Inside EPA's
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An exclusive bi-weekly report tracking environmental legislation, regulation and litigation

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EPA Study Hints At Fracking Contamination Of Water

EPA's research office is probing a Wyoming contamination case after the latest round of monitoring points to hydraulic fracturing as a potential contributor to drinking water pollution, a finding that if confirmed is likely to intensify calls for EPA to regulate the controversial natural gas extraction practice. According to the preliminary study results, the agency found the presence of chemicals commonly used in hydraulic fracturing fluids, such as benzene, naphthalene and diesel, that in some cases exceed agency drinking water limits. The study also appears to rule out agricultural chemicals as a potential source of contamination. ***Drilling, Page 25.***

EPA Crafting New Study On 'Economic Importance' Of Clean Water

EPA's water office is crafting a new study on "the importance of clean water to the U.S. economy," which could help the agency justify a number of key water initiatives under the Clean Water Ac, including a controversial new rulemaking intended to clarify when isolated wetlands and other marginal waters are subject to regulation. In a Nov. 14 *Federal Register* notice, EPA's Science Advisory Board says it is planning a Dec. 5 teleconference to solicit early advice from its Environmental Economics Advisory Committee on the new study's scope, planning and development. ***Water, Page 14.***

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. ***Air, Page 9.***

In Wake Of TCE, Upcoming Risk Studies May Pose Tough New Test For EPA

EPA recently issued its long-awaited risk assessment of the solvent trichloroethylene (TCE) and analyses of several lesser known chemicals, but officials are still grappling with assessments for several high-profile chemicals that could pose major tests for its Integrated Risk Information System program, which is facing heavy criticism from industry and Republicans. Among the more difficult assessments EPA is still struggling to complete are those for ubiquitous contaminants like arsenic, dioxin, hexavalent chromium, platinum salts and perchloroethylene. ***Toxics & Pesticides, Page 20.***

EPA Defends GHG Risk Finding

EPA is defending in federal appeals court its scientific finding that greenhouse gases (GHGs) endanger public health and welfare — in a suit that could determine the fate of EPA's climate rules — while urging the court to reject recent filings citing an Inspector General report outlining flaws in the finding's peer review process. In a Nov. 10 brief, the agency said its climate risk finding was required following the Supreme Court's ruling in *Massachusetts v. EPA* in 2007 that found EPA can regulate GHGs under the Clean Air Act. ***Page 34.***

Pesticide Cleanup Policy Criticized

The Air Force is strongly criticizing an informal EPA policy requiring cleanup of pesticide residuals when the intended use of the chemical changes, warning that the policy could open a "Pandora's box" that could require massive and costly cleanups of contaminated former farmland that may be slated for residential development. ***Page 7.***

EPA Defends Equity Plan

EPA is strongly defending its work to elevate the role of environmental justice considerations in agency decisions and the use of a screening program to identify equity communities, following a Government Accountability Office report that lauds EPA's equity efforts but calls for a clearer, more structured strategy. Rep. Donna Edwards (D-MD), who requested the report, is praising the agency's progress while encouraging EPA to implement the recommendations. ***Page 39.***

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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 *Environmental Policy Alert*. The following are some of the documents available from this issue of *Environmental Policy Alert*. For a full list of documents, go to the latest issue of *Environmental Policy Alert* on InsideEPA.com. For more information about InsideEPA.com, call 1-800-424-9068.

Documents available from this issue of *Environmental Policy Alert*:

- Activists File Suit To Force Compliance Measures For District Stormwater Permit (2381432)
- Activists Seek Conditions For Remand Without Vacatur Of EPA Boiler Stay (2381577)
- Conservative Groups Criticize Power Plant 'Safety Valve' In Bid For Delay (2381134)
- Court Dismisses Challenge to NMFS Salmonid BiOp (2381413)
- D.C. Circuit Sets Oral Arguments For Consolidated Suits Against EPA GHG Rules (2381245)
- Defense Department Questions EPA Trichloroethylene IRIS Assessment (2381533)
- DOE Advisers Press To Speed Oversight Of Fracking (2381817)
- DRBC Moves To Finalize Controversial Drilling Rules (2381689)
- Energy Committee Republicans Press EPA On Unobligated Funds (2381718)
- Environmentalists File Statement Of Basis In Biogenic Deferral Suit (2380449)
- Environmentalists Sue EPA For Exemptions In Avenal Air Permit (2381235)
- Environmentalists Urge EPA To Speed Risk Estimate For Chromium 6 (2377807)
- EPA Conducting New Study On 'Economic Importance' Of Clean Water (2382105)
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- Florida Wins EPA Backing For Plan To Regulate Nutrients (2381079)
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- GAO Finds EPA Has Work To Do On Integrating Environmental Justice (2381673)
- GOP Lawmakers Urge EPA To Take Additional Comment On CWA 'Jurisdiction' Guide (2381705)
- House Caucus Urge White House To Seek NAS Review Of Styrene Risks (2382189)
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- Industry, EPA Move Toward Settlement In Diesel Fracking Suit (2381919)
- Oil Industry Says Catalyst Issue Not Resolved By DSW Proposal (2382019)
- PLF Challenges EPA GHG Heavy-Duty Truck Rule (2381576)
- Supreme Court Declines To Hear Industry Case Challenging EPA RFS (2381408)

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Air Force Warns EPA Stance Opens Door To Widespread Pesticide Cleanups

The Air Force is strongly criticizing an informal EPA policy requiring cleanup of pesticide residuals when the intended use of the chemical changes, warning that the policy could open a "Pandora's box" that could require massive and costly cleanups of contaminated former farmland that may be slated for residential development.

At the annual meeting of the Association of State & Territorial Solid Waste Management Officials (ASTSWMO) in Bethesda, MD, Oct. 27, Mark Trost, an Air Force senior environmental restoration attorney, questioned whether EPA is applying the policy in an ad-hoc manner, subjecting the military to the policy's requirements while not applying it to private parties.

"The ugly reality is you can't make that fine a distinction. You can't [keep] Pandora in that box," he said.

The Air Force is urging agency officials to launch a formal rulemaking if it is changing its interpretation of current waste regulations that exempts pesticides applied for their intended use from the regulatory definitions of solid waste — and related cleanup requirements.

EPA's acting federal facilities cleanup chief Reggie Cheatham said officials are tentatively taking steps to examine the informal policy to assess its fairness and consistency with the agency's Resource Conservation & Recovery Act (RCRA) program. EPA wants to ensure that all parties are treated equitably, he said, adding that the agency is discussing whether it is being consistent in its guidance, and ultimately will talk to states about how they are approaching the issue, he told the state forum.

State sources note regulators are recognizing that the issue of pesticide residuals could be a major cleanup issue and potential "minefield" since the pesticides at issue — organo-pesticides such as chlordane — were once legal and widely used but are now banned, although they persist in the environment years after application. But states do not have a coherent strategy on whether they want further clarity from EPA on the issue.

At issue is EPA's stance at the Kansas Army Ammunition Plant in Parsons, KS, where it is attempting to require cleanup of pesticide residuals — including residuals from the now-banned pesticides chlordane, heptachlor, aldrin and dieldrin that were originally applied on and around buildings to prevent termite damage.

Such residual contamination is generally exempted from RCRA corrective action requirements if it is applied in accordance with its "intended use."

But EPA waste chief Mathy Stanislaus, in a March 4 letter to the Kansas congressional delegation, says that cleanup is now required because the buildings around which the pesticides were applied are slated for demolition — so the chemical's intended use is no longer applicable.

In the letter, EPA contends the so-called "intended use" exemption for pesticides ends when it is decided that buildings around which the pesticide was applied will be demolished.

Stanislaus said the policy applies "in the same manner and to the same extent" at federal facilities as it does at non-federal RCRA permitted facilities, and is intended to prevent contamination and protect future property owners from cleanup costs.

But Trost questioned EPA's underlying rationale, asking how the agency would be able to limit application of its approach to the buildings slated for demolition and sale at the Parsons site but not apply it to farmland that is slated for residential development. How does that not apply to a farmer? he asked.

"The costs you are going to be imposing because of these rules are incredible," he said, alluding to the wide-scale past use of the pesticides.

But Cheatham said EPA's response at the Kansas Army site is clear — when the building is demolished, the pesticide is no longer there for its intended use — and said addressing those residual pesticides is largely driven by RCRA permit conditions. Once it is determined to be a waste, that triggers the characterization stage, he said afterward. Following that is a more complicated process, with states at the meeting stressing the importance of future land use as a trigger for cleanup, he said.

When asked whether regulators should provide more clarity on the issue, an Air Force spokeswoman says the service would prefer EPA and states to make a formal rulemaking, noting that current EPA regulations exclude pesticides from the solid waste definition if they are applied in an ordinary manner of use. The spokeswoman also says EPA should treat all parties — whether federal or not — in the same manner, as is required under federal waste law.

In an interview with Inside EPA following the discussion, Cheatham sought to downplay EPA's role in the issue. He said that generally states with delegated RCRA authority are required to decide the issue but that the agency has a larger role in this case because Kansas does not have fully delegated authority. He said the agency weighed in because Kansas lawmakers asked for the agency's stance, noting that the agency did not craft that response with the intention of characterizing the scenarios related to farmland and emphasizing that EPA is not targeting farmers on this matter.

Nonetheless, Cheatham noted that regional RCRA directors are discussing the implications of Stanislaus' Kansas memo. "This issue manifested itself at a federal facility most recently, but the issue is bigger than federal facilities," he said. "We're trying to assess what is it we do, what is it our states do," recognizing the military will argue its treatment in Kansas differs from elsewhere, he said. All parties should be treated equally, he noted. — *Suzanne Yohannan*

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Oil Industry Says New DSW Proposal Doesn't Moot Spent Catalyst Lawsuit

Oil industry officials say EPA's latest proposed amendments to its definition of solid waste (DSW) rule do not adequately address their concerns regarding regulatory exemptions for the recycling of spent petroleum refinery catalysts and are vowing to push forward with a lawsuit on the issue.

While acknowledging that the proposal could moot some of their legal arguments, the American Petroleum Institute (API) says in a Nov. 4 letter to the U.S. Court of Appeals for the District of Columbia Circuit that "API's claim that the recycled catalysts cannot reasonably be viewed as discarded," a label that would make them subject to strict hazardous waste management requirements, "(regardless of how other materials are treated) would *not* become moot."

EPA in July proposed to amend a Bush-era DSW rule that relaxed certain waste management requirements on many industries in the interest of promoting recycling. The new proposal would tighten many of those requirements, prompting praise from environmentalists and state regulators but widespread disapproval from industry officials.

Prior to EPA's proposed amendments, petroleum refiners argued the Bush-era rule, which EPA finalized in 2008, was too stringent because it made certain petroleum refinery catalysts ineligible for the so-called transfer-based exclusion that the Bush-era rule allowed for other items. Under the transfer-based exclusion, companies that transfer certain spent materials to third parties for recycling purposes can be exempted from complying with certain waste management requirements.

API sued EPA over this issue, arguing that it was improper for EPA to grant other spent materials the exemption but not spent petroleum refinery catalysts.

But under EPA's latest proposal the transfer-based exclusion would be eliminated entirely, which, API officials acknowledge in their letter to the DC Circuit, could make the question of whether spent petroleum refinery catalysts should be eligible for that particular exemption moot. The DC Circuit is scheduled to hear oral arguments in API's challenge to the DSW rule, *API v. EPA,* Dec. 12.

In the new proposal, EPA notes that it is proposing to more stringently define the circumstances under which it would consider spent materials to be properly "contained" and says that this "provision, if properly implemented, could address the pyrophoric properties of the spent petroleum catalysts (as well as other types of reactivity)" that had prevented the agency from granting the catalysts regulatory exemptions under the 2008 rule.

EPA in the proposal requests "comment on whether this provision would adequately address the potential for discard of spent petroleum catalysts due to fire and explosions, thereby allowing EPA to remove the ineligibility of [the spent petroleum refinery catalysts] from the DSW exclusion, and on other regulatory options, including adding more conditions (such as specific container standards) [for] pyrophoric materials to the exclusion."

But given the proposed elimination of transfer-based exclusion, any potential regulatory relief that the DSW rule could provide would only apply to spent petroleum refinery catalysts recycled "under the control of the generator," as opposed to those that are transferred to a third party for recycling, an API source says.

Therefore, the new DSW proposal "does not propose any meaningful relief," regarding the catalysts, API claims in its letter to the court. "Although EPA proposes to make the catalysts eligible for the generator-controlled reclamation exclusion . . . historically the catalysts have been *transferred to third parties* for reclamation." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2382019*)

In addition, in Oct. 20 comments on the rule, API says that "to define the absence of discard, it is sufficient to provide that the catalysts (or any other secondary materials) are 'contained,' just as EPA did in the 2008 DSW exclusions. Materials are either contained or not," API says. "If they are contained, and are genuinely destined for recycling, they are not discarded."

API says that "[a]ssuming (without conceding) that special containment requirements can be relevant to defining discard (or its absence), the language concerning fire prevention that EPA proposes would be entirely adequate. That is, it would be sufficient to provide that the storage unit 'addresses any potential risks of fires and explosions.'"

But the Vanadium Producers & Reclaimers Association (VPRA), which also supports regulatory exclusions for spent catalysts, differs with API on this point. In Oct. 20 comments, VPRA says that "EPA should adopt a more specific definition of 'contained' and a clearer definition of storage requirements. . . The simple statement in the [p]roposal's definition of 'contained' . . . that the unit 'addresses any potential risks of fires' is not sufficient to adequately address this very specific and unique hazard of spent catalysts," VPRA says.

Rather than include a catalyst exemption in the broad DSW rule, VPRA says EPA should provide exemptions for catalysts under a separate, catalyst-specific rulemaking.

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Activists Cite Draft Arsenic Assessment In Bid For Strict Coal Ash Rules

Environmentalists are redoubling their efforts to pressure EPA to strictly regulate coal ash, citing EPA's 2010 draft risk assessment suggesting arsenic — a toxic contaminant found in coal ash — may be 17 times more carcinogenic than previously thought.

Representatives from the environmental group Earthjustice, along with community representatives from 10 states affected by coal ash, met with EPA waste chief Mathy Stanislaus on Nov. 4 to discuss the environmental impacts of coal ash and the agency's pending rulemaking relative to the substance.

During the meeting, Michael Kosnett, a medical toxicologist who has served on National Research Council and EPA Science Advisory Board (SAB) panels on arsenic, gave a presentation in which he contended that EPA's draft risk assessment on arsenic is a reason why EPA should strictly regulate coal ash, according to an environmentalist familiar with the meeting. One of environmentalists' primary concerns over coal ash is that it can lead to arsenic contamination of drinking water, an activist says.

EPA's draft Integrated Risk Information System (IRIS) review for arsenic, which the agency released in 2010, includes an estimate of cancer potency some 17 times stricter than EPA's existing arsenic risk number. The environmentalist says this increased risk requires that coal ash be more tightly controlled.

But EPA's draft IRIS review for arsenic has been controversial. In June 2010, SAB delayed completion of its review and complained that its subgroup charged with conducting the review was not thorough enough. The subgroup's report was generally positive but focused its review too narrowly, SAB officials said.

Industry officials also criticized the IRIS review, saying it was too strict and filing a Data Quality Act (DQA) challenge claiming that deficiencies in the study undermine its objectivity and validity.

