

## EPA Weighs Strict New Metals, Coal Ash Limits For Power Plant Discharges

EPA is weighing strict numeric discharge limits for key metals, including arsenic and selenium, and possible mandates to control releases from coal ash storage sites in its pending effluent limitation guidelines (ELG) for power plants, measures that could begin to clamp down on the ash sites as EPA struggles to craft waste rules for the facilities.

In a recent presentation to state and local government officials, an agency official said that the scope of the Clean Water Act (CWA) rulemaking could include measures addressing fly and bottom ash, in addition to leachate discharges to landfills and contaminated wastewater from emissions control technology installed at power plants. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 2382359)*

*continued on page 17*

## States Urge Broader EPA Air Transport Rules To Comply With New Ozone Limits

WILMINGTON, DE — Mid-Atlantic and Northeast states are pushing EPA to pursue additional strict rules for curbing transport of air pollution from upwind states, fearing that without new agency action they will struggle to meet EPA ozone air standards even if they impose tough rules on all sources within the states' control.

At a Nov. 10 meeting of the Ozone Transport Commission (OTC) here, state officials praised EPA for issuing its final Cross-State Air Pollution Rule (CSAPR) to cut transport of nitrogen oxides (NOx) and sulfur dioxide (SO2) from power plants in 27 states, and welcomed pending rules expected to cut ozone by tightening fuel sulfur limits. But states also said more federal pollution reductions mandates are vital to help them meet the agency's ozone standard.

*continued on page 13*

## EPA May Leave Volatility Limits Unchanged In Pending Fuel Rule Revisions

EPA appears to be leaning against tightening existing fuel volatility emission limits as part of broader pending revisions to its fuel and vehicle rules, sources say, a win for the oil industry concerned about tighter limits — though the agency also appears poised to set a stricter cap on sulfur in fuel over objections from refining companies.

The situation remains fluid, however, with other sources saying EPA officials have not indicated any decision on fuel volatility limits has been made. These sources suggest the agency could issue proposed revisions to its fuel and vehicle rules that includes a request for comment on whether EPA should tighten the volatility limits. EPA is working on its "Tier III" fuel and vehicle rules proposal, which will update existing Tier II emissions regulations and is expected in

*continued on page 15*

## EPA Hints Some Drilling Sites Might Require Stormwater Discharge Permits

EPA officials are formally detailing a possible path for using Clean Water Act (CWA) permit authority to curb erosion and sediment (E&S) from stormwater runoff at natural gas construction sites currently exempt from permitting, saying EPA oversight shows several sites located in sensitive areas that should not be able to claim the CWA exemption.

A series of recent EPA Region III inspections in the Mid-Atlantic region has revealed some well construction is occurring in sensitive areas extremely close to or within stream banks, which likely will result in runoff that violates state water quality standards, meaning "that site would not enjoy the exemption" from permitting. James Hanlon, EPA's wastewater chief, said at a Nov. 16 hearing of the House Transportation & Infrastructure (T&I) Committee's water panel.

*continued on page 16*

### Inside

<b>CLIMATE:</b> EPA, DOT Include First-Time Cost Estimates In New Vehicle GHG Proposal .....	page 3
<b>WATER:</b> Jackson Urges Governors To Help Speed Awarding Of EPA Water Grants .....	page 4
<b>AIR:</b> Treated Wood Sector Seeks Fuel Definition For EPA Boiler Emissions Rule .....	page 11
<b>CONGRESS:</b> Senate Nears Votes On EPA Water Nominee, Bid To Halt Jurisdiction Policy .....	page 12
<b>TOXICS:</b> TSCA Hearing Unlikely To Spur New Momentum For Chemical Law Reform .....	page 20

## 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 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 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.

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

#### **Documents available from this issue of *Inside EPA*:**

- Army Corps' Guidance Claims Exemption From Cleaning Chlordane Contamination (1163461)
- DOE Advisers Press To Speed Oversight Of Fracking (2381817)
- EPA Conducting New Study On 'Economic Importance' Of Clean Water (2382105)
- EPA Faces Two More Lawsuits Over Heavy-Duty GHG Truck Rule (2382381)
- EPA Releases Early Findings In Wyoming Contamination Study (2382045)
- EPA Releases Text Of Defunct Rule To Tighten Ozone Ambient Air Standard (2382336)
- EPA Weighs Options For Steam Power Sector Effluent Rules (2382359)
- EPA, NHTSA Propose Next Round Of Vehicle GHG/CAFE Standards (2382383)
- House Caucus Urge White House To Seek NAS Review Of Styrene Risks (2382189)
- House Energy Panel Raises New Questions Over EPA Power Plant Rules (2381866)
- Industry, EPA Move Toward Settlement In Diesel Fracking Suit (2381919)
- Northeast Regulators Call On EPA To Expand Action On Air Transport (2382392)

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## 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 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 as well as CSAPR.

## EPA, DOT Include First-Time Cost Estimates In New Vehicle GHG Proposal

EPA and the Transportation Department's (DOT) just-released greenhouse gas (GHG) and fuel economy proposal for model year 2017-2025 vehicles includes first-time cost estimates for the rule, showing that the plan — which has support from major automakers — will cost about \$157 billion over the lifetime of the regulation.

The cost estimates and other documents in the Nov. 16 proposal are already prompting swift reaction from opponents of the rules, with the National Automobile Dealers Association (NADA) warning that the proposal could add thousands of dollars to the cost of an automobile. Rep. Darrell Issa (R-CA), chair of the House oversight panel, also criticized the costs of the rule and vowed to continue his investigation into the "closed-door" development of the plan.

Prior to releasing the proposal, EPA had only discussed the benefits of the plan and not its costs. The agency released cost estimates for its previous landmark fuel economy and GHG rules for model years 2012-2016.

In the new proposal, EPA and DOT do not assess whether auto sales will rise or fall due to higher technology costs automakers will incur in complying with the new rule, which will require a fleet-wide fuel economy average of 54.5 miles per gallon (mpg) in 2025. The level of the proposed standard was widely predicted, and is slightly lower than activists sought.

EPA Office of Transportation & Air Quality Director Margo Oge said on a Nov. 16 conference call with reporters that the agencies believe automakers will see a sales benefit, but the agencies are seeking comment in the proposal on whether it should use methodology from earlier rules to estimate sales impacts for model years 2017-2025.

Oge and other EPA and DOT officials on the call stressed rule's benefits, including net benefits of \$421 billion in

2025, including \$1.7 trillion in reduced fuel spending, cutting 12 billion barrels of oil and slashing 6 billion metric tons of GHG emissions. Additionally, they say the average family will save \$6,600 in fuel costs over the lifetime of a model year 2025 vehicle, with a net savings of \$4,400 accounting for increased vehicle costs.

The \$6,600 fuel savings figure is less than a \$8,000 estimate stated in July when the deal was announced, but officials noted it would still mean average drivers would fill up their cars every other week instead of every week. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 2382383)*

EPA Administrator Lisa Jackson said on the call that the proposal had input from automakers, the United Auto Workers, environmentalists and others to ensure that they are achievable and cost effective.

