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Utility Rule Faces Push For Delays, Compliance Extensions

EPA's pending final utility air toxics rule — currently undergoing White House review — faces a strong push by industry and others for delays to its implementation and extensions of its compliance deadlines. Utility officials are pushing the Obama administration to invoke special presidential "national security" authority to extend compliance timeframes for coal- and oil-fired power plants that will be subject to the rule. Conservative groups are criticizing what they say are major data flaws and other problems in the proposed rule, saying that the agency needs to scrap the imminent final version. ***Utility MACT*, Page 3**.

Western States Fear Major Workload Problems With Draft SO2 NAAQS Guide

Western states are warning EPA that its draft guidance for implementing the agency's 1-hour sulfur dioxide (SO2) national ambient air quality standard (NAAQS) will create major workload problems for states, likely increasing the number of areas found out of attainment with the limit and setting tight deadlines for states to submit plans on coming into attainment. States say that crafting new implementation plans for "unclassifiable" areas will require air quality modeling efforts that will both stretch resources and increase the number of areas ultimately found to exceed the standard. ***Modeling*, Page 7.**

White House Reviews EPA Plan Likely To Back Transport Rule As Haze Control

EPA has sent for White House review a proposed rule expected to allow states subject to the agency's power plant emissions trading rule to rely on trading as an adequate control measure for meeting the agency's regional haze program, a move sought by industry but criticized by activists for fear the trading rule might be insufficient to address ongoing haze problems. The rule may allow 27 states to use participation in the Cross-State Air Pollution Rule (CSAPR) to satisfy best available retrofit technology haze requirements, as the Bush EPA did with CSAPR's predecessor, the Clean Air Interstate Rule. ***Regional Haze*, Page 10.**

Suit Marks Test Of EPA's Use Of 'Aggregation' To Permit Oil, Gas Facilities

A pending industry suit is testing EPA's controversial policy for when regulators must "aggregate" emissions from oil and gas operations to determine whether they are subject to strict "major" source permits. Activists, though, are hoping the court backs the agency's decision to strictly regulate a gas field in Michigan, setting a precedent for other permits. Summit Petroleum Corp. has filed suit challenging EPA's determination that the company's Michigan oil field had to aggregate operations for permitting purposes. ***Aggregation*, Page 11.**

OTC Eyes Gas Sector Air Rule

Northeast and Mid-Atlantic state officials in the Ozone Transport Commission (OTC) are slated to meet later this week to debate a revised model rule for cutting ozone-forming emissions from natural gas compressors that would delay the rule's implementation from 2015 to 2016, in response to industry concerns that an earlier draft of the plan was infeasible to meet by the 2015 target. **Page 14.**

Activists Consider Boiler Remand

Environmentalists say they are open to accept an EPA proposal that a federal district court remand — but not vacate — the agency's action to delay implementation of its controversial boiler and incinerator emissions rules while it revises them but only if the court finds the ongoing delay is lawful and the agency revises the rules by April 2012. The activists' suit is complicated as the parties have argued over whether EPA's action was a "rule" subject to notice-and-comment requirements, what court has jurisdiction to review it and what the relevant legal authority is. **Page 16.**

States Call For NACAA Changes

Officials from 22 states are urging the National Association of Clean Air Agencies (NACAA) to make major changes to its process for crafting policy positions on EPA rules, saying the group must strengthen the process for how it reaches consensus on policy positions — steps Ohio says are vital to drop its plan to leave NACAA. **Page 19.**

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Background Documents For This Issue

Subscribers to InsideEPA.com have access to hundreds of documents, as well as a searchable archive of back issues of *Clean Air Report*. The following are some of the documents available from this issue of *Clean Air Report*. For a full list of documents, go to the latest issue of *Clean Air Report* on InsideEPA.com. For more information about InsideEPA.com, call 1-800-424-9068.

Documents available from this issue of *Clean Air Report*:

- 'Clean' Utility Criticizes EPA Delay Of Transport Rule 'Assurance' Provision (2380687)
- Activists Seek Conditions For Remand Without Vacatur Of EPA Boiler Stay (2381577)
- Appeals Court Finds Against Activists Over Transportation Hot Spots Rule (2380621)
- California Advances Disputed Risk Assessment, Limits On Carpet Chemical (2380980)
- Clean Air Council Asks EPA To Intervene In Draft Pennsylvania Aggregation Guidance (2381277)
- Conservative Groups Criticize Power Plant 'Safety Valve' In Bid For Delay (2381134)
- Environmentalists File Statement Of Basis In Biogenic Deferral Suit (2380449)
- Environmentalists Sue EPA For Exemptions In Avenal Air Permit (2381235)
- Environmentalists Sue EPA Over Arctic Drilling Discharge Permit (2380601)
- Environmentalists Sue EPA Over Decision To Retain Carbon Monoxide NAAQS (2381114)
- Environmentalists Win Right To Intervene In Texas Suit Over EPA GHG Rule (2380613)
- EPA Appeals Michigan NSR Ruling To 6th Circuit (2380458)
- EPA Fights Lawsuit Over Method For Designating PM Nonattainment Areas (2381552)
- EPA Grants New Jersey Petition Seeking Emissions Cuts At Pennsylvania Utility (2380767)
- EPA Proposal Partially Approves Oklahoma Pollution Plan (2381131)
- EPA Region VII Objects To Kansas Characterization Of Agency Position On Sunflower Permit (2381451)
- EPA, Industry Spar In Suit Over Legality Of 1-Hour NO2 NAAQS (2380844)
- EPA, Industry Spar Over Legality of E15 Fuel Waiver In Final Legal Briefs (2380454)
- Ethanol Groups Defend EPA Renewable Fuel Standard From Legal Attacks (2381000)
- Faulting EPA Utility Air Toxics Rule Data, Inhofe Threatens IG Investigation (2380926)
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- Oil, Gas Aggregation Test Case Pending Before 6th Circuit (2380023)
- PLF Challenges EPA GHG Heavy-Duty Truck Rule (2381576)
- States Urge Major Changes At Key Air Group For Consensus On EPA Rules (2380274)
- Western States Fear Major Workload Problems With Draft SO2 NAAQS Guide (2381557)

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Conservatives Fault Utility MACT 'Safety Valve' Plan, Step Up Bid For Delay

Conservative groups are criticizing EPA for considering grid operators' push for a "safety valve" compliance option to prevent adverse electric grid impacts from its utility air toxics rule, saying the plan has major flaws and EPA's consideration of it shows the rule could have reliability impacts and should be scrapped and re-proposed.

In a Nov. 2 renewed petition to EPA, the conservative groups ask the agency to rescind its proposed maximum achievable control technology (MACT) rule based on "newly available evidence showing that EPA has tacitly acknowledged that utility MACT threatens to significantly impair electric reliability and is contemplating a flawed reliability 'safety valve' mechanism, while denying the public its legal right to participate in this process." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381134*)

The groups cite a proposal that PJM Interconnection and other regional transmission operators (RTOs) recently submitted to EPA's regulatory docket, outlining the safety valve option to protect grid reliability.

As first reported by *Inside EPA*, the proposal could allow some companies that plan to shut down to continue operating beyond the rule's compliance deadlines without having to invest in pollution controls to meet the rule, if EPA determines the plants are vital to ensuring ongoing grid reliability. Commissioners with the Federal Energy Regulatory Commission (FERC) have expressed general support for the concept of a safety valve.

A safety valve could be one way the agency might address claims that some utilities will shutter rather than comply with the costs of meeting its strict air toxics rule, with the lost generation creating adverse impacts on the power grid. EPA is slated to finalize the rule on Dec. 16, under a recently revised court-approved deadline.

EPA has declined to comment on its consideration of the safety valve proposal, but the conservative groups in their letter cite PJM's draft text — and *Inside EPA*'s coverage of the plan — to argue two main points: the plan has major flaws, and EPA's consideration of it is a concession by the agency that the MACT will harm reliability.

The groups argue that "even a preliminary review" of the safety valve proposal proves it to be "insufficient." Among various arguments, the groups say that the provision would be not be binding on EPA or any other power and instead would be "nothing more than a statement about how EPA may exercise its enforcement discretion."

"As such, it would not block the inevitable citizen suits, and it is possible that EPA could actually bring suit for injunctive relief against a power plant that avails itself of the 'safety valve' process. As such, no regulated entity could reasonably rely on the RTOs' 'safety valve' proposal," according to the renewed petition. It follows a Sept. 27 petition to EPA filed by a similar collection of groups that asked the agency to pull the rule, revise and re-propose it.

The renewed Nov. 3 petition is signed by the Institute for Liberty, Americans for Prosperity, the Center for the Rule of Law, the Freedom Through Justice Foundation. The National Black Chamber of Commerce also signed onto the Nov. 3 petition, but did not sign onto the previous petition.

The conservative groups' petition says that the draft regulatory text for a safety valve and other materials inserted in the MACT regulatory docket "demonstrate that EPA has engaged in discussions with various individuals and entities regarding the utility MACT rule's expected adverse impact on electric reliability and possible legal mechanisms for alleviating these effects. EPA's actions tacitly acknowledge that the utility MACT rule, as proposed, threatens to impair regional and local electric reliability and must be changed in ways that differ fundamentally from the proposal that was published in the *Federal Register* in order to mitigate the threat to electric reliability."

The groups say EPA's deadline to issue the rule — Dec. 16 — is inadequate to fully assess all reliability concerns with the rulemaking, a claim made by the GOP and other critics of the proposed version of the rule. They urge the agency to abandon plans to issue a final rule, and put the rule on indefinite hold while undertaking a major assessment of the rule's potential reliability impacts. "Simply put, unless and until EPA is fully apprised of utility MACT's reliability consequences, any attempt to address them will be arbitrary and capricious," the groups argue.

In addition to pushing the agency to try and drop the Dec. 16 consent decree deadline for issuing a final rule, the conservative groups outline several other criticisms of the proposed safety valve language.

The conservative groups claim that the plan inaccurately assumes that the compliance date for the utility MACT should not include a two-year compliance extension the president can authorize.

They also argue that the plan is "unduly limited" as it could require some units to unnecessarily close down, because it would apply only to units that a utility is willing to deactivate to win the use of the safety valve rather than control those units with emissions control technology or re-powering with a lower-emitting energy source.

According to the group's petition, the RTOs' safety valve plan is also "unduly vague and fails to ensure that they, or other entities with responsibility for ensuring electric reliability, are able to do so."

The groups claim that the plan does not address whether the safety valve would be available to address local reliability programs, as it only discusses reliability impacts on the bulk electric system.

The groups also fault the safety valve plan for imposing "insufficient limits" on EPA's discretion. The groups say that FERC, RTOs or another expert entity should have the final authority to make electric reliability decisions. Although

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some parts of the plan suggest the RTOs would have large control over which facilities are eligible for a compliance extension and that EPA must give deference to the RTOs, "deference is not a blank check." The groups warn that the agency would retain discretion to refuse or limit extensions in at least some circumstances.

Finally, the safety valve plan also "flunks any cost-benefit analysis," according to the groups. It does not apply to units that may eventually be controlled rather than shutting down. As a result, utilities will have to either close economically viable plants to take advantage of the safety valve, or "arrange other means of meeting demand, at excessive costs. In either case, ratepayers will ultimately bear the expense."

The groups warn that EPA would violate Clean Air Act and Administrative Procedure Act requirements if it fails to first seek comment on inclusion of a safety valve, because the plan is not part of the proposal.

The petition says, "In sum, the RTOs' proposed approach to addressing electric reliability appears neither to be workable nor effective. These failings emphasize the need for EPA to seek more time, re-propose utility MACT, and allow for additional public comment." — *Bobby McMahon*

Utilities Press White House For Special Presidential Delay For Utility MACT

Some electric utility officials are urging the Obama administration to invoke special presidential authority in the Clean Air Act to extend compliance timeframes for its pending air toxics rule for electric generating units rather than pursuing facility specific consent decrees that officials are said to be weighing.

But other industry officials and environmentalists say the approach — which requires a showing that it is in the "national security interest" — may be difficult to pursue since EPA has long said the technology to comply is readily available.

Industry officials from the Edison Electric Institute, the National Rural Electric Cooperative Association and investor-owned utility Dominion delivered the call at an Oct. 31 White House meeting. Federal officials attending the meeting included White House regulatory review chief Cass Sunstein, along with officials from the Office of Management & Budget (OMB) and other White House offices and EPA, according to sources familiar with the meeting.

EPA sent a portion of the pending maximum achievable control technology (MACT) standards for coal- and oil-fired power plants to OMB on Oct. 24, with the full rule expected to arrive in the coming days. The agency is slated to finalize the rule on Dec. 16, under a recently revised court-approved deadline.

Potentially hampering industry prospects for a presidential delay is the fact that EPA is weighing a "safety valve" that would delay compliance for a plant in the event the rule would harm electricity reliability. But conservative groups are criticizing EPA for considering the "safety valve" option, saying the plan has major flaws and should be scrapped.

A source with knowledge of the White House meeting said the central topic of discussion was the timeframe for compliance with the MACT rule, noting that the Clean Air Act allows three years for compliance and "everybody recognizes that we're not going to do all the retrofits necessary in three years."

In that vein, the source said that utility officials expressed a preference for the Obama administration to issue an executive order under section 112(i)(4) of the Clean Air Act to extend the compliance deadlines, rather than have EPA pursue consent decrees with individual units. "We generally thought that the executive order approach would create a more clean pathway," the source says.

Under that section of the air law, "The President may exempt any stationary source from compliance with any standard or limitation under this section for a period of not more than 2 years if the President determines that the technology to implement such standard is not available and that it is in the national security interests of the United States to do so," with additional two year extensions possible.

The source with knowledge of the meeting says that the presidential extension would be favorable to the consent decrees because the latter process would be "very messy," and that pursuing a consent decree in court would open up the possibility that third parties could oppose and possibly stymie the deal.

The source also says that while the utility officials are supporting the presidential exemption, the details on how such an extension would be structured are critical, saying, "the more simple we can make this process, the better it is going to be for everyone involved." The source adds that, if such a process is too cumbersome, then the problem such a delay is trying to solve is not alleviated.

EEI in its Aug. 3 comments on the proposed rule expressed support for the provision being used in certain circumstances, including when "[t]he utility is continuing to take diligent, good-faith measures to achieve compliance," "the needed technology is not available" and "the appropriate [regional transmission operator (RTO)], [the North American Electric Reliability Corporation] or appropriate state commission certifies that an extension of time is necessary to address reliability issues or is consistent with the applicable state-approved integrated resource plan (or similar state process), which may take into account the potential reliability and economic impacts of compliance decisions."

Environmentalists, "clean" utility company Exelon, and others have expressed reservations about the use of the

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presidential exemption. Environmentalists in their comments on the proposed rule said that EPA has "confirmed" that the control technologies for meeting the utility MACT have long been available, and that the extensions would not be relevant to "national security interests."

Exelon in its comments said that the three-year compliance deadline can be met, saying as well that it "supports the proposition that the Presidential exemption could apply in truly extraordinary circumstances."

Congressional Action

Faulting EPA Utility Air Toxics Rule Data, Inhofe Threatens IG Investigation

Sen. James Inhofe (R-OK) is threatening to request an EPA Inspector General (IG) investigation into EPA's lack of peer review for data underpinning its pending utility air toxics rule and questioning whether EPA's Dec. 16 legal deadline for the rule gives the agency adequate time to address its advisers' recommendations for revising the data.

Inhofe, ranking member on the Environment & Public Works Committee, sent an Oct. 31 letter to EPA Administrator Lisa Jackson saying the agency's lack of peer review for its utility air toxics rule undermines it. In particular, the senator attacks a risk assessment EPA conducted to inform its finding that it is "appropriate and necessary" to issue a maximum achievable control technology (MACT) standard for power plants. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380926*)

The senator's concerns echo to some extent criticisms by the Utility Air Regulatory Group and others who warn that EPA's proposed version of the utility MACT released March 16 contains major data flaws. Elements within industry want EPA to pull the rule and delay its issuance until late 2012, a suggestion that some House Republicans appeared to back at a Nov. 1 House Oversight & Government Reform Committee hearing on the upcoming air toxics rule.

Inhofe in his letter does not explicitly ask EPA to delay the rule, though he does ask for a reply to several questions over the data by Nov. 15 — one month before the deadline for issuing the rule. He says the agency is "largely non-responsive to requests for information" and warns he will take "all means necessary" to get answers to his utility MACT questions, including requesting an EPA IG investigation into the matter if EPA does not respond.

The senator references a recently released IG report that found EPA failed to meet all White House requirements for peer review of its finding that greenhouse gases endanger health and welfare. The report says it appears the agency has "cut corners" on the utility MACT review, in addition to the climate endangerment finding review.

Among the senator's questions are whether the agency has sufficient time ahead of its Dec. 16 consent decree deadline to address concerns over the data raised by the agency's Science Advisory Board (SAB) and to ensure that the data meet EPA's peer review guidelines and the Data Quality Act (DQA), which requires agencies to ensure that scientific and other data used to develop policies are objective, reproducible and peer-reviewed.

Inhofe faults EPA's process for review of its risk assessment of mercury as a hazardous air pollutant (HAP) for the "appropriate and necessary" finding, a key legal and scientific justification for proceeding with the MACT, and a related document on case studies for non-mercury HAP emissions from coal- and oil-fired power plants. EPA's argument is that the data on power plants' HAP emissions meet Clean Air Act requirements for issuing a MACT.

EPA sent the appropriate and necessary finding for White House Office of Management and Budget (OMB) review Oct. 24 but is yet to send the final MACT standard regulatory text for OMB review — a vital step before EPA can release it.

Even though the finding is under White House review, Inhofe in the letter criticizes the agency's peer review of the mercury risk assessment and HAP case studies as "inadequate, and even non-existent."

According to the letter, "EPA's failure to properly accredit the risk analysis underlying the Utility MACT, at best, runs afoul of both OMB and EPA requirements under the DQA. In fact, EPA's improper 'peer review' of these critical studies threatens to undermine the basis on which EPA claims that Utility MACT regulations are 'necessary and appropriate' under the Clean Air Act. Without further scientific backing, EPA apparently expects the courts to simply take the Agency's word that the regulations are 'necessary and appropriate,'" an apparent reference to expected litigation from industry and other utility MACT critics once the agency releases the final rule.

An SAB panel that reviewed EPA's assessment of the risk of utility mercury emissions from power plants urged the agency to bolster substantial aspects of its document describing the agency's risk assessment of power plant mercury emissions, while maintaining its support for EPA's overall approach as "scientifically credible."

In its review, SAB called for more detailed data among its 82 total recommendations. Inhofe says SAB found "important elements and methods were 'missing or poorly explained,'" and that "the SAB Panel qualified its support of the mercury risk assessment's design on 'our recommendations [being] fully considered in the revision of the assessment.'"

But Inhofe notes that "EPA has not committed to incorporating fully peer review recommendations in support

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documentation before finalizing the Utility MACT" and that — despite moving the deadline for finalizing the rule from Nov. 16 to Dec. 16 — EPA has yet to indicate if it will include the panel's suggestions in the rule.

"This truncated 'peer review' predicates the mercury risk assessment's scientific validity on EPA's capacity to rewrite the Assessment to include all 82 of the SAB panel's recommendations in mere weeks," Inhofe wrote. The senator also says SAB needs to review a revised mercury risk study that implements the recommendations.

"Assuming EPA accomplishes what is a herculean task for any bureaucracy, the results cannot be substantiated unless the SAB panel has an opportunity to review the revised mercury risk assessment. To date, it appears EPA has not done so, nor intends to do so. According to EPA's own policy, then, the Agency's procedural failures here nullify the mercury risk assessment's peer review," according to Inhofe's letter to Jackson.

Inhofe also says EPA's case studies of non-mercury HAPs have not been subject to peer review, which he calls "troubling" given the "fundamental flaws" critics have raised over the MACT data. "These problems combine with the absence of peer review to render the Non-Mercury Case Studies devoid of any scientific credibility," he says.

Inhofe also criticizes the agency for failing to peer review a feasibility assessment included in the rule which examines compliance options that power companies would use to retrofit their facilities.

In particular, Inhofe questions "the highly controversial presumption that dry sorbent injection (DSI) technology can be widely deployed as a pollution control technology" to comply with the rule.

Assumptions by EPA and others that DSI will be used by many plants to comply with the rule's acid gas limits instead of a scrubber have drawn criticism from many in the power sector.

