state had spent only $1.7 million of the $127 million received to date, primarily on program administration costs, and had decided to delay spending the funds pending the outcome of the *Indeck* litigation.[66] The case had settled by the end of the year, however, allowing spending to begin moving forward in 2010. The state of New York, Indeck, and Consolidated Edison (Con Edison) entered into a three-way settlement agreement on December 23, 2009, under which Con Edison will pay the cogeneration plants, such as Indeck, for costs incurred in purchasing CO_2 emissions allowances at RGGI auctions, and the state of New York will make $2.6 million in annual investments in Con Edison's infrastructure and smart grid technologies.[67] The state will continue to set aside the same number of allowances available at no cost for cogeneration plants, such as Indeck, and is now able to implement plans to spend the proceeds of the auctions.[68]

2. Legal Challenges to Air Permits

In 2009, environmental groups followed the strategy of challenging the legality of air permits based on the failure of the permitting authority to consider the effects of GHGs or include CO_2 limits, with mixed results.

In *Longleaf Energy Associates LLC v. Friends of the Chattahoochee Inc. et al.*,[69] environmental groups achieved a victory on such a challenge in Fulton County, Georgia Superior Court in 2008, but the case was reversed in a July 7, 2009 ruling by the Court of Appeals of Georgia, First Division. The appeals court held that because CO_2 is not a pollutant that is "subject to regulation under the CAA" for purposes of a PSD permit, the agency was not obligated to consider BACT controls for CO_2.[70] In so holding, the court relied heavily upon the fact that no final endangerment finding had been issued by EPA, as well as the statement in EPA's proposed endangerment finding that "a final positive endangerment finding would not make the air pollutant found to cause or contribute to air pollution that endangers a regulated pollutant under the CAA's Prevention of Significant Deterioration (PSD) program."[71] The Friends of the Chattahoochee Inc. filed a petition for a writ of certiorari with the Georgia Supreme Court, which was denied on September 28, 2009.

In a case with potentially broader implications, *Public Citizen v. Texas Commission on Environmental Quality*, filed on October 6, 2009, environmentalists challenged the rules put in place by the Texas Commission on Environmental Quality (TCEQ) that have the effect of preventing the TCEQ from considering the effect of CO_2 in air permit proceedings for coal- and petroleum coke-fueled power plants.[72] Public Citizen alleged that Commission rules prevent its members from offering testimony during power plant licensing proceedings and hearings, seeking a judgment that would invalidate rules that allow unlimited CO_2 emissions by power plants and set aside regulations that prevent the presentation of evidence on climate change issues in contested permitting proceedings.[73] If this litigation is successful, it could pave the way for expanded consideration of issues related to CO_2 emissions during Texas permitting proceedings for fossil fuel power plants.

Acting even more broadly, the Sierra Club brought a challenge to a memorandum, issued late in the Bush Administration, that directed regional officials not to set CO_2 emission limits in permits for stationary sources. In this case, *Sierra Club v. EPA*,[74] filed on January 15, 2009, before the D.C. Circuit, the Sierra Club sought invalidation of the December 18, 2008, memorandum issued by then-EPA Administrator Stephen Johnson. The Sierra Club argued that the memorandum simply restated the arguments that EPA presented, and which were rejected, before the Environmental Appeals Board in *In re Deseret Power Electric Cooperative*.[75] However, following the transition to the Obama Administration, EPA issued a statement on February 17, 2009, granting the Sierra Club's request for reconsideration of the memorandum.[76] The

63. Charles Davis, *New York, Activists Defend Regional Climate Plan's Legality In Industry Suit*, InsideEPA.com, June 2, 2009.
64. *Id.*
65. *Id.*
66. Gerald B. Silverman, *Report Says New York Spent Small Amount of RGGI Proceeds Due to Pending Litigation*, Daily Env't Rep. (BNA), Sept. 21, 2009.
67. Gerald B. Silverman, *New York Settles Lawsuit With Plant Owners Who Challenged Implementation of RGGI*, Daily Env't Rep. (BNA), Dec. 29, 2009.
68. *Id.*
69. Longleaf Energy Associates, LLC v. Friends of the Chattahoochee, Inc., 681 S.E.2d 203, 39 ELR 20146 (Ga. Ct. App. 2009).
70. *Id.* at 208.
71. *See* Endangerment Finding, *supra* note 14, at 18905.
72. *See* Susanne Pagano, *Environmental Group Sues Texas Regulators to Force Regulation of Greenhouse Emissions*, Daily Env't Rep. (BNA), Oct. 7, 2009.
73. *Id.*
74. No. 09-1018 (D.C. Cir. filed Jan. 15, 2009).
75. PSD Appeal No. 07-03 (Nov. 13, 2008).
76. Steven D. Cook, *EPA to Reconsider Carbon Dioxide Memo Saying Gas Is Not a Regulated Pollutant*, Daily Env't Rep. (BNA), Feb. 18, 2009.