DOT Secretary Ray LaHood vowed that neither the agencies nor automakers would not compromise safety, such as reducing vehicle weight, to meet the standards, while EPA air chief Gina McCarthy said the rules are designed to ensure that purchasers of every class of vehicle get the most efficient product possible.

But critics quickly raised questions, particularly about the first-time cost estimates. Issa in a Nov. 16 statement noted that the White House's estimates "say this will cost \$157 billion to implement."

NADA asked in a statement, "Can consumers afford the upfront costs of fuel economy hikes? . . . [W]e are concerned that adding about \$3,000 to the average cost of a car will price millions of Americans out of the market, which could reduce fleet turnover and delay environmental gains. This regulation gambles that millions of consumers will be able to afford thousands more" for vehicles.

And a source with the Alliance for Automobile Manufacturers notes that the 2012-2016 standards are estimated to cost \$52 billion, making the two rules combined cost "a whopping \$209 billion to industry."

The source adds, "We are also especially concerned that we could make these investments, and if consumers don't buy these new technologies in very large numbers, then we will face fines."

**Administration officials also sought to preempt concerns by releasing their 2012** annual fuel economy guide, which they say shows that automakers are already producing more consumer choice in fuel-efficient technologies, including 265 models that achieve 30 mpg or more, a 65 percent increase over model years 2011.

Jackson on the call noted that the top 10 vehicles on the list use a range of technologies including conventional engines. "With the certainty of these standards, automakers will continue to make fuel-efficient vehicles available. The Obama administration is ensuring that American car-buyers have their choice of the most efficient vehicle every produced in our country."

Additionally, California Nov. 16 announced its intent to propose a comprehensive summary of its rule, which is expected to largely track the EPA and DOT proposals.

Environmental groups were quick to praise the proposal, with the Environmental Defense Fund calling it "more good news for American consumers, auto manufacturers, public health and the environment."

Additionally, Sen. Tom Carper (D-DE) offered his backing, saying in a statement, "The input and support of America's automotive manufacturers are critical to ensuring that this proposal is a win for both America and our automakers. I will continue to work with my congressional colleagues and the administration to make sure this program is properly implemented."

But the Center for Biological Diversity said the proposal falls short of what is needed to address the "urgency of the climate crisis." — *Dawn Reeves*

## **Jackson Urges Governors To Help Speed Awarding Of EPA Water Grants**

EPA Administrator Lisa Jackson in a draft letter to governors is urging states to take several steps to help the agency speed the awarding of state revolving fund (SRF) water grants — including early submission of applications for fiscal year 2012 funding — and highlighting the funds' role in creating jobs and improving public health.

"Our collective priority has been and remains moving this continuing flow of funds as quickly as possible to carry out projects on the ground, putting Americans back to work and delivering improved environmental and public health protection," Jackson says in the draft letter dated Oct. 7 and reviewed by *Inside EPA*. "EPA is interested in working with you to increase the pace of expenditures under the SRFs," according to Jackson's letter.

Sources recently said that the letter might focus specifically on how governors could help spend unliquidated funds — money that has been dedicated but has not yet been spent — in light of efforts by congressional Republicans to reduce or rescind states' unliquidated obligations in upcoming budget measures (*Inside EPA*, Nov. 11).

Instead, Jackson's letter focuses more broadly on urging state action to accelerate applications for, and spending of, SRF capitalization grants. The federal grants help states establish clean water and drinking water SRFs, and are used to provide loans and other types of financial assistance for water infrastructure projects.

During the last three years, states received almost \$6 billion in SRF funding through the 2009 stimulus law, and a further \$7 billion in clean water and drinking water SRF resources, Jackson says. She also says that "[w]e are making noteworthy progress" on accelerating water funding, noting that within six months of the fiscal year 2011 appropriations

law's enactment, EPA had obligated 79 percent of its water funds.

While Jackson notes that 40 states have received their clean water SRF capitalization grant and 34 states have received their drinking water SRF grants, she requests the governors' "personal involvement in ensuring that your State moves quickly to apply for and receive its capitalization grants each year and moves quickly to award assistance to local projects under both SRFs," and outlines a number of steps states and EPA might be able to take to speed grants funding.

Jackson says in the letter that she has directed agency staff "to give priority to the review and award of SRF capitalization grants, and to streamline and simplify processes where possible on our end."

Jackson says states can take steps to "expedite the flow of SRF dollars" into their economy, including submitting SRF capitalization grant applications for FY12 using the figures in the Obama administration's budget "so that my staff can begin reviewing them early to resolve any problems." Jackson adds, "Applications can be amended as needed following the final [FY12] appropriation, but early review will expedite grant award."

Jackson also recommends other steps that states can expedite the flow of water grants to communities and others, including awarding assistance agreements promptly upon award of the capitalization grant, assisting communities through planning grants or loans to get projects "shovel-ready" and ensuring that contracting and expenditure practices "have integrity at all levels to enable swift and appropriate use of funds."

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 in agency coffers remain unspent. 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 light of both the hearing and the draft letter, state sources say one of their biggest challenges is funding uncertainty due to Congress' shift from regular appropriations bill to short-term funding measures such as continuing resolutions (CRs). One 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. . . . 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 FY11 water funding awards until very late this year, which impacted their ability to plan to get the money out to communities. — *Bobby McMahon*

## Senate Democrats Back Off Plans To Hold Hearing On EPA Ozone Standard

Senate Democrats appear to be backing away from plans to hold a hearing into President Obama's decision to block EPA from tightening its ozone air standard, even as a key GOP senator continues to push for a hearing to investigate alleged flaws in how the agency reviews the standard.

Following Obama's decision in September to scrap the agency's pending rule to strengthen its 2008 ozone standard from 75 parts per billion (ppb) to 70 ppb, Sen. Thomas Carper (D-DE) — chair of the Environment & Public Works Committee's (EPW) clean air panel — vowed to hold a hearing calling on White House officials to "explain these actions and the possible ramifications."

But Carper and a staffer for the senator in comments to *Inside EPA* Nov. 15 suggested there is less need for a hearing now that EPA has provided answers to some questions about its response to the president's decision, including what level of ozone standard EPA is now implementing. Carper has supported a tightening of the existing ozone standard.

The Carper staffer said, "some of the concerns that we initially had . . . have subsequently been addressed by the EPA administrator in testimony provided on the House floor. For example, what standard are they going to be implementing," in lieu of a 70 ppb limit.

The staffer did not elaborate on what testimony she was referring to. However, EPA Administrator Lisa Jackson at a Sept. 22 House Energy and Commerce Committee oversight panel hearing said that the agency's now-defunct final rule would have tightened the ozone limit to 70 ppb. EPA recently released the text of the rule as sent for White House review. *The document is available on InsideEPA.com. See page 2 for details. (Doc ID: 2382336)*

Following the president's decision, EPA air chief Gina McCarthy issued a memo saying the agency will push ahead with implementing the Bush-era ozone national ambient air quality standard of 75 ppb. The agency never implemented the Bush standard pending the outcome of its reconsideration of the 2008 standard, leaving in place the 1997 ozone limit of 80 ppb.