Inhofe also sent a Nov. 7 letter to Jackson and OMB regulatory review chief Cass Sunstein outlining more specific concerns about the agency's DSI assumptions in the utility MACT proposal.

The Edison Electric Institute in its comments on the proposed utility MACT said that the technology "is not a viable option for all coal-based units" and that it "could have limited application as a compliance option due to operational impacts and cost considerations that EPA has not taken into consideration."

In his letter, Inhofe says that a peer review of the feasibility assessment "would have almost certainly taken issue with the scientific foundation upon which EPA bases its DSI presumptions."

Inhofe says that a swift EPA response is necessary "given the potential the utility MACT rule has to cause blackouts and significant economic hardship." Industry officials, Republicans and others have warned that the rule will prove so expensive to comply with that some plants will shut down, threatening electric grid reliability.

In a related development, Republicans on the House Oversight & Government Reform Committee are questioning why EPA is not taking longer than one extra month to review the near one million comments it received on the MACT rule.

EPA cited the massive number of comments as the main reason why it secured a deal with environmentalists to extend the consent decree deadline for issuing the final rule by a month.

At the hearing, Rep. Trey Gowdy (R-SC) asked EPA Deputy Administrator Bob Perciasepe "what's so cosmic about December 2011." In reference to the 21 years since the passage of the Clean Air Act Amendments of 1990 — which first required development of a utility MACT to cut HAPs — "we waited 21 years and we have almost a million comments. Wouldn't you think we ought to wait 22 years so we can fully digest all one million comments," he said.

In response, Perciasepe said that the vast majority of the comments are in favor of the rule, and that only about 22,000 are "unique." He also said that the agency has been working to consider all the comments, saying "we have read every one of those comments, and we'll be replying to every one of those comments" in the response to comments document that accompanies the final rule. — *Bobby McMahon*

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Western States Fear Major Workload Problems With Draft SO2 NAAQS Guide

Western states are warning EPA that its draft guidance for implementing the agency's 1-hour sulfur dioxide (SO2) air standard will create major workload problems for states, likely increasing the number of areas found out of attainment with the limit and setting tight deadlines for states to submit plans on coming into attainment.

At a Nov. 1 meeting of the Western States Air Resources Council (WESTAR), Wyoming air official Tina Anderson gave a presentation warning that the agency's plans are "overly ambitious," requiring submission of state air quality plans for meeting the standard by mid-2013 — even though the rule will create many first-time SO2 nonattainment areas that will have to do extensive modeling and other work to craft their plans for reaching attainment.

EPA in September issued draft guidance for how states should perform modeling and craft state implementation plans (SIPs) outlining how they intend to meet its stricter SO2 national ambient air quality standard (NAAQS). EPA in June 2010 tightened the standard to 75 parts per billion (ppb), using a new 1-hour averaging time. Previously EPA used an annual standard of 30 ppb and a 24-hour standard of 140 ppb.

Since issuing the standard, EPA has acknowledged that a lack of air quality monitors in rural areas means that the status of many areas remains unclear. Instead, EPA is designating areas "unclassifiable" while a new implementation approach based mainly on air quality modeling — rather than monitoring — is put in place.

Even with the uncertainties over states' attainment status, EPA's guidance requires that both unclassifiable and attainment areas write SIPs to either bring them into attainment or prevent them falling into nonattainment, with extensive modeling required. These SIPs previously did not require such modeling.

Traditionally states are presumed in attainment and use modeling to determine where to place monitors to detect potential NAAQS violations, with possible changes in attainment status based on that data. Under the SO2 standard and guidance, a Western state source says, states will have to for the first time "prove a negative" because they will have to draft SIPs for unclassifiable areas immediately.

The SIPs for unclassifiable areas will seek to ensure their compliance with the NAAQS, using conservative modeling that will likely show higher pollutant levels than monitoring would, the source says.

EPA signaled the switch to a modeling-led approach in a separate March 24 guidance document, then followed up with a draft SO2 implementation guidance Sept. 23 (*Clean Air Report*, May 10).

The agency's approach puts pressure on states to prove they do not have a nonattainment problem in a given area, greatly adding to their workload and the likelihood that more nonattainment areas will emerge than would have been the case under the previous approach, the source says. "We are concerned we are never going to be able to determine through this approach whether we are [in] attainment or nonattainment," the source says. Under the Clean Air Act, nonattainment areas have to impose more stringent pollution controls on industry.

The source argues that there could be many theoretical nonattainment areas identified as a result of the EPA-mandated modeling, which assumes worst-case scenarios for SO2 emissions from stationary sources such as power plants, but that many of these sources will not be running at full capacity in the least favorable weather conditions as the model assumes, and hence many areas may needlessly be labeled nonattainment.

EPA shifted its requirements from monitoring to mainly modeling when it became clear that a stricter standard with a short averaging time would require many more monitors than are available, especially in rural areas of the country that have previously had no need of them. Given the poor economy and dwindling state and federal budgets, EPA is trying to minimize monitoring costs for states by shifting toward more modeling.

The new approach, however, has angered some states who argue that EPA's conservative modeling assumptions could lead to areas being classified in nonattainment for the first time — with the nonattainment designations bringing with them the requirement to impose strict, potentially costly, pollution limits on industry.

These states are suing EPA to block the NAAQS in the case *Montana Sulphur & Chemical Company v. EPA*, in which they criticize EPA's AERMOD emissions model as flawed. They claim the model uses unrealistically conservative assumptions about emissions rates and weather, producing excessively high modeled emissions (*Clean Air Report*, Sept. 15).

In the presentation at its fall business meeting Nov. 1, Anderson from WESTAR's planning committee outlined the misgivings of its member states with EPA's modeling approach for the SO2 NAAQS.

The presentation notes EPA's "overly ambitious" implementation strategy, in terms of both timing and scope, as defined by the final NAAQS and the implementation guide. EPA will require both "infrastructure" and "maintenance" SIPs from states by June 2013. Infrastructure SIPs include the overarching structure of a state's air quality program. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381557*)

"States with large SO2 sources may have many new nonattainment areas that aren't violating at the monitor. AERMOD will show violations in areas with variable terrain," the presentation says. Anderson's presentation says it is

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"Not clear who will do all this modeling."

EPA recently extended the comment period on the SO2 guidance through Dec. 2, and WESTAR's presentation says the group will likely ask in its comments for a "more balanced hybrid approach" that would rely more on monitoring, and less on modeling. WESTAR's planning committee recommends asking EPA to keep attainment and nonattainment schedules and requirements separate. EPA extended the comment deadline for the draft guidance by 30 days following requests from states and others, who said they needed more time to parse the complex document.

At the WESTAR meeting, Michael Ling of EPA's Office of Air Quality Planning and Standards said that EPA expects unclassifiable areas to attain the NAAQS by Aug. 2017, using air quality dispersion modeling to demonstrate compliance. Ling defends EPA's use of a 100 tons per year threshold to determine which SO2 source require modeling, which he says will narrow the number of sources to be modeled, while capturing 99 percent of SO2 emissions in modeling.

Ling says that EPA is also working on a separate rule on key issues from the SO2 guidance document, which would: codify the technical approach for determining the compliance with the 1-hour SO2 NAAQS; establish compliance deadlines for attainment and maintenance SIPs; establish regulations for the elements that should be included in these SIPs; and establish criteria for how areas designated as unclassifiable can be redesignated to attainment.

Ling further says that states' participation in other EPA programs, such as the Cross-State Air Pollution Rule cap-and-trade program for power plants and a boiler maximum achievable control technology air toxic rule — stalled while EPA reconsiders it — are "expected to result in the installation of controls at many of the largest SO2 sources to meet emissions limits that will help to ensure attainment and maintenance of the 1-hour SO2 NAAQS."

States will be allowed to include these controls into their SIPs for SO2, but "states will need to adopt emissions limits to be consistent with the form of the 1-hour SO2 NAAQS," Ling said in his presentation, adding that EPA will respond to comments and issue a final guidance as soon as possible afterward. — *Stuart Parker*

Industry Cites EPA Rulemaking To Bolster Suit Challenging SO2 NAAQS

A metals mining company is citing EPA's plans to develop a new rule for implementing its stricter sulfur dioxide (SO2) national ambient air quality standard (NAAQS) to bolster the company's suit challenging the standard, saying the agency's plan to launch a new rulemaking "tacitly" acknowledges that the standard is unlawful.

ASARCO, a metals mining, smelting and refining company that is suing EPA over the standard, says in an Oct. 25 letter to the U.S. Court of Appeals for the District of Columbia Circuit that the agency's plan to launch a formal rulemaking that will detail how to conduct controversial modeling to demonstrate attainment with the standard is an acknowledgment from EPA that the modeling requirement in the standard is unlawful. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380459*)

EPA in June 2010 issued a 1-hour 75 parts per billion (ppb) NAAQS, scrapping a prior 24-hour limit of 140 ppb and an annual standard of 30 ppb. The NAAQS has prompted litigation over the stringency of EPA's standard and the agency's decision requiring states, for the first time, to use both air quality computer modeling and monitoring data to demonstrate attainment. States that only have data in one category are deemed to be "unclassifiable" and must still prepare state implementation plans (SIPs).

Previously, EPA had only required monitoring data to demonstrate attainment.

But the requirement has drawn a legal challenge, *National Environmental Development Association's (NEDA) Clean Air Project v. EPA*, from state and industry opponents, who say the science does not warrant the stricter standard EPA issued. And, they charge, EPA changed modeling mandates not included in the proposed version of the standard.

ASARCO and several other litigants in their Sept. 13 opening brief in the suit argue that the agency did not include the mix of monitoring and modeling in the proposed version of the SO2 revision. As a result, the groups claim the final rule is invalid because it violated the Clean Air Act's notice-and-comment rulemaking requirements.

"EPA's requiring the use of an uncommented-upon implementation approach could dramatically change the stringency of the new standard," petitioners argued in the brief, particularly if the agency uses its emissions model known as AERMOD, which the groups say may overestimate SO2 levels. States and organizations that signed on to the brief in addition to ASARCO are Texas, North Dakota, Louisiana and, the Utility Air Regulatory Group.

Modeling that overestimates emissions would be a concern for states and industry as higher emissions make nonattainment more likely, sources say. "Because EPA never proposed its AERMOD-based implementation approach for public comment, a complete record does not exist regarding how much AERMOD will over-predict SO2 concentrations when one operates that model as directed by EPA," according to the brief.

The groups claim that the concerns about over-prediction are mentioned in EPA's response to comments issued with the final rule, and by data included in an administrative petition filed with EPA seeking reconsideration of the SO2 standard.

NEDA's Clean Air Project, a trade group, and others filed a petition for reconsideration with EPA asking it to revise

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the standard last year. EPA denied the petitions Jan. 26, prompting the groups to also file suit against that decision. Challenges against the standard and the petition for reconsideration denial have since been consolidated.

In recent preliminary guidance for implementing the standard, EPA indicates that the agency plans to launch a new rulemaking to clarify how states and others should conduct the modeling they are seeking.

The agency is slated to publish a notice in the *Federal Register* Oct. 28 extending the comment period on the guide by 30 days to Dec. 2.

ASARCO's lawyers say that EPA's plan to launch the new rulemaking, as detailed in the Sept. 22 draft guidance, indicates an acknowledgment from EPA of flaws in its SO2 NAAQS.

"The Draft Guidance supports Petitioners' position that EPA's decision in the rule under review to implement the revised SO2 NAAQS through air quality dispersion modeling without notice and comment rulemaking was unlawful by tacitly acknowledging that this decision implicates critical issues on which public comment is necessary and appropriate," the lawyers say.

ASARCO cites language in the guidance in which EPA says it is planning a rule to address some 1-hour SO2 NAAQS implementation "program elements." The program elements, according to the guidance, are: establishing that compliance with the standard is appropriately based on air quality modeling and monitoring, establishing modeling requirements for determining compliance, setting the minimum scope of analysis required to demonstrate attainment and maintenance of the standard, creating a "reasonable time period" for sources to comply with new SO2 limits states create for meeting the NAAQS, setting an attainment date for areas deemed "unclassifiable" for attainment purposes, and to establish criteria for redesignating areas from "unclassifiable" to "attainment." — *Anthony Lacey*

EPA Fights Lawsuit Over Method For Designating PM Nonattainment Areas

EPA in a new legal brief is defending its method for designating areas out of attainment with its fine particulate matter (PM2.5) national ambient air quality standard, fighting claims by Utah counties and industry that the agency erred by applying a different method within the state compared to its designation approach in other states.

The lawsuit, *ATK Launch Systems, Inc. v. EPA*, is an important legal test of the agency's nine-factor approach for how to consider outlying "exurban" sites near major metropolitan areas when making PM attainment designations. Nonattainment areas face tighter emission limits and potentially expensive pollution controls on industry in those areas, providing outlying areas with strong incentive to avoid inclusion in metropolitan nonattainment zones.

In its nonattainment designations for the 2006 24-hour PM2.5 standard, EPA found for the first time that parts of outlying counties near Salt Lake City contribute to air quality problems in the metropolitan area, and should be included in one enlarged nonattainment area. Utah's Box Elder and Tooele counties, along with defense firm ATK Launch Systems, sued and claimed EPA used a different method compared to other areas of the United States.

EPA fought successfully to move the consolidated litigation from the U.S. Court of Appeals for the 10th Circuit to the DC Circuit, arguing against petitioners' position that the case concerns local questions because it focuses on the designation of the two counties. The DC Circuit found "unpersuasive" the petitioners' claims that because EPA makes designations on a case-by-case basis, that effectively transforms its PM designation rule to a local issue.

EPA in its Nov. 1 final response brief in the DC Circuit suit *ATK Launch Systems* focuses on the unique nature of the Salt Lake City area to justify its decision to include parts of nearby Tooele and Box Elder counties in the city's nonattainment area — and rejects comparisons to how it made designations for other areas.

EPA says that the petitioners' attempts to draw parallels with Hartford, CT, and Warren, NJ, which escaped inclusion in nearby nonattainment areas are mistaken, given major differences in weather and terrain between Utah and the East Coast. "Most notably, Box Elder and Tooele are affected by mountainous topography in combination with prolonged wintertime temperature inversions absent from Hartford or Warren," according to the agency's brief. *The brief is available on InsideEPA.com.* *See page 2 for details.* (*Doc ID: 2381552*)

The agency argues that it correctly applied a nine-factor analysis the agency uses to determine which outlying areas to include in a nonattainment area. The factors EPA analyzes for PM designations are: emissions data, air quality data, population density and degree of urbanization, traffic and commuting patterns, expected urban growth, weather, topography and geography, jurisdictional boundaries, and degree of existing emissions controls.

"Petitioners fail to show that EPA applied different standards to Box Elder and Tooele than it did to other counties in the Salt Lake City area or Hartford and Warren Counties in the east," EPA says.

The agency says that other complaints over its data and analysis from petitioners should be dismissed by the court because under legal precedent, simply disagreeing with an agency's technical analysis does not rise the level of "arbitrary and capricious" behavior that would justify a court remanding or vacating a rule.

EPA also stresses that petitioners' reliance on comparisons of areas' scores under a measure known as the contributing emissions score (CES) are useless, since the metric, which considers emissions data, meteorological data and air

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quality monitoring information, provides a relative ranking within a given region. "[A]ny comparison to CES scores for an entirely separate metropolitan area is meaningless," EPA says, adding that CES is only one element the agency considers in deciding whether to include an area in a nonattainment zone.

Industry and county petitioners in their Sept. 16 brief argued that, "Hartford and Warren Counties are similarly situated to Box Elder and Tooele Counties in that they are all satellite counties outside of core urban nonattainment areas. . . . When one compares the data EPA analyzed for each of the nine factors, it becomes evident that EPA applied a different, and materially lower, standard to Box Elder and Tooele Counties in finding that they contributed to the urban nonattainment areas, while applying a materially higher standard in finding that Hartford and Warren Counties did not contribute to the urban nonattainment areas."

Petitioners further argued that EPA misinterpreted its own wind data, saying "data used in the final rule uniformly show that, during periods of high PM 2.5 concentrations in Weber County (the county immediately south of Box Elder County), the wind flow is from the southeast — i.e., that emissions from Box Elder County are *not* transported to nonattainment areas during periods when the standard is exceeded."

EPA in its new brief counters that petitioners face a high legal bar to ask the court to overrule the agency's scientific judgment. EPA defends its weather data, and says that during frequent atmospheric inversions, which trap emissions in mountain valleys, the stagnant air mass and light winds cause emissions to slosh back-and-forth within the closed airshed, in a northwesterly-southeasterly direction." Oral arguments in the case are set for Jan. 24.

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Regional Haze

OMB Reviews EPA Plan Expected To Back Transport Rule As Haze Control

EPA has sent for White House review a proposed rule expected to allow states subject to the agency's power plant emissions trading rule to rely on trading as an adequate control measure for meeting the agency's regional haze program, a move sought by industry but criticized by activists for fear the trading rule might be insufficient to address ongoing haze problems.

The agency sent the rule on best available retrofit technology (BART) determinations for the haze program to the Office of Management and Budget (OMB) for review Nov. 2. The haze program requires states to craft plans for improving air quality in national parks and wilderness areas. States impose BART as the level of emission control required on industrial sources that contribute to haze, and have wide discretion on what qualifies as BART.

Even with that discretion, industry has been pushing for EPA to declare that its Cross-State Air Pollution Rule (CSAPR) to cut emissions from power plants in 27 states is equivalent to BART for haze. By doing so, EPA could find that any state subject to CSAPR would automatically be deemed to meet the haze BART requirements.

Industry supports this option because it could ease pressure on state regulators to identify BART for utilities, and help utilities avoid additional emissions controls beyond those necessary to comply with CSAPR. The trading rule requires power plants in covered states to reduce their nitrogen oxides (NOx) and sulfur dioxide (SO2) emissions.

CSAPR replaces the Bush-era Clean Air Interstate Rule (CAIR), remanded to EPA in 2008 by a federal appeals court for failing to tie emissions reductions in one state to specific air quality improvements in another.

The Clean Air Act's "good neighbor" provisions require states to reduced their emissions that either significantly contribute to violations of EPA national ambient air quality standards (NAAQS) in downwind states, or which interfere with the maintenance of NAAQS attainment in other states. CSAPR aims to address the good neighbor provision by cutting SO2 that leads to particulate matter formation, and NOx that leads to ozone formation.

The same pollutants contribute to regional haze, which is why industry — including the American Coalition for Clean Coal Electricity — has asked EPA to find CSAPR equivalent to BART for haze.

Sources expect the proposal sent for OMB review to follow the Bush EPA's policy that allowed states participating in CAIR emissions trading to be deemed in compliance with haze BART requirements.

In comments submitted to EPA on CSAPR-related rules, industry and some states pushed the agency to allow CSAPR participation to qualify states for an exemption from additional controls under BART. Some sources have even suggested EPA could find CSAPR "better than BART." EPA did not resolve the issue in the final CSAPR rule.

In an Aug. 25 presentation, EPA said it "intends to conduct additional analysis to determine whether CSAPR satisfies any BART-related requirements" for power plants, and that if "the additional analysis supports the conclusion that the CSAPR achieves greater reasonable progress than BART, EPA intends to conduct a notice and comment rulemaking that would provide that compliance with CSAPR satisfies BART requirements in certain states."

Some environmentalists have previously questioned the use of a trading program to meet emissions control requirements in state air quality plans, because cap-and-trade allows facilities to decide between investing in pollution controls

or buying credits to comply with the trading program's overall pollution cap.

Another concern for activists is that allowing CSAPR to qualify as BART could limit pollution reduction options, because CSAPR applies only to utilities while haze requirements apply to all industrial sources.

An EPA spokeswoman would only confirm that the proposal will address the issue of BART for haze.

Meanwhile, EPA's haze program continues to provoke opposition from Oklahoma and North Dakota — two states facing proposed agency takeover of haze planning in their states because of what EPA says are shortcomings in their state implementation plans (SIPs) outlining how they intend to comply with the haze program.

In North Dakota, EPA is taking comment until Nov. 21 on its Sept. 21 proposal to replace the SIP with a federal implementation plan (FIP), through which EPA would directly specify the pollution reductions required at sources in the state to meet the haze program. EPA says a FIP would achieve quicker haze reductions.