Agency said in a statement that it would "vigorously review" the Johnson Memorandum and would seek public comment, but declined to stay the memorandum as the Sierra Club had requested.[77] The same day, EPA filed an unopposed motion in *Sierra Club*, requesting that the court hold the case in abeyance pending completion of the administrative reconsideration, which was granted. The case remains pending.

3. Challenges to Standing in Climate Change Litigation

The decision from the D.C. Circuit in *Center for Biological Diversity v. U.S. Department of the Interior*,[78] issued on April 17, 2009, took a step back from the broad doctrine of standing in climate change cases that was suggested in *Massachusetts*, and dealt a blow to environmental groups who hoped to establish standing in claims against the government by demonstrating harm resulting from climate change. Writing for a three-judge panel, Chief Judge David Sentelle explained that the Supreme Court found standing in *Massachusetts* based on unique facts: that a sovereign state was suing based on specific and unique harm that it would suffer itself, as a sovereign.[79] Judge Sentelle noted that these unique facts present a stark contrast to a case, such as the one at bar, where an environmental group seeks to vindicate the rights of its members against generalized harm caused by climate change.[80] Thus, following the legal test for standing that was originally set out by the Supreme Court in *Lujan v. Defenders of Wildlife*,[81] the court concluded that the plaintiffs lacked substantive standing to challenge the actions of the U.S. Department of the Interior.[82] Commentators viewed this decision as likely to make it more difficult for citizens and environmental groups to sue on climate change matters.[83]

4. NSPS for Nitric Acid Plants

In an effort to force agency action on climate change, environmental groups also looked to suits against the Agency. In *Environmental Integrity Project v. EPA*,[84] two environmental groups sued EPA to force the agency to review performance standards for nitric acid production plants, pursuant to 40 C.F.R. Subpart G.[85] Under the CAA, EPA is required to update these performance standards every eight years, but it has not done so with respect to nitric acid production plants since 1984.[86] EPA decided to settle the case, and filed a proposed consent decree with the court in November 2009, which would require the agency to either propose revised NSPS or determine that the current standards are sufficient by November 15, 2010.[87] The proposed consent decree was announced in the November 16, 2009 *Federal Register*, and comments were due on December 16, 2009.

5. Challenge to California Waiver

Following the new Administration's decision in June 2009 to grant the CAA waiver for California to implement GHG emissions limits for automobiles, two industry groups filed suit on September 8, 2009, in the D.C. Circuit to challenge the action. In *Chamber of Commerce v. EPA*,[88] the U.S. Chamber of Commerce and the National Automobile Dealers Association filed a petition for review of the Agency's action, but provided no arguments or statement of what their objections were, and declined to comment as to the substance of their objections to reporters.[89] In October 2009, New York and 17 other states filed a motion to intervene in the case, arguing in support of EPA's position.[90] EPA also filed a motion to dismiss the case for lack of standing on October 26, 2009, and that motion remains pending.[91]

6. Nuisance Law and GHG Emissions

In an unexpected development this year, the Second Circuit issued a ruling in *Connecticut v. American Electric Power Co.*,[92] holding that the district court had improperly dismissed a lawsuit brought by eight states and the city of New York against several large electric power generators based upon a theory that the emissions of these generators constituted a public nuisance. The case had been pending for several years at the time a decision was issued, and had been the topic of discussion during Supreme Court Justice Sonia Sotomayor's confirmation hearings, because she was one of the original three panel members on the case.[93] The opinion in the case, joined by both of the remaining two judges, held that the political question doctrine did not bar consideration of the case, as the district court had held[94]; that the parties

77. *Id.*
78. 563 F.3d 466, 39 ELR 20091 (D.C. Cir. 2009).
79. *Id.* at 476.
80. *Id.* at 477.
81. 504 U.S. 555, 22 ELR 20913 (1992).
82. *Id.* 478-79.
83. Kate Winston, *Key Court Signals High Standing Bar for Activists' Climate Suits*, InsideEPA.com, Apr. 22, 2009.
84. D.D.C., No. 09-0218 (Feb. 4, 2009).
85. Andrew Childers, *Two Organizations Sue EPA to Force Review of Emissions Standards at Nitric Acid Plants*, Daily Env't Rep. (BNA), Feb. 6, 2009.
86. *Id.*
87. Andrew Childers, *EPA Agrees to Review Emissions Standards for New Nitric Acid Plants, Settling Lawsuit*, Daily Env't Rep. (BNA), Nov. 16, 2009.
88. D.C. Cir., No. 09-1237 (Sept. 8, 2009).
89. Steven D. Cook, *U.S. Chamber, Automobile Dealers Sue EPA Over Approval of California Emissions Limits*, Daily Env't Rep. (BNA), Sept. 11, 2009. Petitioners' Non-Binding Statement of Issues, filed Oct. 13, 2009, provides little additional detail as to the substance of the Chamber's arguments. This filing does set forth generally the Chamber's argument that EPA erred in its decision to grant the waiver, concluding that greenhouse gas emission standards are needed to meet "compelling and extraordinary conditions" under §209(b)(1)(B) of the CAA, and concluding that California's standards are consistent with §202(a) of the CAA. Additionally, the Chamber asserts that EPA did not comply with the procedural requirements of the CAA and the Administrative Procedures Act, and that California is precluded from obtaining a preemption waiver for its GHG emission standards under the Energy Policy and Conservation Act of 1975. Docket Entry 1210789, D.C. Cir. Case No. 09-1237, filed Oct. 13, 2009.
90. Steven D. Cook, *New York, 17 Other States Oppose Lawsuit Against EPA for California Greenhouse Limits*, Daily Env't Rep. (BNA), Oct. 13, 2009.
91. Docket Entry 1210789, D.C. Cir. Case No. 09-1237, filed Oct. 26, 2009.
92. 582 F.3d 309 (2d Cir. 2009).
93. Jim Stimson, *Appeals Court Reinstates States' Lawsuit Against Utilities Over Greenhouse Emissions*, Daily Env't Rep. (BNA), Sept. 22, 2009.
94. 582 F.3d at 321.