Carper — speaking on the sidelines of an event in Washington, DC, celebrating 21 years since the passage of the 1990 Clean Air Act amendments — told *Inside EPA*, "We live to fight another day. At least we are not living 14 years behind" with the 1997 standard.

"One of the things I was troubled by was that it appeared for a while that we were going to be stuck trying to have to live on your 1997 standard. And we have been able to at least get beyond that and to a standard that was proposed a couple of years ago."

A Senate Republican source says the GOP remains keen on a hearing to raise questions about the president's decision. "It's stunning that the Democrats on the [EPW] Committee would appear to be silent on a decision of this magnitude

— especially one they so vehemently disagree with. One can only conclude politics trumps principle,” the source adds.

Sen. James Inhofe (R-OK), ranking member on EPW, sent an Oct. 26 letter to Carper and EPW Chairwoman Barbara Boxer (D-CA) seeking a hearing “as soon as possible,” arguing that Obama’s decision highlights the senator’s ongoing concerns about EPA’s process for revising its national ambient air quality standards and the role played by EPA’s scientific advisers in that process.

Carper deferred further EPW scheduling questions to Boxer’s office.

Contacted by *Inside EPA* the same day as Inhofe’s letter last month, a Boxer spokeswoman would only say that EPW “generally announces hearings one week in advance of the hearing date.” According to the committee’s website, the only hearing slated for the rest of this month is a Nov. 17 hearing on the Safe Chemicals Act, which would reform the Toxic Substances Control Act.

Meanwhile, activists led by the American Lung Association (ALA) continue to pursue litigation over the president’s decision to scrap the tighter ozone standard, and are also requesting all information relating to presidential and vice-presidential involvement in the decision in a Freedom of Information Act request, which to date EPA has not replied to, an ALA source says.

## 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 point 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.

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.

Meanwhile, the Pavillion study could also raises questions about the agency’s final plan for studying the effects of

fracking on drinking water, a study that Congress requested in EPA's 2010 spending bill.

According to the Nov. 3 study plan, the agency narrowed its focus on underground sources of drinking water while heightening its focus on surface spills. In the final plan, the agency rewrote its "fundamental research questions" aimed at examining the potential impacts associated with fracking during five stages of the water lifecycle to focus almost exclusively on impacts to drinking water from surface spills and wastewater discharges.

While the draft plan, issued last February, asked generally about "the possible impacts of releases of hydraulic fracturing fluids on drinking water resources," which could include underground contamination, the final plan focuses on "the possible impacts of surface spills on or near well pads of hydraulic fracturing fluids on drinking water resources."

The approach appears at odds with recommendations from the agency's Science Advisory Board, which had urged EPA in its Aug. 4 letter to Administrator Lisa Jackson to consider addressing surface spills in its secondary research questions, in order to better focus the study to take into account processes that could have high potential for human exposure.

An EPA spokeswoman did not return a request for comment regarding the changes to the final plan. — *Bridget DiCosmo*

## 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 *Federal Register* notice slated for publication Nov. 14, 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.

The draft guidance, released last year, seeks 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 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.

But 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.

## Natural Gas Vehicle Groups, Utilities File Suits Over EPA Truck GHG Rule

EPA faces more legal challenges to its heavy duty truck greenhouse gas (GHG) rule, with a coalition of natural gas vehicle groups filing suit over their claims that the rule penalizes lower-emitting gas-fueled vehicles and a utility group challenging the rule over concerns EPA could use it as the basis to justify GHG rules for stationary sources.

The petitions for review, both filed Nov. 14 in the U.S. Court of Appeals for the District of Columbia Circuit, follow a suit filed last week by the conservative Pacific Legal Foundation (PLF). PLF claims EPA violated a decades-old federal law by failing to submit the rule for Science Advisory Board review. PLF is representing several small business and trade organizations in the complaint, *Delta Construction Company, Inc., et al. v. EPA*.

EPA's rule, which sets first-time GHG emissions limits for heavy duty trucks in model years 2014-2016, has the support of major trucking companies, engine makers and shipping companies. But the lawsuits — which the court will consolidate — will nevertheless require EPA to defend the GHG truck rule (*Inside EPA*, Nov. 11).

The natural gas vehicle groups' petition for review, *Clean Energy Fuels Corp. and Westport Innovations, Inc., v. EPA*, does not outline substantive criticisms of the rule. But the group's Jan. 31 comments on the proposed version of the rule outlined a host of concerns, including claims that it unfairly failed to credit natural gas' GHG-reducing advantages. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 2382381)*

The comments urged EPA to include in the final truck rule a natural gas vehicle (NGV) incentive that Congress mandated for light-duty vehicles as part of the Alternative Motor Fuels Act (AMFA) of 1988, which included a specific compliance metric favoring natural gas and other alternative fuels over gasoline.

"Recognizing that every NGV totally eliminates the lifetime petroleum demand of a gasoline vehicle, in AMFA Congress encouraged the production of natural gas vehicles by multiplying the fuel economy of an NGV relative to that of an equivalent gasoline powered one (the 'NGV multiplier')," the comments say.

The multiplier assigned NGV vehicles a fuel content of .15 gallon for every gallon equivalent of gaseous fuel. "Nevertheless, when tasked with creating a medium- and heavy-duty fuel economy program," those incentives were left out. "This makes no sense," the group said — arguments they could raise in the suit.

However, EPA has already offered a defense against including the gas credit in the rule. The agency in its response to comment document issued with the final rule in August disagreed that the NGV incentives in the light-duty vehicle rule were a congressional mandate that required inclusion in the heavy-duty truck rule.

Instead of a multiplier, EPA says it finalized "a conversion process from [carbon dioxide (CO<sub>2</sub>)] to fuel consumption that we believe accurately reflects the fuel consumption of the vehicles while at the same time providing a significant incentive for the alternative fuel use. Using the agencies' calculation, NGVs will exhibit an approximate 20 percent benefit over conventional fuel use. We believe this is a substantial enough advantage to spur the market for these vehicles. The calculation at the same time does not overestimate the benefit from this technology, which could reduce the effectiveness of the regulation."

One industry source questions whether NGVs will be able to convince a court to order the agencies to grant it a larger incentives such as the multiplier, which the source says is limited to technologies that have "genuinely not widely penetrated the market and are probably not cost effective." Natural gas trucks and buses are too widely available to qualify and deserve a smaller incentive.

The NGV groups also asked EPA to include upstream GHG emissions benefits to help them comply with a stringent methane standard, which they say cannot otherwise be met — which EPA also rebuffed.