At an Oct. 13-14 public hearing on the EPA plan in Bismarck, ND, utility industry executives and the state's Governor Jack Dalrymple (R) said EPA's plan, which would require the imposition of selective catalytic reduction (SCR) emissions control technology on coal-burning power plants, is too expensive.

North Dakota utilities warn that SCR is not proven to work correctly in power plants burning lignite coal, a claim that one environmentalist says is false and contradicted by the manufacturers of pollution control equipment themselves. "It has turned into a bandwagon for anti-fed[eral] interests," the source says.

Dalrymple, however, said that the federal plan would cost 14 times more than the state's less-ambitious SIP, which eschews SCR in favor of cheaper measures designed to reduce haze emissions.

EPA meanwhile proposed in an Oct. 17 *Federal Register* notice to approve several revisions to Oklahoma's SIP for interstate pollution transport, including finding that the state does not significantly contribute to NAAQS violations in other states for the agency's 1997 ozone standards. The agency also says its will approve the state's determination that it does not significantly contribute to violations of the 1997 and 2006 fine particulate (PM2.5) NAAQS, or interfere with the maintenance of the two PM2.5 standards by other states. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381131*)

However, EPA leaves open the possibility that it may not approve the state's finding that Oklahoma does not interfere with 1997 ozone NAAQS maintenance in other states, pending the results of supplemental air quality modeling done to support CSAPR. Oklahoma disagrees with EPA modeling that suggests the state may have to be included in the trading program because its emissions contribute to NAAQS maintenance problems in Michigan. Oklahoma denies that its emissions contribute to NAAQS problems in states as far afield as Michigan.

EPA says it will base approval or disapproval of this portion of Oklahoma's SIP on the outcome of modeling supporting a final supplemental CSAPR rule. The supplemental rule was published July 11 in the *Federal Register*, and would expand states' participation in CSAPR's ozone-season NOx trading market, by adding five states including Oklahoma. EPA said when the proposal was published that it intended to publish a final rule by Nov. 1.

Oklahoma is also fighting EPA's proposed imposition of a regional haze FIP on the Sooner State in the courts, arguing that its SIP to re-power coal-fired power plants with natural gas in order to cut emissions should be allowed to stand. EPA says the plan, which would take until 2026 to accomplish the fuel switch, would take too long and miss statutory deadlines for emissions reductions. The case, *State of Oklahoma v. Jackson*, is currently pending before the U.S. District court for the Western District of Oklahoma. — *Stuart Parker*

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Aggregation

Suit Marks Test Of EPA's Use Of 'Aggregation' To Permit Oil, Gas Facilities

A pending industry suit is testing EPA's controversial policy for when regulators must "aggregate" emissions from oil and gas operations to determine whether they are subject to strict "major" source permits, though activists are hoping the court backs the agency's decision to strictly regulate a gas field in Michigan, setting a precedent for other permits.

Summit Petroleum Corp., backed by the American Petroleum Institute (API) has filed suit in the U.S. Court of Appeals for the 6th Circuit challenging EPA Region V's determination that the company's large oil field in Michigan had to aggregate, or group together, operations for permitting purposes. Aggregating emissions meant the facility triggered a "major" source Clean Air Act Title V operating permit, rather than potentially less onerous "minor" source permits if it had been able to seek separate permits for the operations. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380023*)

The decision followed a Sept. 22, 2009, memorandum by EPA air chief Gina McCarthy, which overturned a Bush-era memo that was seen as making it harder to trigger the aggregation requirement. For Summit, EPA found that the activities at issue are under common control, that they are contiguous or adjacent and that they belong to the same

industrial grouping, restoring three original criteria the agency has long relied on for oil and gas permitting decisions.

EPA's determination — being contested by the company in *Summit Petroleum Corp. v. EPA* — says Summit has not presented any evidence to show that the "'far flung well sites' . . . do not provide product to the sweetening plant or that they do or can provide product to any other processing plants," the agency's determination being challenged says.

A pro-aggregation determination is rare for EPA, which faces pressure from activists to force oil and gas operations to combine emissions for Title V and prevention of significant deterioration (PSD) permits.

Summit wants the court to scrap the determination, and it has the backing of the API, which filed an *amicus* brief on the company's behalf — highlighting the stakes of the case, sources say.

One environmentalist calls *Summit* a test case that could set "an important precedent for aggregation," particularly if EPA's determination is upheld. "It is not the be all/end all but certainly it is an important example and . . . it's certainly going to embolden our efforts to ensure that EPA is properly aggregating" in other "*Summit*-like situations" where one company has ownership of an entire oil field and operations are clearly interrelated.

The source says the *Summit* situation is less complicated than many other fights over whether facilities' emissions must be aggregated for permitting purposes, because those often have multiple owners that supply product to different pipelines. The source adds that even before the court rules environmentalists are citing the *Summit* example in cases where the lines are more clear in a bid to broaden their push for aggregation.

For example, in a May 13 letter to EPA Region VIII on a draft renewal for a Title V permit for Anadarko operations in Utah, activists cited an Oct. 18, 2010, letter from Region V to Summit outlining why the agency believes aggregation is necessary. The Region V letter said "sour gas wells and processing plant connected by pipelines should be aggregated as single source," a point activists echoed in their letter to Region VIII. "All portions of the oil and gas wells and related facilities within the Greater Natural Buttes gathering system also appear to be adjacent for PSD and Title V purposes," the activists said.

Environmentalists also recently claimed victory in an EPA Region VI decision granting their request to object to a New Mexico permit, when the agency agreed with their claims that the state did not verify that a compressor station and related equipment were under common control.

In the meantime, the lawsuit continues at the 6th Circuit with no indication from the court as to whether it will agree to requests by EPA and Summit earlier this year to hold oral arguments.

Summit filed a Sept. 8 notice to the court of a related decision by the West Virginia Air Quality Board that rejected environmentalists' efforts to force aggregation from natural gas drilling sites in the state, a ruling some industry sources cited as a precedent hindering a push to expand aggregation.

Summit in an April 1 brief says, "EPA has determined that the emissions from Summit's approximately 100 natural gas production wells, which are widely dispersed over an area of approximately 43 square miles, and its natural gas sweetening facility must be aggregated together as a single stationary source."

The company's filing calls EPA's aggregation decision one that is "in error, arbitrary and capricious, and not in accordance with the law or EPA's own guidance," noting at the time EPA made its initial decision in 2009, the aggregation memo issued by Bush-era acting air chief William Wehrum was still in effect. "However, even using the analysis iterated in the McCarthy Memo (which purportedly withdrew the Wehrum memo), Summit's wells and plants still do not meet all of the criteria required to aggregate the wells," the filing says.

Summit also argues that EPA is seeking to expand the three criteria it uses to determine aggregation — common control, interdependence and adjacent/contingent — to a fourth criteria, interdependence, which the company says was explicitly omitted in 1980 PSD regulations. "Although EPA examined the functional independence of the wells and determined that because the wells supply the plant, they were 'adjacent' and thus fit the 'common sense notion' of a plant, such a functional interdependence criterion was specifically rejected in the 1980 PDS regulations."

One industry attorney says, "Contiguous or adjacent is not the same as interdependent. We think the plain meaning of the word doesn't mean you aggregate across several townships."

"This case is going to have some pretty wide implications because it challenges this guideline of interdependence that EPA has been using as not part of the original parameters. This will be the test case as to whether EPA's guidance will be permitted. We don't think it is appropriate," the source says.

The source argues that EPA's use of interdependency has no statutory or regulatory authority but has evolved over several years as part of agency efforts to determine adjacency.

Similarly, API in its April 14 *amicus* brief says Region V's decision that the sources are "'adjacent' based on their supposed 'interdependent nature,' thereby rejecting proximity as a relevant consideration . . . defies the plain meaning of the term[s]."

However, EPA in a June 6 reply counters that the term "adjacent" is not limited to physical proximity. "To the contrary, it is entirely reasonable to examine the context — i.e., the relationship between the different emissions activities — in order to decide if they are 'close' enough to constitute a single major source of pollutants."

API had also argued that EPA was required to go through notice-and-comment rulemaking to add interdependence

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as a criterion, a position to which EPA in its reply strongly rejects.

The industry attorney says it remains unclear if oral arguments will be scheduled in *Summit* but notes the case has moved at "glacial pace," with the company's permit in question for six years.

The source notes because EPA considers aggregation on a case-by-case basis in administrative decisions, it would be incorrect to say this is the first agency determination in favor of aggregation. Instead, it is the first pro-aggregation agency decision to be challenged in federal court, the source says.

This case comes as Pennsylvania has issued a first-time draft guidance that seeks to set a quarter-mile firm boundary within which sources must aggregate.

However, a second industry source seeks to downplay the significance of the *Summit* case. "The aggregation is very fact specific" and resulted because the company did not provide EPA enough information to not aggregate, the source says. "I don't believe the *Summit* case is a nationwide test case for aggregation because it is very fact specific and the facts in *Summit* are very different than the facts you see in oil and gas development out West and on the Marcellus Shale," the source says.

But the environmentalist notes that API's effort to get involved in *Summit* "signals its importance." The source adds activists are "anxiously awaiting" a ruling, hopefully within months. — *Dawn Reeves*

Activists Urge EPA To Oppose Pennsylvania 'Aggregation' Boundary Guide

Environmentalists are urging EPA Region III to oppose Pennsylvania's new guidance setting a first-time definition of a quarter-mile for determining when to "aggregate," or group together, emissions from oil and gas drilling operations for permitting purposes, saying the Clean Air Act requires EPA to take a position on the guidance.

EPA has said it is only considering offering comments on the draft guidance, which environmentalists say is too restrictive and contrary to EPA's factors for considering aggregation. The agency is separately defending a strict approach to aggregation in a federal appeals court lawsuit, and environmentalists argue that the agency needs to provide consistency by filing comments in opposition to the Pennsylvania guidance for being too weak.

The state proposed the guidance as draft but said it would take effect immediately, even while it is accepting comments through Nov. 21. The environmental group Clean Air Council (CAC) sent an Oct. 31 letter to EPA Region III Administrator Shawn Garvin saying the Pennsylvania guidance fails to comply with EPA's approach for aggregation as well as the Clean Air Act. *The letter is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381277*)

EPA uses a three-factor test — including distance — for determining whether to aggregate emissions at oil and gas operations, an important test because aggregating emissions could mean the sites exceed the air law's threshold for major source permits and require expensive pollution controls. EPA's guidance does not have a specific distance test, and environmentalists say Pennsylvania's guide does not comply with it.

The state's guidance says equipment within a quarter mile will automatically be aggregated and that case-by-case determinations for equipment located farther apart will continue. But CAC says the guidance effectively prevents aggregation beyond that distance by limiting the scope for aggregation to a quarter mile.

CAC says Pennsylvania "has made it clear that it is not interested in complying with the Clean Air Act or protecting its citizens from the massive influx of Marcellus Shale operations and air pollutions. Further, [the state] has made clear that it does not intend to follow longstanding EPA practice in making single source determinations. The EPA, and Region III in particular, must step into protect the citizens of Pennsylvania," the letter adds.

CAC notes that through August of this year Pennsylvania had issued 1,840 minor source permits to drill wells in the shale, with each well "connected to miles of pipeline and associated compressor stations, processing plants and other industrial equipment, all of which emit air pollution," according to the letter to Garvin.

The Oct. 12 guidance, the letter says, "flouts" the Clean Air Act, EPA's aggregation guidance, the Pennsylvania state implementation plan and Title V permitting program, all of which EPA has authority to enforce.

An EPA Region III spokeswoman told *Inside EPA* previously that the region is aware of the state's guidance and may comment on it, but declined to say whether the agency would oppose the quarter-mile definition. EPA Region III did not have a response to the CAC letter.

CAC aims to bolster its case by citing EPA's defense of a strict approach to aggregation in a permit for Summit Petroleum Corp.'s oil and gas operations in Michigan. The company filed suit in the U.S. Court of Appeals for the 6th Circuit challenging EPA's determination that the operations need a major source air permit.

CAC in its letter to Garvin said, "The EPA is currently defending the [air act] and its longstanding practice with respect to single source determinations in the oil and gas context against nearly identical attacks in *Summit Petroleum Corp. v. EPA*, yet with respect to [Pennsylvania's] guidance EPA has indicated that they 'may file comments.' This response is wholly inadequate. . . . A mere consideration to file comments is entirely insufficient to uphold the purpose

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of the Clean Air Act and puts local shale communities and downwind communities at risk."

The *Summit* test case is proceeding in the 6th Circuit and marks one of the first industry challenges to a rare pro-aggregation determination by EPA Region V. Sources say there may be regional splits within the agency on how to address oil and gas permitting. Environmentalists are already broadly citing *Summit* in their push for aggregation and the CAC letter is just the latest example. WildEarth Guardians also cited the aggregation decision in a letter it sent earlier this year to EPA Region VIII urging a major source permit for Anadarko operations in Utah.

Meanwhile, Ohio EPA is taking public comment on its draft general air permit for shale gas production facilities, which some environmentalists are criticizing because it appears to sidestep the aggregation issue.

The draft general permit, which Ohio EPA floated to a select group of stakeholders in July and released to the public Oct. 31, is expected to streamline the permitting process because it contains a set of conditions that can be automatically used for permit applications. Ohio EPA is taking comment on the draft permit through Nov. 28.

The draft permit contains a series of emissions limits, operating restrictions, and monitoring, testing and reporting requirements that apply to internal combustion engines, turbine-powered generators, dehydration systems, storage tanks, flares and unpaved roadways at production sites associated with shale gas production.

But activists in a recent letter to Ohio EPA on the draft air permit are charging that the permit should also address how the agency plans to make single source determinations, citing language from Ohio's draft permit letter that says the agency does not believe it is appropriate to group multiple well sites together to determine the applicability of the permit rules because of pending litigation in other jurisdictions on the aggregation issue.

"While it is true that there is litigation that is currently pending that relates to source aggregation in the oil and gas context, this does not suspend Ohio EPA's obligation to perform source determination analysis," Ohio Environmental Council, Buckeye Forest Council and other environmental groups say in an Aug. 19 letter to Michael Hopkins, assistant chief for Ohio EPA's air office. "Source determinations must be performed on a case-by-case basis, and as such it is improper to broadly state that Ohio will not aggregate oil and gas well sites in any situation."

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Ozone

Northeast States To Debate Revised Model Air Rule For Gas Compressors

Northeast and Mid-Atlantic state officials are slated to meet later this week to debate a revised model rule for cutting ozone-forming emissions from natural gas compressors that would delay the rule's implementation from 2015 to 2016, in response to industry concerns that an earlier draft of the plan was infeasible to meet by the 2015 target.

The Ozone Transport Commission (OTC), representing 12 states and the District of Columbia, will also consider a number of other model rules to cut ozone emissions at the group's Nov. 10 fall meeting in Wilmington, DE. In addition to the gas compressors rule, OTC is floating model rules for solvent degreasers, off-road diesel engine idling, and consumer products. States within the organization can adopt OTC's model rules by regulation or law.

OTC's push to secure additional reductions in ozone-forming pollutants from industrial and other sources is taking on increasing importance as EPA prepares to implement its 2008 ozone national ambient air quality standard of 75 parts per billion. The standard — tightened from the previous 80 ppb limit — requires states to find additional sources of ozone-forming volatile organic compounds (VOCs) and nitrogen oxides (NOx) to cut in order to attain the limit.

State officials say they are relying in part on federal rules for mobile source emission reductions, which they are largely preempted from regulating under the Clean Air Act. However, the states are looking to supplement ozone cuts from the federal rules with state-level rules to achieve additional pollution cuts beyond EPA mandates.

One of the most significant model rules the OTC will discuss would regulate emissions from natural gas pipelines, including those for the expanding Marcellus Shale gas drilling industry affecting several OTC states.

The model rule under consideration would cut NOx from compressors used to move natural gas further down pipelines, a sector currently regulated by a patchwork of state and federal rules.

EPA is moving to cut emissions of VOCs — also ozone precursors — from compressors, and some states such as New York already impose reasonably available control technology on some compressors, but OTC's model rule presents a chance for all states in the region to adopt the same template for regulation.

Industry group the Interstate Natural Gas Association of America (INGAA), which represents pipeline owners, has already voiced concern that OTC's rule would be excessively onerous, requiring emissions cuts of 80-90 percent from uncontrolled compressors, and would not allow enough time for implementation (*Clean Air Report*, Sept. 29).

The model rule as previously written and debated at an OTC meeting in Baltimore in early September would require compliance testing by Jan. 1, 2015, which INGAA argues is not feasible due to equipment shortfalls and other

considerations. In response, OTC's current draft pushes this date back one year to Jan. 1, 2016.

OTC at its meeting will also debate a draft model rule to limit idling time of non-road diesel engines to between 3 and 5 minutes, subject to exemptions for safety reasons, for farming, locomotives and the military, in addition to engines already subject to federal new source performance standards. OTC has altered the rule's wording since the first draft to slightly expand the range of safety-related exemptions for various types of off-road equipment.

OTC will also debate model rules limiting the VOC content of solvent degreasers and consumer products, which are based on existing California regulation from the South Coast and Santa Barbara air districts in the south of the state. The solvent degreasing model rule has attracted criticism from the electronics manufacturing sector, which uses solvents to clean high-precision parts and worries low-VOC cleaners will not be adequate to prevent component failure.

The consumer products rule, meanwhile, would impose numeric VOC limits on a wide range of products from lubricants to windshield washer fluid, expressed in percentage of VOCs by weight. (*Clean Air Report*, Aug. 30). *The draft model rules are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381556*)

In a Nov.1 letter to OTC, the South Coast Air Quality Management District, which includes the greater Los Angeles area, backs OTC's consumer products model rule but recommends that OTC tighten it further. South Coast says OTC should remove an exemption for low-vapor pressure VOCs and make the rule's VOC limit of three percent by weight effective sooner than Jan. 1, 2014, the currently foreseen effective date.

Inhofe Seeks Urgent Senate Hearing On Obama Ozone NAAQS Decision

Sen. James Inhofe (R-OK), ranking member on the Environment & Public Works Committee, is urging panel Democrats to hold a hearing "as soon as possible" on President Obama's decision to scrap EPA's proposed tightening of its ozone standard, arguing that the decision highlights his ongoing concerns about EPA's process for revising its national ambient air quality standards (NAAQS) and the role played by EPA's scientific advisers in that process.

In an Oct. 26 letter to Committee Chair Barbara Boxer (D-CA) and Sen. Tom Carper (D-DE), chair of the clean air subcommittee, Inhofe says the agency's Inspector General is looking into an earlier request to investigate EPA's Clean Air Scientific Advisory Committee (CASAC). According to the letter, he is now seeking a committee hearing on the proposed changes to the 2008 ozone standard because it "will help to resolve the many outstanding questions about the process in use at the EPA in the rule's development and withdrawal, as well as its replacement's implementation." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380263*)

The Obama EPA initially granted environmentalists' request to reconsider the 2008 NAAQS of 75 parts per billion (ppb), and was preparing to finalize a stricter limit of 70 ppb, consistent with recommendations from CASAC that the agency set a standard within the range of 60-70 ppb. But Obama ordered the agency to drop the rulemaking, citing a need to end regulatory uncertainty given that a Clean Air Act mandate to review national ambient air quality standards (NAAQS) every five years means another review is due in 2013.

In the wake of Obama's decision, Carper vowed to hold a hearing due to concerns that the president's order undermines efforts to strengthen the ozone standard. Carper's office deferred questions to Boxer's office, because it handles committee scheduling. A Boxer spokesperson said the environment committee "generally announces hearings one week in advance of the hearing date."

While Inhofe welcomed Obama's decision to stop the rulemaking, he has long been concerned that EPA Administrator Lisa Jackson had criticized the Bush-era version of the rule as "legally indefensible" in part because it did not follow CASAC's advice.

Inhofe says EPA's plan to tighten the standard was based "in large part" on the proposition that the EPA administrator must set the NAAQS within CASAC's recommended range. "But this interpretation of the Administrator's duties flies in the face of common sense and robs her of the ability to exercise the discretion afforded by the [Clean Air Act]," the senator writes.

Inhofe says the EPA administrator has authority to consider various factors before setting the standard, including information and effects "that may fall outside of a strict interpretation of the scientific record." EPA is bound by the Clean Air Act to not consider costs when setting a NAAQS, but it can consider adverse economic effects in its plan to implement the rule.

