Environmental Litigation, Amicus Briefs & Comments

I. EPA Litigation

A. GHG Regulations

- **Background:** ND is a party to 3 separate lawsuits challenging EPA's GHG regulatory scheme. The EPA actions being challenged are:

    - The Endangerment Finding: In December 2009, EPA made a determination that GHGs endanger the public health and welfare. Although the Endangerment Finding was conducted under Clean Air Act § 202(a), which involves motor vehicle emissions, it opened the door for EPA's regulation of GHGs from stationary sources. Specifically, under the CAA, once EPA made the Endangerment Finding, it was required to adopt a rule regulating motor vehicle emissions. According to EPA, once this rule was adopted, GHGs became "regulated" pollutants, triggering PSD and Title V permitting requirements for stationary sources.

    - Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards (a/k/a the "Tailpipe Rule"): This rule specifically addresses motor vehicle emissions. But, according to EPA, it triggered regulation of GHGs from stationary sources.

    - Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs (a/k/a the "Johnson Memo Reconsideration Rule", "Timing Rule", or "Triggering Rule"): This action clarifies when stationary sources need to get permits covering GHGs, as required as a result of the Endangerment Finding and Tailpipe Rule. Under this rule, stationary sources needed permits for their GHG emissions beginning January 2, 2011 (the same date the national controls went into effect for the Tailpipe Rule).

    - Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule (a/k/a the "Tailoring Rule"): This rule is an attempt by EPA to alleviate the "absurd" consequences of regulating stationary sources' GHG emissions under the current regulatory scheme. For instance, without this rule, even small emitters (ex.: office buildings) would need to get an air permit. This rule phases in permit requirements for large stationary sources.

- **Parties:**

    - Challengers: There are several other states challenging EPA's attempts to regulate GHGs, with Texas taking the lead. Other states joining ND

and TX include: Nebraska, South Dakota, Alabama, Virginia, South Carolina, Louisiana, and Mississippi. Several industry groups are also parties to the cases.

- Supporters: There are also many states that have intervened in support of EPA. In addition, many environmental groups are supporting EPA.

- The number of states participating varies with the cases. The Endangerment Finding case has the greatest number of states involved – approximately 18 siding with EPA and 16 siding with Petitioners.

- **Effect of Regulations:** Beginning in January 2011, new or modified large stationary sources (ex.: power plants) were subject to air permitting requirements for their GHG emissions. Small sources (ex.: restaurants, small farms) are not subject to permitting requirements for GHG emissions at this time but may be subject to regulation in the future.

- **States' Arguments:** Generally, petitioners are arguing that the various rules are arbitrary, based on inadequate research and evidence, and violate the CAA.

  - Endangerment Finding (#09-1322): The first brief (authored by VA) focuses primarily on EPA's denial of the Petitions for Reconsideration filed by VA and TX, which ND did not participate in. But parts of VA's brief do address the Endangerment Finding – for example, the brief argues that EPA acted arbitrarily by delegating its rulemaking authority to outside entities, such as the Intergovernmental Panel on Climate Change ("IPCC"). Texas authored the second brief, which argues that EPA acted arbitrarily and capriciously by failing to apply any sort of criteria for assessing when GHG emissions harm the public health or welfare and by not considering the effect of voluntary adaption and mitigation of climate change.

  - Tailpipe Rule (#10-1092): State petitioners argue that the rule is invalid because: (1) EPA did not consider the costs on stationary sources as required by the statutory language; and (2) the rule rests on the legally flawed Endangerment Finding.

  - Triggering and Tailoring (consolidated as #10-1073): State petitioners argue that the Tailoring Rule violates the CAA because it is contrary to the unambiguous statutory language, violates the Constitution because the CAA provides no "intelligible principle" to guide EPA's discretion, and that it tramples the powers Congress reserved for itself in the CAA. With regard to the Triggering/Timing Rule, TX argues that Congress has not delegated to EPA the authority to regulate GHGs under the PSD and Title V programs and that the rule is precluded by the US Supreme Court's ruling in *FDA v. Brown & Williamson Tobacco Corp.* (a case where the

FDA attempted to regulate tobacco and tried to essentially re-write unambiguous statutory language to avoid an absurd result). The brief contains no arguments regarding the science behind global warming.

- **EPA's Arguments:**

  - Endangerment Finding: EPA disputes the state petitioners' arguments. EPA asserts that its Endangerment Finding was made in compliance with the CAA and based on sound science contained in the administrative record.

  - Tailpipe: EPA argues that the rule is valid and disputes the state petitioners' arguments. Specifically, EPA asserts that CAA § 202(a)(2) does not require it to assess costs on stationary sources, and that challenges to the Endangerment Finding are not properly raised in this case.