had standing to bring the action;[95] and that federal efforts at legislation or regulation to address climate change had not yet gone so far as to displace the federal common law of public nuisance in the area of climate change.[96] The case was considered by commentators to be especially significant, because of its expansive language on both the standing and common-law nuisance issues.[97]

II. Emissions

A. NAAQS

EPA recently announced that it intends to complete a review of the NAAQS for all six major air pollutants by the end of 2011.[98] The NAAQS address ozone, particulate matter (PM), carbon monoxide (CO), nitrogen dioxide (NO_2), sulfur dioxide (SO_2), and lead. Although the CAA requires that NAAQS be reviewed every five years, EPA has not come close to meeting this requirement. In 2009, under court order, EPA initiated a review of CO, NO_2, and SO_2. EPA plans to issue a new ozone standard by August 2010 and a new PM standard by April 2011. It finalized a new lead standard in 2008.

1. SO_2

On November 16, 2009, EPA issued a proposed rule to replace both its 24-hour and annual SO_2 NAAQS with a first-time one-hour standard within the range of 50 to 100 parts per billion (ppb).[99] The Agency is also taking comment on alternative levels for the one-hour standard up to 150 ppb. The last time EPA reviewed this standard was in 1996, when it did not make any revisions.[100] The proposal is based on scientific findings that "a 1-hour standard would better protect public health by reducing people's exposure to high short-term (five minutes to 24 hours) concentrations of SO_2."[101] The proposal has prompted mixed reactions from both environmentalists and industry. Environmentalists would prefer that EPA retain all three standards, while industry officials offered a cautious reaction, stating that it is too early to know what the exact burdens will be.[102] Industry will likely challenge the science behind the proposal, arguing that the evidence of risk from short-term exposures is highly uncertain.[103]

The proposal also includes revisions to the monitoring, implementation, and reporting requirements associated with the rule. State, local, and tribal air monitoring agencies, under this proposal, would report both the one-hour and maximum five minute-averaged SO_2 data available for each hour of the day.[104] EPA is also proposing to alter the "form" of the standard used to determine whether an area is in compliance. The new form will be a three-year average of the fourth highest daily maximum one-hour average concentration in a year.[105] New monitor-siting criteria will "establish two categories of monitors: those whose placement is based on population size and local emissions, and those based on a state's contribution to national emissions."[106]

EPA has estimated the annual health cost savings from the short-term limit to be between $16 and $100 billion. Those benefits include "reduced hospital admissions, emergency room visits, work days lost, cases of aggravated asthma, and chronic bronchitis, among others."[107] While EPA is not allowed to consider the cost to industry in setting the standards, it has estimated that the cost of compliance with the new rules is between $1.8 billion and $6.8 billion.[108] The most impacted industries will likely be fossil fuel-based power plants and other industrial facilities, which are the main sources of SO_2 emissions. EPA intends to sign the final primary NAAQS for SO_2 by June 2, 2010.[109]

2. NO_2

For the first time in 35 years, EPA issued a proposed revision to the NO_2 standard. The proposed standard would create a first-time short-term standard for the criteria pollutant to address brief exposures and set new monitoring mandates for air officials to focus on higher levels of NO_2 found near roadways.[110] This standard would supplement, rather than replace, the current annual standard.[111] The proposal includes new monitoring requirements focusing on urban roadway emissions, requiring 165 monitors within 50 meters of roadways. The proposed rule is based on scientific findings demonstrating a link between short-term NO_2 exposure and near-road measurements that are about 30-100% higher than areas away from roadways. EPA proposes to set the level of this new standard within the range of 80 to 100 ppb and solicits comment on standard levels as low as 65 ppb and as high as 150 ppb.[112]

EPA is under a court order to issue final standards by January 22, 2010. Again, this revised rule may be open to challenges from both environmentalists and industry. The range "falls short of some activists' preferred level and is