The groups' comments complained that the proposed methane limit "is an order of magnitude lower than the lowest methane standard" ever set, that would require NGVs to include advanced catalyst technology, estimated to cost at least \$2,000, plus require their participation in a proposed CO<sub>2</sub> equivalent option credit provision.

However, EPA rejected an upstream approach in the rule, saying it has "decided to maintain consistency with past practice for setting vehicle emission standards" under the Clean Air Act where all vehicles are treated "equally, based on tailpipe-only emissions performance." The agency does note that it adopted a modified upstream approach in the 2012-2016 model year rule for light-duty vehicles, where it agreed to consider upstream emissions associated with vehicle electrification contingent on sales volume. And it says it recognizes that it may expand this approach under its proposal — issued Nov. 16 — for model years 2017-2025 light-duty vehicles, which "may yield information and policy direction relevant to the planned follow-on rulemaking for the heavy-duty sector."

**Meanwhile, the Utility Air Regulatory Group (UARG) — representing power companies — says it filed its petition for review "because of potential implications . . . with respect to regulation . . . of stationary sources, including electric generating facilities."** UARG is also suing over EPA's GHG permit rules for stationary sources and its endangerment finding.

UARG's Jan. 31 comments warned that the heavy-duty truck rule could serve as the statutory trigger for GHG requirements at stationary sources, if other EPA GHG rules being challenged are overturned.

But EPA in its response to comments on the truck rule downplays the regulation's significance as a trigger for other GHG rules. "The commenters are mistaken that any costs to stationary sources due to GHG control [under stationary source permitting] are attributable to this rule. . . . In any case, it is the light-duty rule, not this rule, which initially resulted in the GHGs at issue being 'regulated pollutants'" under the air law, EPA said. — *Dawn Reeves*

## 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 values.

The second tier of toxicity values the guidance calls for considering are EPA’s Provisional Peer Reviewed Toxicity Values. 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, adding that allowing the Air Force to determine the toxicity criteria 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.”

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  $1 \times 10^{-4}$  — the bottom of EPA’s acceptable risk range of  $1 \times 10^{-4}$  to  $1 \times 10^{-6}$  — 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  $1 \times 10^{-6}$ , 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,” Isabella Alasti, senior staff counsel with DTSC, said at the ASTSWMO meeting. — *Suzanne Yohannan*

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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*

## 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 — with an Air Force spokeswoman noting that current EPA regulations exclude pesticides from the solid waste definition if they are applied in an ordinary manner of use..

EPA’s acting federal facilities cleanup chief Reggie Cheatham said headquarters and regional 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. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 1163461)*

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.

Cheatham also emphasized that EPA is not targeting farmers on this matter. — *Suzanne Yohannan*

## **Treated Wood Sector Seeks Fuel Definition For EPA Boiler Emissions Rule**

The treated wood sector, including companies that use wood products as a fuel source, is urging EPA to ensure that it defines treated wood as a "fuel" subject to EPA's boiler air toxics rule rather than a "waste" subject to stricter incinerator emissions limits, seeking to qualify for the broad "fuel" definition the biomass sector is likely to win.

At a Nov. 8 meeting with White House and EPA officials, the Treated Wood Council pushed for a regulatory determination of "traditional" fuel for burning such common items as railroad ties and telephone poles, which are coated with treatments such as creosote. This would put these items in the same class as biomass, which EPA is working to clarify as a fuel subject to the boiler rule rather than the potentially more costly incinerator rule.

The group argued that classifying its products as waste would violate longstanding contractual obligations to supply fuel, causing adverse economic consequences, an industry source says. The council says classification as waste would send a large volume of material to landfills, and if treated wood is banned as fuel it will likely be replaced by petroleum-based fuels or coal, with resulting increases in greenhouse gas emissions compared to burning wood.

But environmentalists are likely to oppose greater use of treated wood products as fuel due to concerns about burning wood releasing chemicals used for treating the product. Activists have previously sued, though unsuccessfully, to try and force a phaseout of the use of the chemical pentachlorophenol to treat wood utility poles, claiming that the poles require Clean Water Act permits or regulation under the Resource Conservation & Recovery Act.

EPA's existing non-hazardous secondary materials (NHSM) rule for determining whether the boiler or incinerator rules apply provided a "very narrow" definition of what could be considered a traditional fuel, and it excluded treated wood according to the industry source. Although the rule allows industry to petition the agency for inclusion of a class of materials, it used "legitimacy criteria" to allow this that are "very inflexible," the source says.

As a result, the treated wood sector hopes to win a broad definition of its products as a fuel in EPA's planned revisions to the NHSM rulemaking — part of a wider process that includes reconsideration of key provisions in the boiler maximum achievable control technology (MACT) rule and the commercial and industrial solid waste incinerators

(CISWI) emissions rule, in response to industry concerns about the rules' costs and feasibility.

Democratic and Republican senators, union officials and others have already raised concerns that the agency's existing NHSM regulation appears to define biomass as a solid waste subject to the agency's stayed strict emissions limits for incinerators. Critics warn that the costs of meeting the stringent CISWI emissions rule will be so high that it will make it difficult for some facilities that burn biomass as a fuel source to keep operating.

Sens. Susan Collins (R-ME), Ron Wyden (D-OR) and others have been pushing a bill, S. 1392, that would define biomass as a fuel subject to the boiler MACT. The legislation would also define as fuel wood debris, resinated wood, creosote-treated wood and other types of treated wood — a major goal of the treated wood sector. Resinated wood products are a class of materials including dust from veneer and plywood manufacturing.

EPA Administrator Lisa Jackson sent an Oct. 14 letter to the senators outlining the agency's plans to revise the NHSM rule to clarify that biomass, wood debris and other products are considered fuel. The rule will also include a list of secondary materials, including resinated wood products, which are not considered waste when used as a fuel or an ingredient in a combustion unit, according to the letter.

Jackson's Oct. 14 letter appeared to assuage the concerns of several critics, with the United Steelworkers suggesting EPA's plan obviates the need for legislation to change the rule. However, the American Forest & Paper Association said there is a need for legislation to provide legal certainty and lengthier compliance times.

The treated wood industry source says that although some biomass proponents appeared satisfied with Jackson's plans, the scope of the revisions to the NHSM as it affects the wood sector remains unclear. — *Stuart Parker*

## Senate Nears Votes On EPA Water Nominee, Bid To Halt Jurisdiction Policy

The Senate is slated to vote on the administration's nominee to head EPA's water office, possibly as soon as this week, suggesting that Democrats are likely to overcome GOP holds on the nomination due to concerns over administration plans to revise how EPA and the Army Corps of Engineers determine whether waters can be regulated.

But in a possible test for opponents of the administration's plans, senators may also vote in the coming weeks on a GOP amendment to a pending Corps spending bill to block the administration from revising the agencies' policy for determining whether waters are subject to regulation under the Clean Water Act — though the administration has already indicated opposition to a similar House measure.

It is not clear when or whether the amendment will be debated because senators have been unable to agree on a process for debating the underlying spending bill.