Regarding coal ash, EPA has been taking comment on a notice of data availability that provides data for its rulemaking. The agency last year floated two options — either regulate coal ash as a "hazardous waste" subject to strict rules under the Resource Conservation & Recovery Act (RCRA) or as a "solid waste" subject to less-stringent RCRA requirements.

Many states, industry and Republicans favor the less stringent solid waste option, fearing that regulating coal ash as hazardous waste would harm the beneficial ash reuse industry. Environmentalists prefer the hazardous waste option, arguing it is needed to adequately guard against dangerous human exposure.

Meanwhile, in Congress, the House recently passed a bipartisan bill, H.R. 2273, that would preempt EPA's pending rule and instead allow states to craft their own non-hazardous regulations for coal ash. Although the White House stopped short of threatening to veto the bill, its companion, S.1751 appears unlikely to make it through the Senate.

Wisconsin Coal Ash Spill Prompts New Activist Calls For EPA Regulation

A coal ash spill at a Wisconsin power plant, together with new EPA data showing increased vulnerability of ash impoundments, is prompting new calls from environmentalists for policymakers to drop legislative efforts to address coal ash and instead allow EPA to strictly regulate the large volumes of waste material generated by power plants.

"This spill in the Great Lakes is a tragic reminder of why the status quo is not good enough. As long as Congress interferes, spills like this are going to happen, and dozens of communities are at risk. Congress needs to back off and allow the EPA to finalize strong protections," Sierra Club's Mary Anne Hitt said in a Nov. 1 statement.

Hitt and other environmentalists issued statements in response to a fill project that on Oct. 31 spilled into Lake Michigan from the We Energies Oak Creek Power Plant in Milwaukee County, WI. The company said in a statement that the spilled material was "likely" coal ash that had been used as fill material but that it is "not hazardous material" and "[it] is unlikely there will be any health impacts at all from this event."

Other environmentalists are also highlighting new EPA research showing a three-fold increase in the number of ash disposal ponds that could pose hazards to surrounding areas. According to Earthjustice, EPA recently released a new set of data that reveals 181 'significant' hazard coal ash dams in 18 states. "This is more than three times the 60 significant-hazard ponds listed in the original database released in 2009," the group said in an Oct. 31 statement.

The group also says eight coal ash ponds previously unrated have since been found to be high-hazard ponds in data released earlier this year, which puts the total number of high-hazard ponds at 47, the group says. The Oak Creek plant in Wisconsin is a fill project, so was not included in EPA's data on impoundments.

But despite signs of potential risks, federal officials appear a long way off from crafting new policies to address the ash. EPA is still taking comment on a notice of data availability it issued last summer to provide additional data for its controversial rulemaking to regulate the ash. The agency last year floated two options — either regulate it as a "hazardous waste" subject to strict rules under the Resource Conservation & Recovery Act (RCRA) or as a solid waste subject to less-stringent RCRA requirements. Many states, industry and Republicans favor the less-stringent subtitle D rules,

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fearing that hazardous waste rules would harm the beneficial ash reuse industry and be costly to meet.

The agency received an estimated 450,000 comments on its proposal and its deadline to issue a final rule is still "to be determined," according to the unified agenda.

Meanwhile in Congress, the House recently passed a bipartisan bill that would preempt EPA's pending measure while allowing states to craft their own non-hazardous waste programs. Although the White House stopped short of threatening to veto the measure, it appears unlikely to make it through the Senate, where key Democrats and environmentalists strongly oppose it in its current form.

Among other things, the critics say the House bill lacks an overriding safety standard, though the bill, S. 1751, is co-sponsored by six Democrats.

But Earthjustice says the new EPA data should prompt the Senate to drop the bill. "The sharp increase in coal ash ponds likely to cause significant damage if they should fail should give the Senate pause as they consider S.1751, a bill that will allow coal ash ponds to operate indefinitely without adequate safeguards," the group says in an Oct. 31 statement.

And in a Nov. 1 statement, Earthjustice attorney Lisa Evans called on the White House to veto the bill if it makes it out of the Senate in its current form. "While we wait for yet another clean-up, we're battling Senate polluter benefactors who deny that coal ash is anything but mud. If this Senate legislation sees the light of day it must be stopped in its tracks by the White House. This event must be a wake-up call for our government to take action now," Evans said Nov. 1.

Evans and Hitt both argued that it has been almost three years since a massive coal ash spill at a Tennessee Valley Authority power plant prompted EPA Administrator Lisa Jackson to launch the agency's rulemaking effort. "We're coming up on the three-year anniversary of the TVA coal ash disaster and it is disheartening that we still have no measures in place to protect the public against toxic ash," Evans says.

Judges Skeptical Of Industry Suit Over EPA Scrapping Lead Rule 'Opt-Out'

Federal appellate court judges appeared skeptical at oral arguments over industry's claim that the Obama EPA lacked authority to reverse a Bush-era policy allowing home renovators to "opt-out" of complying with EPA's rule to reduce lead paint exposure without providing new information to justify the change, with the judges suggesting that the agency has the discretion to protect human health however it sees fit so long as it does not violate federal law.

The National Association of Home Builders (NAHB) sued EPA in the U.S. Court of Appeals for the District of Columbia Circuit to challenge the Obama administration's decision to end opt-outs from the lead renovation, repair and painting rule that sets safe work practices for home renovations to minimize childrens' exposure to lead.

The Bush-era version of the rule issued in 2008 allowed opt-outs from the potentially costly requirements for renovators if they could show no young children or pregnant women were present in a home.

But public health advocates sued over the opt-out and the Obama EPA scrapped the provision in 2010, citing concerns it could lead to children or pregnant women being exposed to lead dust after moving into homes that were renovated under the exemption.

A panel of three DC Circuit judges expressed doubts over industry's claims in the opt-out suit, *NAHB, et al. v. EPA*, during oral arguments Nov. 1, saying new administrations can change existing agency rules.

Industry lawyer Thomas Jackson argued that the Obama EPA's action was improper because it "fundamentally reversed [the agency's] position" on whether the opt-out provision was prudent without providing any new information that was not already available at the time the Bush administration issued the original rule.

Jackson suggested that the Administrative Procedure Act sets a higher standard for what justifies a rule change. Jackson argued that EPA failed to provide any new data to justify ending the opt-out, and reassessing existing data does not meet that standard. But the appellate judges quickly scrutinized this argument.

"Now you're really in trouble," Judge Merrick Garland told Jackson. Garland said that under the Supreme Court's 2009 ruling in *FCC v. Fox Television Stations*, there is "no higher standard," and that a new administration can change federal rules however it wants so long as the contents of the new rule are permitted by federal law. Prior to the high court's ruling Jackson may have had a legitimate argument, but afterward it is less likely, Garland said.

Jackson argued that the Supreme Court in its *Fox* ruling left the door open to exceptions to this rule, and that EPA's reversal was not proper because the agency had previously determined that the original rule was "safe, effective and reliable" and in compliance with federal law.

But Garland said the Obama EPA has not argued that the original rule was not in compliance with federal law, only that the new version was "safer, more effective," and "more reliable."

EPA said only that the "new rule is also consistent" with federal law and that it "wants to protect people that would not have been protected" by the original rule. "That's all that is necessary," Garland said.

Similarly, Senior Judge Stephen Williams noted that EPA said that while the 2008 rule "is good, this rule is better."

Even if the Obama EPA had argued that the Bush-era rule was illegal, Judge Garland said that it "doesn't matter if the previous rule could have survived the sort of deferential review we give" federal rules, and that new administrations

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have the right to review prior rules so long as they do so within the confines of the law.

"*Fox* says you do not have to prove the reason for the new policy is better — it's sufficient that the new policy is permissible," Garland said.

Jackson faced tough questions regarding several of his arguments against ending the opt-out. The judges asked relatively few questions of Stephanie Talbert, a Department of Justice attorney who argued the case for EPA, and spent most of their time scrutinizing Jackson's case. — *Douglas P. Guarino*

SUPERFUND

States Worry Military May Seek To 'Cherry Pick' Preferred Cleanup Levels

The Air Force and California remain at odds over what chemical toxicity values and protection levels should be used in hazardous waste cleanups, an issue that has arisen in other states and which has raised concerns from some state regulators that the military may try to "cherry pick" favorable toxicity values from one state and apply them elsewhere.

Although the Air Force and California have been able to avoid any delays in cleanups due to the disagreement so far, a final resolution to the debate is needed in order to avoid any potential future adverse effects to cleanups, an Air Force spokeswoman says in an email response to follow-up questions on the matter.

California and Air Force officials are at odds over what toxicity values to use for both cancer and non-cancer levels for cleanup decisions and the appropriate cancer risk level or range to use as a basis for taking action at a cleanup site, Air Force senior environmental restoration attorney Marc Trost said Oct. 27 at the Association of State & Territorial Solid Waste Management Officials' (ASTSWMO) annual meeting in Bethesda, MD.

The Air Force says it is being consistent with EPA headquarters guidance, using EPA's hierarchy of toxicity values for Superfund risk assessments. "While there is a hierarchy, ultimately we select the toxicity values that constitute the best science," the Air Force spokeswoman says. The Air Force says it does not deviate from the EPA guidance, which calls for using the best science in making risk determinations.

"We would prefer that California aptly characterizes their position, but in prior correspondence they have stated to the Air Force the most health protective value should be used," without referencing best science, she says.

California officials say they and EPA have for years agreed that the most protective level should be used for cleanups regardless of whether it is an EPA- or state-derived number, and that the Air Force, as the responsible party at contaminated sites, lacks the authority to select toxicity criteria.

EPA guidance lays out a hierarchy of three "tiers" of toxicity values to use in risk assessments at Superfund sites. Tier 1, which represents EPA's generally preferred source of human health toxicity values, consists of EPA Integrated Risk Information System (IRIS) values. These generally include reference doses, reference concentrations, cancer slope factors, and drinking water and inhalation risk values that have gone through peer review and EPA consensus review, the EPA guidance says.

The second tier of toxicity values the guidance calls for considering are EPA's Provisional Peer Reviewed Toxicity Values (PPRTVs). These are developed by the agency on a chemical-specific basis at the request of its Superfund office.

Tier 3 values use methods similar to those used for deriving the first two tiers and must be peer reviewed. These include such sources as California EPA toxicity values, the guidance says.

California's Department of Toxic Substances Control (DTSC) and EPA agree with the Air Force on the use of the tiered system EPA has set forth and they agree that the tiers "are not totally rigid," says a DTSC paper. But where they differ is in the Air Force's position that the service, as the responsible party, has the authority to select the toxicity criteria and "that whenever there is an IRIS value for a contaminant, the IRIS value should be used," the paper says.

The state's position is to use the most health protective level, according to a state source. "For years on an informal basis, US EPA and Cal EPA toxicologists have agreed to use the more protective of Cal EPA and IRIS criteria for risk assessment at California waste sites (both private sector and federal sites)," the DTSC paper says.

"The Air Force, who is not recognized as a credible source of toxicity criteria and is in the position of responsible party, is proposing to remove this flexibility of using the best toxicity criteria available at the time of the risk assessment, by imposing its interpretation of the EPA Guidance under its presidential lead agency implementation authority," the paper says. Such an approach conflicts with the terms of interagency cleanup agreements governing federal facility Superfund sites and "ignores EPA's role as the oversight agency" for Air Force Superfund site cleanups, it says.

"We have been going back and forth on this for quite a while at our sites in California," Isabella Alasti, senior staff counsel with DTSC, said at the ASTSWMO meeting. She said "it's the overarching concepts that we don't agree with." She noted that EPA Region IX agrees with the state's position.

Specifically, she said the state does not see the tier system as rigid where just Tier 1 or Tier 2 is considered. Instead,

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the state looks at the different tiers and toxicity criteria, and "if we have a scientifically valid and current, more stringent value, that's what should be used" in risk assessments and cleanup level selections.

On the risk range issue, the Air Force says it relies on EPA headquarters guidance. The service's view is that, in general, if the site's cumulative cancer risk does not exceed 1x10-4 — the bottom of EPA's acceptable risk range of 1x10-4 to 1x10-6 — then action is generally not required, the Air Force says. The Air Force's position that no further action is required includes no consideration of institutional controls, DTSC says in its paper.

In contrast, the state is taking the view that if the cumulative cancer risk exceeds 1x10-6, then the site must go forward into a feasibility study and be assessed for possible remedial action, the Air Force spokeswoman says.

"In no way would 10-4 or less be a cutoff where no further action is needed," Alasti said during the meeting.

EPA Urges Brownfields Grant Applicants To 'Leverage' Outside Funding

EPA is changing its criteria for awarding brownfields assessment grant money, boosting the amount of weight it gives to applicants who can leverage funding from outside sources and thus increase the likelihood that their cleanup and redevelopment projects have a realistic chance of moving forward, EPA officials say.

EPA will now double the number of points it normally gives to brownfields grant applicants for leveraging outside funds for their projects under EPA's system of scoring applications to decide which communities will be awarded grants. In past years, EPA has given applicants who can leverage brownfields grant money with outside funds five points in its scoring system, but EPA's proposal guidelines for brownfields assessment grants for fiscal year 2012 say the category will now carry a weight of 10 points.

Communities are awarded EPA brownfields assessment grants in order "to inventory, characterize, assess, and conduct planning and community involvement related to brownfields sites," EPA's website says. Recipients can receive up to $200,000 for the assessments, and in some cases as much as $350,000 due to the amount of contamination at the site, EPA says.

"Under this criterion, applicants who can demonstrate firm commitments for additional funds/resources for completion of the project may be evaluated more favorably," the guidelines say. "Demonstrate how you will leverage additional funds/resources beyond the grant funds awarded to support the proposed project activities.

"Specifically, describe how these funds will be used to contribute to the performance and success of the proposed project," the guidelines say. "This includes, but is not limited to, funds and other resources leveraged from businesses, non-profit organizations, education and training providers, and/or Federal, state, tribal and local governments." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2382014*)

During the Association of State & Territorial Solid Waste Management Officials' (ASTSWMO) Oct. 26 annual meeting in Bethesda, MD, EPA brownfields director David Lloyd said EPA made the change in order to promote brownfields projects that have a likelihood to move beyond the assessment phase and into the cleanup and redevelopment phase.

The change is one of a series of efforts EPA is undertaking as part of an effort to promote brownfields cleanup and redevelopment. For example, during the ASTSWMO meeting, Lloyd also announced an EPA effort to quantify how brownfields cleanup and redevelopment can boost property values.

Lloyd said one preliminary analysis suggested the values may be increased by as much as 15 to 25 percent, a finding the agency hopes will provide communities with an added incentive to address the problem of abandoned commercial sites. He told *Inside EPA* that the agency was conducting the analysis with the hope that it would illustrate the value of undertaking brownfields projects to communities which may otherwise be reluctant to do so.

EPA Launches Evaluations of Renewable Energy Projects At Brownfields

EPA and the Energy Department (DOE) have begun evaluating the feasibility of siting renewable energy projects on 26 Superfund, brownfields and former landfill or contaminated mining sites, as part of EPA's push to encourage such development on such sites.

EPA is investing $1 million in the analysis, which will consider technical and economic opportunities and challenges at each site. Earlier this year, the agency asked states and local governments to submit renewable energy development proposals for cleanup sites in their regions, with EPA's top choices being evaluated by DOE's National Renewable Energy Laboratory (NREL).