"Binding the Administrator's judgment to CASAC's recommendations effectively delegates the Administrator's authority to set the NAAQS to an unaccountable scientific review panel — a panel whose credibility and independence, incidentally, are now the subject of an investigation on the part of EPA's Office of Inspector General," Inhofe writes.

Inhofe in an Aug. 4 letter asked EPA Inspector General Arthur Elkins, Jr. to look into members of CASAC and the agency's Advisory Council on Clean Air Compliance Analysis over concerns that they had taken public stances backing

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stringent NAAQS for ozone and other pollutants prior to being selected to serve on the committees.

The Inspector General's office did not respond to a request for comment by press time.

Following Obama's order last month for EPA to kill its final rule to tighten the 2008 standard, EPA has set an "aggressive" timeline for implementing the Bush-era limit of 75 ppb, Inhofe writes in his letter. The senator warns that EPA's plan to implement the 2008 standard creates uncertainty for states with "severe budget constraints and workload issues."

State officials have warned that EPA's implementation plan — outlined in a Sept. 22 memo from EPA air chief Gina McCarthy to the air office directors of EPA's 10 regional offices — could be illegal as it could delay states' compliance with the limit until at least 2015 despite a Clean Air Act mandate for earlier compliance.

EPA plans to designate areas as attaining or not attaining the standard by mid-2012, and those designations would trigger a requirement for states to craft air quality plans for meeting the standard. But Inhofe warns that plan could clash with EPA's next air act-mandated review of the ozone NAAQS, which is due in 2013. EPA's plan could therefore "force states into an expensive and seemingly endless loop of state planning submittals."

Litigation

Activists Open To Remand EPA Boiler Rule Delay But Seek Conditions

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Environmentalists say they are open to accept an EPA proposal that a federal district court remand — but not vacate — the agency's action to delay implementation of its controversial boiler and incinerator emissions rules while it revises them but only if the court finds the planned delay is lawful and the agency revises the rules by April 2012.

"If EPA acted without statutory authority or arbitrarily, the Delay Notice must be vacated," Sierra Club's lawyers say in a Nov. 4 brief. The group adds that its "non-opposition" to a court remand is also conditional on EPA completing its reconsideration of the rules by April 2012, "as the agency indicated it will" in public statements. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 2381577)*

While activists are not conceding their argument that EPA acted arbitrarily in delaying its maximum achievable control technology (MACT) standards for boilers and a related rule for commercial and industrial solid waste incinerators (CISWI), they are nevertheless opening the door to one path toward resolution of the litigation.

The rules seek to regulate scores of boilers and incinerators, prompting significant concern from a host of industrial sectors that use such units for energy generation and waste disposal. Many lawmakers have also weighed in, seeking to rollback or delay the regulations.

EPA issued the rule last February after the U.S. District Court for the District of Columbia rejected an EPA request to delay issuance of the rules by 15 months.

But EPA later invoked authority under the Administrative Procedure Act (APA) to stay implementation of the rules while it revises them. EPA stayed the rules using rarely used APA authority to reconsider the rule and address industry claims that flaws in the rules make the standards unachievable.

Sierra Club sued over the delay, bringing suit in the same district court that had ordered EPA to issue the rule by Feb. 2011 — more than a year sooner than what EPA had requested. Sierra Club argued the delay was unlawful and sought to vacate it and require the boiler rules to take effect. While the group argued that EPA's failure to seek notice and comment on the stay violated the APA, it also has argued that EPA lacks the authority to stay the standards under the Clean Air Act, which bars the agency from delaying final rules for greater than three months, and that the decision is otherwise arbitrary.

But the litigation is complicated as the parties have argued over whether EPA's action was a "rule" subject to notice-and-comment requirements, what court has jurisdiction to review it and the relevant legal authority.

Judge Paul Friedman initially rejected EPA's request to dismiss the suit and asserted jurisdiction to review it under the APA. But he later suggested that he might revise the basis for his ruling, opening the door to vacating EPA's stay but forcing activists to move the suit to an appellate court where they could argue that EPA can only delay the rules for three months, as allowed by the air act (*Clean Air Report*, Oct. 27).

In the new filing, Sierra Club refutes EPA's argument that the delay cannot be subject to APA requirements without also being subject to the U.S. Court of Appeals for the District of Columbia Circuit's jurisdiction to review air act rules, which EPA said is activists' attempt to "have it both ways." Sierra Club says EPA is incorrect, arguing that court's jurisdiction hinges on "the authority under which the agency acts" and that APA's notice and comment requirements stem from "the effects of the action."

Sierra Club also challenges EPA's "reluctance to answer" whether the delay notice is an "amendment" or

"recission" to the rules, which the court suggested could make the decision a rule. "The agency's jurisdictional argument depends entirely on the false notion that the Delay Notice amends the 'substance' of the Boilers and CISWI rules. . . . But by characterizing the Delay Notice as either a rescission of the Boilers and CISWI Rules or an amendment that prevented those Rules from taking effect by the Court-ordered date, EPA would necessarily indicate that it is now in violation of this Court's January 20, 2011 deadline Order in *Sierra Club v. Jackson* . . . even under the agency's own legal theory."

Sierra Club offers this summation: "(1) the Delay Notice did not amend or rescind the Boilers and CISWI Rules; (2) even if it had, the Delay Notice would not be reviewable in the D.C. Circuit, because it was not taken 'under' the authorities provided by the Clean Air Act; and (3) the Delay Notice was subject to the APA's notice and comment requirements, even though it did not amend or rescind the substance of the Boilers Rules, because it jeopardizes the rights and interests of Sierra Club members and the public."

EPA Appeals Landmark Court Ruling Seen Limiting NSR Enforcement

The Justice Department (DOJ) on behalf of EPA is appealing to the U.S. Court of Appeals for the 6th Circuit a landmark federal district court ruling that sources say could dramatically curtail the agency's Clean Air Act new source review (NSR) enforcement efforts.

The Oct. 20 notice of appeal, while a non-substantive filing, suggests that the Obama administration has decided the ruling is so onerous it is worth the risk that it could be upheld and set a major precedent, sources said. The district court ruling cites Bush-era reforms to the NSR program as the reason for limiting EPA's ability enforce NSR permit requirements. *Relevant documents are available on InsideEPA.com.* *See page 2 for details.* (*Doc ID: 2380458*)

Michigan U.S. District Judge Bernard Friedman in the Aug. 23 decision in *United States of America, et al. v. Detroit Edison [DTE] Company, et al.,* backed industry's argument that the Bush NSR reforms upheld by a court mean the agency can only enforce "major modifications" at existing facilities based on emissions data after the project is complete, rather than before construction begins. The NSR program requires installation of state-of-the-art controls at facilities that undertake major modifications and had otherwise been grandfathered from many Clean Air Act requirements.

The ruling imposes a major limitation of restricting EPA's enforcement of NSR to cases based on post-construction emissions data, which critics said "kind of defeats the whole purpose of NSR, which is to assure that emissions increases are minimized" when modifications are made. However, backers said the ruling eliminated EPA's "whole 'gotcha' game" of pursuing pre-construction NSR enforcement to what is actually occurring.

Sources said the ruling's potential to limit NSR enforcement only to post-construction activities all but guaranteed a DOJ appeal even though EPA runs the risk of having the 6th Circuit upholding the district court ruling.

Appeals Court Assigns Panel For Bulk Of Suits Over EPA Climate Rules

The U.S. Court of Appeals for the District of Columbia Circuit has assigned the three-judge panel that will hear the mass of challenges to EPA's greenhouse gas (GHG) rules and has set oral arguments for Feb. 28 next year — shining a spotlight on the rules in the midst of a GOP presidential primary where candidates are targeting the measures.

But some sources say the three-judge panel assigned to hear the case — Chief Judge David Sentelle and Judges Judith Rogers and David Tatel — could bode well for EPA as the majority of the judges have in the past backed the agency.

For example, the LegalPlanet blog in a Nov. 2 post notes that "the makeup of the panel is good news for EPA. It will contain two Clinton appointees, Judith Rogers and David Tatel. But it will also contain David Sentelle, a Reagan appointee, who voted against giving environmentalists standing in climate change litigation in *Massachusetts v. EPA*. Overall, however this seems like as good a panel as EPA could hope for."

In its Nov. 2 order, the court's clerk also notes that the court anticipates the argument in *Coalition for Responsible Regulation Inc., et al. v. EPA, et al.,* will be scheduled over two days, continuing into Feb. 29.

The court will consider industry challenges to the agency's finding that GHGs endanger public health and the environment, and its "tailoring" rule to limit the application of GHG permitting. Many environmental groups are backing EPA, with states split on both sides of the issue.

EPA most recently argued in a Sept. 16 filing that industry lacks standing to challenge the tailoring rule, considered the most legally suspect of the agency's regulatory package under review.

LegalPlanet says in its blog that it believes EPA will easily win its endangerment finding case and that the panel makeup "gives the agency at least a fighting chance of winning on the tailoring rule."

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Activists Sue EPA Over Decision To Retain Carbon Monoxide NAAQS

Environmentalists are suing EPA over its decision to retain its existing carbon monoxide (CO) air quality standard, arguing that the latest scientific information on the pollutant warrants tightening the CO limit in order to adequately protect public health.

Following a review of the national ambient air quality standard (NAAQS), EPA in an Aug. 15 final rule cited scientific uncertainties in CO's risks in rejecting activists' calls to tighten the limit, while also scaling back a planned CO air monitoring network in response to states' concerns about the costs of the network.

Communities for a Better Environment and WildEarth Guardians in response filed suit Oct. 31 in the U.S. Court of Appeals for the District of Columbia Circuit over the final rule. While the filing does not outline the specific challenges to the decision to retain the existing CO NAAQS, the groups issued a Nov. 1 press release saying the science on CO's effects requires a stricter limit. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381114*)

To bolster their case, the groups in the release cite comments from EPA's Clean Air Scientific Advisory Committee (CASAC) expressing a "preference" for tightening the 8-hour CO NAAQS of 9 parts per million (ppm) and a 35 ppm standard for short-term, 1-hour exposures.

"Under the Clean Air Act, the EPA is required to set national ambient air quality standards based solely on what is necessary to protect public health and the environment. Unfortunately, EPA rejected its scientific advisors and instead opted to maintain the status quo," according to the environmental groups, who say a ruling in the case "is likely within the next year."

"We all need the strongest protection possible from this poisonous gas. . . . Sadly, current standards allow our children to be exposed to dangerous levels of carbon monoxide and continue to put our climate at risk," said Jeremy Nichols, WildEarth Guardians' climate and energy program director.

EPA in its final rule defended retaining the existing CO limits because the agency "judges the current standards to provide the requisite protection for public health, including the health of sensitive populations, with an adequate margin of safety."

The agency also noted that CASAC in comments on a draft policy assessment created by agency staff and outlining proposed ranges to set the NAAQS "agreed with the conclusion that the current evidence provides support for retaining the current suite of standards, while they also expressed a preference for a lower standard and stated that the epidemiological evidence could indicate the occurrence of adverse health effects at levels of the standards." EPA also cited uncertainties in data on CO's health effects in justifying a retention of the existing limits.

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EPA Fighting Industry Push To Vacate NO2 Ambient Air Quality Standard

EPA is fighting industry's bid for a federal appeals court to vacate its nitrogen dioxide (NO2) national ambient air quality standard, rejecting industry's claims that the agency relied on inadequate data in creating the new 1-hour limit, and erred by requiring new air permit applicants to meet the standard immediately.

The American Petroleum Institute (API) and the Utility Air Regulatory Group filed suit April 12, 2010, in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA's Feb. 9, 2010, NO2 standard. The final rule created a new 1-hour standard of 100 parts per billion (ppb) to protect against health risks from short-term NO2 exposure, while also retaining the annual average standard of 53 ppb.

The industry groups in their Aug. 30 brief in the suit, *API, et al. v. EPA*, said the agency violated its own data quality guidelines by not relying solely on peer-reviewed studies on NO2 when setting the NAAQS. Industry argues that EPA based its decision to create the 1-hour limit on a non-peer-reviewed agency "meta-analysis" of several studies on NO2. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380844*)

EPA's NO2 NAAQS in place before creation of the 1-hour standard was sufficient to meet the Clean Air Act requirement of ambient air limits being "requisite" to protect public health, industry argues, adding that the 1-hour standard is not necessary to address potential harm.

Industry also says EPA erred by requiring that the final NO2 NAAQS be immediately applicable to the Clean Air Act prevention of significant deterioration (PSD) permitting program. Industry argues that the air law prevents the PSD program from harming economic growth. But requiring new facilities to demonstrate they will not harm attainment of the 1-hour standard from the date of its issuance will harm the economy by stalling projects, because the agency is yet to implement the necessary tools and regulations for the short-term standard, industry says.

To bolster its case, industry cites EPA's decision to "grandfather" the Avenal Energy Project in California from having to meet the 1-hour NO2 NAAQS due to "unforeseen challenges" in preparing and reviewing data to predict the impact of sources on 1-hour NO2 attainment.

EPA in its Oct. 28 brief rejects industry's claims, defending its decision to set a 1-hour standard as based on "a

significant body of scientific information" and not just the meta-analysis, which EPA says is an update of a previous peer-reviewed analysis. "Petitioners do not take issue with the vast majority of the scientific evidence underlying EPA's revision of the NO2 NAAQS," EPA says.

The agency also says that it must include in its NAAQS an "adequate margin of safety" to protect human health, and says a 100 ppb standard is "well-supported by the record" and has the endorsement of the agency's Clean Air Scientific Advisory Committee. EPA also notes that courts traditionally give the agency major discretion on the science behind setting standards.

In its brief, EPA also rejects mention of the Avenal grandfathering decision by noting that the Avenal permit application was filed with the agency before the NO2 NAAQS took effect. The requirement for meeting the 1-hour standard only applies to PSD permits filed after the standard took effect, EPA says. The agency argues that it has "long interpreted" the Clean Air Act to require that new or revised NAAQS be immediately applicable to PSD permitting decisions.

The Natural Resources Defense Council has intervened on EPA's behalf to defend the agency's standard. The group is due to file its brief in the suit on Nov. 18.

The court is yet to schedule oral arguments.

State Action

States Urge Major Changes At Key Air Group For Consensus On EPA Rules

Officials from 22 states are urging the National Association of Clean Air Agencies (NACAA) to make major changes to its process for crafting policy positions on EPA rules, saying the group must strengthen the process for how it reaches consensus on policy positions — steps Ohio says are vital to drop its plan to leave NACAA.

An Oct. 22 letter to NACAA, obtained by *Inside EPA*, describes in detail concerns that state environmental regulators discussed on recent conference calls and at a meeting last month of the Environmental Council of the States (ECOS), where Ohio EPA Director Scott Nally first announced the state's plan to quit the group. Nally said Ohio was leaving because NACAA's positions supporting EPA rules are often at odds with the state's positions, among several grievances. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380274*)

Sources said earlier this month that Nally was crafting a letter to NACAA outlining his conditions for dropping the threat to leave the group by the end of the year. At the same time, Nally has reached out to other states on creating an "interim or permanent" replacement for NACAA, outlining initial steps for establishing such an organization.

NACAA's supporters counter that creating a competing group of state air officials could reduce regulators' influence in Congress and at EPA, in part because it could lead to competing policy positions from both groups.

In the new letter, Ohio and 21 other states — including several former NACAA members — say that "We believe that there is strength in having a national organization which can provide expertise in the complicated area of air quality issues." But they argue that policy positions taken by the organization "must be on a consensus or near-consensus basis," rather than recent NACAA positions that are at odds with some of its members' positions.

"NACAA has often ventured into policy discussions and the undersigned states now believe that without significant and serious organizational changes designed to better reach consensus, we must consider other options to NACAA membership," according to the letter, sent to NACAA officers.

"This statement does not come lightly as many of the states have been members of NACAA for many years and have been active at various levels. But, when NACAA goes on record on policy issues, it does so on behalf of all of its members. In that regard, recent NACAA positions have conflicted with individual member's positions to the degree where membership becomes implausible," according to the states' letter.

The letter is signed by 22 states — Alabama, Alaska, Arkansas, Florida, Indiana, Kentucky, Michigan, Mississippi, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Pennsylvania, South Carolina, Tennessee, Texas, Virginia, West Virginia, Wisconsin and Wyoming. That number is similar to earlier speculation that up to 17 states have concerns with NACAA and had at least informally discussed leaving. However, several of the states included in the letter — including Florida and Texas — had already left NACAA in recent years.

NACAA Executive Director Bill Becker told *Inside EPA* on Oct. 26 that "We appreciate the fact that we now have a concrete list of the concerns expressed by some of these commissioners. NACAA's officers look forward to having a conversation with these commissioners about these issues." NACAA sent an Oct. 19 letter to states seeking to meet with them regarding their concerns, offering to have an "honest and open" discussion with them. Sources have said that NACAA has already had some internal discussion about making adjustments to appease minority concerns.

The 22 states in their letter outline five areas of concern with NACAA's operations that "sum up the various

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common and state-specific concerns that have arisen over the past," saying that "the time has come to ensure that our membership and participation in NACAA is advancing a cause that we can all support."

For instance, the states urge NACAA to clarify how the group "strives to gain consensus" on policy positions, arguing that while other state organizations "state the beliefs that all members — or at least the vast majority — can agree upon" in policy positions, several letters from NACAA and statements from Becker have been issued without an apparent effort "to adjust comments to stated and voted upon positions."

"We are aware of several times where a flurry of activity occurred to get comments, only to find that the finished product was inconsistent with at least some or several of the members' view points. This cannot happen and is not in line with a consensus approach. This places states in a position of distancing themselves from NACAA that is untenable," the letter says, though the states do not give specific examples of differing views on rules.

The letter also says that "the organization needs to remain silent" when it cannot reach consensus in situations that demand a "rapid response," and argues that "there is a belief by many states that the Executive Director often acts on his own and without seeking consensus of the members." To this point the states write, "This is a critical component of concern and without a clear plan going forward and concrete reassurance, including new policies and resolutions, negotiations may be an effort of futility. The plan for this concern needs to be articulated and presented to the undersigned states."

Elsewhere in the letter, the states express concern that NACAA staff salaries have increased "while states are facing severe budget situations," and that NACAA needs to clarify how states and local air agencies shape and determine policy positions taken by the larger group. To the latter, they write, "Please explain how this works and provide some assurance that our state consensus decisions cannot be undermined or compromised by a mixed voting panel of state and local entities."

The states in their letter seek a meeting with NACAA officers to discuss their concerns, saying that "We are ready to work with the leadership of NACAA and look forward to your response." While the states do not threaten to leave the group unless its conditions are met in full, the states' letter does say, "We would request to know your plans within the next 30 days so we can plan for possible alternatives should they become necessary."

But one state source argues that every state signing onto the letter does not share all the concerns raised in the letter, and that the number of states strongly considering leaving NACAA remains small.

NACAA's Oct. 19 letter to state commissioners notes the concerns from some state regulators about the group's positions, saying that "it is our understanding that these questions focus, for the most part, on the procedures NACAA follows when adopting positions and developing comments, and whether the association should be engaging in policy development, including sending letters to Congress on important clean air issues."

Citing language adopted by NACAA wherein the group says that it "understands there are concerns among some state environmental commissioners, takes this seriously and would like to understand these concerns and have an opportunity to address them," the officers request a meeting with states to discuss the issues.

"[W]e are extremely interested in having an open and honest discussion, in person, about these concerns and attempting to seek a suitable path forward to try and ameliorate them. We are looking forward to hearing from you shortly so that we can arrange to speak directly with one another," NACAA writes. — *Bobby McMahon*

Transport Air Rule Suit Highlights States' Split Over EPA Regulatory Role

Several Northeastern states are defending EPA in a lawsuit filed by Western and Southern states over the agency's cap-and-trade rule to cut utility emissions, highlighting growing tensions among states over EPA's role in environmental regulation — in particular forcing EPA pollution cuts in upwind states to benefit downwind states.

The Environmental Council of the States (ECOS), representing state environmental agencies, touched on the tensions at its fall meeting in Indianapolis in September. ECOS renewed a federalism resolution but punted on adopting draft changes to the measure that criticized some EPA actions as "duplicative" of existing state efforts, with some state officials warning the draft changes would undermine their "cooperative federalism" with EPA.