Sen. Benjamin Cardin (D-MD), chairman of the Senate Environment and Public Works (EPW) Committee's water panel, says Senate Democrats will try to approve the administration's nominee to head EPA's water office, Ken Kopocis, this week. "We hope to move the nomination this week," Cardin told *Inside EPA* Nov. 15.

A Senate floor vote would have to overcome Republican holds on the nomination due to concerns about pending EPA and Corps plans to revise policy for determining when isolated wetlands, intermittent streams and other non-navigable waters are subject to regulation under the water law.

The administration has issued draft guidance that 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 waters.

EPA is also pursuing a rulemaking to codify the guide, expected to be published in the *Federal Register* in January, and expanding its outreach to state and local groups.

But the proposed policy, whether articulated in guidance or a rule, has drawn considerable opposition from industry and municipal groups, as well as GOP lawmakers, who charged it would significantly expand regulatory jurisdiction over private property.

Sen. James Inhofe (R-OK), the environment committee's ranking Republican, said recently that Kopocis' "nomination faces some obstacles not because of Ken but because the Obama Administration has chosen to use the Office of Water as a way to impose their view of the world on farmers and businesses through use of 'guidance' as opposed to rulemaking. Until such time as we can reach some type of agreement with the Administration on their inappropriate use of 'guidance,' I don't believe that Ken's nomination can move forward."

Inhofe said, however, that Kopocis, a long-time congressional staffer, is "ideally suited" for the position and a "go-to guy" on water infrastructure issues. Kopocis previously served on the House Transportation & Infrastructure Committee. An Inhofe spokesman previously said the senator's prime concern is over EPA's proposed water act jurisdiction policy, which seeks to clarify what test regulators should use when determining whether marginal waters are subject to regulation under the law.

Cardin echoed this, acknowledging that there have been some holds on Kopocis' nomination from the GOP, but that these are not related to the candidate himself, whom Cardin said was "well respected" on both sides of the aisle.

Democrats' plans to vote on the nomination comes as the Senate also appears slated to vote on an amendment to the pending energy and water appropriations bill to block the administration's policy for determining whether

waters are jurisdictional.

Sens. John Barrasso (R-WY) and Dean Heller (R-NV) Nov. 10 unveiled their long-awaited amendment to the energy and water spending bill, which is pending on the Senate floor this week, that would bar the Corps from using any funding “to develop, adopt, implement, administer, or enforce a change or supplement to” the existing CWA jurisdiction rules.

The Senate amendment hews closely to language included in the House energy and water appropriations bill, which passed last summer but which the administration opposed in part because it sought to block the proposed regulatory clarification.

The senators “are committed to preventing this Washington power grab over all farms, small businesses and rural communities,” a Senate source says.

Meanwhile, the Water Advocacy Coalition, a group of industry, agricultural, municipal and other groups, is urging Congress to stop the EPA-Corps guidance from moving forward and reiterating calls for EPA to launch an advanced notice of proposed rulemaking to take additional input on the policy before crafting a proposed rule. The group says EPA current rulemaking plan is a “fast-tracked approach” that “lacks credibility and jeopardizes the legitimacy of any final rule.”

## States Seek Broader EPA Rules To Cut Ozone . . . begins on page one

“Air pollution is a national challenge, so it requires a national solution,” said Collin O’Mara, head of Delaware’s Department of Natural Resources and Environmental Control. He cited modeling data at the meeting showing areas in the OTC region of Mid-Atlantic and Northeast states that will struggle to attain EPA’s 2008 ozone national ambient air quality standard (NAAQS) in the coming years, even with all existing and planned state and federal air rules.

But a top EPA air official at the meeting said that EPA’s priority for now is ensuring a robust CSAPR, which the agency has said will help toward meeting attainment by reducing transport of ozone-forming NOx emissions.

Attainment is a major goal for states, because if they stay in nonattainment beyond Clean Air Act deadlines then EPA has the authority to impose sanctions that can include withholding of federal highway funding.

Some critics of EPA’s air standards also say that being in a nonattainment area can harm local economies by driving away businesses or being less appealing to prospective industries, given that companies do not want to locate in a nonattainment area where they might be subject to strict, expensive pollution controls or as part of a states’ air quality plan for bringing that area into attainment or experience higher electricity prices as a result of a more rigorously controlled electricity sector.

At the meeting, OTC adopted a resolution with majority support from its members for the group to craft a strategy on administrative and legal options to achieve major cuts in ozone pollution.

The resolution “is the foundation for a broader conversation about a national solution,” O’Mara said, calling it a “shift” for OTC to look at broader questions about a need for more federal policies on ozone reduction to help the OTC region. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 2382392)*

The states’ resolution — which passed with Pennsylvania objecting and Virginia abstaining — directs OTC staff and state air directors “to evaluate mechanisms provided for under the Clean Air Act to address ozone nonattainment and transported pollution. . . . The optimal strategy should strive to achieve both substantial emission reductions and public health benefits in the most cost-effective manner possible,” the charge says.

During a question-and-answer session with EPA air official Janet McCabe, Dan Esty of Connecticut’s Department of Energy and Environmental Protection said of EPA’s rules, “There are lots of us who want to say that we are with you in trying to get as much of this done in the next few months and year as possible, and there really are a number of us who are in the downwind-recipient class who are going to benefit enormously by these investments.”

But air officials also said that much more needs to be done to reduce transport of air pollution into their states, which will hinder their ability to attain EPA’s 2008 ozone NAAQS of 75 parts per billion (ppb).

Jeff Underhill of *New Hampshire* Department of Environmental Services’ Air Resources Division said OTC’s modeling run found there is a path to attainment for most areas by 2020, but that there are likely not enough pending emissions reductions from a combination of state and federal emission regulations for states classified in “marginal” nonattainment to come into attainment by their Clean Air Act deadline of 2015, or for “moderate” nonattainment areas to attain by 2018. As a result, several OTC areas will remain in nonattainment until at least 2018, and likely later.

“There are not enough projected emission reductions for many potential Marginal or Moderate nonattainment areas to meet their projected attainment dates,” according to Underhill’s presentation.

O’Mara said that the OTC modeling supports the notion that areas within OTC states will still be out of attainment despite pending pollution cuts and “we really need to look at a broader cross-state responsibility.”

State sources say that some areas may choose to “bump up” from marginal to moderate if it appears they will not be able to meet the standard in time, pushing their attainment deadline to 2018.

One state air official says that many of the options available to states and EPA for reducing ozone would take years to implement, and “we don’t have years. . . . I’m not sure that I can identify a measure that we can implement in that

timeframe to prevent these areas — or a number of them — from failing to meet those dates.”

O’Mara argued that the next pollution control measures OTC states would have to consider are significantly more expensive than pollution control measures than in other states which have not placed significant controls on plants to reduce NOx or other pollutants. He emphasized the need for federal measures that are justified by health analyses, economics and “fundamental fairness,” saying, “We can’t do this on our own.”