95. *Id.* at 332.
96. *Id.* at 371.
97. Steven Patrick & Steven D. Cook, *Second Circuit Decision Foreshadows More Lawsuits Over Greenhouse Emissions*, Daily Env't Rep. (BNA), Sept. 23, 2009.
98. Steven D. Cook, *EPA to Complete Review of Standards for Six Major Air Pollutants by 2011*, Daily Env't Rep. (BNA), Oct. 27, 2009.
99. U.S. EPA, Fact Sheet: Proposed Revisions to the National Ambient Air Quality Standards for Sulfur Dioxide, Nov. 16, 2009. The existing primary standards were 140 ppb measured over 24 hours, and 30 ppb measured over an entire year. The fact sheet also notes that the proposed changes would not affect the secondary SO_2 NAAQS, set to protect public welfare.
100. *Id.*
101. *Id.*
102. Molly Davis, *EPA Plan to Drop SO_2 NAAQS for Short-Term Limit Spurs Mixed Reaction*, InsideEPA.com, Nov. 18, 2009.
103. *Id.*
104. Fact Sheet, *supra* note 99.
105. *Id.* (or the 99th percentile for days that lack monitoring data).
106. Davis, *supra* note 102.
107. Fact Sheet, *supra* note 99.
108. Ayesha Rascoe, *U.S. EPA Sets New Sulfur Dioxide Emissions Rules*, Reuters, Nov. 18, 2009.
109. Fact Sheet, *supra* note 99.
110. *EPA Revisions to NO_2 Standard Target Short Term, Near Road Exposure*, InsideEPA.com, June 30, 2009.
111. Primary National Ambient Air Quality Standard for NO_2, 74 Fed. Reg. 34404 (July 15, 2009) (to be codified at 40 C.F.R. pts. 50 & 58).
112. 74 Fed Reg. 34404 (July 15, 2009).

contrary to industry's arguments that a short-term standard is unnecessary."[113]

3. CO

EPA is in the process of reviewing the NAAQS for CO. It recently sought public comment of a draft risk assessment document entitled, "Risk and Exposure Assessment to Support the Review of the Carbon Monoxide (CO) Primary National Ambient Air Quality Standards—First External Review Draft."[114] The document describes the quantitative analyses that are being conducted as part of the review of the NAAQS for CO.

4. Ozone

In 2009, EPA significantly decreased the flexibility of the ozone NAAQS and increased enforcement. In January, EPA issued a proposal to revise the rule implementing the 1997 eight-hour ozone NAAQS and to remove language relating to the vacated provisions of the rule that provided exemptions from the requirements of nonattainment NSR and CAA §185 penalty fees under the one-hour standard.[115] The revised rule imposes stricter control requirements on all facilities that emit more than 25 tpy of ozone and are located in areas that violate the agency's 1997 eight-hour ozone standard. Previously, 76 of 122 ozone nonattainment areas were under a less-strict classification, which identified major stationary sources as those emitting 100 tpy of ozone.[116] These were subject to pollution control requirements based on CAA §181, Subpart 1. Now, all nonattainment zones will fall under the same, stricter classification and will be subject to pollution control requirements and attainment deadlines based on the more prescriptive Subpart 2. The proposed change is in response to a D.C. Circuit opinion that vacated EPA's distinction between types of nonattainment areas.[117]

In addition to changing the nonattainment area classifications, the proposal also reinstated certain penalties and anti-backsliding contingency measures. State regulators are currently waiting on guidance from EPA on how to apply the penalties.[118] The penalties are estimated at about $8,000 per ton of emissions over the baseline and apply to all stationary source emissions of nitrogen oxide (NO_x) and volatile organic compounds (VOCs) (both precursor pollutants to ozone) in severe and extreme nonattainment areas.[119] Currently, under §185 of the CAA, fines are to be levied regardless of the steps the industrial plants have already taken to curtail emissions of VOCs.[120] A member of EPA's CAA advisory committee explained that "the problem with a well-controlled unit is the only thing you can do to reduce emissions is to curtail operation."[121] The guidance would let states suggest alternative programs for reducing ozone pollution rather than imposing fees.[122] States are very hesitant to implement §185 and impose large penalties until they receive guidance. For example, the California South Coast Air Quality Management District's governing board has postponed a vote on the measure six times, estimating that the penalties would cost 585 facilities between $24 million and $35 million a year beginning in 2012.[123]

EPA further reduced flexibility for obtaining ozone compliance when it ended the use of early action compacts (EACs). EACs allowed some areas to avoid being designated in nonattainment for ozone by taking steps to meet an early attainment deadline.[124] After threats of lawsuits by environmental groups, EPA conducted a review of the EACs. It determined that they were illegal under the CAA and did not result in greater emissions reductions.[125] Their main benefit was bringing many stakeholders to the table to try and create innovative ways to reduce air pollution.

In a final blow to flexibility for ozone NAAQS in 2009, the D.C. Circuit remanded portions of a 2005 EPA rule that allowed the substitution of regional emissions trading for pollution controls in ozone nonattainment areas and reinstated an 18-month limit on interim NSR findings and the requirement that nonattainment areas demonstrate progress toward achieving the ozone standard before issuing permits to new sources.[126] The trading program allowed sources to purchase NO_x credits and offsets, rather than install reasonably available control technology.[127] The court found that this violated the plain text of §172(c)(1) of the CAA.