One state source at the ECOS conference said "there's a disagreement in this room" about what the proper role should be for the federal government in environmental regulation, and that for downwind states, "we need greater collaboration. We need federal involvement. These are nationally significant challenges."

EPA's Cross-State Air Pollution Rule (CSAPR) trading program to cut power plant emissions is a major example of the tensions between states over EPA's role in regulation. The rule establishes caps on nitrogen oxides and sulfur dioxide emissions from utilities in 27 states, and is designed to cut pollution from upwind states that drifts into downwind states, hindering those states' ability to attain the agency's national ambient air quality standards.

At the Oct. 24 Air Quality VIII conference in Arlington, VA, EPA air chief Gina McCarthy defended CSAPR, saying there exists an "inherently un-level playing field" between upwind states and downwind states that CSAPR aims

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to address, and that there is a need to address pollution coming into particularly Northeastern and coastal states because of the challenges it creates for them in attaining and maintaining ambient air standards.

Referencing her former role as an environmental regulator in Connecticut, she said, "if you shut down the little state of Connecticut, it could not meet air quality standards. It can only do that if you take care of the pollution that is coming into that state using the same type of cost-effective technologies" that those downwind states and facilities already use. The rule allows companies to either install pollution controls to meet the trading programs' emission caps and sell unused credits, or purchase credits in order to comply with the rule.

Seven Northeastern states in an Oct. 19 filing with the U.S. Court of Appeals for the District of Columbia Circuit are looking to intervene to defend the rule from lawsuits consolidated in *EME Homer City Generation L.P. v. EPA*. The states argue that they have "direct and substantial interest in the outcome of this action" and that their nonattainment of EPA ambient air standards "due to interstate transport of pollutants continues to be a problem." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380280*)

CSAPR "continues the EPA's process towards reduction of the risks" from air pollution that affect the "the health and welfare of their citizens, the well-being of their natural environments, and the vitality of their economies," the states say. "A negative outcome in this case will delay or prevent the [states] from reducing the direct risks presented by the interstate transports of air pollution, thereby directly harming their interests," the states say.

Several Western and Southern states, however, are challenging the rule — revealing major differences between states over the trading program and more generally highlighting divisions over EPA's regulations.

Kansas, Texas, North Carolina, Georgia, Ohio and others are seeking to block the rule, arguing it is too onerous. When the lawsuit was filed, Kansas Attorney General Derek Schmidt (R) said the rule will require the state's utilities "to invest hundreds of millions of dollars in new emissions control equipment before Jan. 1, 2012 — a timeline the state's utilities say is impossible to meet," according to a Sept. 19 statement on the state's lawsuit.

"It will be physically impossible for all of our utilities to comply, which means that either Kansans will be paying higher rates to buy out-of-state electricity or there simply will not be enough electricity to meet Kansans' demand after the first of the year. Neither of those is an acceptable option," Schmidt said in the statement.

A state source argues that EPA's role pursuing rules covering many states — such as CSAPR — is vital to avoid disparities in costs of power for those states contributing to downwind pollution issues in others, which has health and economic costs. For those downwind states addressing both their own pollution as well as emissions from other states, the source says, the upwind states may have less expensive power because of a lack of modern controls on plants, which in turn makes those areas more attractive to manufacturing and gives them an economic advantage.

ECOS' Planning Committee debated EPA's and the states' roles in regulation during the group's Sept. 26 meeting, where the panel renewed a resolution on environmental federalism. In the resolution ECOS "affirms that states are and ought to be partners with appropriate federal agencies and with each other in a federal environmental protection system."

ECOS' resolution "affirms that expansion of environmental authority to the states is to be supported, while preemption of state authority is to be opposed." The resolution also calls on EPA "to consult integrally with the states' environmental agencies in the priority setting, planning, and budgeting of offices of the U.S. EPA as these offices conduct these efforts in preference to after these efforts have been discussed and drafted."

But state officials sparred over proposed new language some states wanted to add to the resolution saying, "the role of U.S. EPA is oversight rather than implementation of programs when programs have been delegated to the states" and that EPA during the past year "has increased its presence in some states by creating parallel environmental regulatory programs that duplicate or replace state inspection, enforcement, permitting and standard setting."

The draft language said EPA's "use of parallel environmental regulatory programs is duplicative, confusing to the public and the regulated community, weakens states' ability to implement federally delegated programs, consumes excessive resources in a time when resources are declining, [and] is a marked and unwarranted departure from the agency's 40-year tradition of working cooperatively with states to conduct EPA's oversight responsibilities."

Connecticut's Dan Esty worried the draft language would not reflect the "longstanding balance that is underpinned by a spirit of cooperative federalism" between the states and EPA. Esty in comments to the planning committee argued in favor of regulatory activity and supervision at "the scale of harms," and some of the environmental challenges facing states "are national and regional and need to have that." Esty as well argued that — as a downwind and downriver state — "we want to have some balance that would reflect that in a resolution going forward."

Despite an effort by California and Oklahoma to work out compromise language in advance of the meeting, Esty suggested to retain an unmodified version of the environmental federalism resolution with an eye toward passing a revised resolution at the Spring 2012 ECOS meeting, slated to be held in Austin, TX.

Nevada's Leo Drozdoff, chair of ECOS' planning panel, said, "I think some of those concerns that the states have brought to me today reflect . . . a bigger issue that needs to be resolved rather than trying to shoehorn something into a

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resolution," adding that this is one of those issues where "the states need to talk with themselves."

The move to retain the current resolution and then work toward a revised version passed unanimously before the committee. Justin Johnson of Vermont, speaking in support of the decision, said that "this is, in some ways, one of the most important issues we'll deal with, and we ought to take the time to get it right. . . . I don't see a situation in the next couple of years where this gets any easier, so I think it is something that we just have to spend some more time on in the hopes of not having to revisit it that often."

"It goes to the heart of a lot of the issues we've had with EPA and how we interact with them and then how we interact with each other," Johnson said. — *Bobby McMahon*

Utilities

EPA Power Rules Spur Fears Over Economic Harm Due To Coal Switching

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EPA's rules to cut sulfur dioxide (SO2), toxics and other emissions from utilities are likely to spur a major shift away from the use of high-sulfur Eastern coal to low-sulfur Western coal that releases less SO2 and toxics when burned, prompting union and industry officials to warn of the adverse economic impacts and infeasibility of a sudden shift.

Power companies in Eastern states such as Pennsylvania could face higher costs to pay for transporting lower-sulfur coal from the West to their facilities and modifying their facilities to handle the different coal type. Utilities also warn that increased demand for lower-sulfur coal could create supply problems with insufficient Western coal supplies for all plants, while Eastern miners could see falling demand for their product as a result of the coal switching.

The concerns add to existing criticisms about the costs to utilities of implementing EPA's Cross-State Air Pollution Trading Rule (CSAPR) to cut power plant emissions of SO2 and nitrogen oxides (NOx) in 27 states, and its pending final maximum achievable control technology (MACT) standard aimed at cutting mercury, acid gases and other air toxics from coal- and oil-fired power plants nationwide. A final MACT is due for release Dec. 16.

Critics of the rules claim that they will prove so costly for some utilities to meet that the facilities will choose to shut down instead, leading to lost generation that opponents of the rules say will harm electric grid reliability and raise electricity prices.

EPA in its regulatory impact analyses (RIA) for the rules predicts significant fuel switching, not only with coal plants transferring to lower-emitting natural gas plants but also with utilities changing their coal supply to Western coal containing lower sulfur than Eastern coal. The sulfur content of coal is a major concern for utilities trying to comply with CSAPR, because the higher the content the more SO2 the plant will release when it burns the coal.

In the June 2011 RIA for CSAPR, EPA predicts a significant shift from high and medium-high sulfur coals to very low sulfur coals for those units without SO2 controls in 2014, and more broadly a shift toward using more very low sulfur coal across the industry. CSAPR takes effect in 2012, setting caps for utilities' SO2 emissions.

EPA's modeling finds that the amount of very low sulfur sub-bituminous coal used will increase from 156 million short tons in a base case to 255 million short tons under the rule in 2012, with use of low-sulfur sub-bituminous and high, high-medium and low-medium sulfur bituminous coals decreasing under the rule for the same period.

The CSAPR analysis finds significant reductions in the amount of coal production for the power sector from the Appalachian region and mines in Indiana, Illinois, Missouri and other states deemed in the "Interior" region. EPA finds that — while Western coal will increase by 26 million short tons by 2012 in the rule — Interior and Appalachian coal use will drop by 26 million short tons and 9 million short tons respectively over that period.

In the March 2011 utility MACT rule RIA, EPA predicts that the use of lignite coal will drop by 33 percent by 2015 as a result of the rule, and notably reduce the amount of Appalachian coal by 8 percent by 2015.

Lignite coal has similar levels of mercury as other coals, according to the Energy & Environmental Research Center's (EERC) website, but lower chlorine levels and higher calcium levels. This leads to higher levels of elemental mercury emissions when lignite coal is burned, and EERC says it is hard to control these emissions. Some power plants might therefore choose to switch to other types of coal in order to meet the MACT's mercury limit.

The mining industry has already predicted significant coal switching as a result of the rules, a union source says, adding that the threats of large-scale coal switching under the rules "are real and substantial."

Facilities are likely to switch from high sulfur coals produced in Pennsylvania, Ohio, northern West Virginia, western Kentucky, Indiana and Illinois to lower sulfur coals from the Powder River Basin in Wyoming and Montana and southern West Virginia, the source says.

The key pollutant in the mix for both rules is SO2, the union source notes, because of the substantial reductions required in the CSAPR rule and because it can be used as a surrogate in the MACT rule's limits on acid gases. This creates challenges both for plants that are currently uncontrolled as well as plants that have already installed pollution

control “scrubbers” and face further reductions, the source says, putting at risk the coal produced in high-sulfur regions.

Looking at CSAPR, the source argues that EPA is seeking substantial emission reductions for units that have already installed SO2 scrubbers, many of which are located in West Virginia, Pennsylvania and other states that installed those scrubbers with an eye toward allowing themselves to burn locally-available high sulfur coal.

Under CSAPR, the source says, those plants are required to reduce their SO2 emissions significantly by 2014, and the only way to do that is to switch to a lower sulfur coal — such as Powder River Basin coal — or stop burning for periods of time in order to keep emissions at a level within EPA’s limits.

Plants that installed scrubbers to comply with the 1990’s acid rain rules or under CSAPR-predecessor — the court-remanded Clean Air Interstate Rule — “are being penalized” now, the source says.

For the MACT rule, the source raises concerns over EPA’s pollutant-by-pollutant approach of setting individual limits on mercury, acid gases and other emissions based on how facilities are controlling for the specific pollutants, rather than an approach that weighs the impacts of limits of one pollutant and another emissions limit.

This does not take into account the type of coal used, putting high-chlorine coal from Ohio and elsewhere at risk, the source says. The MACT rule also “not only deprives existing coal mining and coal miners of a prime market, it deprives them of any future, because you can’t build a new plant. That has to be fixed,” the source says.

Industry and other sources are also expressing concern about the feasibility of switching from one type of coal to another, including questions about Western coal facilities’ ability to ramp up to meet production.

In testimony at an EPA Oct. 28 hearing on the agency’s proposed rule revising elements of CSAPR, Martin McBroom of utility American Electric Power (AEP) called upon EPA to address the amount of fuel switching in the rule that can occur by 2012. “Very low sulfur fuel is only available from a select number of mines in Wyoming and Montana,” he said, adding that the production increases expected by EPA are “not technically feasible.”

“We think that it’s probably unrealistic to expect that much of an increase in the next year,” says an industry source that agrees with AEP’s assessment, saying that EPA must review those numbers in its rule.

The source also says that power units sometimes have to be modified to use a different type of coal, and having those changes in place by 2012 is infeasible because of time it takes to make such changes.

A Western coal source says that while “we have the ability” to provide low sulfur coal to meet EPA’s requirements for SO2, it is unclear what the rules’ final impact on western coal companies will be. “I think we’re going to suffer right along with everybody else,” the source says, arguing that EPA’s rules generally aim to reduce the use of coal.

EPA Climate Rule Under OMB Review Limits GHG Controls To New Utilities

EPA’s proposed greenhouse gas (GHG) rule for power plants under White House Office of Management & Budget (OMB) review limits climate emissions controls to new facilities and omits existing power plants, though activists seeking the GHG limits say they are hopeful that the agency will soon agree to a deadline for proposing GHG limits at existing plants, and for finalizing the standards at all plants.

Environmentalists say that they are continuing to negotiate a new overarching legal deadline for EPA to issue proposed and final GHG limits at all power plants, after the agency missed a Sept. 30 deadline for issuing the proposal that has now been split. States and activists seeking GHG limits agreed to negotiate a new deadline, but have yet to announce any agreement. Activists say that any new deal must set a deadline for proposing GHG limits at both new and existing power plants.

The NSPS that EPA sent for OMB review on Nov. 7 only addresses new facilities, according to environmentalists. Existing plants are considered far more difficult to address under NSPS, industry says, because the Clean Air Act standards are primarily designed to apply at new facilities.

OMB’s website says that the rule under review will create a GHG standard for new, modified and reconstructed facilities and also establish requirements including GHG emission guidelines for existing facilities.

But EPA confirms that the rule will omit existing sources, saying in a statement that in line with the Supreme Court ruling in *Massachusetts v. EPA* — which ruled EPA can regulate GHGs under the Clean Air Act — it has sent OMB ‘a proposal for review that would address greenhouse gas pollution standards for new power plants.’

Sources suggested earlier this fall that EPA could limit the NSPS to new facilities, with the struggle over how to regulate existing facilities seen in part as the reason behind the agency’s difficulties in meeting previous deadlines for proposing the first-time utility climate NSPS. Industry sources said at the time that one of the major struggles the agency faces in crafting the NSPS is identifying GHG emissions control options for existing facilities.

David Doniger of the Natural Resources Defense Council told an American Constitution Society for Law & Policy panel Nov. 8 that after EPA’s submission of the proposed rule on new facilities to OMB, environmentalists ‘are hopeful and optimistic and very supportive of this move and are hopeful there will soon be a proposal for new source standards.’ He said environmental groups will continue to push EPA to issue a proposal for existing facilities.

SAMPLE ISSUE

Interstate Pollution

EPA Grants New Jersey Petition Seeking Pennsylvania Utility Emission Cuts

EPA has finalized its approval of New Jersey's petition asking the agency to curb emissions from a Pennsylvania power plant that cross into the Garden State, which will force the utility to implement pollution cuts similar to emission reduction mandates it faces under other EPA air rules.

In a final rule released Oct. 31, EPA follows through on its March 31 proposal to grant New Jersey's petition to cut interstate emissions under section 126 of the Clean Air Act. The section allows states to request EPA intervention for the agency to impose pollution reduction mandates on emission sources in neighboring states that are harming the petitioning state's ability to meet or stay in attainment with EPA's national ambient air quality standards (NAAQS). *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380767*)

The petition asked EPA to find that sulfur dioxide (SO2) emissions from the coal-fired Portland Generating Station in Northampton County, PA, were crossing the state line to New Jersey, harming the Garden State's ability to meet EPA's 1-hour SO2 NAAQS.

EPA's final rule requires a combination of emission limits for the facility that will achieve near-term pollution cuts and eliminate the plant's contribution to New Jersey's air quality violations within three years, according to an agency fact sheet.

According to the final rule, some comments EPA received on its proposal urged the agency to defer acting on the petition, and instead harmonize the schedule and requirements of the approval with other pending and final utility rules. The other rules include EPA's final Cross-State Air Pollution Rule (CSAPR) trading program to cut utility emissions of SO2 and nitrogen oxides in 27 states, and a pending final rule to cut air toxics from coal- and oil-fired power plants.

EPA in its response to comments says it is "sensitive to the desirability and advantages of harmonized regulatory requirements and the fact that GenOn — owner of the Portland Generating Station — will have to make pollution control investment decisions for meeting CSAPR and the air toxics rule. "We recognize the value for GenOn in having the ability to make informed investment decisions that optimize strategies for addressing these pollutants concurrently," EPA says.

Still, the agency says that the final requirements of CSAPR are now known, and the final air toxics rule will not regulate SO2 directly — although the proposed version of the rule predicts that its acid gas limits will have "substantial" co-benefits of reducing SO2 emissions.

The final section 126 response "provides flexibility for Portland to develop a specific compliance strategy that protects air quality and public health, while maximizing cost effectiveness. Actions taken to meet these [emission] limits are similar to those the facility would need to comply with other Clean Air Act requirements" including CSAPR and the air toxics rule, EPA says in the fact sheet.

In the final rule, EPA also says it would not be appropriate to defer action on the petition because the Clean Air Act requires decisions on section 126 petitions within 60 days, and that time period has already passed for New Jersey's request. "We could not delay lawfully this rulemaking by any significant time period to coincide with the date for the final [air toxics] rule," EPA says.

SAMPLE ISSUE

Transportation Conformity

Appeals Court Rejects Activists' Suit Over Transportation Conformity Rule

A federal appeals court has rejected environmentalists' suit challenging an EPA rule requiring transportation projects to "conform" with the agency's 2006 fine particulate matter (PM2.5) standard, saying activists' demand that EPA require individual transport projects to significantly cut emissions exceeds mandates in the Clean Air Act.

The Natural Resources Defense Council (NRDC) sued EPA earlier this year over a March 2010 rule ensuring that transportation planning complies with states' plans for meeting EPA's 2006 PM2.5 national ambient air quality standard (NAAQS). NRDC argued before the U.S. Court of Appeals for the District of Columbia Circuit that the rule fails to adequately address "hot spot" emission spikes and will increase exposure to air pollutants.

The case stems in part from a related NRDC suit in federal district court challenging a planned truck expressway serving ports in the Los Angeles region, and will likely affect the outcome of that case. In *NRDC et al. v. California Department of Transportation*, now before the U.S. District Court for the Central District of California, activists claim the state and federal government have failed in their air act duty to ensure the expressway will not worsen pollution.

EPA's rule requires only that projects not worsen the PM2.5 standard attainment status of a nonattainment area or delay its coming into attainment. The rule is the result of a prior ruling by the DC Circuit, which remanded a 2006 agency rule on the issue of hot spot analysis back to EPA because it failed to include explicit language banning any

delay in NAAQS attainment as a result of new projects — the 2010 rule addresses this omission.

Environmentalists argue that the agency's approach in the 2010 rule means a project could create hot spots that violate a NAAQS and not have to reduce emissions if the hot spots would not lead to a NAAQS violation in the broader nonattainment area. Activists say that no transportation projects should be allowed to increase potentially harmful emissions.

In an Oct. 28 ruling the DC Circuit rejected NRDC's suit saying the environmentalists' arguments "advocate a startling interpretation of 'delay timely attainment'" in terms of projects postponing NAAQS attainment. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380621*)

"According to them, it requires 'existing NAAQS violations to be *eliminated* by the [attainment] deadline as a condition for project approval,'" but this is not an air act requirement, the court finds. "In other words, in a region that is already expected not to meet an upcoming attainment deadline, a new local project could not be approved unless it would *accelerate* the reduction of emissions enough to ensure timely compliance, even if the project would not delay attainment a millisecond beyond its formerly expected date," according to the unanimous three-judge ruling.

Further, the court agrees with EPA's argument that if NRDC succeeded, a transportation project could not proceed unless it actually cleaned the air sufficiently to offset all other emissions sources in the nonattainment area. "But for any such extraordinary blockage of harmless development, one would expect Congress to be most emphatic and clear," the court says, finding that no such clear congressional intent is apparent in the Clean Air Act.

The DC Circuit also finds that environmentalists' other arguments about deficiencies in EPA's policy regarding hot spot analysis, such as inadequate roadside monitoring, "are forfeit and, in any event, outside the scope" of the court's 2006 ruling remanding the rule to EPA. The remand "does not provide petitioners with the opportunity to challenge aspects of conformity analysis not integral to the remand or the EPA's action in response," the court says.

NRDC alleges that EPA improperly relies on regional level air quality modeling in state implementation plans (SIPs) to identify potential hotspots that could delay NAAQS attainment, but the court disagrees, arguing that EPA's requirement for such regional-level modeling, included in the 2010 rule, was never designed to be sufficient on its own. "The difficulty with petitioners' argument is that no one ever seems to have supposed that SIP regional analysis could 'substitute' for local conformity evaluations," the court says. EPA says as much in its briefs to the court, emphasizing that regional SIP planning is required, but not a substitute for local-level analysis.