The state source says the “biggest factor” in not meeting the ozone standard is that emission cuts expected from EPA’s pending revised fuel and vehicle rules will not be fully phased yet due to a lack of fleet turnover. Unless owners are encouraged to sell old cars and buy new cars, the pollution cuts will not occur quickly, the source say.

At the OTC meeting, Tad Aburn from Maryland said his state is taking all appropriate steps to regulating local sources within its control, but noted that the city of Baltimore has some of the lowest emissions of any city in the region but still has the highest ozone levels due to transport of emissions from upwind states.

“We would love to work with you,” Aburn told EPA’s McCabe. Aburn said it will take a combination of local control programs and federal control measures to accomplish attainment by 2020 for most areas.

But McCabe downplayed the likelihood of EPA moving quickly and comprehensively toward addressing transport to help states meet the ozone limit. Responding to a question about what she could say on such efforts, McCabe said “probably not as much as you would like me to tell you,” going on to say that the agency does understand that transport issues remain and that states are expected to address those in working toward the 75 ppb standard.

“Our major energy at the moment is getting CSAPR solid, and right and finalized, and past the legal challenges that it is facing right now,” McCabe said of the trading program — which currently faces consolidated litigation from several states and power companies claiming flaws in the rule. McCabe added that while the agency is considering how to address transport at the 75 ppb standard, there is no rulemaking in the works at this point.

## States Delay Gas Compressor Air Rule To Weigh Expansion, Industry Data

WILMINGTON, DE — State air officials are postponing until next year a highly anticipated model rule to cut ozone-forming emissions from natural gas compressors, citing a need for more industry feedback on the feasibility and cost of the rule even while the states weigh a possible expansion of the rule to include other gas industry sources.

At a Nov. 10 meeting here of the Ozone Transport Commission (OTC), representing 12 Northeast and Mid-Atlantic states and the District of Columbia, state officials delayed action on an expected vote on the model rule. The rule would cut emissions of nitrogen oxides (NOx) from compressors that move natural gas down pipelines, filling a regulatory gap as the natural gas sector is currently regulated by a patchwork of state and federal regulations.

Though states tout the rules as a crucial step toward cutting ozone-forming NOx and helping them in their goal of meeting EPA’s strict ozone air standard, the gas industry has raised numerous concerns over the model rule ranging from concerns about a short implementation timeline to questions over whether the rule could be economically met by sources with existing controls.

Those concerns already prompted OTC to push the rule’s previous 2015 implementation date to 2016 ahead of the meeting earlier this month. But state officials said during the meeting that further concerns raised by industry — and a possible expansion of the rule’s scope — warrant punting debate on the rule to next year.

In a further complication for the OTC’s efforts, Pennsylvania’s top air official said that the large gas-producing state will not be adopting the model rule because it feels it can reduce compressor NOx through the Clean Air Act permitting process. OTC approves model rules that states can then adopt through regulation or law.

Still, other state officials at the meeting expressed ongoing interest in reducing emissions from the natural gas sector as part of their broad effort to target industrial sources of NOx in order to reduce ozone.

EPA has taken some steps to regulate the gas industry, including a June 8 final rule that imposed tighter limits on NOx and other pollutants from large diesel engines used to compress gas and move it further along pipelines.

In addition, the agency in July proposed a package of four rules: a new source performance standard (NSPS) to cut volatile organic compounds from the oil and natural gas industry, an NSPS to cut sulfur dioxide, a national emission standards for hazardous air pollutants to cut air toxics from oil and natural gas production and an air toxics standard for natural gas transmission and storage. EPA is taking comment on the four rules until Nov. 30.

Some gas-producing states, including New York, already impose reasonably available control technology (RACT) requirements on gas compressors. OTC’s model rule would be a template for all the states in the Northeast and Mid-Atlantic regions that the group represents, many of them home to expanding gas drilling.

Collin O’Mara, Delaware environmental chief and OTC chair, said at the OTC meeting that the group needs to resolve technical questions with its model rule and that “cost estimates need to be sharpened” before the rule can move forward. O’Mara said that the OTC’s Stationary and Area Source Committee will continue getting feedback and working on the rule, with an eye toward coming up with a recommendation in “the next couple of months.”

Ali Mirzakhali, head of the Delaware Department of Natural Resources and Environmental Control’s air office, said the committee “would like to give an opportunity for additional comment” on the rule — including likely outreach to gas

industry groups that have criticized the costs and feasibility of existing drafts of the rule.

The Interstate Natural Gas Association of America (INGAA), which represents pipeline operators, in Sept. 26 comments to OTC questioned the utility of the natural gas compressor model rule and its stringency, saying an INGAA analysis “indicates that the vast majority of prime movers and associated capacity are already controlled — nominally to levels that are marginally higher than the proposed emission standards in the model rule.”

At the meeting, INGAA consultant Jim McCarthy backed a delay in pursuing the rule, and echoed points made in the group’s comments. He argued that, because of the costs of requiring further reductions on units with existing controls, the rule could be a “paperwork exercise” where they would seek alternative regulations from the state because of those cost concerns.

Delaware’s O’Mara said that a key ongoing question to address in the model rule is incremental costs of reductions, noting that it may be cheaper to install controls on presently uncontrolled units rather than to get further NOx cuts from controlled units.

Even in the face of industry concerns, members of OTC voted unanimously to examine the possible inclusion of other NOx emissions from natural gas production in the rule, including from “upstream” activities such as well drilling, well completion and well head and field gathering natural gas compressor prime movers. — *Bobby McMahon*

## **EPA May Leave Fuel Volatility Limits Unchanged . . . begins on page one**

late December or early January.

Many states are eager for EPA to issue tighter rules, looking in particular to a stricter fuel sulfur limit that, according to a soon-to-be-released state group’s report, would help reduce ozone levels in the Northeast.

According to an informed source, an EPA official told a state caucus meeting at the recent gathering of the Ozone Transport Commission (OTC) in Wilmington, DE, that EPA would not be revising the fuel volatility limits as part of its forthcoming proposed rulemaking setting Tier III standards for gasoline and motor vehicles.

It comes after Margo Oge, director of EPA’s Office of Transportation and Air Quality, told a Nov. 2 hearing of the House Science Committee’s energy panel that the agency is “concentrating” on sulfur limits.

Oge also said that the National Association of Clean Air Agencies’ (NACAA) study on the potential costs and benefits of a stronger sulfur cap is “more close . . . to what EPA is planning to do” with the revisions to the fuel and vehicle rules rather than an industry-backed study that looked at tighter sulfur caps and fuel volatility limits.

Under the current Tier II limits for fuel volatility — a measure of volatile organic compounds based on Reid Vapor Pressure (RVP) — the limit is set between 9 pounds per square inch (psi) and 7.8 psi in the summer months, with the stricter limits in areas that have greater air pollution problems or those areas using reformulated gasoline.