While industry and local government sources have raised concerns in the past over liability issues connected with placing renewable energy projects on contaminated sites, sources following EPA's RE-Powering America's Land Initiative now say the biggest hurdle is obtaining financing.

State incentives such as tax breaks for development projects can "make or break" these deals, says one brownfields expert. "The biggest problem still is making the finances work," says another long-time environmental activist in an

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email response to questions.

The NREL studies will include conducting a preliminary analysis of the economic and physical viability of each site; reviewing economics, payback periods and capital costs; assessing the availability of renewable resources; identifying the size, design and location of a potential project; highlighting financing options such as available incentives; estimating job growth from the project; and estimating greenhouse gas emissions reductions from the project, EPA says in the application form for the feasibility studies. Among the sites being analyzed are former manufacturing sites, military bases, railyards, landfills, and mining sites across 20 states, EPA said in a Nov. 4 announcement.

The types of renewable energy being analyzed are wind, solar, biomass and geothermal, EPA says. Wind feasibility studies may take as long as two years or more, if wind data is studied, while the studies for the other types of energy production are expected to take one year, EPA says in response to questions from *Inside EPA*.

EPA says it is looking at a variety of potentially contaminated land as renewable energy production sites for a number of reasons: it can preserve greenfields; create jobs; offer existing infrastructure and lower land costs; and allow contaminated properties to be put to productive use.

The initiative "is not just about using these sites for energy production but using these sites to re-energize communities," EPA waste chief Mathy Stanislaus said in the Nov. 4 announcement. "These studies are the first step to transforming these sites from eyesores today to community assets tomorrow."

As to concerns about potential cleanup liability being transferred to developers, the brownfields expert says that liability risk can be managed, for instance through insurance products developers purchase. EPA, in its response, says developers have expressed concern about liability risks, but the agency found that many of these developers and investors are "often not aware of the statutory liability protections, enforcement discretion guidances, and site-specific tools available to protect them from potential [Superfund] liability."

EPA issued a fact sheet in March, seeking to "clarify potential liability issues" and provide answers to common questions that developers of such projects may have about liability. EPA notes in the fact sheet that the vast majority of properties requiring cleanup are most likely to be addressed by state cleanup programs, which may provide liability protections for new owners or lessees who were not responsible for the past contamination. The fact sheet also outlines the liability protections available for purchasers of contaminated property under the Comprehensive Environmental Response, Compensation & Liability Act and the Resource Conservation & Recovery Act, as well as liability protections for lessees of contaminated property.

Developers are not afraid of risk, but are "afraid of unquantified risk," the brownfields expert notes.

EPA and NREL launched the RE-Powering America's Land: Siting Renewable Energy on Potentially Contaminated Land and Mine Sites Initiative in September 2008 "to encourage siting renewable energy on potentially contaminated sites," according to EPA.

EPA estimates there are more than 11,000 "EPA tracked sites" for developing solar, wind, biomass, and geothermal facilities, representing 15 million acres of untapped land resources.

AIR

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. *The letter is 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

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questions, including requesting an EPA IG investigation into the matter if EPA does not respond.

The senator cites 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.

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 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.

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

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.

Activists Open To Remand EPA Boiler Rule Delay But Seek Conditions

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.

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 require-

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ments 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."

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." *The petition is 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. — *Bobby McMahon*

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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 (*see related story*).

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.

EEI in its Aug. 3 comments on the proposed rule expressed support for the provision being used in certain circumstances.

But environmentalists, "clean" utility company Exelon, and others have expressed reservations about the use of the 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." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2372241*)

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."

Critics Eye New Attacks On EPA Transport Rule After Failed Senate Vote

Critics of EPA's power plant emissions rule have failed to muster the votes needed to debate a measure to block the agency's regulation, prompting a new focus on other measures to delay or soften the regulation, which is slated to take effect in January, as well as other upcoming power sector rules, though the failed vote may make such efforts difficult.

The Senate Nov. 10 voted 41-53 to reject a motion to proceed to a vote on S.J. Res. 27, Sen. Rand Paul's (R-KY) "resolution of disapproval" to undo EPA's Cross-State Air Pollution Rule (CSAPR). The rule seeks to cut utility nitrogen oxide and sulfur dioxide emissions in 27 states, aiming to reduce transport of pollution into downwind states.

The resolution, which is privileged under the Congressional Review Act, is exempted from a filibuster but supporters of the resolution failed to gain the simple majority needed to proceed. Six Republicans, including Sens. Lamar Alexander (TN), Kelly Ayotte (NH), Scott Brown (MA), Susan Collins (ME), Mark Kirk (IL) and Olympia Snowe (ME) all voted against the motion to proceed, while two Democrats — Sens. Ben Nelson (NE) and Joe Manchin (WV) — voted for it.

Following the vote, which effectively kills the resolution, House Energy & Commerce Committee power panel

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Chairman Ed Whitfield (R-KY) issued a statement urging the Senate to pass the so-called TRAIN Act that would delay CSAPR's implementation, among other provisions.

The bill, H.R. 2401, approved by the House in late September would require a cumulative impacts assessment of several key EPA rules and delay two major air rules, including CSAPR.

"I appreciate the Senate effort to reject a costly and far-reaching rule that has already cost jobs, and believe we can build on that effort by pressing for a study of these rules and a plan to provide more time and analysis to develop sensible, achievable regulations," Whitfield said in the statement.

Whitfield said that in lieu of CSAPR, EPA should continue to administer the Clean Air Interstate Rule (CAIR), a Bush-era trading program predecessor to CSAPR. But the U.S. Court of Appeals for the District of Columbia Circuit remanded the Bush EPA rule back to the agency due to several legal flaws.

Sen. John Kerry (D-MA) argued on the Senate floor Nov. 10 that because Paul's resolution would bar EPA from pursuing a "substantially similar" rule to CSAPR, the agency would not be able to replace CAIR even in the face of the court remand. "This would be an enormous step backwards," Kerry said.

Nevertheless, Whitfield said H.R. 2401 would keep the "effective" CAIR in place while EPA studies the impacts of CSAPR. "Estimates show EPA's power sector rules would affect over 1,000 power plants nationwide, putting hundreds of thousands of jobs in jeopardy and the reliability of our electricity supply at risk."

Whitfield and other House Republicans are also asking Department of Homeland Security Secretary Janet Napolitano for information on how CSAPR and a pending EPA utility air toxics rule could impact the United States' critical infrastructure and key resources (CI/KR)

Whitfield, together with full energy committee Chairman Fred Upton (R-MI) and oversight panel Chairman Cliff Stearns (R-FL), sent a Nov. 9 letter to Napolitano reiterating long-running claims that the air rules could prompt some plants to shutter, causing grid reliability problems. Plant closings could "adversely impact electric reliability by reducing reserve margins, leaving the grid more vulnerable to disruption, and threatening CI/KR across the country," they write. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381866*)

The House lawmakers also sent a Nov. 8 letter to EPA Administrator Lisa Jackson raising a host of questions about the potential reliability impacts of the utility maximum achievable control technology (MACT) as well as CSAPR. For example, the letter asks EPA to explain "how the timing of EPA's regulations, and in particular the compliance deadlines in the CSAPR and Utility MACT rule, are consistent with the planning horizons of the electric sector."

Despite the lawmakers' concerns and Whitfield's push for the Senate to pass bills to stall CSAPR, prospects for such legislation remain uncertain at best, with environmentalists now seeing the upper chamber as a firewall against the measures, as well as other measures to stall or block EPA rules.

"While the U.S. House has taken more than 165 anti-environmental votes in the 112th Congress alone, the more moderate U.S. Senate remains a hurdle for legislation that would undermine environmental and public health protections.," according to a Sierra Club press release on the defeat of Paul's resolution.

In addition to the defeat of the Paul resolution, senators Nov. 10 also voted down a jobs package from Sen. John McCain (R-AZ) that includes long-sought legislation requiring Congress to approve EPA and other agencies' rules, as well as language delaying EPA's pending rules for boilers. — *Anthony Lacey*

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WATER

EPA Crafting New Study On 'Economic Importance' Of Clean Water

EPA's water office is crafting a new study on "the importance of clean water to the U.S. economy," which could help the agency justify a number of key water initiatives under the Clean Water Act (CWA), including a controversial new rulemaking intended to clarify when isolated wetlands and other marginal waters are subject to regulation.

In a Nov. 14 Federal Register notice, EPA's Science Advisory Board (SAB) says it is planning a Dec. 5 teleconference to solicit early advice from its Environmental Economics Advisory Committee on the new study's scope, planning and development. *The notice is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2382105*)

The effort appears likely to extend and formalize ongoing efforts by agency officials to quantify the economic benefits of clean water to help justify regulatory efforts. For example, EPA Administrator Lisa Jackson recently noted the significant costs to fishing, tourism and other industries posed by water contamination from the Gulf of Mexico oil spill.

"We had to hit pause on a billion-dollar seafood industry and saw a drastic slowdown in tourism dollars," Jackson told the Milwaukee Water Summit Sept. 20. "There was a great cost in losing that economic activity, even for just a

short period of time. But it was nothing compared to what would happen if we lose those waters for good."

"It is hard to overstate the value of clean water — and clean water innovation — to our economy," Jackson added.

Agency officials have also argued that measures to clamp down on nutrient pollution could provide substantial drinking water benefits, as would their efforts to clarify the scope of the CWA.

According to the draft notice, EPA's Office of Water requested that SAB provide "a consultation on the data, information and analytical methodology to evaluate the value of water to the U.S. economy and provide a resource for future decision-making."

Those decisions could include efforts to regulate under the CWA. "EPA anticipates this effort, when combined with EPA research on the value of water in the United States from non-market values (e.g., non-use values, recreation, etc.), will integrate market and non-market economic value information that is critical to support decision-making at multiple scales (e.g., EPA, state, regional, watershed, or local)," the notice says.

EPA says it is seeking advice from SAB on topics including "how the availability of clean water may affect patterns of economic development, advantages clean water may provide to different sectors of the economy (i.e., tourism, farming and food production, fishing, manufacturing, infrastructure, housing and energy), and what data are available or needed to support strategic choices," the notice says.

The Dec. 5 meeting will include an opportunity for public comment, the draft notice says.

The study could help justify a number of controversial measures EPA is crafting, including its pending policy clarifying when isolated wetlands and other marginal waters are subject to regulation under the water law.

The policy, which is intended to strengthen a Bush-era policy, was first articulated in a draft guidance that EPA released last year, but officials are working to codify the policy in a recently launched rulemaking.

Industry groups have raised concerns that the effort will impose significant new regulatory costs by subjecting previously unregulated waters to permit and other regulatory requirements.

A cost-benefit analysis that EPA conducted at the request of the White House Office of Management & Budget found that the new approach would result in an increase in the number of waters deemed to be jurisdictional compared to the Bush-era version. It estimates that the annual costs of implementing the new approach range from $63 million to $185 million, while the benefits range from $162 million to $367 million.

Facing Hill Pressure, EPA Poised To Urge States To Speed Water Spending

EPA is poised to urge state governors to spend water infrastructure, nonpoint cleanup and other funds as expeditiously as possible, sources say, amidst concerns that congressional Republicans are aiming to reduce or rescind states' unliquidated obligations in upcoming budget measures.

But state sources say it is often difficult to spend the money quickly given the structure of EPA's programs and the nature of infrastructure projects they support, adding that Congress' fractured budgeting process exacerbates the issue.

According to several state sources, EPA Administrator Lisa Jackson is slated to send a letter to governors in the coming days asking for their help in spending unliquidated funds — money that has been dedicated but has not yet been spent — for the state revolving loan fund (SRF) programs, nonpoint source grants under section 319 of the Clean Water Act and other such funding sources.

An EPA spokesman could not be reached for comment.

The letter comes after the House Energy & Commerce Committee's oversight panel Oct. 12 pressed EPA Chief Financial Officer Barbara Bennett for why millions of dollars remain unspent in agency coffers. During the hearing, GOP lawmakers suggested that the agency may have as much as $13.3 billion in appropriated dollars that remain unspent, although sources say it is unclear what this total dollar amount includes.

In his opening statement, subcommittee Chairman Cliff Stearns (R-FL) said that the amount of unspent money and related pieces of information "could be useful to Congress because the availability of recertified amounts could partially offset the need for new funding."

In an Oct. 24 letter as well, Stearns, full committee Chairman Fred Upton (R-MI) and others seek "a better understanding of the role unliquidated obligations appropriated in prior years may play in identifying opportunities to reduce new appropriations." *Relevant documents are available on InsideEPA.com.* *See page 2 for details.* (*Doc ID: 2381718*)

In the letter, the lawmakers seek a "complete list of EPA programs and other expenditures" with information on the status of the funding for those programs, all efforts since fiscal year 2009 to "deobligate" unliquidated obligations and other related information.

In response to questions about the funds, Bennett said at the hearing that most of the funds go to assist states and tribes, with many of the infrastructure projects the funding supports taking place over several years. Bennett also noted her commitment to addressing unliquidated obligations, saying, "I know I've put a real renewed focus on looking at unliquidated obligations. We instituted a new tool and provided new guidance to the agency so that every unliquidated

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obligation was reviewed on at least an annual basis, and they have to send assurances to me that they have done so. And by virtue of that tool, we've been able to reduce the unliquidated obligations by over 50 percent in one year alone."

"So we recognize that this is an issue. We recognize that this is an important budget item. And it's important for me as CFO to make sure that funds are not only used properly but they're expended in the most efficient and effective way," Bennett said.

While state sources say that there are improvements that can be made in their efforts to spend grant and loan dollars, they argue that the nature of the SRF program and others and the targets of the funding mean that dollars are often spent over several years. One state source says that funds for a sewage treatment plant or other infrastructure project are spent over the life of the project, which can take several years to plan and build, and are not drawn down from EPA by the state until the city or municipality funding the project asks the state to do so.

Sources also say that states have faced significant challenges recently given that Congress has shifted from doing budget appropriations bills to passing continuing resolutions (CRs) and other such short-term funding measures. The state source says, "the fastest thing Congress can do to get money spent is to issue its budget before the end of the fiscal year and not do CRs," adding "That'll speed it up by a year if they did that."

A second state source concurs, saying that states were not aware of their awards until very late this year, which impacted their planning.

But the source expresses concern that those fixes do not change the mechanics of the SRF program, saying "it's never going to be the situation where the money can quickly be dumped out the door, because that's not how the program works." Coupled with Congress' recent focus on deficit reduction and budget cutting and the fact that SRF funding is a significant chunk of EPA's budget, the source worries that lawmakers will see the funds unspent and target them for reductions. — *Bobby McMahon*

EPA Agrees To Review 'Federalism' Effects Of CWA Jurisdiction Rulemaking

EPA has agreed to requests from state and local officials to review the "federalism" effects of its pending rulemaking to clarify when wetlands and other marginal waters are subject to regulation under the Clean Water Act (CWA), though officials appear unlikely to grant industry requests to formally review potential small business impacts.

The agency held a meeting Nov. 10 to address concerns that the rule will eventually impose substantial costs and burdens on state and local governments, revising an initial EPA decision to avoid such a consultation.

"It is what we think they need [to do]," says an informed source, who notes that an Oct. 26 briefing between the agency and state and local groups did not address issues like the costs and burdens of EPA's proposed approach.

Looking at cost concerns "is a large part of what you do in a federalism consultation . . . [by] more officially bringing them to the table and talking about them," the source adds. Also, the federalism process could also result in EPA responding to state and local concerns in a letter after the meeting, the source says.