  - Triggering and Tailoring: EPA disputes the state petitioners' arguments and asserts that the rules comply with the CAA. EPA also argues that the petitioners lack standing to challenge the rules because the petitioners are helped – not injured – by them. With regard to the Tailoring Rule, EPA argues that it properly applied the administrative necessity, one-step-at-a-time, and absurd results doctrine. EPA also asserts that the Court in *Massachusetts* rejected the *Brown & Williamson* argument.

- **Current Status:** Briefing is complete. Oral argument is set for Feb. 28th and 29th.

B. SO_2 Standard (Special Assistant AG Paul Seby)

- **Background:** On June 22, 2010, EPA finalized a rule creating a new SO_2 standard. The preamble to the rule requires states to use computer modeling to show compliance with the standard – monitoring alone is not sufficient. ND and EPA have a history of disagreeing on the use of modeling. ND believes that EPA's modeling methods often over predict the level of pollutants in the air. On August 23, 2010, ND filed a Petition for Review with the D.C. Circuit Court of Appeals and a Petition for Reconsideration with EPA. (Note: ND is not challenging the standard itself, only the method of implementing it.)

- **Parties:**

  - Challengers: The other states challenging the SO_2 rule are: Texas, Louisiana, South Dakota, and Nevada. Various industry groups are also challenging the rule.

- Supporters: The Environmental Defense Fund and the American Lung Association have intervened on behalf of EPA.

- **Arguments:**

  - ND is arguing that this is a dramatic shift in EPA policy and that it should have had the opportunity to comment on the modeling requirement.

  - EPA argues that the statements in the preamble are not final requirements and that the lawsuit is premature.

- **Effect of Rule:** ND will likely not be able to show that the state is in attainment of the new standard using modeling. If EPA requires ND to show attainment using modeling (and not just monitoring), it will likely result in the state being designated as "unclassifiable." ND will then have to implement unnecessarily stringent measures to address air quality. Uncertainty could result, hindering economic development.

- **Current Status:**

  - D.C. Circuit Court Case: ND filed a motion to stay the rule's effectiveness during the litigation, but the court denied the motion so ND had to submit its recommendations to EPA on whether the state is in attainment of the new SO_2 standard. ND recommended EPA find the state in attainment.

  - Petition for Reconsideration: EPA denied the petitions for reconsideration filed by ND and others. ND filed a petition for judicial review of this denial, which was, as expected, consolidated with the original SO_2 case.

  - Briefing: Briefing is complete. Oral argument is set for May 3rd.

C. Minnkota BACT

- **Background:** In July 2006, the State of North Dakota, EPA, and Minnkota entered into a consent decree to resolve Clean Air Act violations at Minnkota's Milton R. Young Station (MRYS) coal-fired power plant. Under the consent decree, the Department must determine the Best Available Control Technology (BACT) for the plant's nitrogen oxides (NO_x) emissions. On November 18, 2010, the Department determined that BACT for both of the plant's units is selective noncatalytic reduction (SNCR) operated in conjunction with advanced separated overfire air (ASOFA).

- **Issues:** EPA disagrees with the Department's choice of BACT. EPA believes that selective catalytic reduction (SCR) should be selected as BACT for both units. The Department rejected SCR because it believes that it is not technically

feasible for MRYS. Minnkota agrees with the Department's BACT decision. (Note: SCR is much more expensive than SNCR.)

- **Current Status:** In May 2011, after attempts to informally resolve the dispute failed, EPA filed a Petition disputing ND's BACT Determination in U.S. District Court for the District of North Dakota, as permitted under the consent decree. ND filed its response in late June and Minnkota filed a response supporting the Department's BACT Determination. In addition, a group of 9 states, led by South Dakota, filed an amicus brief supporting ND. On December 21, 2011, the Court upheld the Department's BACT Determination. EPA has 60 days from the date of the order to file an appeal.

D. Regional Haze SIP

- **Background:** Under EPA's Regional Haze Rule, which is intended to improve visibility in national parks and wilderness areas, the Department was required to submit a state implementation plan (SIP) for reducing pollution causing visibility impairment in these areas. Pollutants impairing visibility include fine particulate matter (PM2.5), nitrogen oxides (NO_x), and sulfur dioxides (SO_2). Sources meeting certain criteria must install emission controls, known as best available retrofit technology (BART). Sources may also be subject to emission controls under the reasonable progress portion of the regional haze program. On November 29, 2010, the Department received a letter from EPA notifying it that EPA intends to reject a portion of ND's Regional Haze SIP and instead implement a federal implementation plan (FIP). In a letter dated December 8, 2010, the Department informed EPA that it believes its SIP does meet the requirements of the Clean Air Act and that EPA's proposed FIP is improper. On July 29, 2011, EPA received the Department's Amended SIP (among other things, information relating to the Minnkota BACT Determination, which was not available at the time the original SIP was submitted, was included in the SIP). On September 21, 2011, EPA published its proposal to partially approve and partially disapprove ND's SIP and intent to implement a FIP. EPA then held a public hearing and took public comments on the proposal. The comment period ended on November 21, 2011.