"The addition of the regional component to the test merely clarifies that in order to conform, transportation projects must comply with other (preexisting) statutory and regulatory regional-level requirements," the court says. — *Stuart Parker*

SAMPLE ISSUE

Cross-State Air Pollution Rule

'Clean' Utility Criticizes EPA Delay Of Transport Rule 'Assurance' Provision

A major "clean" utility is criticizing EPA's plan to delay from 2012 to 2014 a provision in its power plant emissions cap-and-trade rule that would penalize utilities if their pollution contributes to states exceeding the rule's state pollution thresholds, saying the provision must take effect to address problems over a remanded Bush-era version of the rule.

The push-back on the delay from Exelon — a utility company with investments in nuclear, coal, wind, hydroelectric, solar, gas and oil — comes as opponents and supporters of EPA's Cross-State Air Pollution Rule (CSAPR) trading program have filed several new briefs in consolidated litigation over the rule. Some states and industry groups are seeking a stay of the rule, but EPA opposes that and also rejects industry claims of flaws in the rule's structure.

Exelon's Bruce Alexander told an Oct. 28 public hearing on the rule in Washington, DC, that his company generally supports CSAPR, and the company is one of several that have intervened to back EPA in the consolidated lawsuits over CSAPR pending in the U.S. Court of Appeals for the District of Columbia Circuit.

The rule replaces the Bush-era Clean Air Interstate Rule (CAIR), which the DC Circuit remanded to EPA in its 2008 ruling in *North Carolina v. EPA* because of flaws in its trading system, and other issues.

Alexander supported EPA's Oct. 6 proposal in terms of its revisions to emissions credit budgets for 10 of the 27 states covered by CSAPR, which aims to cut nitrogen oxide (NOx) and sulfur dioxide (SO2) emissions from power plants and help states meet EPA air standards. But he criticized language in the proposal that would delay from 2012 until 2014 the effective date of the rule's "assurance penalty provisions."

EPA said the provisions will ensure that individual states reduce their emissions to be compliant with the Clean Air Act's "good neighbor" provisions, and sources within a state are required to not combine to exceed a certain threshold of emissions, which is based on a "variability limit" and the emission budgets for each state. If states exceed that threshold, EPA then can penalize individual units by requiring that they surrender emissions allowances. EPA's final rule

made the provisions effective in 2012, while the proposal released this month would punt that date to 2014.

With the proposed changes and "[b]ased on observed compliance planning behavior among sources anticipating the 2012 control periods" for meeting CSAPR's pollution caps, pushing back the assurance provisions until 2014 would "ease the transition" from CAIR to CSAPR and "accelerate the development of robust transport rule allowance markets and facilitate a smooth transition to the transport rule programs," EPA said in the proposal.

Alexander argues the delay "goes too far . . . We do not believe that the proposed multi-year delay in the start of the assurance provision is necessary to address concerns about market liquidity."

The assurance provisions are a key aspect of EPA's response to the problems with CAIR as outlined by the DC Circuit in its remand, Alexander said. "The issue of liquidity is a 'year one' issue that should only be addressed, if at all, by accommodations in 2012. EPA should not delay the assurance provision implementation by more than one year. The assurance provision construct is a necessary element of the CSAPR, implemented to respond to the Court's invalidation of CAIR in *North Carolina*, and is a critical element of what makes CSAPR different from CAIR."

"With regard to the development of emission allowance markets and liquidity in the early years of the CSAPR, we believe that the sooner this proposed rule process is concluded, the better, as final Agency action will remove remaining regulatory uncertainty. Nothing inhibits early market development more than unresolved risks that final regulations may be further modified," Alexander said.

Exelon's views, however, are not shared across the utility industry, with American Electric Power's Martin McBroom at the hearing on the proposed CSAPR changes saying that the company "strongly favors deferring the effective date of the assurance provisions until 2014 or later, if such provisions are necessary."

Representatives from the Texas Commission on Environmental Quality said at the hearing that EPA's changes do not address their underlying concerns about Texas' inclusion in the rule or the compliance timeframe Texan utilities are facing. Environmental and public health groups such as the Environmental Law and Policy Center and Clean Air Task Force, meanwhile, urged EPA to not delay the rulemaking as it weighs making corrections.

As EPA weighs comments on its proposed revisions to CSAPR, it is continuing its fight against utilities and states seeking to delay the rule in consolidated litigation in the DC Circuit. In Oct. 27 briefs, it opposes the Southwestern Public Service Company's (SPSC) Oct. 7 motion to stay the rule as it pertains to Texas. EPA justifies the scope of the rule in Texas by saying it is vital to cutting the state's "significant contribution" to other states' air quality problems. *Relevant documents are available on InsideEPA.com.* *See page 2 for details.* (*Doc ID: 2380687*)

SPSC in its stay motion argued that "EPA's definition of 'significant contribution' is fundamentally inconsistent with the states' obligations" under the Clean Air Act — including that EPA required "Texas to reduce emissions at levels far exceeding levels necessary to address linkage to a putative nonattainment area."

EPA in its brief counters that SPSC's arguments fail in a number of areas. For instance, EPA argues that SPSC interprets the relevant language of the Clean Air Act "as limited almost exclusively to air quality considerations," a position that ignores "EPA's compelling rationale for rejecting such an approach for the rule as a whole."

EPA notes that most upwind states contribute to pollution issues in multiple downwind states, arguing that an "air quality-only approach" to this issue would "generally require each upwind State to reduce its emissions to address the maximum contribution that the State makes to any downwind nonattainment problem, resulting in much larger required emission reductions in upwind States than would be necessary, collectively, to address the identified downwind nonattainment issues." The agency says, "The mere fact that SPSC believes its narrow interests would have been better served in this particular case by an air-quality only approach does not rebut EPA's well-reasoned choice of a different approach for the rule that is entirely consistent with the statute and this Court's precedent."

Elsewhere in briefs, Texas in an Oct. 27 reply brief counters EPA's arguments that it does not have standing in the case, saying the Supreme Court noted in 2007's *Massachusetts v. EPA* that "a State can suffer an injury by virtue of its status as a landowner, even though the harm is widely shared." *Massachusetts* was the high court's landmark ruling that found EPA has authority to regulate greenhouse gases as pollutants under the Clean Air Act.

Texas says that CSAPR will cause some power plants to shut down, which in turn will harm electric grid reliability, saying it will suffer harm due to those electric generation interruptions. "At a very basic — and again, self-evident — level, the petitioners' operations, like those of other energy consumers, depend on electricity. When the computers shut down and the lights go out at agency offices, those agencies suffer concrete injuries in fact," Texas says.

Texas also fights EPA's opposition to a stay, saying EPA "faults Texas for not accurately guessing what its emissions budgets would be," and that the suggestion that Texas' choice to not provide comments on certain aspects of the rule was not a "strategic choice." "It is unclear how such a strategy could have furthered Texas's interests," Texas says.

In a related development, the Environmental Integrity Project, Sierra Club and Earthjustice have sent a notice of intent to sue to Texas utility Luminant for permit violations at its Monticello and Big Brown plants in the state.

The company has said in response to CSAPR that it would be forced to idle units at both facilities. In the notice, the groups accuse Luminant of violating allowed opacity limits — a measurement of particulate matter — thousands of times over the past five years. — *Bobby McMahon*

SAMPLE ISSUE

Senate Measure To Scrap EPA 'Transport' Rule Faces Almost Certain Defeat

An imminent Senate measure to block EPA's cap-and-trade rule for power plants faces an almost certain defeat as key GOP senators are signaling they oppose the measure and the White House is threatening to veto it.

The offices of Sens. Scott Brown (R-MA) and Susan Collins (R-ME) told *Inside EPA* they will not vote for the "resolution of disapproval" to scrap EPA's Cross-State Air Pollution Rule (CSAPR), which seeks to reduce power plant emissions of nitrogen oxides and sulfur dioxide in 27 states.

In a Nov. 7 statement, Brown said that his constituents "should not have to breathe pollution from other states, and therefore I cannot support rolling back an important public health protection for the people I represent." In turn, a Collins spokesman said Nov. 8 that the senator "intends to oppose" the resolution.

The resolution, S.J. Res. 27, which is sponsored by Sen. Rand Paul (R-KY), is immune from filibuster and other procedural hurdles under the Congressional Review Act (CRA).

Paul last week won support from enough GOP senators to discharge the bill from the Senate environment committee. Under CRA procedures the measure is guaranteed a vote and needs only a simple majority to pass. The resolution is slated to get an up-or-down floor vote, and sources expect that the measure will see a possible vote on Nov. 10.

But Sen. James Inhofe (R-OK) has expressed doubts about its prospects for passage because it would face a likely veto from President Obama.

And now it appears like the resolution may not win enough votes to make it out of the Senate. Collins and Brown join Sen. Lamar Alexander (R-TN) as Republican senators vowing to vote against the resolution. "In my opinion, overturning the rule [by voting for the resolution] would throw the matter back to regulators, back to courts, back to lawsuits, and back into a delay," Alexander said in a Nov. 7 floor speech.

Alexander, together with Sen. Mark Pryor (D-AR), Nov. 7 introduced S. 1815, a bill that would codify the rule and delay implementation and compliance deadlines.

Alexander's opposition to the resolution means its supporters will need at least seven Democratic senators to break ranks and vote in favor of the measure while losing no more GOP senators.

But there may not be that many Democrats willing to break ranks, while several other Republicans are signaling they may not support the measure.

In addition to Brown and Collins, at least 10 other Republicans, including Sens. Olympia Snowe (ME), Kelly Ayotte (NH), Lisa Murkowski (AK), Richard Lugar (IN) and Mark Kirk (IL), did not sign the letter seeking to discharge the resolution from the environment committee, though they could still vote to support the resolution.

Of those seven, Snowe and Ayotte are facing pressure from their Democratic colleagues to join the opposition to the resolution because their states would benefit from the rule. During a Nov. 7 conference call, Democratic Sens. Tom Carper (DE) and Sheldon Whitehouse (RI) urged senators from their regions to vote against the resolution, arguing that the rule is about equity and reducing Midwestern power plants' emissions impacts on downwind states. They said votes should be based on where lawmakers are from rather than their political persuasion, with Whitehouse saying that the outcome of Paul's effort will hinge "on whether downwind Republican senators take their downwind status as a greater priority than their Republican status."

"I cannot support rolling back an important public health protection for the people I represent"

— Sen. Scott Brown (R-MA)

Ayotte's and Snowe's offices did not return calls seeking comment.

While no Democrats have indicated publicly that they plan to support the resolution, several are concerned about the rule. Pryor, for example, is co-sponsoring S.1815 with Alexander and Sen. Joe Manchin (D-WV) is reportedly sponsoring a similar measure with Sen. Dan Coats (R-IN).

But Carper and Whitehouse said they would oppose efforts to delay CSAPR's implementation date as a compromise measure to the resolution. "We've waited long enough, and the idea of waiting further isn't in our interest," Carper said.

Meanwhile, the White House is threatening to veto the resolution if it reaches the President's desk. "Each year, this rule would avoid tens of thousands of premature deaths, prevent more than ten thousand heart attacks and hospital visits for respiratory and cardiovascular disease, and alleviate hundreds of thousands of childhood asthma attacks and other respiratory illnesses," the White House said in a Statement of Administration Policy (SAP).

"The Environmental Protection Agency estimates that this flexible, commonsense rule will yield hundreds of billions of dollars in net benefits each year. S.J.Res. 27 would overturn this rule, jeopardize these public health and economic benefits, and perpetuate uncertainty for businesses, freezing investments in clean technologies," the SAP adds. — *Bobby McMahon*

SAMPLE ISSUE

Fuels

EPA Official Says Pending Fuels Rule To Focus On Contested Sulfur Cap

A top EPA air official says the agency in its pending revised fuel and vehicle standards is "concentrating" on reducing fuel sulfur content — a significant boost for states and automakers that are pushing for a strict sulfur cap in fuel, but likely to prompt further criticism from refiners who are fighting EPA's attempts to tighten the sulfur limit.

Margo Oge, director of EPA's Office of Transportation and Air Quality, told a Nov. 2 House Science Committee's energy panel hearing that a recent National Association of Clean Air Agencies (NACAA) study outlining options for reducing fuel sulfur content is "more close . . . to what EPA is planning to do" with the standards, compared to a study from energy consulting firm Baker & O'Brien that looked at both sulfur caps and fuel volatility limits.

NACAA found that sulfur fuel reductions can be made for less than a penny a gallon as part of a reduction in the average sulfur cap from 30 parts per million (ppm) down to 10 ppm. NACAA's report did not address fuel volatility limits.

In the July Baker & O'Brien report — backed by the refining industry — several scenarios were outlined, predicting increased costs of fuel by 12 to 25 cents under tighter limits on sulfur content and fuel volatility. Industry sources have argued that the study is more realistic and considers factors the NACAA study ignores, particularly a tighter fuel volatility standard.

But Oge during the hearing said that the industry-backed study made certain assumptions about what EPA will do even though the agency is yet to propose the so-called Tier III rule. EPA in its "Rulemaking Gateway" says that a proposed rule is expected to be published in the *Federal Register* in January. In turn, Oge told lawmakers that "our Tier III efforts are concentrating on reducing sulfur to less than 30 parts per million."

Michael Walsh, the NACAA study's author, told *Inside EPA* on Oct. 31 that while the Baker & O'Brien study does not detail the costs attributable to a tighter volatility limit compared to a tighter sulfur limit, he expects that most of the costs of the Tier III standards stem from stronger fuel volatility standards and not from sulfur.

Walsh, an event in Washington, DC, to release the study, also downplayed the expectation that EPA will strengthen the fuel volatility levels, saying, "I don't think EPA is going to be going in that direction."

Petroleum industry sources have said that the Baker and O'Brien study looks at the full picture of the rule's impacts on refineries and that "from what we're hearing from EPA, they're still intending" to strengthen fuel volatility limits.

At the hearing, Oge also faced criticism from Rep. Andy Harris (R-MD), chairman of the subcommittee, for her recent comments that EPA is holding "very productive discussions with both car companies and fuel providers" about the upcoming revised standards. While car companies have offered support for the reduced sulfur cap, arguing that such a reduction will aid in the effectiveness of pollution-reducing catalysts, refiners have expressed concerns over both the costs of the rule and have questioned the benefits derived from reducing sulfur below its present level.

Petroleum industry officials told *Inside EPA* recently that they dispute remarks Oge made at a an Oct. 6 Clean Air Act Advisory Committee mobile sources panel meeting in Arlington, VA. Oge said, "we have held very productive discussions with both car companies and fuel providers" about the upcoming standards, noting the productive conversations EPA has had to reduce sulfur in fuel so that more advanced catalysts can be used.

After American Petroleum Institute official Bob Greco at the hearing affirmed that member companies held "a united view" in their concerns about the costs an impacts of the rule, Harris said that there is no doubt where the industry stands and asked Oge "what do you define as a very productive discussion?" given industry's concerns.

In response, Oge reaffirmed her belief that the conversations have been "very productive," particularly because of EPA's effort to hear the concerns of refiners about the forthcoming rule.

"What we heard from the industry was very productive, because that's how we're going to design the program," adding that the program they're designing will be informed by these discussions.

"They don't know how those discussions are forming the policy that EPA is going to recommend," Oge said, calling industry's statements about the nature of the discussions "unfortunate" and saying that EPA is aiming to create a revised Tier III rulemaking that is "very flexible and cost effective."

SAMPLE ISSUE

Accessing Documents Related To This Issue Of *Clean Air Report*

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EPA, Industry Spar Over Legality Of E15 Fuel Waiver In Final Legal Briefs

EPA and industry are sparring over the legality of the agency's partial waivers allowing the sale of fuel containing up to 15 percent ethanol (E15) in final briefs in a suit over the waivers, with EPA refuting industry's claims that it cannot grant partial waivers and erred by failing to show that E15 does not have the potential to damage engines.

Groups representing the food, oil and automobile manufacturing sectors are urging the U.S. Court of Appeals for the District of Columbia to vacate EPA's two waivers — issued Nov. 4 and Jan. 26 — allowing the sale of E15 in model year 2001 and newer vehicles. Food groups fear greater use of corn-ethanol for fuel will limit corn available for food production, while the oil and vehicle groups fear liability from potential engine damage from E15.

EPA's E15 decision is also causing concern for underground tank owners who fear they could face increased cleanup liability because E15 is more corrosive than conventional E10 fuel, possibly resulting in more leaks. They are warning that few marketers will sell E15 without EPA providing them with certainty about their potential future cleanup liability. EPA in a new proposed rule is pushing to require underground storage tank owners to use systems that are compatible with ethanol blends above E10.

Lawsuits over the E15 waivers have been consolidated in the suit *Grocery Manufacturers Association, et al., v. EPA*. In its final Oct. 25 brief, EPA defends the partial waivers from a number of industry attacks. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380454*)

Industry says the Clean Air Act does not authorize EPA to grant fuel waivers to a limited number of model year vehicles. Critics also say EPA erred by justifying its decisions in part using Department of Energy (DOE) data to show E15 would not damage engines, saying the data fails to demonstrate damage will not occur.

Industry also says that EPA has not done enough to prevent possible misfueling of engines that cannot handle E15, such as lawnmowers, or corrosion of equipment such as fuel tanks by the higher ethanol blend.

But in the final brief, EPA says section 211(f)(4) of the Clean Air Act permits a partial waiver if EPA determines that a new fuel "will not cause or contribute to a failure of any emission control device or system . . . to achieve compliance" with emissions standards "by the vehicle or engine." EPA argues this limits the permissibility of the new fuel to its effects on an individual vehicle or engine, not on all vehicles and engines as industry claims.

"EPA reasonably concluded that for E15, which has different effects on the emission control systems of different types and model years of vehicles and engines, a partial waiver was appropriate," EPA says in the filing. "Petitioners ignore the statute's plain language and otherwise fail to show EPA was unreasonable or inconsistent with the statute."

EPA also says industry petitioners fail to support their "novel" argument that EPA cannot consider data other than that submitted by the waiver applicant — in this instance, the ethanol group Growth Energy that sought the waivers.

EPA says it "reasonably considered" the DOE data and other information on E15's potential effects, and says it met all notice-and-comment requirements by providing notice of the DOE data and EPA's reliance on it.

Overall, petitioners' arguments boil down to "disagreements with EPA's reasoned technical judgments. Petitioners disagree with the numbers and types of studies EPA relied on, EPA's interpretation of the data and other information in the record, and reasonableness of EPA's steps to prevent misfueling," EPA says.

EPA says these arguments do not meet "petitioners' high burden under the arbitrary and capricious standard of review," used by courts to determine when environmental regulations are illegal.

Growth Energy, intervening on EPA's behalf, says in an Oct. 25 final brief the case should be dismissed because industry petitioners lack standing, as they are unlikely to suffer harm from the waivers. "Petitioners have not shown — and cannot show — a substantial probability that they will suffer an injury in fact that is traceable to the E15 waivers. Petitioners do not challenge any regulatory burden imposed upon them, and their claims of indirect harm are speculative or premised on their own anticipated *voluntary* decision to make or sell E15," the group says.

Further, petitioners lack "prudential standing," Growth Energy says, because their economic interest in opposing the waivers does not fall within the zone of interests protected by the environmental statute under which the waivers were granted." The group agrees with EPA's arguments on the merits of the case as well.

Industry petitioners, meanwhile, answer Growth Energy's accusations on standing and EPA's merits arguments in an Oct. 25 final reply brief. "The record is replete with studies demonstrating the harmful effects of E15 on vehicles and engines," and "Misfueling and engine failures are hardly 'speculative'," petitioners say, meaning that petitioners will suffer real harm due to liability from potential engine and vehicle damage, and thus have standing.

Food industry petitioners have standing because EPA itself in its renewable fuel standard (RFS) has said corn prices will likely rise as more ethanol is diverted to fuel production, industry argues.

Further, Growth Energy's arguments over prudential standing are wrong, since E15 could cause the failure of emissions controls and environmental damage, industry says. Industry petitioners also say that Growth Energy's narrow interpretation of prudential standing is incorrect, and that any petitioner whose interests are "*regulated* by the statute in question" has such standing. Nor is the production and sale of E15 truly voluntary, it is a mandate, industry claims. Oil

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sector petitioners' members "will *have* to sell E15" in order to meet RFS targets, industry argues.