EPA's rule is intended to codify a new EPA approach for determining when isolated wetlands and other marginal waters are subject to regulation under the water law. EPA's initial articulation of the policy, contained in draft guidance, sought to clarify legal uncertainty over how EPA and the Army Corps of Engineers can determine whether such waters are subject to the CWA in the wake of two key Supreme Court rulings that caused confusion over the law's scope.

The draft guidance allows regulators to use either of two Supreme Court tests for determining whether waters are subject to regulation, an approach that generally expands CWA jurisdiction over tributaries to traditionally navigable waters, wetlands adjacent to those tributaries and other marginal waters.

The U.S. Court of Appeals for the 3rd Circuit recently affirmed, as several other appellate courts have, that regulators can use either of the two tests articulated by the Supreme Court when determining if waters are jurisdictional.

"We join the Courts of Appeals for the [1st]and [8th] Circuits in holding. . . that property is 'wetlands' subject to the CWA if it meets either of the tests laid out" by the Supreme Court, the appellate court said in its Oct. 31 ruling in *United States v. Donovan*.

But EPA's guidance has raised concerns from industry and local government groups, who fear it will significantly expand the scope of the CWA — beyond what the Supreme Court has allowed — and could impact existing CWA permit programs.

EPA and the Corps originally planned to finalize the guide before launching a rulemaking but under intense pressure from industry, GOP lawmakers and others, the agency recently launched a rulemaking to codify the guide — though officials have not said whether they plan to issue a final guidance as an interim policy before the rule is promulgated.

But the rulemaking plan has drawn significant concerns from industry and GOP lawmakers, in part because EPA appears to be preparing to codify the draft guidance. Industry groups, backed by key House and Senate Republicans,

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have sent letters urging EPA to begin the rulemaking without relying on the guidance, launch an advance notice of proposed rulemaking (ANPRM), rather than the proposed rule EPA is planning, and to hold a lengthy consultation to minimize the rulemaking's impacts on small businesses.

We "look forward to the agencies formally withdrawing the Draft Guidance and beginning the rulemaking process with an open mind," key House and Senate Republicans said in a Nov. 8 letter to EPA Administrator Lisa Jackson and the Corps' Jo-Ellen Darcy. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381705*)

The letter was signed by Sens. James Inhofe (R-OK) and Jeff Sessions (R-AL) of the Senate environment committee, and Reps. John Mica (R-FL) and Bob Gibbs (R-OH), of the House transportation committee.

Republican Sens. John Barrasso (R-WY) and Dean Heller (R-NV) are also expected to introduce an amendment to an upcoming Senate spending bill that would block the Corps from implementing the proposed guidance. "They are committed to preventing this Washington power grab over all farms, small businesses and rural communities," a GOP source says.

While industry groups and GOP lawmakers are pushing for EPA to expand consideration of industry concerns, the agency appears unlikely to grant the requests, though an agency spokeswoman says officials are giving industry groups an additional two weeks to provide comments to the agency.

Environmentalists, meanwhile, are dismissing industry and GOP concerns and urging EPA to move quickly with the rulemaking, while also calling for EPA to finalize the proposed guidance. — *Aaron Lovell*

Environmentalists Vow To Block EPA From Backing Florida's Nutrient Criteria

EPA is signaling its willingness to approve Florida's proposed water quality criteria for nutrients, a move that could end the long-running battle over the agency's landmark numeric criteria, but environmentalists are promising to sue, saying the state's approach is not protective and violates the Clean Water Act (CWA).

Acting EPA water chief Nancy Stoner informed Florida Department of Environmental Protection (FDEP) Secretary Herschel Vinyard in a Nov. 2 letter that EPA's initial inspection of the state's recent draft rule for numeric nutrient criteria would be acceptable to the agency and would be approved.

"While EPA's final decision to approve or disapprove any nutrient criteria rule submitted by FDEP will follow our formal review . . . our current review of the October 24, 2011 draft rule, guidance, and other scientific and technical information supporting the draft rule, leads us to the preliminary conclusion that EPA would be able to approve the draft rule under the CWA," Stoner said in the letter. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381079*)

"Should EPA formally approve FDEP's final nutrient criteria as consistent with the CWA, EPA would initiate rulemaking to withdraw federal numeric nutrient criteria for any waters covered by the new and approved state water quality standards."

Stoner has previously promised the state the agency would withdraw its own numeric criteria if state officials craft acceptable criteria of their own, a move that if implemented would mark the end of a contentious debate over EPA's first-time numeric criteria. While states continue to oppose EPA efforts to force adoption of numeric, rather than less-stringent narrative limits, agency approval for Florida's criteria would signal that states are able — under pressure — to adopt such measures.

But one environmentalist says they are "deeply disappointed" with EPA's indication that the state's criteria are acceptable under the CWA, and have informed EPA that if the agency formally approves the criteria it will face a legal challenge from the environmental community.

"We do not believe that the rule as it is currently written is approvable in accordance with federal regulations and the Clean Water Act, and we will continue to aggressively oppose it in every manner possible until [the state water quality standards] are consistent with the Clean Water Act and adequately protective of the environment and human health," the source says. "And frankly this decision appears to be more political than anything else."

FDEP sent final draft revisions to the state water quality standards to the state's Environmental Regulation Commission (ERC) on Nov. 3. Under Florida procedure, any FDEP waste, water or air quality standards must win ERC approval. In addition to ERC approval, the Florida Legislature in 2010 passed a bill — overriding then-Governor Charlie Crist's (R) veto — requiring all environmental rules costing more than $1 million over five years to be "ratified" by the Legislature, so the Legislature must also approve the water quality standards when it begins its regular session in January. If and when the Legislature ratifies the changes, they will be sent to EPA for its approval.

FDEP began work revising its water quality standards earlier this summer, allowing the public to weigh in through stakeholder sessions in July and August throughout the state and accepting public comments. Drew Bartlett, deputy director of FDEP's Division of Environmental Assessment and Restoration, told *Inside EPA* in an Aug. 3 interview that

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the purpose of the state changes was to attempt to strike a balance between EPA-developed numeric criteria and the perceived impacts of those rules on the state economy by industries and state political leaders.

EPA finalized its own numeric nutrient criteria for the state's lakes and streams in a November 2010 rule, following a determination in 2009 that the criteria are necessary to protect the waters. Those criteria sparked dozens of lawsuits from industry organizations and the state, who say the federal nutrient limits are scientifically unsound and excessively costly for permit holders to comply with. Activists also sued, but targeted the legality of a provision in the final rule that allows for site-specific alternative criteria.

FDEP argued in an April petition to the agency that it is well suited to develop its own criteria, citing a March 16 EPA memo from Stoner to EPA regional offices directing federal regulators to encourage states to develop their own numeric criteria. Stoner said in an informal response letter to FDEP that the agency would accept state-issued water quality standards, so long at they included numeric criteria that were adequately protective of the environment and human health and met the conditions of the CWA.

But activists say they have several options to challenge the effort in addition to suing EPA for finalizing the state's criteria. For example, a second environmentalist says they could pursue an administrative law challenge to the rule once it has arrived at ERC for its approval, though critics of the changes have not yet determined whether that is an option they would pursue.

EPA Faces Industry, Environmentalist Suits Over Novel Stormwater Permit

EPA's landmark municipal separate storm sewer system (MS4) permit for the District of Columbia, which sets a novel numeric water retention standard, is facing challenges from both industry and environmental groups.

Regulators generally use MS4 permits to set conditions for how local governments must limit stormwater runoff from parking lots, housing developments and other sites whose runoff is collected in the storm systems and discharged into regulated waters.

EPA's permit, issued Sept. 30 by EPA's Region III, is considered a model for other MS4 permits nationwide, since Washington, DC, does not have delegated permitting authority and EPA drafted the permit itself. The permit set an on-site stormwater runoff retention standard for new and redeveloped properties, which would require facilitates to retain 1.2 inches of rainwater during 24-hour storm events, along with implementing green infrastructure practices such as planting 4,150 trees annually to further limit runoff.

But environmentalists Nov. 4 filed an administrative challenge to the permit saying it does not mandate water quality compliance and gives facilities a "safe harbor" from complying with water quality standards in exchange for achieving the retention standard.

Some environmental groups, including Natural Resources Defense Council (NRDC), initially appeared to welcome the MS4 permit, particularly its stormwater retention standard, as a potential model for state-issued permits in the Chesapeake Bay watershed and other areas where MS4 requirements can be more stringent to meet nutrient limits.

But NRDC, along with Earthjustice, Potomac Riverkeeper, Friends of the Earth and Anacostia Riverkeeper, Nov. 4 filed an appeal with EPA's Environmental Appeals Board (EAB) in an effort to force the agency to revise the provision the activists say provides a safe harbor that does not require the district to meet the permit's terms. *The appeal is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381432*)

In their petition for review, the groups roundly fault the permit, for lack of a compliance schedule to set interim requirements for meeting effluent limits and lack of provisions to ensure that the sewer system's receiving waters come into compliance with wasteload allocations contained in pollution control plans, known as total maximum daily loads (TMDLs), and water quality limits.

"Neither the District nor the Region followed the legally mandated path for compliance with the legal requirements for MS4 permits," the group's petition says.

The environmental groups also take issue with what they are dubbing a "safe harbor" provision in the permit. The permit requires facilities to limit pollutant discharges into the MS4 as necessary to comply with existing District of Columbia Water Quality Standards (DCWQS) and applicable wasteload allocations (WLAs), or the maximum amount of a pollutant that a source can discharge into an impaired waterbody, for established or approved TMDLS.

However, with the exception of the WLA for the Anacostia River trash TMDL, complying with the stormwater retention standard and the other conditions of the permit "shall constitute adequate progress toward compliance with DCWQS and WLAs" for a permit term, the permit says.

Activists take issue with this. "The Permit explicitly states that the District is not expected to meet standards at any time during this five-year permit term," the EAB petition charges.

Meanwhile, a coalition of wastewater groups filed a similar EAB petition, charging that the permit's numeric goals are in some cases unachievable. The petition, filed by the District of Columbia Water and Sewer Authority and the Wet

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Weather Partnership, also says the permit fails to distinguish between the utility's responsibilities and the responsibilities of the District of Columbia government.

Specifically, the industry petition takes exception to the permit's requirement that permittees develop a TMDL implementation plan, which addresses all 370 WLAs for more than 200 individual pollutants, within two years of the issuance of the permit. "Given the time-consuming, iterative process of identifying effective best management practices (BMPs) to reduce pollutants and meet WLAs, and considering that there are not even established sources of some pollutants, the requirement is impossible to achieve, the petition says.

"This is a setup for failure, irrational, arbitrary and capricious," the petition reads. "The District Government will need many permit cycled to identify a suite of iterative BMPs that will allow cost-effective progress toward reducing pollutants in its MS4 discharges."

Senate Eyes FY12 Omnibus To Move Landmark Gulf Cleanup Funding Bill

A key senator says lawmakers may seek to attach landmark legislation to fund EPA-led Gulf cleanup activities onto upcoming fiscal year 2012 spending or other legislation likely to pass, a move that could overcome opposition to the precedent-setting measure and speed passage of a bill that is vital to the agency's effort.

"Legislatively there are multiple options for moving the bill forward," Sen. Benjamin Cardin (D-MD), chairman of the Senate environment committee's water panel, said in an interview with *Inside EPA*.

The bill, S.1400, would direct Clean Water Act penalties from the Gulf oil spill to state restoration efforts that EPA is overseeing, rather than to the federal oil spill trust fund. Passage of the bill would assuage concerns over how EPA plans to fund the scores of nutrient reduction and other restoration actions it hopes to take as part of its Gulf of Mexico Regional Ecosystem Restoration Strategy, according to a host of public comments filed on the Oct. 5 draft.

EPA's draft strategy calls for Congress to "dedicate a significant portion of the eventual Clean Water Act civil penalties resulting from the *Deepwater Horizon* oil spill for Gulf recovery, in addition to current funding for Gulf programs," but does not detail how much money to expect or how it would be divided up between the involved states and programs.

The pending legislation has strong bipartisan support among Gulf Coast senators and was voted out of the Environment & Public Works Committee Sept. 21 in a largely bipartisan vote. A group of House lawmakers, led by Rep. Steve Scalise (R-LA), Oct. 5 introduced a companion bill, H.R. 3096, but it is still under review by the House Transportation & Infrastructure Committee.

Senators from both parties, however, have voiced concerns that the bill sets a dangerous precedent for how lawmakers may deal with federal penalties from future spills. "This is unprecedented in terms of taking this amount of money and these fines and dedicating this [to states that border on the spill]," said Sen. Tom Udall (D-NM), who voted in favor of the bill in committee.

"It raises a precedent for me of how we're going to deal with future spills, environmental accidents, these kinds of fines. And should all states be entitled to fines for environmental accidents that occurred near their borders?" he said.

While Cardin did not comment on whether or how supporters of the bill may address Udall and other senator's concerns, he said that attaching it as an amendment to another legislative vehicle would likely advance its passage. "The proposal has overwhelming support in the Senate, and it could easily withstand a 60-vote-threshold vote" to attach an amendment, Cardin said.

Cardin's comments come as House and Senate appropriators are planning to bundle EPA's FY12 spending bill into a "minibus" measure, together with spending bills for the departments of defense, labor and health and human services. Rep. Jim Moran (D-VA), the ranking Democrat on the House Appropriations Committee's environment panel, said recently that lawmakers may bundle the bills together because "those would be the three toughest because of the [policy] riders" that lawmakers have sought to attach to the bills.

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In Wake Of TCE, Upcoming Risk Studies May Pose Tough New Test For EPA

EPA recently issued its long-awaited risk assessment of the solvent trichloroethylene (TCE) and analyses of several lesser known chemicals, but officials are still grappling with assessments for several high-profile chemicals that could pose major tests for its Integrated Risk Information System (IRIS) program, which is facing heavy criticism from industry and Republicans.

Among the more difficult assessments EPA is still struggling to complete are those for ubiquitous contaminants like arsenic, dioxin, hexavalent chromium (Cr6), platinum salts (Pt) and perchloroethylene (perc), which could be subject to stringent new regulations once the agency completes the assessments.

With the exception of TCE, "EPA is largely completing assessments that are less controversial," says one industry source.

As fiscal year 2011 drew to a close, EPA released a handful of new IRIS documents, including a final assessment for TCE that classified the ubiquitous solvent as a known carcinogen. The agency also issued a final assessment for trichloroacetic acid (TCA), a metabolite of the solvent, as well as a final assessment of hexachloroethane (HCE), a chemical most commonly used by the military.

EPA staff also posted new draft assessments for the chemicals biphenyl and vanadium pentoxide, with EPA opening public comment periods and setting listening sessions on each.

EPA released the assessments despite concerns from industry and GOP lawmakers that the risk assessments are based on flawed science that could drive costly regulations.

To address this, the program's critics are urging the agency to reform the IRIS program — as at least one National Academy of Sciences (NAS) panel has recommended — and subject at least one of the major assessments to heightened scrutiny by the NAS.

While EPA has adopted some reforms, the agency is struggling to adopt others in part due to concerns that doing so may prompt further delays in a program long-criticized for its lengthy assessment process.

When the agency released the TCE assessment, research chief Paul Anastas highlighted the value of the IRIS program and the new regulations that will result. "This assessment is an important first step, providing valuable information to the state, local and federal agencies responsible for protecting the health of the American people," he said in a statement. "It underscores the importance of EPA's science and, in particular, the critical value of the IRIS database for ensuring that government officials and the American people have the information they need to protect their health and the health of their children."