Sources say that the potential for a tighter RVP limit is in part driven by EPA’s one-pound waiver for fuels containing 10 percent ethanol (E10), wherein E10 can exceed the RVP for gasoline by 1 psi, and more broadly the expanded use of biofuels in gasoline. But the oil industry has raised concerns about the adverse economic impacts of tightening fuel volatility limits, and one industry source supports leaving existing limits in place.

A recently released industry-backed study by the energy consulting firm Baker & O’Brien predicts that fuel costs would increase 12 to 25 cents based on revisions to RVP and sulfur limits in the Tier III rule.

The industry source cautions that EPA could still take public comment on changing the limit in its proposed rule, which the agency is due to issue in the coming months. That approach would enable the agency to include new volatility limits in the final rule. The source adds that while the proposed rule is important, “the meat” is in the final rule.

One environmentalist says the greatest pollution reduction benefits from the Tier III rulemaking would be tightening the sulfur limit from 30 parts per million to 10 ppm and aligning vehicle emission standards with California’s Low Emission Vehicle (LEV) III standards. Environmentalists’ top priorities for the rule are the sulfur limits and the vehicle emission standards, the source says, with the larger goal of having the rule ready so that, when the stronger fuel economy standards go into place in 2017, there is a vehicle fleet “that’s dramatically cleaner and more efficient than anything on the road today.”

Sources also note that RVP limits are not uniform across the nation, and that some urban areas, California and parts of the Northeast already have RVP limits that are more stringent than those EPA set in the Tier II rulemaking. A stronger RVP standard, the informed source says, would therefore “make no difference” for those areas.

Another informed source cautions that EPA has given no indication that it plans to leave RVP limits unchanged, saying the agency could propose tightening the one-pound waiver and the fuel volatility limits.

An EPA spokeswoman says that the rule “is currently under development, so it is too premature to comment on specifics.”

**States, meanwhile, continue to make the case for EPA to tighten fuel sulfur limits** down to 10 ppm, with an imminent study by the Northeast States for Coordinated Air Use Management (NESCAUM) predicting that a tighter sulfur limit would help cut ozone-forming nitrogen oxides (NOx).

In a Nov. 10 presentation to a meeting of the OTC in Wilmington, DE, NESCAUM’s Arthur Marin and Nancy

Seidman of the Massachusetts Department of Environmental Protection said the report will argue that reductions in fuel sulfur content will lower vehicles' NOx emissions that lead to ozone formation, in turn reducing ozone levels. OTC represents Northeast and Mid-Atlantic states and the District of Columbia.

Reductions in ozone are crucial for the OTC states, which have long struggled to identify industrial and other sources of ozone-forming pollutants to regulate in order to cut emissions down to a level that will help the states attain EPA's strict ozone national ambient air quality standard. OTC states and others are looking to EPA to issue a stringent Tier III proposal because the Clean Air Act largely preempts the states from regulating mobile sources.

State officials have warned that without tighter Tier III rules they will have to find other ozone sources to regulate, requiring additional and more expensive reductions at local sources or targeting minor sources such as dry cleaners to garner reductions — an approach that states are unwilling to take due to the adverse economic impacts.

The NESCAUM study finds that a 10 ppm sulfur limit would mean reductions of 51,600 tons per year of NOx in the OTC region in 2017. Marin also said that the rule would also reduce NOx emissions in the Midwest and South, which in turn would reduce transport of NOx emissions from those regions across to the Northeast states.

Marin said that the Tier III proposal could represent “one of the largest near term reductions we could expect from any measure” and represents why federal pollution control measures are so important. Marin told *Inside EPA* on the sidelines of the meeting that NESCAUM will formally release the report in the coming days.

Seidman echoed these points, saying that “lowering the sulfur content of gasoline to an average of 10 ppm would cost effectively reduce NOx emissions” and that the rule “represents one of the most significant strategies available to protect public health by addressing ozone nonattainment” in the OTC region.

In line with the NACAA study — which said a 10 ppm limit could be met at a cost of less than a penny a gallon — the NESCAUM study finds that the rule would cost between 0.5 cents and 1.4 cents per gallon, Marin said, at a price of between \$2,500 to \$7,000 per ton NOx reduced. This price puts it in the range of the existing Tier II standards, as well as NOx controls like selective catalytic reduction on coal plants, Marin noted. — *Bobby McMahon*

## **EPA Suggests Drilling Sites May Need Stormwater Permits . . . begins on page one**

Hanlon's remarks follow comments by Jon Capacasa, EPA Region III's water protection division director, who told a Nov. 14 Senate Energy and Natural Resources Committee field hearing in East Charleston, WV, that the state should consider addressing E&S in its upcoming hydraulic fracturing rules due to concerns about gas site runoff harming water quality. “We're seeing some situations where well pads are actually in the stream bank, roads are in the stream bank, and I think spending some time on proper siting to avoid the stream would be very important,” he said.

Environmentalists have repeatedly raised concerns that the recent explosion of oil and gas development — particularly in the Northeast — has resulted in increasing E&S problems at gas construction sites. The 2005 energy law exempted the industry from permit requirements for uncontaminated stormwater runoff.

The provision in the law generally expanded existing an CWA exemption for stormwater permitting of oil and gas drilling sites to include “activities necessary to prepare a site for drilling and for the movement and placement of drilling equipment” though those activities might otherwise be permitted as construction sites.

Environmentalists and conservation groups are urging Congress to repeal the waiver, through that effort faces at best uncertain odds. Efforts to move such legislation in the 111th Congress failed to gain traction.

But the EPA officials' remarks suggest a possible route to regulating the runoff through CWA permit requirements under existing authority. Hanlon said the energy law exemption only applies where stormwater runoff would not be expected to result in a violation of state water quality standards — and for those drilling sites where E&S from stormwater runoff harms water quality, states should be requiring CWA discharge permits.

Hanlon did not elaborate, but his remarks suggest states or EPA could potentially require stormwater permits in areas where they find violations from runoff, meaning permit writers could set stricter permitting conditions to address E&S concerns.

Sources recently said the agency is weighing what authority it can use to promulgate best management practices (BMPs) for controlling erosion and sediment from stormwater runoff, though environmentalists argue that the approach would be insufficient to account for water quality protection (*Inside EPA*, Nov. 11).

**Any effort by EPA to ramp up oversight in instances where siting of gas drilling construction** activities could be subject to permitting because of such violations is likely to further inflame Congressional Republicans, who during the recent House and Senate hearings challenged the agency's efforts to develop wastewater standards for the booming shale gas industry, an industry sector whose regulation has historically been the purview of the states.

“Do you feel that states are equipped to regulate . . . is a one-size-fits-all approach really the way to go?” Rep. Bob Gibbs (R-OH), chairman of the House T&I Committee's water panel, asked Hanlon during the Nov. 16 hearing. Gibbs' question was in reference to EPA's Oct. 20 announcement that it would develop wastewater pretreatment standards for the shale gas industry by 2014, as part of a broader effluent limitations guideline plan.