Industry says EPA is wrongly interpreting section 211(f)(4) of the air law to grant a partial waiver. It permits waivers for certain fuels, not for use of those fuels in certain vehicles, industry argues, saying to be lawful the waiver must apply to the totality of vehicles post model-year 1974, when the section was enacted.

Industry goes on to attack EPA's reliance on government information to make Growth Energy's case in the group's original petition for an E15 waiver, which they say show EPA's "results oriented approach" and pro-ethanol bias. Industry also claims EPA "cherry-picked" studies backing a waiver; that the DOE testing lacked necessary vigor; that EPA "improperly dismissed or averaged away unfavorable test results;" that EPA overlooked emissions failures likely to result from E15, and that EPA's misfueling mitigation measures are "arbitrary and capricious" because similar measures have proven ineffective in the past.

Oral arguments have not yet been set in the case. — *Stuart Parker*

High Court Rejects Oil Industry Bid To Hear Suit Over Retroactive EPA RFS

The Supreme Court has rejected the oil industry's request to overturn a lower court ruling upholding EPA's retroactive application of its renewable fuel standard (RFS), which industry fears may set a dangerous precedent allowing agencies to retroactively apply rules without Congress' authorization.

The National Petrochemical & Refiners Association (NPRA) and the American Petroleum Institute (API) urged the high court to hear their appeal of a December 2010 ruling by the U.S. Court of Appeals for the District of Columbia Circuit in *NPRA, et al. v. EPA*, in which a three-judge panel upheld an EPA rule issued in 2010 that had retroactive application to 2009.

The groups said the rule — setting production quotas for the RFS in 2009 and 2010 — is illegally retroactive because it requires refiners to obtain credits based on their production and importation of renewable fuel from Jan.1, 2010, to June 30, 2010, before the rule became effective July 1, 2010. Industry says this is at odds with Administrative Procedure Act mandates that rules only have future effects, and could give EPA the power to retroactively apply other rulemakings.

But the high court in its Nov. 7 orders list denied the groups' petition for a writ of *certiorari* to hear the case, prompting the groups to warn of the consequences of letting the *NPRA* ruling stand.

API in a Nov. 7 statement said it is "discouraged by the Supreme Court's decision not to hear the case. We remain concerned that the lower court's decision could set a precedent that allows federal agencies to issue retroactive rules impacting all industries."

API senior policy advisor Patrick Kelly added in the statement that the "DC Circuit's decision unnecessarily complicates compliance and may set a dangerous precedent allowing administrative agencies to issue retroactive rules without express congressional authorization. EPA failed to meet a specific deadline set forth by Congress, issued a final rule that became effective almost a year and a half after the statutory deadline, and then retroactively applied that rule to transactions that occurred before the effective date."

API says the case "presents a fundamental question of administrative law that should be of interest to any regulated entity."

Ethanol Groups Defend EPA Renewable Fuel Standard From Legal Attacks

Ethanol groups are defending EPA from a slew of food sector, oil industry and environmentalist lawsuits challenging various provisions of the agency's renewable fuel standard (RFS) to boost biofuel production, arguing the petitioners lack standing — and saying that even if the groups had standing they would lose on the merits of their suits.

Food sector groups want the group to overturn the rule, saying increased diversion of corn to ethanol production to meet the RFS will raise food prices. Oil sector groups, meanwhile, have concerns about ethanol competing with petroleum products. Activists in legal filings claim that biofuels productions could result in more pollution, including increased greenhouse gases (GHGs), and criticize exemptions for some facilities from the RFS' GHG reduction mandates.

Various challenges have been consolidated in the U.S. Court of Appeals for the District of Columbia Circuit suit *National Chicken Council, et al. v. EPA*. Oral arguments in the case are not yet scheduled.

In an Oct. 26 filing, the Renewable Fuels Association, National Biodiesel Board, National Association of Forest Owners and Growth Energy claim that all petitioners challenging the RFS lack standing to do so for several reasons, and that even if they had standing to challenge the various provisions of the RFS, they would lose on the merits. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381000*)

Among the challenges to the RFS is criticism of a "deemed compliant" provision, which says ethanol plants that

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commenced construction prior to 2010 and are either natural gas or biomass-fired can be deemed compliant with the RFS even if they do not reduce GHG emissions as much as the RFS requires. The 2007 Energy Independence & Security Act (EISA) set the latest RFS mandates, updating requirements in the 2005 energy law.

Petitioners also challenge EPA's method for ensuring non-agricultural land is not converted to biofuel production under an "aggregate compliance" method. This is designed to prevent higher GHG emissions or lost food production by limiting the total number of qualifying acres of land to that deemed to qualify in 2007.

Environmentalists also challenge EPA's failure to account for a theoretical "global rebound effect," which says that increased biofuel production in the United States will lead to rising oil supplies and lower prices, and hence rising oil consumption, elsewhere in the world. Increased oil consumption will raise global GHG emissions.

The pro-ethanol groups in their filing say that a ruling in favor of petitioners on the "deemed compliant" issue would not redress their claimed injury, failing one test to establish standing. Environmentalists, meanwhile, fail to show "injury-in-fact," causation or redressability for their claims of rising GHG emissions, the group says.

EPA in an Oct. 5 brief in the lawsuit has already stated why the "deemed compliant" complaint is not redressable. EPA said in that brief that "a second exemption, unchallenged by any party, independently grandfathers the full volume of exempt renewable fuel that is eligible for use in satisfying EISA's mandates."

The grandfather provision exempts all biofuel plants that commenced construction before EISA was enacted on Dec. 19, 2007, from the 20 percent GHG reduction requirement. This provision covers the entire volume of renewable fuel that does not qualify as advanced biofuel. The maximum amount of exempt fuel that can be used to satisfy the EISA's volume mandates, under either the "deemed compliant" or "grandfather" provisions or both, is 15 billion gallons. Ethanol production capacity sufficient to produce this volume is already registered with EPA by grandfathered facilities, the agency argued, making the dispute over "deemed compliant" facilities moot.

EPA is also fully within its rights to set 2022 as the reference year for its calculation of lifecycle greenhouse gas emissions from biofuels, the pro-biofuel groups argue. The RFS program requires analysis of lifecycle GHG emissions, and overall GHG reductions. Environmentalists say EPA must use an earlier year, and continuously update its lifecycle estimates to avoid unnecessary delay and potentially avoid illegal GHG pollution from biofuels.

Although EISA sets 2005 as the base year for determining lifecycle emissions for petroleum fuel, for biofuels "Congress directed that lifecycle emissions be 'as determined by the [EPA] Administrator,' without specifying any particular year or timeframe for biofuels," the biofuel groups say in their filing.

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Risk Assessment

Carpet Industry Fears California Risk Study May Spark New Air Rules

The carpet industry is raising concerns that a new California Environmental Protection Agency (Cal/EPA) backed risk assessment for a compound commonly used in carpeting may lead to stringent indoor air quality standards overseen by the state health department, according to sources. Industry officials have criticized the state health hazard office's risk assessment as scientifically flawed and oppose a new draft reference exposure level (REL) for the chemical in question.

Cal/EPA's Scientific Review Panel (SRP) Oct. 31 approved the draft Office of Environmental Health Hazard Assessment (OEHHA) REL for caprolactam, a compound typically used in carpet manufacturing.

An OEHHA spokeswoman says that at the request of the science panel, OEHHA will make some minor, technical changes to the REL document to respond to industry comments. But these revisions should not affect the substantive parts of the proposed REL. The draft REL, set at 50 micrograms per liter or 11 parts per billion, will remain the same, the spokeswoman says.

After making these adjustments, OEHHA's director will formally adopt the REL, the spokeswoman says. Upon adoption, the REL can be used for conducting health risk assessments under the state's air toxics hot spots program, she says.

In recent comments to OEHHA and the science panel, carpet industry representatives ripped OEHHA's proposed REL and its interpretation of studies used to set the REL. For example, in a Sept. 12 email to OEHHA, representatives of the Carpet & Rug Institute argue that studies and raw data on caprolactam health impacts show that the impacts are not biologically significant. There is nothing in studies or the entire data set used by OEHHA to warrant the establishment of an acute REL, the group argued.

In a Sept. 11 letter to OEHHA, TERRA, Inc., a toxicology and risk assessment consulting firm, argues on behalf of the industry that OEHHA assessments are "possibly driven more by an unstated goal or preference for what level a chemical exposure should be rather than letting the data determine it. A brief review of the revolving door that has been

the constant changing paradigm of how to calculate acute caprolactam seen in each of four draft [assessments] provides another observation that appears to support this concern," the group said. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380980*)

In an Aug. 12 letter to the SRP, Sauerhoff & Associates, a toxicology consulting firm, requested the panel to find that caprolactam REL values are scientifically unsound, invalid and to reject them. "The REL values lack relevance to public health and establish a dangerous scientific precedent for future regulation of compounds based on questionable" data, the letter states.

A source with the Carpet & Rug Institute did not respond to requests for comment regarding the science panel's action.

A February blog on the Carpet & Rug Institute's website indicated that OEHHA's proposed REL would recommend reducing emission levels for caprolactam to "unattainable levels." The group's blog adds that caprolactam is used in the production of Nylon 6, the fiber that accounts for approximately 30% of carpets in the U.S.

OEHHA's proposed REL is significant to the carpet industry because it sets levels for many volatile organic compounds that produce emissions. Once OEHHA sets the level, the Department of Public Health (DPH) uses one-half of that number to set emissions limits under its indoor air quality standards, according to the blog.

The blog also points out that after reviewing the same data used by OEHHA, European officials actually raised a European Indoor Air Quality Standard for caprolactam. Frank Hurd, Carpet & Rug Institute vice president, told industry officials during a January 2011 conference that "this vastly different view of the science by OEHHA is very troubling and [the industry] is doing all it can to convince OEHHA they have the wrong numbers."

Permitting

Judges Offer EPA, Texas Tough Questions Over 'Flexible' Air Permit Fight

Federal appeals court judges at recent oral arguments gave EPA and Texas tough questions in the state's lawsuit challenging the agency's disapproval of a Texas "flexible" Clean Air Act permitting program, but gave little indication of whether they will back EPA's determination that the program could lead to violations of the air law.

Until the three-judge panel of the U.S. Court of Appeals for the 5th Circuit issues a ruling in *State of Texas v. EPA*, dozens of companies that have flexible permits are left in regulatory uncertainty, sources say.

Flexible permits, issued to 140 Texas facilities, allow multiple pollution sources to be covered by a single emissions cap at a given site, allowing industry to make process changes without triggering new permit requirements. EPA says the program is poorly defined and could allow some units to avoid new source review (NSR) emissions control mandates for "major" pollution sources. EPA formally disapproved the permit program in a July 15, 2010 rule.

Although the program has functioned for 15 years without a recorded instance of misuse to avoid major source NSR permit requirements, EPA and environmentalists say its vague wording could allow major sources to dodge NSR, and its weak monitoring and recordkeeping requirements make it impossible to enforce.

The state counters that its program clearly applied only to "minor" pollution sources, and would not lead to any violations of federal major NSR permit requirements. Texas argues that EPA has no basis for disapproving its flexible permits program, submitted for EPA approval as part of a broader state air quality plan.

The suit is just one of several legal challenges that the Lone Star State has pending against EPA, with lawsuits filed in the U.S. Court of Appeals for the DC Circuit challenging the agency's climate regulations and its Cross-State Air Pollution Rule cap-and-trade emissions program covering 27 states, including Texas.

At oral arguments in the flexible permit suit, the judges asked Texas why the state does not simply add some language to its existing flexible permits rule to say explicitly that its program does not apply to major sources — those emitting over 100 tons of any one pollutant or 250 tons of a combination of them.

According to a recording of the Oct. 4 arguments, an attorney for the state replied that although some have suggested this step, it would not address the flexible permits already issued, which EPA has said are invalid. Industry is now working with EPA and the state to "de-flex" these permits by converting them to conventional air permits, but the process is far from complete, leaving permit holders in a legally questionable situation.

Industry and state attorneys at oral argument pointed to the absence of actual recorded air act infractions as evidence that EPA cannot meet the statutory requirement necessary to disapprove the flexible permits program — that it will interfere with meeting national ambient air quality standards or other air act requirements.

EPA and an attorney for the environmental groups Environmental Integrity Project (EIP) and Environmental

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Defense Fund (EDF) — intervening to defend the agency's disapproval decision — at oral arguments said that the flexible permit regulatory text makes it impossible to know whether it will definitely result in NSR violations.

Pressed by the judges on why EPA did not examine the actual NSR compliance record of plants covered by flexible permits, the Department of Justice's David Carson, representing EPA, replied that this was not necessary in order to find the rule inadequate.

When asked if EPA has any objection to the way the program is actually working, Carson replied that, "EPA didn't review it in that manner." Further, "it is hard to tell" if any past infractions have taken place.

"A major source can come under this program and we would never know about it," he said, noting that state-level monitoring and recordkeeping requirements are left entirely up to the executive director of the Texas Commission on Environmental Quality, and are therefore unenforceable by EPA or citizens.

Attorney Charles Irvine, representing EIP and EDF, added that the organizations do not oppose flexible permitting in principle, "we just think this flex permit program goes too far," echoing EPA's position.

Environmentalists would like to see permits with enforceable emissions limits for individual emissions sources, or at least smaller groups of sources than currently allowed by Texas' flexible permits.

Industry attorney countered Samara Kline that "this discussion has nothing to do with any actual air quality" problems, and that the recordkeeping and monitoring requirements at issue are the same as those for other forms of Texas air permits that EPA has not disallowed.

The judges pressed Carson on why it has taken so long for EPA to disapprove a program that has been in place for 15 years, given that it is the agency's responsibility to approve or disapprove the plan within air act-prescribed deadlines.

Carson said "I don't know," but added that it is the responsibility of the state or industry to sue the agency in order to get a decision if EPA is late — and indeed an industry lawsuit was the source of the EPA decision now at issue. Industry petitioners in the case include the American Petroleum Institute, National Association of Manufacturers, American Chemistry Council, and others. — *Stuart Parker*

Activists Sue EPA Over Air Permits For Exploratory Arctic Oil Drilling

Environmentalists are continuing their legal fight over oil companies' permits for exploratory oil drilling in the Arctic Ocean, filing a lawsuit over EPA's Clean Water Act permits issued to ConocoPhillips and a new administrative appeal of Clean Air Act permits issued to Shell.

The Oct. 21 suit over the water permits, *Inupiat Community of the Arctic Slope, et al. v. Lisa P. Jackson, et al.*, asks the U.S. Court of Appeals for the 9th Circuit to review two letters EPA sent to ConocoPhillips granting the company's request that its drilling operations planned for 2013 in the Chukchi Sea be covered under the National Pollutant Discharge Elimination System general permit for oil and gas exploration activities on the Outer Continental Shelf. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380601*)

Meanwhile, the Oct. 24 administrative appeal filed with EPA's Environmental Appeals Board (EAB) challenges EPA's major source Clean Air Act permits for Shell to operate the *Discoverer* drill ship in the Arctic's Beaufort and Chukchi seas next summer for its drilling operations.

The air permits are revised versions of permits that EAB previously remanded to the agency over air quality impact modeling, its nitrogen oxide (NO2) limits and other issues. The Center for Biological Diversity (CBD), Sierra Club and other groups filing the challenge say the revised permits fail to address their criticisms. EPA Region X — which issued the permits — "clearly erred by failing to require Shell to demonstrate that the *Discoverer*'s operations will not cause pollution in excess of the 1-hour maximum allowable concentration for NO2," the groups argue in their petition.

CBD in a statement said the new Clean Air Act permits "mark the start of full-scale industrial oil exploration of the extremely sensitive Arctic. Oil drilling in the Arctic Ocean comes with unacceptable risks of spills that could have catastrophic impacts on Arctic wildlife and the communities that rely on the Arctic environment. . . . The new permits violate the Clean Air Act once again, allowing Shell to emit harmful pollutants beyond legal limits."

A Shell spokesman says the company expected the environmentalists to appeal the permits to EAB and also "expects the permits will be validated and usable."

Meanwhile, EPA Region X issued a minor source air permit Oct. 21 for Shell to explore for oil with the Kulluk drill rig in the Beaufort Sea next summer, saying it limits emissions to less than 250 tons per year, noting the minor source permit "significantly reduces the potential air pollution" and protects air quality standards.

But environmentalists are also criticizing that permit and accusing EPA of turning "a blind eye to the cumulative impacts" of Arctic drilling, according to an Earthjustice statement. If activists want to challenge the permit, they must file with EAB by Nov. 28.

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Particulate Matter

GOP House Energy Panel Members Approve Bill To Bar EPA 'Dust' Air Rules

Republicans on the House Energy and Commerce Committee's power panel approved on a 12-9 party line vote a bill to exempt "nuisance" dust from Clean Air Act regulation, advancing the bill to the full energy committee after rejecting Democrats' efforts to soften the legislation.

At a subcommittee markup Nov. 3, GOP lawmakers approved without Democratic backing H.R. 1633, a bipartisan bill that would block the EPA from revising its coarse particulate matter (PM10) standards for one year and exempt nuisance dust from regulations. Although the bill has Democratic support, none of its Democratic backers serve on the energy and power subcommittee.

As expected, the panel approved an amendment in the nature of a substitute to the bill adding language stipulating that dust "emitted directly into the ambient air from combustion, such as exhaust from combustion engines and emissions from stationary combustion processes" does not fall under the definition of nuisance dust. The revised language was seen as an attempt to win over Democrats concerned that the bill would limit EPA's air regulatory authority over power plants, vehicles and other emissions sources.

Rep. Mike Pompeo (R-KS) said that the amended language, which also excludes "windblown dust" from the definition of nuisance dust, was intended to provide clarity and ensure that emissions from vehicles or power plants would not fall under the definition.

But Rep. Bobby Rush (D-IL), ranking member of the power subcommittee, argued that the language was still too broad and that PM emissions from mining operations, Portland cement facilities and other facilities could still be excluded from Clean Air Act regulation under the bill's definition.

Rush's view was backed by House Energy & Commerce Committee ranking member Henry Waxman (D-CA), who said that while the GOP's changes improve the bill, they do not fix its "fundamental flaws," including how monitoring would distinguish between rural and urban PM.

Rush offered an amendment to the bill that would remove the exemption on nuisance dust entirely and clarify that nothing in the bill would prevent EPA from revising its ambient air quality standard for fine PM. Waxman said the amendment would codify EPA Administrator Lisa Jackson's commitment not to revise the PM10 standard and would remove the "fatally flawed" definition of nuisance dust.

But subcommittee Chairman Ed Whitfield (R-KY) opposed the amendment, saying that since the purpose of the legislation is to exempt the regulation of farm dust, "this amendment would really gut the bill." The amendment failed 9-12 on a party line vote.

While Republicans reiterated claims that the bill is necessary to provide farmers and ranchers with certainty and prevent EPA from reneging on its commitment to retain the existing PM10 standards, Democrats argued that the bill is a waste of time and that it addressed a non-existent issue.

Rep. Ed Markey (D-MA) at the hearing compared GOP belief about the "imaginary problem" to a child's belief that clapping their hands will revive Tinkerbell in the fairy tale "Peter Pan," saying that "if we just believe that EPA has launched a war on jobs, then it must be so, and we must stop it."

"The Republican Lost Boys are telling America that the only way to revive the Jobs Fairy is to kill the EPA," Markey said.

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GHG Permits

Activists Win Role In Texas Suit Against EPA Greenhouse Gas Permit Rule

Environmentalists have won the right to intervene in Texas' lawsuit challenging EPA's greenhouse gas (GHG) permitting rule, giving activists another opportunity to defend the rules even if the agency eventually stops defending its regulations.

The U.S. Court of Appeals for the District of Columbia Circuit in a brief one-page order Oct. 27 granted the motion to intervene filed earlier this year by the Natural Resources Defense Council, Environmental Defense Fund, Sierra Club and Conservation Law Foundation.

The groups filed a June 3 motion to intervene in *State of Texas, et al. v. EPA*, in which Texas is challenging the agency's imposition of a federal implementation plan (FIP) on the state to ensure EPA's GHG permit rules would apply to Texas-based sources seeking Clean Air Act preconstruction permits. Texas opposes the GHG limits and refused to craft a state implementation plan to adopt them, prompting the agency to impose the FIP and take over GHG permitting in the Lone Star State. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380613*)

Following the court's order granting the motion, environmentalists will now be able to intervene on EPA's behalf to

defend the FIP should a Republican win the White House in 2012 and force EPA to drop its support of the regulations.