On April 29, 2009, EPA issued seven *Federal Register* notices taking two separate types of action on state 1997 eight-hour ozone nonattainment planning requirements. In six of these notices, EPA proposed to disapprove seven ozone attainment demonstrations and, in one additional notice, EPA made two findings of failure to submit ozone attainment demonstrations.[128]

113. *EPA Revisions to NO_2 Standard Target Short Term, Near-Road Exposure*, InsideEPA.com, June 30, 2009.
114. 74 Fed. Reg. 55843 (Oct. 29, 2009).
115. Proposed Rule to Implement the 1997 8-Hour Ozone National Ambient Air Quality Standard: Revision on Subpart 1 Area Reclassification and Anti-Backsliding Provisions Under Former 1-Hour Ozone Standard; Proposed Deletion of Obsolete 1-Hour Ozone Standard Provision, 74 Fed. Reg. 287027 (proposed Jan. 16, 2009) (to be codified at 40 C.F.R. pts. 50 & 51).
116. Charles Davis, *Stricter Ozone Subpart*, InsideEPA.com, Jan. 21, 2009.
117. South Coast Air Quality Management District v. EPA, 472 F.3d 883, 37 ELR 20003 (D.C. Cir. 2006).
118. *States Craft Disparate Ozone Fee Plans Amid Pending EPA Guidance*, InsideEPA.com, Mar. 10, 2009.
119. Jenny Johnson, *EPA Advisors Ask Agency to Evaluate Legality of Ozone Fee Alternatives*, InsideEPA.com, May 19, 2009.
120. Andrew Childers, *Ozone Nonattainment Areas May Be Forced to Fine Sources Contributing to Pollution*, Daily Env't Rep. (BNA), Jan. 8, 2009.
121. *Id.*
122. *States Craft Disparate Ozone Fee Plans Amid Pending EPA Guidance*, InsideEPA.com, Mar. 10, 2009.
123. Carolyn Whetzel, *State Regulators Look to EPA for Guidance as They Grapple With Nonattainment Fees*, Daily Env't Rep. (BNA), Sept. 25, 2009.
124. *Agency Finds Early Action Ozone Compacts Unlawful, Ineffective*, InsideEPA.com, June 22, 2009.
125. *Id.*
126. Natural Resources Defense Council v. EPA, 571 F.3d 1245, 39 ELR 20150 (D.C. Cir. 2009).
127. Andrew Childers, *Appeals Court Remands Part of Ozone Rule That Allowed Regional Emissions Trading*, Daily Env't Rep. (BNA), July 13, 2009.
128. Fact Sheet—Managing Ozone Air Quality: Actions on 1997 Ozone NAAQS State Implementation Plans, *available at* http://www.epa.gov/air/ozonepollution/fs20090429.html. The proposed disapprovals are as follows: Connecticut for their portion of the New York City ozone nonattainment area; New Jersey for their portion of the New York City ozone nonattainment area; New Jersey

5. Lead

In March, EPA dropped its defense of the Bush Administration's NAAQS for lead emissions in a suit brought by environmentalists, asking the court to stay the suit.[129] In 2008, EPA Administrator Stephen Johnson significantly tightened the lead NAAQS from 1.5 to 0.15 micrograms per cubic meter.[130] However, documents also showed that the White House Office of Management and Budget pressured EPA to weaken a proposed monitoring threshold from a 0.5 tpy to 1 tpy threshold.[131] This change reduced the number of facilities covered from 346 to 135.

EPA recently followed that move with a proposed reversal of its monitoring threshold. On December 31, 2009, EPA proposed to revise the NAAQS for lead and associated monitoring requirements by lowering "the lead emission threshold at which monitoring agencies are presumptively required to conduct lead monitoring near a lead source to 0.50 tpy from an emissions threshold of 1.0 tpy."[132] It is currently seeking comments on a threshold between .50 and 1.0 tpy.[133] Among the additional facilities that would be covered by a threshold of 0.5 tpy are 55 airports. In order to address this, EPA is also seeking comments on data for an alternative emissions threshold for airports.[134]

6. Fine PM

In October 2009, EPA announced an accelerated schedule for issuing new NAAQS for fine particles in response to a remand from the D.C. Circuit.[135] A proposed standard is planned for July 2010, followed by a final rule by April 2011. EPA issued a Risk Assessment to Support the Review of the PM National Ambient Air Quality Standards—External Review Draft, which "found an estimated 1.7 percent to 6.7 percent of all deaths in 2007 in 15 cities were attributable to long-term exposure to fine PM."[136] The previous rule at issue grandfathered in sources that submitted a complete permit application before July 15, 2008, and is discussed in more detail in the NSR section below.[137]

for their portion of the Philadelphia ozone nonattainment area; Delaware for their portion of the Philadelphia ozone nonattainment area; Pennsylvania for their portion of the Philadelphia ozone nonattainment area; Maryland for their portion of the Philadelphia ozone nonattainment area; and Maryland for the Baltimore ozone nonattainment area. EPA is also making a finding that North Carolina and South Carolina missed the June 15, 2007 CAA deadline for submitting ozone attainment demonstrations for the Charlotte ozone nonattainment area.