But sources say several pending assessments will be much more difficult for the agency to complete than TCE and some of the others.

"I can understand putting some of the minor [assessments] through — it's a way of being able to show progress," says a consultant. But the "big, problematic assessments [will] have to be thoroughly re-thought," the consultant adds. The source suggests that EPA would be "better off if they could just get through those four or five big ones that have been thorns."

EPA is already running behind its own stated schedule for completing assessments for Cr6, arsenic, dioxin, Pt and perc.

While one source says the perc assessment could be released "soon," the Cr6 assessment had been expected for publication by Sept. 30, according to slides presented to agency advisers in late June. But it has yet to move to the final stages before publication — interagency review and final EPA review, according to the agency's IRIS Track website. EPA now estimates the Cr6 assessment will be published in the second quarter of fiscal year 2012, sometime between January and March 2012.

The Cr6 assessment may be particularly contentious as environmentalists and industry representatives are already telling EPA that how the agency proceeds on Cr6 will be a test for the future of the IRIS program and reforms adopted by Administrator Lisa Jackson to address Government Accountability Office concerns that the program is too slow in completing assessments.

And the Small Business Administration's Office of Advocacy (SBA) told EPA research chief Paul Anastas in an Oct. 5 letter that delaying the Cr6 assessment in order to consider the upcoming industry studies would demonstrate EPA's commitment to put the IRIS program on a strong scientific footing.

"Any delay in the process that results from EPA waiting a few months longer on [Cr6] will no doubt be significantly outweighed by the benefits from a more robust data base to uphold informed regulatory decisions," according to SBA's Oct. 5 letter. "Advocacy believes that by moving back the deadline for a final assessment of the scientific data, by assessing all available science, including the most recent studies, and by rewriting the Draft Toxicological Review, that EPA can demonstrate that sound science is indeed the backbone of the IRIS program." *Relevant documents are available on InsideEPA.com.* *See page 2 for details.* (*Doc ID: 2377807*) — *Maria Hegstad*

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Amid Concerns From DOD, EPA Slated To Release Perc Risk Assessment

EPA is poised to release its long-delayed Integrated Risk Information System (IRIS) assessment of the ubiquitous solvent perchloroethylene (perc), which is often used in dry-cleaning and metal degreasing, though the Defense Department (DOD) is concerned with how EPA conducted its assessment and is calling for heightened scrutiny.

Sources both at EPA and closely following the assessment are indicating the long delayed assessment will be released "soon," possibly as early as mid-November. An EPA spokeswoman would not comment on the timing for the perc assessment but said in a statement that the agency is committed to finalizing IRIS assessments "on a timely basis."

But DOD is raising concerns that EPA is using a different method for assessing perc's risks than it did for a related solvent, trichloroethylene (TCE) — even though the agency acknowledges the two compounds are similar.

A DOD spokeswoman says the inconsistencies in EPA's approaches is undermining the department's confidence in both assessments, prompting officials to call for heightened scrutiny. "DOD uses the information and conclusions to communicate risk to stakeholders, and we need to have confidence in the way those risks were calculated. In order to achieve that confidence, DOD is looking for a review of whether or not the risks should have been calculated differently, and if so, what the justification is."

EPA began updating its 1988 assessment of perc, a common contaminant at hazardous waste sites, in 1998. Once final, the assessment could strengthen cleanup standards at the dozens of waste sites where the chemical is a contaminant, as well as air toxics rules governing facilities that use the chemical.

The agency released a draft assessment in 2008 to undergo peer review by the National Academy of Sciences (NAS). The revised assessment had been delayed for two years because Bush EPA research chief George Gray wanted the agency to use it to implement for the first time his plans for broader consideration of scientific uncertainty in EPA risk assessments.

But agency staff refused to conduct the uncertainty analysis — or develop the less-conservative non-linear risk models — Gray sought, delaying the assessment. Once released, EPA's draft assessment provided a first-time inhalation exposure standard — or reference concentration (RfC) — set at 0.016 milligrams per cubic meter (mg/m3), as well as first-time cancer risk standards.

The draft also proposed a more stringent oral exposure standard — or reference dose (RfD) — from the 1988 value of 0.01 milligrams per kilogram per day (mg/kg/day) to 0.004 mg/kg/day. The new — and stricter — safety standards would, if finalized, likely result in stricter cleanup and emissions levels for the solvent.

But the NAS in its 2010 report called on the agency to rewrite key portions of the assessment. The NAS panel strongly criticized the agency's reliance on conservative, but scientifically uncertain, studies on the chemical's cancer and non-cancer risks, findings that the panel said undermine the agency's recommended safety levels.

While it is unclear what changes EPA will have made to the document since its 2008 draft, DOD is already indicating concern with how EPA conducted its quantitative cancer risk estimates. "DOD is very concerned about the apparent lack of consistency in the evaluation of TCE and PCE, the latter also under interagency review," according to written comments DOD submitted to EPA July 15. EPA released the other agencies' written comments Sept. 28, alongside the final TCE assessment. *The comments are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381533*) — *Maria Hegstad*

EPA Considers New Approaches To Calculating Inhalation Risk Estimates

EPA staff are preparing to begin reviewing their existing approach for estimating non-cancer inhalation risk from chemical exposures, one of four risk values EPA generally includes in its risk assessments, and are weighing a modeling approach that may be less conservative than the current default method, according to a recently released EPA review.

Should EPA eventually adopt less conservative methods, it could address some of industry groups' concerns that the agency's Integrated Risk Information System (IRIS) assessments — which are often the basis for agency regulations and other decisions — are too conservative.

"Our default approaches give you a . . . [risk estimate], that is a little bit lower, may result in a concentration that is less than that estimated by these more sophisticated models. And that's very much what you'd kind of expect. With this additional knowledge we're reducing some of those uncertainties," says an agency source familiar with the effort.

Specifically, EPA is reviewing its method for setting reference concentrations (RfC), which measures the amount of an environmental gas at or below which EPA estimates a person can inhale daily over a lifetime without experiencing adverse noncancer heath effects. RfCs are one type of risk value the agency often includes in its IRIS assessments.

The agency's existing guidance for how these risk estimates should be estimated, *Methods for Derivation of Inhalation Reference Concentrations and Applications of Inhalation Dosimetry*, and referred to as *RfC Methods*, was published in 1994.

But the agency is in the midst of a multi-year process reviewing approaches for modeling inhalation dosimetry of

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environmental gases in the respiratory system.

EPA in late September published the second of two reviews of updates to the field, "Advances in Inhalation Dosimetry for Gases with Lower Respiratory Tract and Systemic Effects." The paper indicates that newer approaches may lead to less stringent inhalation risk estimates than those produced by existing default methods. *The review is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2382182*)

The paper concludes that its "results give indications the current dosimetry approach of *RfC Methods* that uses ratios of animal to human [blood:air or blood:gas partition coefficient] as a basis of dosimetry for the extrarespiratory region may result in human equivalent concentrations that are less than estimated by PBPK [physiologically based pharmacokinetic] models."

PBPK models are used to estimate how a chemical moves travels the body. They are intended to provide a more sophisticated way to compare the results of chemical exposure to lab animals with the what would be expected if humans were similarly exposed.

The first paper in the series, published in 2009, focused on advances in inhalation dosimetry for the upper respiratory tract.

The agency source describes the most recent document as "a fundamental science report that we'll be getting into later as we evaluate our [RfC] methodologies during this fiscal year."

"We're going to be looking into the RfC methodology and taking this report plus other reports, the status 1 report done in 2009 that deals with the upper respiratory tract . . . this is the complement to that," the agency source says. "Those two together serve as the science foundation for taking a look at our methodologies. We're just really getting going on that."

The most recent paper explains that "the goal of this project is to provide information necessary for ensuring that methods and guidance used and implemented by EPA in inhalation risk assessment reflects the state-of-the-science." The paper adds that the methods it reviews "are used predominately for interspecies extrapolation, typically from laboratory animal inhalation exposures to humans," which are necessary when assessments are based — as they often are — on toxicological studies of how laboratory animals respond to chemical exposures.

The source explains that the agency's current approach uses the ratios of animal to human blood to gas as the basis for dose adjustments between animals and humans for certain areas of the respiratory tract called the extrarespiratory region. "In those areas, the default approach may result in concentrations that are less — a little bit lower — than those that are estimated by a more sophisticated approaches like these PBPK models we talked about," the source says.

The source explains that this may result in less stringent RfCs than those estimated from the default ratio approach recommended in the agency's current *RfC Methods*.

"With more information, more sophisticated models, there is somewhat less uncertainty. So the resulting RfC may be higher if you use a PBPK model than if you use our default approach," the source adds. "That's what the state of the science is pointing to." *— Maria Hegstad*

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NAS Panel Grapples With Agencies' Competing Limits To Protect Species

The National Academy of Sciences' (NAS) panel tasked with recommending ways to streamline how EPA and federal wildlife officials assess risks of pesticides to endangered species is facing a tough task as officials are highlighting their competing statutory requirements that may make any consolidation of the process difficult.

At the panel's first meeting Nov. 3 in Washington, DC, EPA officials argued that their requirements under federal pesticide law call for the agency to provide "reasonable" protections for the environment, but federal wildlife officials say their approaches governed by the Endangered Species Act (ESA) give "the benefit of the doubt" to protecting species.

EPA and other federal officials sought the NAS panel to help overcome a host of issues that are threatening to stymie their ability to register pesticides.

Section 7 of the ESA requires EPA to consult with the National Marine Fisheries Service (NMFS) and Fish & Wildlife Service (FWS), collectively the services, when taking actions that could effect or harm endangered species and to mitigate any harms.

But EPA and the agencies have long struggled to consult over the pesticide registration decisions, in part because the they face competing statutory standards for protection. Under the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA), EPA is required to ensure that a pesticide cannot cause an "unreasonable adverse effect" to the environment. But ESA imposes a more stringent prohibition, barring actions that cause "jeopardy" to a species or habitat.

As such, under FIFRA, testing involves looking at the effects of one pesticide on one animal at a time, and often a surrogate for an endangered species, instead of the complex mixtures of substances that exist in the environment, which

the services need for ESA ecological assessments.

Such difficulties have delayed consultations between the agencies and prompted a growing number of suits from environmentalists to force the consultations and to require mitigation — including the so-called "mega suit," which alleges impacts of dozens of pesticides on more than 200 species. But EPA and other federal officials have complained that the lawsuits are tying up resources that could be used on additional consultations.

In one case where EPA and the agencies completed a consultation, industry groups sued over the services' assessment — though a federal court Oct. 31 upheld the assessment (*see related story*).

Earlier this year, officials from EPA and the departments of Agriculture (USDA), Commerce and Interior asked the NAS to create a panel to review the issue. As part of its review of "Ecological Risk Assessment Under FIFRA and ESA," the agencies have asked the panel to make recommendations on the best available science; how to assess sublethal, indirect and cumulative effects; how to account for mixtures and inert ingredients; how to improve modeling; interpretation of uncertainty; and how to best use geospatial information and datasets.

While the panel's review is focused on the risks of pesticides to endangered species, the effort could be relevant to a host of other media, as EPA is required to weigh the impacts of many of its air, water and waste decisions as well.

At the NAS panel's first meeting Nov. 3, officials highlighted the differences in their statutory requirements and risk assessment approaches.

EPA officials told the panel that their pesticide review practices are protective, arguing that the standards they apply to chemicals are "reasonable" and sufficiently protective of the environment.

They rejected claims from services' officials that EPA errs on the side of reducing costs and burdens on companies instead of increasing protection for endangered species that is called for under the ESA. In our models, "we are trying to make efforts to provide protection" for endangered species, Edward Odenkirchen, a senior scientists with the Office of Pesticide Programs told the NAS panel.

But the agency has to determine "what is a reasonably expected affect or scenario . . . how big are the uncertainties, where do you want park on the scale of those uncertainties so that a you can reasonably account for those but your construct is reasonable in terms of how a pesticide is used."

Given all of the uncertainty and conservative elements built into EPA's models and risk assessment for pesticides under FIFRA, the question is "how much effort and how far out on the curve do we all need to be to be reasonable," Odenkirchen said.

However, Nancy Golden, a pesticide consultation toxicologist for FWS, said that in its reviews the agency attempts to minimize false positives — or instances when an adverse effect is seen that is not related to the presence of a pesticide — in testing, arguing that such errors are overly conservative and can be costly to the pesticide manufacturers and users.

The services, however, under the ESA attempt to minimize false negatives, which can reduce the protection for species, because the law says the "burden lies in proving the absence of adverse effects," Golden said. That the result is that the services "give the benefit of the doubt to the species" when there are uncertainties or an absence of data. — *Jenny Hopkinson*

In First-Time Ruling, Court Backs Pesticide Risk Study To Protect Salmon

A federal judge has backed the administration's assessment on the risks posed by three pesticides on several species of endangered salmon, the first time a court has weighed in on the merits of such an assessment since a precedent-setting ruling earlier this year held that such biological opinions (BiOps), which EPA uses to regulate pesticides, are judicially reviewable.

And in his Oct. 31 ruling in *Dow AgroSciences et al. v. National Marine Fisheries Services (NMFS) et al.*, Judge Alexander Williams, Jr., of the U.S. District Court for the District of Maryland Southern Division gave NMFS' assessment a significant measure of deference in holding that despite some good arguments by industry, the assessment was within the confines of standards laid out by the Endangered Species Act (ESA).

"Plaintiffs have not shown that the NMFS ignored the best scientific and commercial data available or that the NMFS' conclusions are irrational. Although plaintiffs have demonstrated that the BiOp is of 'less than ideal clarity' at points and that the NMFS could have reasonably reached a conclusion more favorable to Plaintiffs, the Court finds that the BiOp is not arbitrary and capricious." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381413*)

Activists are welcoming the ruling, saying it shows that "NMFS is required to be protective," says one environmentalist. "It shows NMFS has to take a protective approach," the source says. "It rightly rejects a lot of industry's novel arguments, and industry's attempts to undermine the effects of their products on salmon."

But industry is downplaying the ruling, with one attorney arguing that "this was one case, one district court ruling that may or may not be appealed, so this doesn't preclude other registrants from challenging a BiOp. It depends on each

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BiOp, and a different court may see things differently."

At issue in the case is a 2008 BiOp by NMFS that concludes the registration and continued use of three pesticides — chlorpyrifos, diazinon and malathion — could jeopardize the existence and habitats of 27 species of salmon.

NMFS, part of the Department of Commerce, and the Department of Interior's Fish & Wildlife Service, collectively known as the services, are responsible under section 7 of ESA for completing BiOps, which are similar to ecological risk assessments, to assess the impact of a EPA decisions on endangered species. Based on the BiOps from the services, EPA then proposes risk mitigation measures for pesticide registrants using Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) authority.

But EPA and the agencies have long struggled to consult over the pesticide registration decisions, in part because they face competing statutory standards for protection.

This has prompted a growing number of suits from environmentalists to force the consultations and to require mitigation — including a so-called "mega suit," which alleges impacts of dozens of pesticides on more than 200 species. But EPA officials have complained that the lawsuits are tying up resources that could be used on additional consultations, and have reached out to the National Academy of Sciences to craft recommendations on how to include better science in the assessments (*see related story*).