Environmentalists have already won the right to intervene in other lawsuits challenging various aspects of EPA's broader climate program, including its GHG vehicle emissions standard and the agency's finding that GHGs endanger human health and welfare.

Texas Gov. Rick Perry (R) has repeatedly criticized the costs of EPA rules, and in the event he wins the Republican presidential nomination and defeats President Obama in next year's election, a Perry EPA could drop its defense of the climate rules and try to dismiss the suit.

In that event, environmentalists' intervention in the case would give them an important legal power to try and force the case to continue and have the court uphold EPA's climate rules — effectively binding a potential Republican administration to continue administering the regulations.

The environmental groups in their motion to intervene say they have a "substantial interest in this proceeding based upon their long-standing work to protect and extend the Clean Air Act's clean air and public health protections in order to benefit their members."

The groups say they have for years advocated for federal GHG rules, and that their members benefit from the climate rules because they will reduce adverse GHG impacts on natural resources and public health will benefit from "clean air measures" to cut GHGs and other pollutants.

The groups say they have "acted to defend their interests by intervening in defense of EPA rules and interpretations" in several lawsuits. A win for Texas in the case would "disrupt" GHG permitting in Texas and deprive environmentalists "of the opportunity to participate in preconstruction permit proceedings to help ensure that new and modified sources of greenhouse gases minimize their emissions, as well as the climate benefits of those reductions themselves."

Activists Sue Over Exclusion Of GHG, NO2 Limits From Avenal Air Permit

Environmentalists are suing EPA in federal appeals court over the agency's unusual decision to exempt, or "grandfather," an air permit for the proposed 600-megawatt Avenal natural gas plant in California from strict greenhouse gas (GHG) and nitrogen dioxide (NO2) emissions control requirements.

The suit, filed Nov. 3 in the U.S. Court of Appeals for the 9th Circuit, was widely anticipated as activists have long criticized the exemption. Sierra Club, the Center for Biological Diversity (CBD) and Greenaction for Health & Environmental Justice, represented by Earthjustice, are suing over the exemptions. The groups also claim that the permit will fail to adequately control pollution from the plant, adversely impacting nearby low-income communities. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381235*)

In a Nov. 3 statement announcing the suit, the groups also warn that the Avenal decision could set a negative precedent, as EPA could extend the grandfathering policy to an estimated 10 to 20 other permits seeking to avoid GHG and strict NO2 emission limits.

EPA has defended the decision to exempt Avenal from meeting GHG limits and a stricter NO2 ambient air quality standard (NAAQS), saying that the plant is in the rare position of having applied for a permit long before the agency's GHG permit rules and stricter NO2 NAAQS took effect.

Avenal won its final Clean Air Act permit after successfully challenging EPA in the U.S. District Court for the District of Columbia for taking too long to issue the permit. A district judge May 27 imposed a three-month deadline for the agency to issue or deny the permit, including any time taken for administrative appeals of the permit to EPA's Environmental Appeals Board (EAB).

Environmentalists filed an EAB challenge to the permit, but the board rejected that challenge in an Aug. 18 ruling, in time to comply with the district court's order. EAB sidestepped the grandfathering issue, noting that due to "the time constraints imposed by the" district court "and the importance of contributing to an orderly and efficient administrative process, the board declines to exercise its discretion to review" the GHG and NO2 permitting exemptions, according to the ruling.

EPA published the final permit in the Sept. 9 *Federal Register*, starting a 60-day lawsuit clock. The environmentalists are filing their challenge ahead of the Nov. 9 deadline to sue.

"The EPA has already announced that during the next several years, it will regulate harmful carbon pollution from only the largest industrial polluters in the country," CBD attorney Vera Pardee said in the groups' statement. "Now the agency wants to let even those polluters off the hook and let them foul our air and worsen climate change."

"The Avenal decision would be devastating not only for the communities living around the plant in the San Joaquin Valley but for all of us that depend on EPA to ensure that new industrial sources are allowed only if they will not create new air quality problems," Sierra Club attorney Joanne Spalding said in the same statement.

Bradley Angel, director of Greenaction, said environmental justice communities in Avenal and Kettleman City,

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CA, "are already burdened by a major birth defect and infant mortality cluster, high levels of diesel traffic fumes, toxic pesticide spraying, and living next to the largest toxic waste dump in the Western U.S. The EPA should not permit a new polluting power plant, especially as the law is clear that new power plants must achieve air pollution control requirements that exist today, not those from the past that EPA has already found to be insufficient to protect public health."

Avenal could not be reached for comment.

Pushing GHG Limits, Activists Seek Rare EPA Construction Halt For Utility

Environmentalists are urging EPA to take the rare and major step of blocking construction of a coal-fired power plant in Kansas due to concerns about its permitted pollution limits, a move that if successful could require a new permit and serve as a vehicle for activists to win their long-running bid for greenhouse gas (GHG) limits at the facility.

Kansas' Department of Health & Environment (KDHE) late last year issued a Clean Air Act prevention of significant deterioration (PSD) permit for the Sunflower Electric Power Cooperative's proposed 895 megawatt coal-fired power plant. The proposal is a scaled-back version of an earlier design former Kansas Gov. Kathleen Sebelius (D) rejected due to concerns about the impact that its emissions would have on global warming.

KDHE issued the final permit just before the Jan. 2 effective date of EPA's "tailoring" rule outlining when PSD and Title V operating permits must include GHG limits. Environmentalists have long criticized the permit for failing to include GHG limits, though Sunflower has effectively skirted the GHG requirement for now.

The state this summer also granted a novel "stay" of the final permit that could help the plant avoid GHG limits by allowing it more time than the 18-month limit in PSD permits to begin construction, should permit modifications be required as a result of an environmentalist challenge to the permit in the Kansas Supreme Court. KDHE granted the stay in July, in response to the company's request (*Clean Air Report*, Aug. 16).

The lawsuit in the state supreme court argues that the facility's air permit is unlawful because its limits on sulfur dioxide (SO2), nitrogen oxides (NOx) and air toxics are too high.

The lawsuit does not address the lack of GHG limits in the permit. But if the court sides with activists — or if EPA objects to the permit and halts construction — it could trigger a requirement to develop a fresh permit. Any new permit would be dated after the GHG limits took effect, likely ensuring the plant would need to limit GHGs.

EPA Region VII Administrator Karl Brooks sent an Oct. 31 letter to KDHE Secretary Robert Moser complaining about the state's characterization of the agency's position on the permit in the high court suit.

While EPA is not involved in the court battle, Brooks wrote to Moser to "express the agency's concern about the state of Kansas' characterization of this agency's position about [Clean Air Act] permit limits in the states' recent brief" in the case, according to the letter. EPA says that Kansas is incorrectly arguing in the high court case that the Sunflower permit does not need to include 1-hour national ambient air quality standard (NAAQS) limits for NOx and SO2 emissions because it has three years to implement those new standards into its state implementation plan.

"Kansas' brief did not inform the court that EPA has in three separate letters advised KDHE that any Sunflower permit needs to ensure that the NAAQS are protected. . . . EPA continues to believe that KDHE could amend the permit to include enforceable 1-hour emission limits prior to the construction and/or operation of the new unit," EPA's letter says. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381451*)

But environmentalists say EPA does not go far enough and should formally object to the permit under rarely used Clean Air Act authority, which would halt the project until the 1-hour NAAQS compliance issue is resolved.

Environmentalists tell *Inside EPA* that they are urging the agency to invoke section 167 of the Clean Air Act that allows it to "take such measures, including issuance of an order, or seeking injunctive relief, as necessary to prevent the construction or modification of a major emitting facility which does not conform to the requirements of this part."

The add that they have made this point in earlier letters and meetings with EPA, and point to a March request from Brooks to schedule a meeting to hear their thoughts.

But EPA is not committing to taking such a step, which would undoubtedly unleash widespread political backlash because the agency would be halting construction of a new coal-fired power plant. A Region VII spokesman tells *Inside EPA*, "At this time the agency is not in a position to discuss any future steps."

One environmentalist says activists cannot formally petition EPA to object until KDHE issues a Title V clean air operating permit for the facility because there is no petition process under PSD, the source notes.

A second says EPA appears to be awaiting the outcome of the court case before deciding whether to make a move. The first source notes, "I think it's about time things blow up and escalate. EPA has told the state repeatedly that this permit does not comply with the Clean Air Act and EPA has powerful tools at its disposal to ensure compliance. . . . A letter telling them there are still issues that need to be resolved [is] . . . not good enough." — *Dawn Reeves*

SAMPLE ISSUE

EPA Fracking, Auto Emissions Policies Among Slew Of New IG Evaluations

EPA's Inspector General (IG) is planning a slew of evaluations into major EPA air, water and other policies for fiscal year 2012, including a review of the accuracy of the agency's mobile source emission models, and of the extent that EPA is protecting human health and the environment from the effects of hydraulic fracturing.

According to the IG's recently released FY12 annual plan, the office will also evaluate EPA's criteria for, and assessment of, regulatory reviews to comply with President Obama's Executive Order (E.O.) 13563 on improving regulations. According to a section of the plan outlining findings from IG outreach interviews, "The Agency's extremely complex regulatory process should be streamlined without compromising its required integrity."

The plan outlines the audits, evaluations and investigations that the IG is carrying over from FY11 and the new work that the IG intends to undertake in FY12. The IG's Office of Audit will perform work that includes investigating for possible fraud in grants, implementation of the 2009 economic stimulus law, and other projects, according to the plan. *The plan is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381526*)

The IG's Office of Program Evaluation is readying an ambitious number of new projects for FY12 that touch on several major policy areas — fracking, methane emissions, Clean Water Act (CWA) enforcement and more. "Program evaluations and special reviews assess and answer specific questions about how well a program is working," according to the plan, and they aim to influence "systemic changes" in how EPA works.

The IG's plan does not detail any specific fracking policies that EPA is crafting, though the agency recently announced plans to regulate wastewater discharges from shale gas and coalbed methane operations and recently finalized its plan to study the impacts of fracking on drinking water.

For the air and research program, the IG will look at whether EPA is effectively and efficiently planning research to address its needs, and whether it is managing risks to protect the public from air pollution.

New assignments planned or ongoing in FY12 include an evaluation into the accuracy of mobile source models. EPA's Motor Vehicle Emission Simulator (MOVES) has received criticism from states, who say the mobile source emissions model has a number of problems that hinder its use in air quality planning.

EPA recently issued a final rule delaying requirements for when states must use MOVES for determining whether transportation projects will worsen air quality, allowing them to continue using the previous model known as MOBILE6.2.

The Department of Energy's (DOE) National Renewable Energy Laboratory earlier this year released first-time research comparing and testing the accuracy of mobile source air quality models, including EPA's MOVES model and California's independent regulatory model, shows that they dramatically underestimate ozone-forming emissions on high temperature days, likely leading to inaccurate air quality planning by states.

A former DOE researcher who helped author the peer-reviewed research says there are "huge discrepancies" between the California and EPA models "and someone needs to follow up on this."

The IG will also assess EPA's efforts to reduce methane-product emissions from leaking pipes — a potentially significant review given that the agency is looking for ways to indirectly cut methane from oil and gas operations in its pending new source performance standards for the sector. EPA Administrator Lisa Jackson has also touted the benefits of being able to capture methane and sell it, bringing economic benefits to the sector.

Other air investigations include an evaluation into the efficiency and effectiveness of EPA's vehicle inspection and maintenance programs, and a review of EPA's oversight of Clean Air Act Title V fees.

Another potentially controversial issue the IG plans to evaluate is "Flare Emissions and Control." While the annual plan does not provide further details, Rep. Henry Waxman (D-CA), ranking member of the House Energy & Commerce Committee, has asked committee Chairman Fred Upton (R-MI) for a hearing on the energy and environmental consequences of unregulated natural gas flaring at thousands of oil wells in North Dakota and whether EPA and the Department of Energy should more carefully scrutinize the practice.

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Conservative Group Sues Over Lack Of SAB Review For Truck GHG Rules

The conservative Pacific Legal Foundation (PLF) has filed a lawsuit challenging EPA's first-time rule to reduce greenhouse gas (GHG) emissions from heavy-duty trucks, arguing that the agency violated a decades-old federal law creating EPA's Science Advisory Board (SAB) by failing to submit the GHG rule for SAB review.

PLF on behalf of several small business and trade organizations filed the suit, *Delta Construction Company, Inc., et al. v. EPA*, Nov. 8 in the U.S. Court of Appeals for the District of Columbia Circuit. The filing offers no substantive arguments, but the group in its Jan. 28 comments on the proposed version of the rule outlined its criticism of the agency's failure to provide SAB with an opportunity to review and comment on the GHG regulation.

It is unclear if others will sue over the rule. The Owner Operator Independent Driver Association (OOIDA) has expressed opposition due to potential costs on independent drivers and an OOIDA source last month said the group was "exploring various options" in litigating the rule. The deadline to file a challenge is next week.

PLF's filing ahead of the deadline ensures that EPA will have to defend in court its truck rule published in the Sept. 15 *Federal Register*, which otherwise enjoys broad support from environmentalists, industry and others.

PLF attorney Ted Hadzi-Antich in a statement issued on the legal filing blasts EPA for "dictating onerous new rules for vehicle manufacturers while violating important legal rules itself. . . . We're suing because federal regulators can't be allowed to thumb their noses at legal safeguards that are designed to ensure that new regulations are credible and well-considered. When EPA acts like a scofflaw, it has to be called to account."

According to the group's comments, EPA should have submitted the rule for SAB review in accordance with the 1978 Environmental Research, Development & Demonstration Authorization Act that established SAB. "The SAB statute provides that, at the time EPA proposes any 'criteria document, standard, limitation or regulation under the Clean Air Act,' it 'shall make available' the proposal to the SAB. . . . This is a non-discretionary requirement for all EPA Clean Air Act 'standards' and 'regulations,'" the comments say. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381576*)

The comments add that the heavy-duty truck rule is a "standard" and a "regulation" as described by the law establishing SAB, and qualifies for review by the advisory board. The SAB's charter says its major objectives include reviewing the adequacy and scientific basis of Clean Air Act regulations and other rules.

A PLF source says EPA also failed to submit to SAB the proposed versions of its finding that GHGs endanger public health and welfare, and its passenger vehicle GHG rule. "The idea is that SAB is a blue-ribbon panel of scientists [and is charged with making] . . . sure EPA's rulemakings are scientifically and technically sound before they are finalized. . . . Clearly here this is a regulation that should have been but was not submitted to the SAB so we view this as a do-over. We are seeking a remand back to the agency to reopen the comment period and . . . submit to SAB."

The source adds that SAB has discretion on what it does once EPA submits a proposal. "They can file comments, or not file, but the point is the law requires EPA to give them an opportunity to do that, and they didn't have that here." The source adds the group did not have any conversations with SAB about the matter.

EPA in its response to comment document released with the final rule takes issue with PLF's claim that the law establishing SAB means the agency must "submit" the truck GHG rules to the board.

"[T]he commenter assumes (without explanation) that the provision requires that EPA 'submit' the proposed regulation to the SAB, whereas the statute requires EPA to 'make available' to the SAB the proposed regulation and supporting technical information. Documents are made available when they are 'accessible' or 'obtainable,'" which EPA says it addressed when it published the proposal in the *Federal Register*.

EPA also discounted a 1981 ruling PLF cited supporting its claim, saying it "antedated the present period of instantaneous availability of documents via electronic dissemination. EPA believes that by publishing and posting the proposed regulation . . . those materials have been made available to the SAB."

One source representing trucking companies that support the rule says SAB does not generally review specific rules, instead providing its expertise on risk assessments and broader scientific issues. "I am quite certain there is no SAB obligation [to review a rule]. The function of the SAB is much more of a scientific peer-review function."

The source says the National Academy of Sciences (NAS) thoroughly studied limiting GHGs from trucks in 2009, a report that was required by Congress. "So you had all that academic work available . . . and the rule reflects substantially the work that NAS did, so it's not that you can argue it lacks a thorough scientific basis."

The source also notes that the rule has not had "a lot of opposition," winning support from the American Trucking Associations, the Engine Manufacturers Associations and major fleets. — *Dawn Reeves*

SAMPLE ISSUE

SAB Panel Vote Highlights Doubts Over EPA Plan To Measure Biomass GHGs

Members of the EPA Science Advisory Board (SAB) panel reviewing the agency's draft framework for measuring greenhouse gases (GHGs) from biomass are signaling that they do not believe the draft plan can be amended to make it workable, raising doubts about the validity of any plan that officials may eventually adopt.

At the end of its three-day meeting Oct. 27, the panel held an unusual vote to determine whether members believed that the agency's approach is workable, with four of the panel's 18 members voting for the agency to scrap the process entirely and nine saying the approach could "possibly" work if a host of unanswered questions are resolved.

None of the panelists believed the plan is workable in its current form while four voted in favor of the agency's approach "with modifications." One member was absent.

Panel chair Madhu Khanna, a professor at the University of Illinois at Urbana-Champaign, agreed to call for a show of hands at the end of the Oct. 27 meeting in response to requests from panelists who expressed a host of concerns with the agency's proposal at the start of their review, boosting calls from many stakeholders who had urged the panel to craft their own framework.

Many of the panelists' initial concerns remained unresolved when they heard results of breakout sessions to respond to various charge questions EPA posed to the group.

The draft framework is supposed to help the agency determine how to discount biogenic GHG emissions from a smokestack for permitting purposes, accounting for regrowth of the feedstock. EPA crafted a formula to determine the amount of GHGs to subtract from permits, but one SAB work group is suggesting a new version.

The agency has so far granted a three-year conditional exemption from its GHG permit requirements for facilities that burn biomass but officials have questioned whether the agency has authority to grant a permanent waiver. Environmentalists have sued over the three-year waiver and Oct. 24 filed a statement of basis in the U.S. Court of Appeals for the District of Columbia Circuit. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380449*)

The issues activists want considered in *Center for Biological Diversity, et al., v. EPA* include whether the agency's deferral is unlawful, and whether the agency improperly cited legal doctrines — including administrative necessity — to justify the deferral. The court has yet to schedule oral arguments in the case.

SAB panelist John Reilly of the Massachusetts Institute of Technology noted the problem was not solely attributable to EPA but the fact that the agency was forced to seek to address the issue under the Clean Air Act, which he likened to being required to use a screwdriver to slice bread when "we need a knife."

One industry source following the discussions says that EPA "may have unknowingly unleashed a monster."

The four panel members who voted to scrap the framework entirely said they would prefer that EPA grant a blanket categorical exclusions for biomass — possibly similar to the controversial three-year deferral EPA has put in place now, while it establishes an accounting framework — in lieu of the draft framework, which they see as overly complex and unworkable.

The majority of the rest of the panel was skeptical that enough changes could be made to the framework to make it useful in permitting decisions. Many of the panelists expressed concern that they were charged to address the framework in the absence of a policy context, and that necessary fixes would be too expensive to be realistic.

Following the vote, Chairwoman Khanna, who voted "possibly yes," said the results show how "challenging and difficult" the framework discussions have been, and reflect the "intense discussion" among panelists over the past few days.

SAB staff director Vanessa Vu told the panelists that they need not try to reach consensus on all six charge questions and that instead individual members could endorse different answers to the questions.

The panel will begin seeking to craft its formal responses to the charge questions and will hold at least two teleconferences in coming weeks before determining how to proceed.

Also at the meeting, speakers for subgroups presented their draft answers to EPA's charge question. For example, panel member Steven Rose of the Electric Power Research Institute said panelists did not believe the framework "accurately represent the changes in carbon stocks that occur offsite, beyond the stationary source," as EPA had asked. Rose said his group had also agreed that the framework does not include proper accounting for carbon dioxide in forests or agricultural emissions that occur over decades.

The group also questioned the use of a single reference point baseline and criticized the framework's complete disregard for any consideration of leakage and uncertainty, Rose said.

He said the group also found the framework is not "scientifically rigorous." Many elements are not adequately discussed and supported by science, the group said. "Is it simple to implement and understand?" No, the group said, it is not easy and non-intuitive. They also called it "possibly unworkable." — *Dawn Reeves*

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