129. *Dropping Like a Lead (Standard)*, InsideEPA.com, Mar. 17, 2009.
130. 73 Fed. Reg. 66964; 66966 (Nov. 12, 2008) (to be codified at 40 C.F.R. at pts. 50,51,53 & 58).
131. *Dropping Like a Lead (Standard)*, *supra* note 129.
132. 74 Fed. Reg. 69050, 69051 (Dec. 31, 2009) (to be codified at 40 C.F.R. pt. 58).
133. *Id.*
134. *Id.* at 69055.
135. Andrew Childers, *EPA Accelerates Review of Air Standards for Fine Particles, Plans Rule by April 2011*, Daily Env't Rep. (BNA), Oct. 7, 2009. *See* American Farm Bureau Federation v. EPA, No. 06-1410, 39 ELR 20042 (D.C. Cir. 2009).
136. *Id.*
137. Andrew Childers, *EPA Again Stays New Source Review for PM-2.5 to Repeal "Grandfather" Clause*, Daily Env't Rep. (BNA), Sept. 22 2009.

B. Interstate Pollution

1. The Clean Air Interstate Rule

Demonstrating the complexity and controversy surrounding air emissions rules in recent years, late in 2008, the D.C. Circuit took an unusual step regarding the Clean Air Interstate Rule (CAIR). Although the CAIR emissions trading program was to be a key component of the Bush Administration's answer to air quality concerns, the court had vacated the rule on June 11, 2008, finding that it had "more than several fatal flaws."[138] This decision removed one of EPA's main tools to combat air pollution, and in response to criticisms from multiple stakeholders, the D.C. Circuit reversed itself, reinstating and remanding the rule to the Agency for reconsideration, in order to "temporarily preserve the environmental values covered by CAIR,"[139] until EPA could properly revise the rule consistent with the June 11 decision.

Revising the rule has not proved to be a simple task. By the middle of 2009, efforts by various members of Congress were already underway to craft legislation that would give EPA the legal authority it needed to promulgate a program resembling CAIR. For instance, Sens. James Inhofe (R-Ok.) and George Voinovich (R-Ohio) planned on releasing a bill to grant EPA authority to establish trading programs by narrowly amending §110 of the CAA, which provides for the establishment of NAAQS programs. With other pressing issues, such as health care and climate change occupying Congress, the legislative efforts targeting CAIR faltered, and it appears that it may be up to EPA to promulgate a new rule in 2010 without relying on trading to the extent it did in CAIR.

2. NO_x State Implementation Plan Call

Meanwhile, downwind states continue to struggle to meet their air quality targets, in part due to cross-border pollution. In a case illustrating this ongoing tension, the D.C. Circuit held on November 24, 2009, that North Carolina lacked standing to sue EPA for failing to require Georgia to limit certain emissions along the border with North Carolina.[140] North Carolina sued EPA when it eliminated the requirement for portions of northern Georgia to reduce NO_x emissions under the NO_x State Implementation Plan (SIP) Call. North Carolina claimed that Georgia's emissions contributed to North Carolina's failure to meet ozone standards (NO_x is a precursor to ozone formation). The NO_x SIP Call requires states that contribute to cross-border pollution to include goals for reducing these emissions in their SIPs. The D.C. Circuit ruled that North Carolina did not have standing, because Georgia could have met its NO_x SIP Call requirements with emission allowances, thereby not reduc-

138. North Carolina v. EPA, 531 F.3d 896, 901, 38 ELR 20172 (D.C. Cir. 2008) (per curiam).
139. North Carolina v. EPA, 550 F.3d 1176, 1178, 39 ELR 20306 (D.C. Cir. 2008).
140. North Carolina v. EPA, No. 08-1225 (D.C. Cir. 2009).

ing emissions along the border, and providing no redress to North Carolina.[141]

C. Hazardous Air Pollutants

1. The Clean Air Mercury Rule and the Maximum Achievable Control Technology Hammer

Paralleling to some degree the controversy surrounding CAIR, the challenge of creatively regulating mercury emissions under §112 of the CAA has proven to be significant. In February 2008, the D.C. Circuit vacated the Clean Air Mercury Rule (CAMR), colorfully finding that EPA had "deploy[ed] the logic of the Queen of Hearts [to] substitute EPA's desires for the plain text of section 112(c)(9)."[142] CAMR would have created an interstate trading program for mercury emissions from power plants, despite the fact that mercury had previously been listed as a hazardous air pollutant, which would typically require a technology-based standard. The Bush Administration EPA joined with utility groups in seeking Supreme Court review, but EPA abandoned its certiorari petition in February 2009, as the Obama Administration announced that it would chart a new course on mercury, seeking to establish technology-based emissions standards for mercury emissions from power plants.[143] Utility groups pressed on in the Supreme Court, only to have the Court deny further review just weeks after EPA abandoned its petition.[144] Without a mercury standard in place for power plants, states have been forced to apply case-by-case maximum achievable control technology (MACT) review under the MACT Hammer provision of §112(j). Under a proposed consent decree, EPA will promulgate technology-based standards to control emissions of mercury and other air toxics from fossil fuel-fired power plants by March 2011.[145]