Manufacturing Caucus Seeks NAS Study Of Styrene Following Cancer Listing

The bipartisan House Manufacturing Caucus is urging the Obama administration to initiate a National Academy of Sciences (NAS) review of the "potential health effects" of the widely-used industrial chemical styrene, after the National Toxicology Program (NTP) listed the substance as "reasonably anticipated to be a human carcinogen."

While it is not clear if the administration plans to seek an NAS panel, any NAS review could influence a long-pending EPA assessment of the risks posed by the ubiquitous chemical. EPA's last assessment of styrene, issued in 1993, said the agency lacked sufficient data to make a determination on the chemical's carcinogenicity — though industry sources have said the agency is now crafting a cancer assessment.

The House caucus, led by Reps. Donald Manzullo (R-IL) and Tim Ryan (D-OH), sent a Nov. 8 letter to White House Chief of Staff William Daley asking the administration to contract with NAS for a study of styrene after NTP's classification appeared in its most recent Report on Carcinogens (RoC).

"Our request for an NAS study is driven by the conflict of authorities both within and outside of the federal government regarding the health effects of styrene and public confusion that has occurred as a result of the listing June 10th of styrene as a 'reasonably anticipated to be a human carcinogen' in the 12th edition of the [RoC]," the representatives write. *The letter is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2382189*)

Twelve Democrats joined 38 Republicans in signing the letter.

At issue is the RoC, a congressionally mandated biennial report published by NTP, which is housed within the National Institutes of Health and the Department of Health and Human Services (HHS). Each report lists chemicals and environmental substances deemed to be carcinogenic or reasonably believed to be carcinogenic. The most recent report is the first RoC to list styrene as potential human carcinogen.

But the NTP finding has prompted criticism from industry and others, who charge there is little scientific basis for such a finding and warn that it will have harmful regulatory effects, including stymieing development of pollution control technologies.

An industry group, the Styrene Information and Research Center (SIRC), sued NTP over the RoC listing of styrene, though the court hearing the suit has conditionally rejected the group's effort to block officials from listing styrene as a potential carcinogen.

Now the House caucus is echoing the industry concerns, telling the administration that "a definitive styrene carcinogenicity assessment from the respected and independent [NAS] would go a long way towards settling the scientific controversy and allow the Administration to base its regulatory decisions and hazard identification on the best available information."

"HHS staffers must have known that the latest science did not support their conclusions about styrene's health effects — and yet HHS insisted on issuing a ruling with the potential to alarm and confuse workers at hundreds of large and small manufacturing operations and their plant neighbors, with no public health benefit whatsoever," Tom Dobbins, the chief staff executive of the American Composites Manufacturers Association (ACMA), and Jack Snyder, executive director of the SIRC, said in a joint Nov. 9 statement on the caucus's letter.

The ACMA and SIRC statement argues that the RoC listing puts at jeopardy some 750,000 jobs at companies that manufacture a slew of products using styrene, ranging from bathtubs to pollution control equipment. They argue the chemical "has been used safely for 60 years" in related industries.

In addition to seeking a panel review, SIRC is also suing over the study. While Judge Reggie Walton of the U.S.

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District Court for the District of Columbia recently rejected the industry motion to block the NTP listing, he also left the door open to additional briefing on the issue. Walton granted SIRC's July 1 motion for leave to file supplemental declarations in support of their motion for preliminary injunction.

And last month Walton granted SIRC's October 4 motion to stay the briefing schedule until he rules on SIRC's motion for HHS to complete the record.

The parties now appear deadlocked over documents that industry requests but HHS argues aren't required. Walton has scheduled a Dec. 1 hearing to determine what documents HHS must provide petitioners in the case regarding how it drafted the styrene listing. Walton also issued a Nov. 3 order requiring the attorneys and their clients to be civil. *— Maria Hegstad*

DRILLING

EPA Study Hints At Fracking As Source Of Drinking Water Contamination

EPA's research office is probing a Wyoming contamination case after the latest round of monitoring points to hydraulic fracturing as a potential contributor to drinking water pollution, a finding that if confirmed is likely to intensify calls for EPA to regulate the controversial natural gas extraction practice.

According to the preliminary study results, unveiled at a public meeting in Pavillion, WY, Nov. 9, the agency found the presence of chemicals commonly used in hydraulic fracturing fluids, such as benzene, naphthalene and diesel, that in some cases exceed agency drinking water limits. *The document is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2382045*)

The study also appears to rule out agricultural chemicals as a potential source of contamination.

The agency's Office of Research & Development (ORD) plans to release later this month a draft report on the findings that will be subject to public comment and a formal peer review.

EPA did not comment at the Nov. 9 meeting on the cause of the contamination, according to press reports. "Our scientists are continuing to complete their analysis of those data and we are working hard to complete a report interpreting the findings in the near future," an EPA spokesman told the Billings Gazette.

While the agency's findings are still preliminary, they could provide one of the first cases of fracking contaminating underground sources of drinking water — which would likely intensify calls from environmentalists and some Democrats for Congress to repeal a controversial legislative waiver that generally bars EPA from permitting fracking injection under the Safe Drinking Water Act (SDWA).

The process injects fluids containing a variety of chemicals, sand and other substances to release natural gas and oil from shale and other geologic formations that were previously difficult to exploit. It has resulted in vast new natural gas supplies coming to market, prompting optimism that it could become a cleaner-burning generation alternative than coal.

But environmentalists and others are concerned that it is not adequately regulated, in part because language inserted into the 2005 energy law exempted the fracking injection process from SDWA regulation. But Democratic legislation in the House and Senate that would repeal the exemption and require full disclosure of chemicals used in fracking injection has failed to move this Congress.

Industry groups and other proponents say EPA regulation is not necessary because the fracking injections travel so far below drinking water aquifers, upward migration of fracking chemicals through such a considerable volume of rock is highly unlikely to occur.

While methane contamination has been linked to natural gas production activities in other parts of the country through wells leaks, faulty cement jobs and flawed well casings, industry frequently argues, and agency officials have conceded, that EPA has been unable to link injection to a single case of drinking water contamination to the actual fracking process.

EPA first raised concerns about adverse changes to Pavillion's drinking water supply in 2008 after residents began complaining of unpleasant odors in their drinking water.

After discussion with Wyoming Department of Environmental Quality (WDEQ), the agency sampled water wells to assess the cause of the methane gas found in the drinking water. The agency also installed deeper monitoring wells to evaluate the composition of water deeper in the aquifer, in the hopes of determining whether nearby natural gas exploration and production activities by Encana, a Canadian natural gas company, are linked to the contamination.

Meanwhile, the Agency for Toxic Substances & Disease Registry listed gas drilling, along with agricultural activities, as a potential cause of the Pavillion contamination, but the new test results found no detectable levels of pesticide chemicals or nitrate in drinking water wells, which might point to agricultural-related pollution. *— Bridget DiCosmo*

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Commission's Fracking Rules Punt Wastewater Treatment To EPA, States

The Delaware River Basin Commission's (DRBC) new proposed water quality rules for oil and gas drilling in a four-state watershed appear to punt to EPA and states the key issue of how to treat drilling wastewater, prompting criticism from activists who say that existing agency and state wastewater controls are inadequate.

DRBC on Nov. 8 unveiled its revised natural gas development regulations ahead of a Nov. 21 vote by the multi-state regional body which must finalize the rules before they can take effect. The commission consists of the governors of four host states — New Jersey, Delaware, New York and Pennsylvania — and an Army Corps of Engineers official representing the federal government. Observers previously said the rules could inform EPA's pending shale gas wastewater standards. *Relevant are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381689*)

During development of the rules, activists argued they were inadequate to prevent significant environmental impacts in the sensitive watershed. Environmentalists had pushed for the rules to regulate the fracking process itself, given that EPA is statutorily barred from doing so, and for the DRBC to conduct an analysis of "cumulative impacts" of drilling in the basin on wildlife, air emissions and other impacts combined with existing natural gas development.

They also urged the commission to require states covered by the rules to study the composition of wastewater to ensure available technology would ensure discharges could not affect surface water quality.

The draft DRBC rules would have required centralized waste treatment plants and publicly owned treatment works (POTWs) to commission an independently conducted, detailed "treatability study" before accepting gas wastewater to show available technology would effectively remove contaminants in the oil and gas drilling wastewater.

Activists cautiously welcomed the draft requirement because it could have provided more data on the composition of wastewater and assurances that surface discharges were safe, given that EPA's Clean Water Act technology-based pre-treatment discharge standards for shale gas operations are now slated for release in 2014.

But the revised rules released this week would allow less detailed treatability studies prepared in fulfillment of host state or EPA requirements — which EPA has already indicated are inadequate — in lieu of the DRBC-designed criteria. "A treatability study prepared in fulfillment of a state and/or federal requirement may be used to satisfy this requirement if such study establishes that the proposed discharge will meet the conditions," DRBC says.

One environmentalist calls the language a "total cop-out" because it allows affected states to defer to existing state or federal treatment requirements that the source says are inadequate to address wastewater risks.

States and EPA have struggled with what to do with the massive amounts of wastewater generated by the shale gas industry. EPA's wastewater chief Jim Hanlon in a memo issued to regional offices last March cited problems with setting National Pollutant Discharge Elimination System permit conditions for shale gas waste and discouraging wastewater discharges to POTWs. Hanlon cited the lack of pre-treatment standards as one major hurdle.

EPA announced its intent to develop pre-treatment standards by 2014 as part of its long-awaited 2010 Effluent Guidelines Program Plan released Oct. 20, but Cynthia Dougherty, director of EPA's Office of Ground Water and Drinking Water, told a Senate energy panel hearing that, "There really isn't good treatment available right now."

The lack of available treatment technology could be a sticking point for EPA, because the Clean Water Act requires the technology-based standard use technology that is available, effective and economically achievable.

EPA is struggling with how to address pollutants associated with produced water and flowback as a result of fracking operations, including naturally occurring radioactive materials, high levels of total dissolved solids and fracking chemicals, which can potentially interfere with sewage treatment processes at wastewater facilities.

The draft DRBC rules would have required a treatability study that "must be prepared by a professional engineer, licensed to practice in the state in which the proposed discharge is located, and must demonstrate that the introduction of the non-domestic wastewater into the receiving treatment facility will not result in any interference in the treatment operations, or sludge treatment and disposal operations" — language dropped from the proposed rules.

The revised proposed commission regulations would mandate, among a host of other requirements, pre- and post development groundwater sampling, 300-foot setbacks for wellpads from waterbodies or wetlands, tracking of water withdrawals and storage of wastewater in closed tanks to prevent contamination.

New York Attorney General Eric Schneiderman (D) blasted the DRBC rules in a Nov. 8 press release for their failure to address the cumulative impacts analysis, saying that "though modified, these regulations still lack the benefit of a full environmental impact study, which is required by law and dictated by common sense."

Schneiderman previously filed suit May 31 in U.S. District Court for the Eastern District of New York, *State of New York v. U.S. Army Corps. of Engineers, et al,* to force EPA, the Corps and other agencies to conduct a full National Environmental Policy Act analysis of the rules' cumulative impacts prior to the commission approving them. — *Bridget DiCosmo*

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DOE Panel Urges EPA To Strengthen Proposed Air Rules For 'Fracking'

The Energy Department (DOE) panel developing advice to limit the risks of hydraulic fracturing is urging EPA to strengthen its pending air rules for the oil and gas sector to regulate emissions of methane, a potent greenhouse gas (GHG) that the agency has so far declined to regulate directly, and to extend the rules to existing sources not just the "new" sources EPA is proposing to regulate.

"We encourage EPA to complete its current rulemaking as it applies to shale gas production quickly, and explicitly include methane, a greenhouse gas, and controls from existing shale gas production sources," the Secretary of Energy Advisory Board (SEAB) panel on shale gas said in its draft report, issued Nov. 10. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381817*)

While a top EPA official has defended the agency's proposed approach, the panel's recommendations are likely to inflame industry groups that are already concerned about EPA's proposed new source performance standards (NSPS) for the drilling sector. Environmentalists, however, have long been pushing for stricter regulations, especially of methane emissions.

The recommendation for stricter rules is one of several urging EPA and other agencies to step up their efforts to oversee extraction of vast gas reserves from shale deposits around the country.

Fracking, the process of injecting fluid underground to extract fuel, has brought huge new natural gas supplies to market, making gas a viable — and potentially cleaner burning — alternative than coal. But a study released earlier this year estimated that methane releases from fracking operations may create a larger carbon footprint than coal, raising doubts about the fuel's clean energy potential.

In the draft, the seven-member SEAB panel expands on how EPA and other federal agencies along with states should implement its previous set of 20 suggestions aimed at improving environmental monitoring and disclosure of releases associated with shale gas development. The panel's Aug. 18 recommendations provide advice for gaining public confidence that shale gas development, in particular fracking, is proceeding safely, including a more holistic, systems-based approach to water management, disclosure of wastewater composition and elimination of diesel in fracking fluid.

In the new draft report, the panel stresses the importance of quickly implementing those recommendations, saying in a press release issued alongside the report that "the progress to date is less than the Subcommittee had hoped" and cautioning that "concerted and sustained action" is necessary to avoid environmental impacts and the subsequent risk of public opposition to expansion of shale gas production.

For example, the draft report urges EPA to address risks from fracking even before the agency completes its massive study — slated for completion in 2014 — into the potential drinking water risks from fracking. Republicans and industry groups have criticized EPA for taking action prior to completion of the study but the SEAB panel brushes this aside.

"The Subcommittee observes that there will be a tremendous amount of activity in the field before EPA completes its study (and any potential regulatory actions that flow from it) and urges the EPA to take action as appropriate during the course of its process," the draft report says.

The panel also said that EPA's plans to craft water rules for the drilling sector, which the agency plans to propose in 2014, "will benefit from the results of EPA's study on the impact of hydraulic fracturing on drinking water that will not be complete until 2014 and will likely initiate significant negotiation between EPA and state regulators on the scope and responsibility for water regulations."

The panel approved the document with minor editorial changes during a Nov. 14 conference call before sending its final recommendations to Energy Secretary Steven Chu. — *Bridget DiCosmo*

EPA Poised To Settle Industry Suit Over Controversial Diesel Fracking Policy

EPA appears poised to settle an industry lawsuit challenging its informal policy requiring permits for fracking operations that use diesel fuel, a planned settlement that raises questions about the fate of the agency's pending guide for how to permit operations that use diesel fuels — the only fracking injection process EPA has authority to regulate.

The agency, together with industry petitioners in the suit, Independent Petroleum Association of America (IPAA), et al. v. EPA, filed a joint motion Nov. 10 asking the appellate court hearing the case to delay oral arguments that were slated for Nov. 14 because "they have agreed upon the substantive terms of an agreement to settle the current dispute." *The motion is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381919*)

At issue in the case is whether the agency's 2010 policy statement posted to its website indicating that permits were required for fracking operations that use diesel fuels in their injection fluid violated the Administrative Procedure Act.

IPAA and U.S. Oil & Gas Association are arguing in the suit that while a 2005 energy law that stripped the agency's

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authority to permit fracking injection under the Safe Drinking Water Act generally preserved its ability to permit only those fracking processes that use diesel, EPA cannot actually force companies to obtain permits without conducting a formal rulemaking.

Despite the suit, EPA was proceeding with developing a guidance for implementing the policy statement — a guide that officials have already indicated was likely to adopt a broad definition of 'diesel fuel' that would have regulated fuels that share similar characteristics as diesel.