- **Issues:** EPA is proposing to disapprove of the Department's BART determinations for MRYS, Basin's Leland Olds Station, and GRE's Coal Creek Station. While GRE involves a typographical error that resulted in a flawed cost analysis, MRYS and Leland Olds involve similar issues to those raised in the Minnkota BACT case – specifically, whether SCR is technically feasible on cyclone-fired boilers burning ND lignite. EPA is also proposing to disapprove of the Department's determination that no further NO_x controls are needed at Basin's Antelope Valley Station under the reasonable progress portion of the regional haze program.

- **Current Status:** Due to a consent decree with WildEarth Guardians, EPA claims to be under strict deadlines to approve a SIP, FIP, or combination SIP/FIP. These deadlines are a moving target, as the parties have filed amendments to the consent decree to extend the deadlines – the most recent deadline is March 2nd.

- **Related Cases:** North Dakota sought to become involved in two cases between EPA and WildEarth Guardians. In both cases, WildEarth Guardians sued EPA to take action on ND's SIP and the parties sought to enter into consent decrees establishing deadlines by which EPA must take action on ND's SIP.

    - U.S. District Court for Colorado: In this case, EPA and WildEarth Guardians sought to enter into a consent decree. The court granted ND's Motion to Intervene in the case but denied its Motion to Dismiss and entered the consent decree without ND's input.

    - U.S. District Court for Northern California: In this case, EPA and WildEarth Guardians sought to amend their consent decree to extend the timeline by which EPA must act on ND's SIP. ND filed a Motion to Intervene and Motion to for Order to Show Cause. Both motions were denied – the court thought the issues would be more appropriately raised in a challenge to a SIP disapproval and FIP in the 8th Circuit.

II. MN Litigation

- In August 2007, MN's Next Generation Energy Act became effective. The goal of the Act is to reduce statewide greenhouse gases emissions, but emissions aren't confined to those produced in Minnesota. Included are emissions "from the generation of electricity imported from outside the state and consumed in Minnesota." Thus, ND facilities are affected by the Act. This Act is separate from Minn. Stat. § 216B.2422, which requires MPUC to "establish a range of environmental costs associated with each method of electricity generation." In 1997, after North Dakota intervened, MPUC determined that it would not apply these "externality values" to electricity emitted by utilities outside Minnesota.

- The ND Industrial Commission has participated in the following actions by the Minnesota Public Utilities Commission to implement the Act:

    - NDIC participated in a rulemaking to establish the estimate of the likely cost of future carbon dioxide regulation. MPUC rejected NDIC's argument that applying the estimate to electricity generation beyond Minnesota's borders violated the Commerce Clause of the United States Constitution.

    - NDIC also participated in MPUC's review of GRE's Resource Plan. An issue in the proceedings was the proper interpretation of Minn. Stat. §

216H.03 and whether that statute bars electricity produced at Great River's Spiritwood Station from the Minnesota market. GRE's proposed carbon offset plan pursuant to Minn. Stat. § 216H.03 was set to be heard by an administrative law judge and North Dakota had been granted participant status in the matter but the case was dismissed after the MN legislature amended the law to include an exemption benefitting Great River Energy's Spiritwood Station.

- On November 2, 2011, North Dakota filed a complaint challenging the Next Generation Energy Act in the United States District Court for the District of Minnesota. North Dakota argues that the act is unconstitutional and seeks declaratory and injunctive relief.

III. Amicus Briefs

- North Dakota has joined amicus briefs in the following cases involving energy generation:

    - *Rocky Mountain Farmers Union, et al. v. James Goldstene* (US District Court for the Eastern District of Calif.). The amicus brief (by Nebraska) supports the plaintiffs (ethanol farmers) who argue that California is regulating beyond its borders to the detriment of the Midwest ethanol industry. The Court struck down California's low carbon fuel standard as unconstitutional under the Dormant Commerce Clause.