2. Startup/Shutdown Rule

Late in 2008, the D.C. Circuit, in a split 2-1 decision, struck down a second EPA regulation relating to hazardous air pollutants. The court found that in allowing facilities to exceed hazardous emissions standards during startup, shutdown, and periods of malfunction, EPA's startup and shutdown rule "belies the text, history, and structure of Section 112."[146] The court's decision became effective on October 16, 2009, shortly after which industrial petitioners filed a petition for certiorari with the Supreme Court.[147] They argued that the D. C. Circuit had applied a practice known as "constructive reopening" of a regulatory decision more than 60 days after the promulgation of a rule. The rule at issue dates back to 1994, and the dissenting judge on the D.C. Circuit panel that heard the case, Judge A. Raymond Randolph, had raised this concern in questioning the court's jurisdiction in his dissent.[148]

D. NSR

The NSR program under the CAA applies to major new stationary sources in areas that are in nonattainment for at least one criteria pollutant. The Obama Administration acted quickly to change course on a number of rulemakings proposed during the last year of the Bush Administration, while reviving interest in strict NSR enforcement that the Bush EPA had deemphasized.

1. NSR Rulemaking

a. Aggregation Rule

In May 2009, EPA delayed for 12 months the effective date of the controversial "aggregation" rule, promulgated by the Bush EPA in early 2009,[149] following a petition by the Natural Resources Defense Council for reconsideration of the rule. The rule allowed emissions sources to treat several modifications at a single facility as separate projects, thereby reducing the chance that each individual project would trigger NSR pollution control requirements.[150]

b. "Reasonable Possibility" Recordkeeping Rule

The reasonable possibility rule gave industrial facilities some degree of discretion in determining whether they needed to maintain detailed records of air emissions.[151] If there were no reasonable possibility that emissions increases from a plant modification would trigger NSR, records would not be required. After having its petition for reconsideration rejected by the Bush EPA in January 2009, New Jersey resubmitted its petition to EPA in March 2009. EPA determined in April 2009 that it would reconsider the rule, but would not stay it during the period of reconsideration.[152]

c. Fine Particle Rule

In September 2009, EPA issued a nine-month stay of a 2008 NSR rule on fine particles, after a three-month stay issued to consider a petition for reconsideration entered by several environmental groups had lapsed.[153] The rule grandfathered in emissions sources that submitted a complete permit application

141. Andrew Childers, *North Carolina Lacks Standing to Sue EPA Over Georgia Emissions, Appeals Court Rules*, Daily Env't Rep. (BNA), Nov. 25, 2009.
142. New Jersey v. EPA, 517 F.3d 574, 582, 38 ELR 20046 (D.C. Cir. 2008).
143. Andrew Childers, *Supreme Court Denies Industry Petition for Appeal of Decision on Mercury Rule*, Daily Env't Rep. (BNA), Feb. 24, 2009.
144. Utility Air Regulatory Group v. New Jersey, 129 S. Ct. 1308 (2009).
145. American Nurses Ass'n v. Jackson, No. 08-02198 (D.C. Cir., consent decree proposed 10/22/09).
146. Sierra Club v. EPA, 551 F.3d 1019, 1028, 38 ELR 20303 (D.C. Cir. 2008).
147. American Chemistry Council v. Sierra Club, No. 09-495 (U.S. *cert. filed,* Oct. 22, 2009).
148. Robert C. Cook, *American Chemistry Council, Other Groups Petition Supreme Court on Shutdown Rule*, Daily Env't Rep. (BNA), Nov. 2, 2009.
149. 74 Fed. Reg. 2376 (Jan. 15, 2009).
150. Andrew Childers, *EPA Plans Year-Long Delay of Rule to Limit Pollution Control Requirements*, Daily Env't Rep. (BNA), May 14, 2009.
151. 72 Fed. Reg. 72607 (Dec. 21, 2007).
152. Andrew Childers, *EPA to Reconsider Three Bush-Era Rules Under Air Act New Source Review Program*, Daily Env't Rep. (BNA), Apr. 28, 2009.
153. Andrew Childers, *EPA Again Stays New Source Review for PM-2.5 to Repeal "Grandfather" Clause*, Daily Env't Rep. (BNA), Sept. 22, 2009.

prior to July 15, 2008, allowing them to be considered in compliance with the fine particle regulations if they were able to demonstrate compliance with the rules for coarse particles.[154]

d. *Fugitive Emissions Rule*

On December 11, 2009, EPA issued an interim final determination staying the Bush-era rule on "fugitive" emissions, which are air pollutants emitted from sources other than a facility stack, chimney, or vent.[155] The Bush EPA published its final fugitive emissions rule, which exempted fugitive emissions entirely from the determination of whether a facility's modifications trigger NSR requirements, in December 2008.[156] The stay gives EPA until March 31, 2010, to address a petition by the Natural Resources Defense Council for reconsideration of the existing rule.[157]