Industry and state sources have already vowed to sue over both the guidance and the definition of "diesel fuel," charging that the agency's planned definition is unlawful because it targets chemicals beyond what the law allows.

EPA said earlier this year it intended to issue a final guidance by early next year, but the process appears to have been delayed, and some sources have said the agency is yet to send its draft guide for White House review.

It is not clear why EPA is choosing to settle the suit at this time but industry officials and environmentalists have said the agency is on shaky legal ground in seeking to permit fracking operations that use diesel without a rulemaking. The agency has already lost several high profile cases where courts have vacated informal policies — addressing mountaintop mining and ozone emissions — finding that they had the effect of rules and the agency had to proceed with formal notice-and-comment regulations.

"The Parties agree that postponing the oral argument would enable them to focus on finalizing a settlement, securing the approval of the necessary government officials, and, ultimately, voluntarily dismissing the current action without need for further involvement from the Court," the joint motion says.

The court in response to the motion has removed the oral arguments from the calendar and directed the parties to either file a motion to dismiss or a status report by Jan. 9.

EPA Eyes Options To Push State Use Of Stormwater BMPs For Drilling Sites

EPA is weighing what authority it can use to promulgate best management practices (BMPs) for controlling erosion and sediment from stormwater runoff at the burgeoning number of oil and gas drilling sites under construction, an effort activists say fails to protect water quality though EPA may be hamstrung by a Clean Water Act exemption for the sites.

Pennsylvania, for example, a state struggling to keep regulatory pace with the recent explosion of natural gas drilling in the Marcellus Shale formation, imposes some BMPs in its erosion and sediment (E&S) control permits for oil and gas production.

But Pennsylvania's Department of Environmental Protection (DEP) requires E&S permits only for sites larger than five acres, which environmentalists say gives industry incentive to construct well pads just shy of the threshold to avoid having to implement costly controls.

During an Oct. 20 hearing of the Senate energy committee panel hearing on shale gas development in the eastern United States, Tom Beauduy, deputy executive director of Susquehanna River Basin Commission (SRBC), called the issue "the greatest threat" in Pennsylvania right now because of its potential contribution to land disturbance. "Any time you have industrial activity in these areas, you're going to have to have extremely tight E&S controls in order to avoid impacts — there have been impacts," Beauduy said.

Sources say EPA is weighing how to address the issue and officials are weighing what legal authority it can use to provide such guidance — given that the water law generally seeks to exempt drilling construction sites from permit requirements.

Former EPA water chief Benjamin Grumbles said "EPA is looking intently at surface water impacts from stormwater runoff at oil and gas construction sites and regional administrators are looking at what authority they can use — what potential authority EPA might have to help inform states of BMPs for stormwater management," during a Nov. 1 webinar jointly hosted by the Clean Water America Alliance and American Water Resources Association.

It is unclear whether EPA is considering options beyond its existing suite of BMPs for stormwater management, which include a vast list of practices ranging from physical controls such as dust control measures to limit soil transport by high winds, layering of large stones to protect against erosion in areas of concentrated runoff, or vegetated buffers to slow runoff and filter sediment to siting restrictions and considerations.

Although EPA may be looking at the issue, Grumbles and others are concerned that the water act exemption — which Congress attached to the 2005 energy law — is a "perfect example of the potential gap between authority and information and knowledge" for EPA and conservation groups recently called on Congress to repeal the exemption.

The Energy Policy Act of 2005 included a provision championed by Sen. James Inhofe (R-OK) that generally expanded an existing water law exemption for oil and gas drilling sites.

The new waiver, which applied only to uncontaminated stormwater discharges, broadened the exemption by expanding the definition of these operations to include "activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment, whether or not such field activities or operations may be considered to

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be construction activities."

In 2006, EPA sought to codify the new exemption with a rule that sought to exclude "sediment" from the definition of contamination — a move that would have effectively exempted all stormwater runoff from oil and gas construction sites from regulation. But the U.S. Court of Appeals for the 9th Circuit ruled two years later that the rule was arbitrary and capricious because it unlawfully expanded the scope of the exemption and remanded the issue back to EPA.

EPA has not taken public steps to reissue the rule. When asked what new options EPA is considering for its guidance, an EPA Region III spokesman reiterated the agency's existing BMP guidance documents. — *Bridget DiCosmo*

Kansas Backs Activist Call For EPA To Repeal Waiver For Oil, Gas Waste

Kansas — an oil and gas producing state — is siding with environmentalists in urging EPA to scrap a longtime exemption for exploration and production (E&P) wastes from strict Resource Conservation & Recovery Act (RCRA) hazardous waste rules, fearing adverse environmental and agricultural impacts from land disposal of the waste.

"It's so rare that I'll ask EPA to come up with something beyond general guidelines, but whatever laws allow this to be exempted needs to re-looked at because states like ours are going be unable to proceed with the exemptions in place," Bill Bider, director of the Kansas Department of Health & Environment's (KDHE) Bureau of Waste Management, said during an Oct. 27 meeting of state waste regulators in Bethesda, MD. Bider said the exemption could limit burgeoning natural gas operations because state permit writers do not know how to handle E&P wastes from the operations.

The comments appear in line with the Natural Resources Defense Council's (NRDC) petition late last year asking the agency to reconsider and scrap its exemption, and impose hazardous waste rules for E&P waste.

Kansas' dilemma highlights a growing patchwork of discrepancies in how various oil and gas producing states across the country are electing to deal with waste management issues absent blanket EPA rules.

That Kansas — a member of the influential Interstate Oil & Gas Compact Commission — is asking EPA to revisit the exemption could also be significant because the 1988 exclusion is partly based on the agency's finding that states were doing an adequate job of regulating the industry.

Kansas is a major oil and gas producing state, but it is struggling with how to adequately dispose of drill cuttings from oil and natural gas operations, often stored on sites in inadequately lined or unlined pits.

Industry is lobbying Gov. Sam Brownback (R) to allow drillers to land-apply the cuttings on agricultural land. The cuttings are currently regulated by EPA as RCRA subtitle D solid waste rather than being subject to more stringent RCRA subtitle C hazardous waste rules. Land application of drill cuttings would be advantageous to the oil industry because drilling companies often do not own surface rights to the land where their oil and gas drilling operations occur, limiting on-site storage and making transportation to dispose elsewhere extremely costly.

"Drillers are now lobbying the governor to be able to land spread like Oklahoma," Bider said during a "Solid Waste Roundtable" during the annual Association of State & Territorial Solid Waste Management Officials (ASTSWMO) annual meeting. "That's what the pressure is with states where drilling is just taking off," he said.

Bider said that the drill cuttings — a viscous mixture of wastes removed from the borehole post-drilling — are extremely high in chloride levels, posing a "big environmental threat to any unlined area."

EPA in 1988 issued a finding that E&P waste from oil and gas facilities should not be subject to RCRA hazardous waste rules. Bider's comments show that Kansas environmental officials are pushing for a reevaluation of that finding because it could set strict disposal requirements protecting against harm from disposal of the waste.

"We'd love to figure out what we should be doing in this area," Betsy Devlin, associate director of the materials recovery and waste management division within EPA's RCRA office, said to Bider at the meeting.

Industry sources have suggested that if the natural gas industry does not act swiftly to improve transparency in areas like disclosure of drilling fluids and other best practices, public concern over adverse impacts from oil and gas operations could ultimately drive EPA to re-consider within the next several years whether the exemption is appropriate. "We could end up re-visiting that [1988] exemption," one industry source previously told *Inside EPA*.

NRDC in its Sept. 8, 2010, petition asked EPA to repeal the 1988 finding that E&P wastes, namely those "intrinsically derived from primary field operations associated with the exploration, development or production of crude oil or natural gas" should be exempt from RCRA subtitle C hazardous waste rules.

EPA has yet to formally respond to the group's petition, but an agency source says the issue is "still an ongoing discussion." That source notes that the NRDC petition has helped facilitate a major discussion about the federal government's role in natural gas operations, a purview which has historically been the state's domain, though the environmentalist group originally intended the petition to target the BP spill in the Gulf of Mexico.

Another important issue that the agency is struggling to address is whether it needs congressional approval to revisit the exemption or can instead scrap the exemption through a RCRA rulemaking, since the exemption stems from an amendment offered to RCRA by then Sen. Lloyd Bentsen (D-TX), the source says. — *Bridget DiCosmo*

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North Dakota Eyes Suit If EPA Pursues Broad Definition Of Diesel Fracking

North Dakota is weighing a possible suit against EPA over its pending draft guide for how states should permit hydraulic fracturing operations that use “diesel fuels,” fearing that agency plans for a broad definition of the term would be especially burdensome since some substances are essential to extracting vast oil supplies from the state’s Bakken geologic formation.

EPA’s Safe Drinking Water Act (SDWA) guide will attempt to clarify for state regulators how to write drinking water permit requirements that address the unique characteristics of fracking, though the fate of the guidance may be in doubt as EPA and industry groups are in settlement talks over whether the agency can require permits without first crafting a rule.

But officials with North Dakota’s Industrial Commission, which oversees oil and gas regulation in the state, at a Nov. 8 special session of the state legislature asked lawmakers to authorize $1 million in contingency fiscal year 2011 funds to finance the potential lawsuit, a commission spokeswoman says.

The commission fears massive permitting burdens if EPA adopts a broad definition of diesel fuels, which would require SDWA permits for all use of diesel or similar substances for fracking. Of special concern are the petroleum distillates that are used in volumes of less than 1 percent of the total fracking fluid in North Dakota oil extraction operations, but which are considered essential to exploiting the Bakken oil shale formation that spans the western part of the state.

The Bakken play, which includes parts of Montana and Canada, is expected to hold as much as 4 billion barrels of oil reserves, only made recoverable in recent years by technological advances in fracking. But sources say that the geological features of the shale formation make it necessary to use some petroleum-based substances — similar in composition to diesel fuels — to dissolve fracking chemicals during the injection process.

“The guidance definitely would have an impact on our operations,” a commission spokeswoman says.

North Dakota’s concern is that if its Industrial Commission had to permit each fracturing operation that used those substances — even though they typically only comprise 0.088 percent of the whole fluid — it would over-burden permit writers. But if companies were to alternatively cease using the distillates to avoid having to obtain permits, that would significantly impair oil production, which is prohibited under SDWA’s permitting system and could give states a potential legal avenue to challenge the guidance, industry lawyers have previously told Inside EPA.

Of the funds the commission is seeking for the suit, half is slated to come from a state general fund and the other half from a state-authorized loan from the Bank of North Dakota. The request has been folded into disaster relief funding legislation that is under debate during the special session. “We’re considering a lawsuit against EPA over the definition of diesel fuels,” the spokeswoman says, depending on the scope of the final SDWA guide.

But the effort faces at least some political push-back, with the Bismarck Tribune reporting that state Sen. Tim Mathern (D) offered a Nov. 8 amendment to the disaster relief bill to block the $1 million, saying taxpayer funds should not be used to fight fracking rules given that many North Dakota residents are concerned about fracking’s potential adverse health impacts. Critics of fracking warn that the process can contaminate water supplies.

The state commission’s concern with the potentially broad scope of the SDWA fracking guidance follow comments made by Ann Codrington, acting director of EPA’s Drinking Water Protection Division on the scope of the guide. She told groundwater regulators in Atlanta in September that the agency is planning to use a broad definition of “diesel fuels” — one that “takes into consideration the physical and chemical characteristics” of diesel fuels — to determine what fracking operations must obtain SDWA permits.

But industry officials and others have already warned that EPA’s planned definition may be unlawful because it targets chemicals beyond “diesel fuels” and oversteps the agency’s SDWA powers. “We think the law says [EPA has the power to regulate] ‘diesel fuels’,” not the more general term, “diesel,” one industry attorney has said.

As an example of the type of broad definition that might trigger a North Dakota lawsuit against EPA the commission spokeswoman offered one of the options EPA floated during a series of stakeholder meetings held last spring: “any amount of diesel fuel (whether mixed with or applied to other constituents being injected.”

North Dakota ideally would like to join with other states in a suit, but would consider filing on its own if no other states expressed interest in suing over the final guidance, the spokeswoman says.

EPA is expected to send its draft guidance for White House Office of Management & Budget for review by December, leaving North Dakota little time to ready its litigation plans, the spokeswoman says.

Other state agencies that regulate fracking, particularly the Railroad Commission of Texas, have voiced concerns that the guidance represents an EPA effort to venture into what has historically been state domain, and that the guidance will broadly define diesel so as to target a range of other compounds used in fracking fluid.

SAMPLE ISSUE

EPA Rejects Panel's Push To Make Agriculture Enforcement A 'Last Resort'

A top EPA official is rejecting a preliminary suggestion from the agency's agriculture advisers to label enforcement actions against farms "a last resort," saying it would limit officials' ability to conduct routine oversight of the facilities even in cases where the agency is not planning penalties or legal action.

While EPA's Farm, Ranch and Rural Communities Committee (FRRCC) has now dropped the proposed language after opposition from Lawrence Ellworth, agricultural counselor to EPA Administrator Lisa Jackson, one panelist says the language is an "expression of some frustration people are feeling" over agency efforts to regulate the agriculture sector, including new air, water, waste and pesticides policies.

In one sign of that frustration, the House Small Business Committee is considering holding a hearing in its agriculture, energy & trade subcommittee before Thanksgiving on how possible EPA regulations on farm dust — which the agency says it is not crafting — and its just-issued clean water permit for pesticide spraying affect small businesses, a House source says.

But EPA's Ellworth said it would be counterproductive for the agency to restrict its options in "black and white" terms.

In the case of EPA's FRRCC, a committee of academics, activists and industry representatives, the group is working to complete recommendations two years in the making for changes to EPA's policies and outreach strategies for the agricultural community. The panel met Oct. 26-27 to refine the executive summary of that report in preparation for a meeting with Jackson that committee members said will happen in "December or January."

Part of the text under discussion called for EPA to explicitly label enforcement actions against farms to be a "last resort." Since FRRCC's recommendations target farms, the language appeared likely to apply broadly to a host of agricultural facilities, including small crop farmers and livestock farms small enough to be classified as animal feeding operations (AFOs) instead of the concentrated animal feeding operations (CAFOs) that EPA currently oversees.

But EPA's Ellworth said it would be counterproductive for the agency to restrict its options in "black and white" terms, and pointed out that even measures that do not involve financial penalties or legal action, including "just sending a letter," are officially categorized as enforcement and would have been restricted under FRRCC's proposal.

He added that such a measure would "be perceived as kicking the problem down the road."

One committee member said the last-resort recommendation was a "surprise" that had not come up in previous group discussions, and the language has been dropped from the latest draft summary.

Another panelist says the committee includes a "cross section" of those involved with the sector, including those who believe EPA's enforcement authority should be severely curtailed.

FRRCC's report is coming due just as the debate over EPA enforcement against farming operations has become more heated.

The agency has made Clean Water Act oversight against CAFOs a top enforcement priority for fiscal years 2011-13, noting that many CAFOs are not obtaining permits and complying with their requirements. Therefore, EPA says on its website, it will work to "strengthen" its enforcement focus on those facilities, especially existing large and medium CAFOs identified as discharging without a permit.

At the same time, EPA is crafting a controversial rule that will likely aid enforcement against the sector. EPA Oct. 21 proposed a set of options for new rules requiring CAFOs to report their location and other data that would facilitate enforcement actions against farms that add pollutants to protected waters without a permit — rules that the sector has staunchly opposed.