    - *American Electric Power v. Connecticut* (U.S. Supreme Court). In this case, plaintiffs brought a federal nuisance claim against energy producers and sought injunctive relief capping their CO_2 emissions. The Court held that the CAA displaces any right to bring a federal nuisance claim for abatement of CO_2 emissions. North Dakota joined an amicus brief (by Indiana and joined by many other states) supporting AEP, which primarily argued that the claims were nonjusticiable political questions.

    - *North Carolina, ex rel. Cooper v. Tennessee Valley Authority* (4th Circuit Court of Appeals). In this case, NC brought a public nuisance claim against TVA for air pollution from its plants that it alleged was harming NC. On July 26, 2010, the Court held that the plants' emissions were not a public nuisance under Alabama and Tennessee law because the issuance of an air-quality permit bars a public nuisance action under the laws of those states. North Dakota joined an amicus brief supporting TVA. A Petition for a Writ of Certiorari was filed but was later dismissed.

    - *American Nurses Ass'n v. EPA* (D.D.C.). The Utility Air Regulatory Group (UARG) sought to extend the deadline of promulgation of EPA's Utility MACT rule to November 16, 2012. The deadline was set in a consent decree between plaintiff environmental groups and EPA. North Dakota joined an amicus brief (by Michigan and joined by twenty-three other

states and Guam) supporting UARG's motion. EPA issued its final rule on December 21, 2011, rendering further action in the case moot.

- In addition, North Dakota has joined amicus briefs involving other environmental issues:

    - *Friends of the Everglades v. EPA* (11th Cir.). This case challenges the legality of EPA's water transfer rule, which exempts water transfers from discharge permitting requirements. This case is important to North Dakota because the Devils Lake Outlet (and any future outlets) is a water transfer. North Dakota joined with Colorado, New Mexico and several other western states in an amicus brief supporting the exemption. Minnesota and Manitoba are among those challenging it. The case has been fully briefed; oral argument will be held sometime in 2012.

    - *Sackett v. EPA* (U.S. Supreme Court). In this case, the Sacketts were building a home on land EPA and the Army Corps considered to be wetlands. EPA issued a compliance order requiring the Sacketts to restore the wetlands. The Sacketts are seeking pre-enforcement judicial review of EPA's compliance order, while EPA argues the statute allows it to sue to enforce the order and impose penalties without an opportunity for pre-enforcement judicial review. The amicus brief, in which several other states joined, was written by the Alaska AG's Office. It argues that the Sacketts should have an opportunity for pre-enforcement judicial review. The issue is before the court.

IV. Comments to EPA Rulemaking/CDs

A. Proposed Utility MACT Rule

- ND joined NE's comments on EPA's proposed Utility MACT Rule, which will require complete retrofitting of coal and oil-fired power plants in three years. These comments argue that the proposed rule is contrary to the Clean Air Act and will impose substantial costs on both the power industry and the states, with minimal evidence of public health and environmental benefits. Several other states, including Alabama, Alaska, Florida, Indiana, Kentucky, Louisiana, Oklahoma, South Dakota, and South Carolina also signed-on. EPA issued the Utility MACT rule on December 21, 2011.

B. Proposed Cooling Water Intake Structure Rule

- ND joined NE's comments on EPA's proposed rule governing existing cooling water intake structures, which would impose a "one-size-fits-all" federal standard limiting state discretion on certain aspects of water intakes used to cool existing coal, gas and nuclear power plants and manufacturing and industrial facilities. These comments argue that EPA should avoid adopting a rigid, one-size-fits-all

rule regulating impingement (i.e., aquatic life trapped against filters) in cooling water intake structures ("CWIS") at power plants and manufacturing and industrial facilities, and that state environmental regulators have significant experience in making sound decisions that protect their aquatic ecosystems by taking site-specific factors into account and should retain that discretion. EPA is considering comments. Under a consent decree with an environmental group, EPA is obligated to issue a final rule by July 27, 2012.

C. Proposed CAFO Reporting Rule

- ND – along with several other states – joined NE's comments on EPA's proposed CAFO Reporting Rule, which would require all Concentrated Animal Feeding Operations (CAFOs), regardless of size, to report certain information to EPA. The states' primary argument is that EPA does not have jurisdiction over all CAFOs, just those that have discharged to waters of the US. EPA is considering comments. It plans to take final action on the rule by July 2012.

D. Proposed Regional Haze CD

- North Dakota, along with NE, OK, and several other states, filed comments objecting to EPA entering into a consent decree with several environmental groups to set deadlines by which EPA must propose FIPs or act on SIPs proposed. Although ND was not directly impacted by the CD (its deadlines were already set in other consent decrees), it objected to EPA ignoring the statutorily-mandated process for the promulgation of FIPs and the infringement on states' rights. EPA is considering comments.