2. NSR Enforcement

Only weeks into the Obama Administration's tenure, EPA announced a $136 million NSR settlement with Kentucky Utilities, which included a $1.4 million civil penalty and approximately $135 million in new pollution controls.[158] It was the first sign of a renewed interest in NSR enforcement against coal-fired power plants. Days later, EPA filed a civil lawsuit against Westar Energy Inc., alleging that the company had violated NSR requirements at its a power plant in Kansas in 2004.[159] Two weeks later, the Agency filed another lawsuit, this time against Louisiana Generating, alleging that one of its Louisiana power plants had made major modifications in 1998 without obtaining the necessary NSR permits.[160] EPA's third NSR lawsuit of 2009 came in August, when the Agency filed NSR claims against six Illinois power plants.[161] To put this pace of activity in perspective, observers note that EPA, under the Bush Administration, only settled 14 NSR cases, including three that had been filed by the William J. Clinton EPA.[162]

Capping an active year of NSR enforcement, in December 2009, Cinergy Corp., a subsidiary of Duke Energy, agreed to a $93 million settlement with the government.[163] The company had been found guilty by a federal jury on May 19, 2009, for failing to apply for NSR permits before replacing equipment at an Indiana power plant.[164] The settlement included $85 million in new pollution controls, a $1.75 million fine, and $6.25 million for environmental mitigation projects. Cinergy had already been forced by the court to shut down three generating units and retire SO_2 allowances at a separate facility, which had been a subject of the same lawsuit. Cinergy appealed that decision to the U.S. Court of Appeals for the Seventh Circuit.[165] It was the first time a court had ordered a defendant to mitigate past harm in a contested NSR case, rather than as part of a settlement agreement.[166]

E. *Air Permitting*

1. Title V Permits

While the Obama EPA has withdrawn a number of Bush Administration rulemakings, it has put its weight behind at least two Bush-era positions relating to Title V operating permits. In April 2009, EPA issued a response rejecting a petition that had asked the Agency to withhold a Title V permit for a facility that had been issued a notice of violation (NOV). The environmental petitioners had argued that an NOV is a finding of noncompliance, and thus requires that a compliance schedule be added to a Title V permit. The Agency disagreed; in a response signed by Administrator Jackson, it took the position that an NOV is not a final Agency action and has no binding legal consequences.[167]

In October 2009, EPA published its final Flexible Air Permitting Rule.[168] The rule allows emissions sources, such as power plants and refineries, to switch fuels and make other operational changes under certain circumstances without review of their Title V permits by permitting authorities. According to the Agency, the purpose is to allow facilities to be more responsive to market conditions, while ensuring equal or greater environmental protection than that achieved by conventional permits.

2. Multipollutant Permitting

One additional area of rulemaking that EPA is considering for future initiatives is sectorwide, multipollutant air regulations for industries that have multiple standards currently governing each piece of equipment. Such regulations, which have been adopted in a number of other countries, could greatly streamline the process of permitting and compliance for major industrial facilities.[169] In the midst of the attention being paid to climate change, NSR, and other major CAA provisions, however, it is unlikely EPA will be able to promulgate such novel permitting regulations in the near future.

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154. 73 Fed. Reg. 28321 (May 16, 2008).
155. 74 Fed. Reg. 65692 (Dec. 11, 2009).
156. 73 Fed. Reg. 77882 (Dec. 19, 2008).
157. Andrew Childers, *EPA Extends Stay of New Source Review Rule for Fugitive Emissions Through March 2010*, Daily Env't Rep. (BNA), Dec. 11, 2009.
158. *Coal in the Cross Hairs*, InsideEPA.com, Feb. 5, 2009.
159. United States v. Westar Energy, No. 09-2059 (D. Kan., filed Feb. 4, 2009).
160. United States v. Louisiana Generating, No. 09-100 (M.D. La., filed Feb. 18, 2009).
161. United States v. Midwest Generation, LLC, No. 09-05277 (N.D. Ill., filed Aug. 27, 2009).
162. Andrew Childers, *Third New Source Review Lawsuit Signals Focus on Enforcement at Obama EPA*, Daily Env't Rep. (BNA), Sept. 1, 2009.
163. United States v. Cinergy Corp., No. 99-1693, 39 ELR 20114 (S.D. Ind., consent decree proposed Dec. 22, 2009).
164. Andrew Childers, *Duke Energy Subsidiary Agrees to Spend $93 Million to Settle Clean Air Violations*, Daily Env't Rep. (BNA), Dec. 23, 2009.
165. United States v. Cinergy Corp., No. 09-3344 (7th Cir., filed Sept. 21, 2009).
166. Dawn Reeves, *EPA Hails First-Time Mitigation, Shutdown Mandates in Court's NSR Ruling*, InsideEPA.com, June 3, 2009.
167. *Backing Bush, Obama EPA Rejects Compliance Schedules in Title V Permits*, InsideEPA.com, May 12, 2009.
168. 74 Fed. Reg. 51418 (Oct. 6, 2009).
169. Andrew Childers, *EPA Air Administrator Pushes Multipollutant Rules, Better Implementation of Regulations*, Daily Env't Rep. (BNA), Oct. 8, 2009.