The controversy stems from a 2008 rule that required all CAFOs to obtain National Pollutant Discharge Elimination System (NPDES) permits, even if they were not known to discharge into regulated waters.

The rule was partially vacated by the U.S. Court of Appeals for the 5th Circuit in *National Pork Producers Council, et al. v. EPA, et al.*, which found that EPA could not require CAFOs to seek permits on the basis of their intent to discharge pollutants alone.

But a settlement agreement in *Natural Resources Defense Council v. EPA*, a related case in the 5th Circuit, requires the agency to develop the reporting rule for all CAFOs whether or not they require an NPDES permit, in order to determine which, if any, of the operations that do not have permits might be discharging regardless.

The proposed rule is already drawing significant concerns from the agriculture sector, who say that the reporting requirement is not necessary because EPA can obtain the data from existing public sources. Key industry representatives are already urging the sector to weigh in.

One official told *The National Hog Farmer* Oct. 31 that "the window of time in which producers' comments can make a difference is short. Don't wait." — *David LaRoss*

SAMPLE ISSUE

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 say 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 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. *The filing is 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 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.

SAMPLE ISSUE

High Court Declines Industry Request To Overturn EPA's Retroactive 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. *The list is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381408*)

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."

INSPECTOR GENERAL

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 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 is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381526*)

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 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, which 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 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

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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.

The IG plan also outlines a number of major water policy evaluations, including assessing the data quality and overall effectiveness of EPA's municipal separate storm sewer system stormwater permitting program, and the adequacy of water enforcement monitoring. The IG is also looking into EPA's oversight of state approvals of CWA section 316(a) thermal variances, though like the air projects the plan gives no further details.

Another major issue that the IG will address in the water context is EPA's protection of human health and the environment from the effects of hydraulic fracturing, or fracking. Some critics of the fracking process have warned that it could harm water supplies, and EPA is readying a study on the possible adverse impacts.

In a related development, the annual plan says that a carryover assignment from FY11 is an evaluation into "Oversight of Hydraulic Fracturing Impact on Water Resources." Special reviews are evaluations of agency programs that stem from congressional requests, EPA requests, self-direction, and hotline complaints.

The IG is also planning work on several waste issues, including evaluations of a brownfields area-wide planning pilot program and assessing results from Superfund removals at cleanup projects.

For cross-media, including toxics, EPA says it is carrying over an FY11 assessment of EPA's approach to nanomaterials. For FY12, it is launching a study of EPA's children health evaluation agenda.

The plan also notes that a new assignment for FY12 will be assessing EPA's criteria for, and assessment of, E.O. 13563 regulatory reviews. The order called on agencies to identify rules that should be "modified, streamlined, expanded, or repealed" in order to reduce regulatory burdens. EPA released its response plan Aug. 23.

EPA's plan will focus on 35 rules across its program offices, with 16 actions slated for 2011, while EPA will determine in the future if action is needed for the 19 additional rules undergoing review.

GREENHOUSE GASES

EPA Defends GHG Risk Finding, Fights Legal Bid To Cite Critical IG Report

EPA is defending in federal appeals court its scientific finding that greenhouse gases (GHGs) endanger public health and welfare — in a suit that could determine the fate of EPA's climate rules — while urging the court to reject recent filings citing an Inspector General (IG) report outlining flaws in the finding's peer review process.

In a Nov. 10 brief filed with the U.S. Court of Appeals for the District of Columbia Circuit, the agency said its climate risk finding was required following the Supreme Court's ruling in Massachusetts v. EPA in 2007 that found EPA can regulate GHGs under the Clean Air Act. The agency describes as scientifically sound its finding, which EPA has used to justify issuing its vehicle GHG rules, stationary source GHG permitting rules, and other policies. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2382043*)

The DC Circuit is slated to hear oral arguments over the endangerment finding and a related suit challenging the "tailoring" permitting rules Feb. 28-29. If industry and other litigants succeed in having the court scrap the risk finding, it could imperil the climate rules, given that the regulations rely in large part on the finding's conclusions.

EPA in its new brief says the high court required the agency to determine whether GHGs endanger public health or welfare. The air law says an affirmative finding requires EPA to issue rules to curb those risks.

EPA defends its conclusions in the endangerment finding — and in its denial of administrative petitions asking the agency to reconsider the finding — as "fully consistent with the statute and are well-supported, if not compelled, by the scientific information in the extensive administrative record compiled by EPA. Indeed, many of the arguments petitioners present in this case are similar to those the Supreme Court rejected in Massachusetts."

For example, the high court said that "'residual uncertainty' about the science of climate change is 'irrelevant' to EPA's inquiry; only 'scientific uncertainty . . . so profound' . . . could justify a decision not to regulate," the agency's brief says, adding that in finalizing the rule in December 2009, the administrator determined that GHG concentrations in the atmosphere "may reasonably be anticipated to endanger public health and welfare," EPA says.

In addition to rejecting concerns over the finding's science, EPA also accuses petitioners of seeking to enforce changes to the endangerment finding process that are "wholly (and unjustifiably) re-engineered to fit petitioners' notion of rational decisionmaking, all the while ignoring that their preferred approach is completely at odds with congressional intent. They also pay scant attention to the actual, articulated basis for EPA's scientific findings."

EPA notes the 10 petitions for administrative reconsideration raised two primary categories of objection — the validity of certain temperature data as well as information released during the "Climategate" scandal where damaging

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emails from the Climate Research Unit at the University of East Anglia were made public. EPA said in its filing that the emails did not show "evidence of scientific misconduct or intentional data manipulation."

However, Texas and Virginia in their Nov. 10 filing continue to argue that the leaked emails and other new information that arose after the public comment period on the endangerment finding closed "were sufficiently damaging to the data upon which the EPA relied" and warranted reconsideration, due to alleged flaws in EPA's climate science.

"In addition, the entire point of the [air law's] reconsideration process is to require EPA to determine the relevance of new information submitted by petitioners which petitioners believe is inconsistent with EPA's basis for rulemaking," according to the states' filing. EPA rejected this information and at the same time added more than 400 documents to the record after the close of the comment period, citing more than 50 of those in its response to the petition for reconsideration, which the filing says violates the air law reconsideration process.

The states also complain that EPA's review of the Climategate scandal was not subject to public comment.

EPA in a separate motion in the case also asks the appeals court to strike a host of recent filings by opponents of the risk finding that cite a September 2011 IG report reviewing the assessment. The IG found that EPA failed to meet all White House peer review requirements for the finding, which critics say bolsters their concerns about the finding.

Virginia and Texas cited the IG's finding in an Oct. 17 brief in the case, noting, "EPA has so pervasively delegated its statutory functions that it lacked the information to ensure that its data quality standards were satisfied."

EPA earlier urged the court to reject requests to include the IG report in the official record and is now asking that those motions that be stricken entirely from the challenge to the endangerment finding.

In a Nov. 8 motion, EPA urges the court to strike "those portions of petitioners' reply briefs that (1) contain new arguments and (2) rely on materials not contained in the administrative record."

The agency says the report came nearly two years after EPA made the endangerment finding, and notes that Texas and Virginia have made "extensive new arguments" in their recent filings in the finding lawsuit, based on the report. "Even where petitioners do not raise new arguments, the fact remains that the report is not part of the administrative record . . . and cannot be used as a basis for judicial review of that finding," EPA says. — *Dawn Reeves*

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Activists Sue EPA Over Avenal Air Permit's Exemption Of GHG Controls

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. *The suit is 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 filed 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, 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.

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. *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381576*)

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.

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. 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."

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DC Circuit Prepares To Hear Challenges To EPA Greenhouse Gas 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. *The document is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381245*)

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."

States, Activists Agree To Another EPA Delay On Power Plant GHG Rules

States and environmentalists have agreed to another EPA request to delay the deadline — until at least Nov. 30 — for groups to agree to a new schedule for proposing first-time greenhouse gas (GHG) standards for power plants, though the parties leave the door open to additional delays as they negotiate the schedule for the controversial rulemaking.

In a Oct. 28 letter to the Department of Justice, Michael Myers of the New York Attorney General's office said that states and activist groups recognize the "additional time needed to negotiate a revised Settlement Agreement," and "[i]n light of the progress made to date, Petitioners are amenable to extend the time for negotiations until November 30, 2011." *Relevant documents are available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2380731*)

The letter says the petitioners in the litigation that forced EPA to craft the rule will not seek court action to compel the rule's proposal until after that date, though the parties could revive the suit, *New York, et al., v. EPA*, if the agency does not complete negotiations by the end of November.

EPA air chief Gina McCarthy told the Air Quality VIII conference in Arlington, VA, Oct. 24 that she expects to announce a new schedule "very shortly," adding that the agency does not want to commit to a schedule for the rule that does not allow for a rule that is cost effective and can be thoughtfully implemented. "We want to think it through as much as possible," McCarthy said, adding that litigants have been "very amenable" to seeking those same goals.

A source with the Environmental Defense Fund, which is a party to the litigation, says the group is "hopeful that a resolution can be reached without litigation," adding that "there is much at stake in finding a path forward" and that it is "urgent" that the GHGs from the energy sector be addressed.

In an Oct. 29 statement, an EPA spokeswoman said that the agency is "continuing to work with petitioners on a new schedule for issuing the proposed greenhouse gas pollution standards for power plants," and that it plans to announce "its next steps shortly."

"EPA has engaged in an extensive and open public process to gather the latest and best information prior to proposing GHG pollution standards for fossil fuel-fired power plants, the largest stationary source of GHG pollution. We will fully consider all of this information to develop smart, cost-effective and protective standards," the spokeswoman says.

The Oct. 28 letter outlines an extension longer than those previously agreed to by petitioners — which include the states of New York and California as well as Sierra Club, the Natural Resources Defense Council and other groups — and follows letters sent in the preceding weeks seeking shorter-term extensions to allow for more time to negotiate a revised schedule. In a Sept. 30 letter, petitioners agreed not to seek "legal remedies" until Oct. 14, and in an Oct. 14 letter allowed for negotiations to continue until Oct. 28.

EPA first agreed to issue a proposal in July as part of a consent decree with environmentalists and some states, designed to resolve litigation seeking the GHG rules. EPA in June then negotiated a new Sept. 30 deadline for issuing a proposal, but failed to propose the rule by that date. Under the current consent decree schedule, the deadline for a final rule is May 26, 2012.

Environmentalists had sent a Sept. 20 letter to President Obama urging him to ensure that EPA release a new schedule for proposing the utility climate rule after EPA Administrator Lisa Jackson announced the deadline would slip.

Meanwhile, petroleum industry groups are citing EPA's delay in issuing the proposed power plant NSPS in their push for the agency to delay by at least one year its pending proposed climate NSPS for refineries.

In an Oct. 28 letter to EPA, the American Petroleum Institute and the National Petrochemical & Refiners Association restate their request that EPA postpone a Dec. 10 consent decree deadline for issuing the refinery proposal. "EPA's decisions to defer the utility proposed rule twice only reinforces the complexity of the task at hand and the unrealistically aggressive timeframes originally proposed by EPA" for the refinery rule, the groups say.

The groups argue that the refinery NSPS presents "complexities and challenges . . . even greater" than the utility NSPS. Reiterating past suggestions, the groups say EPA should ask environmentalists involved in the consent decree to agree to dropping the Dec. 10 deadline for a proposed refinery climate NSPS.

Instead, the groups say, EPA should issue an advance notice of proposed rulemaking seeking input on "analysis of results and key policy decisions" about the refinery rule. EPA should then wait one year from issuance of the notice to vet data and ideas prior to issuing a proposal, according to the letter.

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. *The statement is 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*

SAMPLE ISSUE

EPA Defends Equity Screening Plan After GAO Call For Clearer Strategy

EPA is strongly defending its work to elevate the role of environmental justice considerations in agency decisions and the use of a screening program to identify equity communities, following a Government Accountability Office (GAO) report that lauds EPA's equity efforts but calls for a clearer, more structured strategy.

Rep. Donna Edwards (D-MD), who requested the GAO report released Nov. 7, issued a statement praising the agency's progress while encouraging EPA to implement the recommendations. Edwards that said the screening tool, known as EJ SCREEN, is not a substitute for a more comprehensive agency-wide equity plan.

The GAO report, "Environmental Justice: EPA Needs to Take Additional Actions to Help Ensure Effective Implementation," generally praises efforts by Administrator Lisa Jackson to renew the agency's commitment to environmental justice (EJ) after a decade of limbo, including developing "Plan EJ 2014" — a four-year plan finalized this fall to help the agency develop stronger relationships with communities, and boost efforts to improve the environment and public health in overburdened areas — and its related implementation plans.

However, GAO faults EPA for not establishing "a clear strategy for how it will define key environmental justice terms," particularly by limiting itself to the EJ SCREEN computer program it plans to use to define a nationally consistent strategy. EPA uses the program to identify areas with potential equity concerns.

GAO says agency officials responsible for developing EJ SCREEN "repeatedly cautioned us that this tool would have very limited capabilities and would need to be supplemented with additional information in order to adequately identify such communities. While agency officials informed us that EJ SCREEN will ultimately contain some definitions for environmental justice terms, these definitions will be limited to the screening tool's use and would not have agency-wide application. Absent definitions of key environmental justice terms that have agency-wide application, integration efforts are likely to be inconsistent across EPA's program and regional offices."

EPA failed to identify "the resources it may need to carry out its environmental justice implementation plans," nor has it "articulated clearly states' roles in ongoing planning and environmental justice integration efforts," GAO says. The agency also has not "developed performance measures for eight of its nine implementation plans" to track progress of Plan EJ 2014, GAO says. *The report is available on InsideEPA.com. See page 2 for details.* (*Doc ID: 2381673*)

Edwards, in her statement, pressed EPA on this. "If the agency wants all elements of its national structure to incorporate environmental justice values into the agency's work, there needs to be foundational definitions to guide employees. A computer program such as EJ SCREEN will only be as useful as the definitions and categories that are fed into the software. It is not a substitute for a rich articulation of what needs to be considered," she said.

But EPA in its response contained in the report defends EJ SCREEN. "We agree with the GAO regarding the need for greater consistency in how overburdened communities are identified. However, there is more than one way to achieve this goal. Our approach is to continue to develop a nationally consistent EJ screening tool."

EPA also rejected GAO's recommendation to conduct a resource assessment for implementing Plan EJ14, noting such an assessment is unnecessary because "Environmental justice is the responsibility of every program and region and this is reflected in the leadership."

Additionally, GAO in recommending that EPA more directly involve states notes that without such outreach the agency's effort may be hampered "given the significant role that states have in administering some environmental programs" under delegated authority to implement EPA rules.

EPA in response says it will continue to reach out to states but expects their involvement "will vary by the nature of the work outlined in each implementation plan." For example, EPA says it "has already engaged states in our EJ in permitting work where we envision a significant state role. State involvement in other implementation plans, e.g., science tools development, may not be as significant."

Edwards requested the report while serving as ranking member of the House Science, Space & Technology and Committee's investigations panel, but has since left that position to serve as ranking member of the technology subcommittee, a committee spokeswoman says, adding that Edwards has no plans to follow up on the GAO report.

Rep. Paul Tonko (D-NY) replaced Edwards as the ranking member of the investigations subcommittee. The spokeswoman says he has yet to look at the GAO findings. — *Dawn Reeves*

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