Hanlon responded that the pretreatment standards will be geared toward the “truck driver with five thousand gallons of wastewater” from a gas drilling operation, and meant to help give a publicly owned treatment works (POTW) “some

surety about what that wastewater has in it” in terms of contaminants that can effectively be treated at a municipal treatment plant.

The CWA under section 304(m) requires EPA to every two years evaluate whether to add or revise its effluent limitation guidelines or wastewater treatment standards for industry sectors that discharge to POTWs or centralized waste treatment plants. EPA’s upcoming shale gas rules are aimed at addressing concerns in eastern states along the Marcellus Shale formation, including Pennsylvania, West Virginia and New York.

Because of their geologic terrain, the Eastern states have fewer options than Western states for injecting wastewater into underground reservoirs — industry and EPA’s preferred disposal option. Those states have struggled with what to do with the massive amounts of wastewater generated by the shale gas industry.

Hanlon in a memo to regional EPA offices last March outlined some of difficulties in addressing the issues with setting national pollutant discharge elimination system permit conditions for shale gas waste, citing the lack of agency pretreatment standards as one obstacle to crafting permitting conditions.

**Pennsylvania’s Department of Environmental Protection (DEP) Secretary Michael Krancer** said during the hearing that the pretreatment standards are unnecessary and represent the “lowest common denominator,” given that most states have adequate rules in place for ensuring that natural gas drilling does not impair water quality. Krancer touted DEP’s recently tightened water quality standard for total dissolved solids, a key contaminant in shale gas waste, and the state’s discouragement of POTW’s treating of shale gas wastewater under grandfathered permits.

“Pennsylvania took care of its POTWs — EPA was trying to give us free advice that we didn’t ask for and we said, ‘hey, why don’t you get your own house in order before you come into our house?’” Krancer said.

Republican Rep. Bill Shuster (PA) sided with Krancer at the hearing, saying that the agency’s pending wastewater rules appear to address the “lowest common denominator,” and asked Hanlon whether EPA’s view is that states have different geology that might hinder development of one blanket federal approach.

Hanlon in response pointed out that a wastewater treatment standard “has nothing to do with what happens in the well,” saying that it would apply to effective technology for treating constituents in wastewater from drilling operations, and therefore be more applicable over a variety of regions — not just Eastern states.

Rep. Andy Harris (R-MD), meanwhile, used the hearing to target EPA’s concern about high concentrations of bromide in shale gas wastewater as a potential contaminant of concern because of its potential to interfere with sewage treatment processes, saying “Isn’t bromine a swimming pool chemical? Is EPA comparing levels of hydrofracking fluid to levels of bromine used in swimming pools?” — *Bridget DiCosmo*

## **EPA Weighs Strict New Limits For Power Plant Discharges . . . begins on page one**

“We’re still in the process of developing a proposed rule and it’s too early to talk about what it may or may not include,” an EPA spokeswoman says.

But environmentalists and industry sources say the measures EPA is considering, such as a first-time, zero discharge standard for liquid coal ash storage sites, would have the effect of forcing or encouraging many facilities to shift from storing liquid coal ash to dry storage — an approach that would limit the likelihood of future coal ash spills like the one in 2008 at a Tennessee Valley Authority (TVA) plant in Kingston, TN.

“There could likely be conversion” to dry storage as a result of the ELG, an industry source says. In 2009, TVA officials announced that they would be converting their remaining wet storage sites to dry storage.

Should EPA mandate such requirements in its rule, it would bolster environmentalists who have long looked to the pending ELG rule as a potential backstop for regulating coal ash in the absence of strict Resource Conservation & Recovery Act (RCRA) hazardous waste rules that EPA is struggling to develop. Activists say, however, that CWA limits alone are insufficient because they will not address transport, handling and storage requirements that can be regulated under RCRA hazardous waste provisions (*Inside EPA*, July 31, 2009).

An early test for the environmentalists, especially on whether EPA will force facilities to switch to dry ash storage sites, may come in the case of pending permit revisions the agency is writing for the Merrimack Station coal-fired power plant in Bow, NH.

While the draft permit EPA recently issued for the New Hampshire facility sets first-time numeric limits for metals and other toxics that may be present in effluent at power plants with scrubbers, it is silent on requiring the facility to switch to a dry ash storage system. “We haven’t seen where EPA has dealt with that at all,” says one environmentalist. “Converting to dry-handling makes the most sense.”

Nevertheless, the source welcomed the draft permit’s first-time limits for arsenic of 0.00227 milligrams per Liter (mg/L), 0.0000071 mg/L of mercury, and 0.571 mg/L of selenium, three key metals that they hope EPA will adopt in its ELG rulemaking for the sector. “It has some quite protective limits,” the source adds.

“It’s an unquestionably big step forward,” the activist says, adding that “Where EPA is headed [with the rulemaking] is clearly laid out in the Merrimack permit.”

While environmentalists may welcome stricter EPA requirements, the options EPA is floating for the rulemaking

could also intensify industry and Republican concerns that EPA's rules are undermining electricity reliability. EPA appears to acknowledge this point in its recent presentation, noting that "compliance could result in [unit] closure," though the agency says the rule would likely only have "supply impacts on marginal, low-capacity factor, peaking units," as well as those plants required to have oil-capability during adverse weather conditions.

But the agency says it is working to reduce potential energy supply impacts, noting that it is weighing "Coordination with other EPA rules affecting the steam electric industry."

The agency also indicated it could consider subcategorizing the power plant industry by fuel type, if warranted, to reduce the anticipated regulatory burden on industry and state and local agencies. Such an approach could win broader industry buy-in, especially from the natural gas and nuclear sector, because it would likely lead the agency to target coal-fired plants which make up 41 percent of the industry, or about 500 plants, according to EPA's presentation.

The first industry source says that EPA should provide a compliance deadline of at least 8-10 years if facilities are expected to convert waste management systems to dry storage. The agency has significant flexibility for allowing time for facilities to comply with new discharge standards, although the national pollutant discharge elimination system (NPDES) permit cycle is every five years.

"We need an adequate time frame — we can't simply convert on a dime," the industry source says, adding that EPA has been silent on how much time it would allow for compliance should it adopt a zero discharge standard for coal impoundments. "The question is whether EPA would press to have the ELG numbers in NPDES permits" without allowing additional compliance time.

EPA formally announced its intent to develop the rule — which will revise an ELG issued in 1982 — in its recently released Effluent Guidelines Program Plan for 2010. Although EPA only issued its ELG plan last month, the agency signed a consent decree last year with environmentalists that requires the agency to issue a proposed rule by July 2012, and to promulgate the regulations by January 2014.

The rule is expected to target 1200 oil, coal, gas and nuclear facilities with a focus on about 500 coal-fired plants. The EPA presentation, crafted for an agency review of the rulemaking's impact on state and local governments Oct. 11, identified about 158 state and local governments and municipal cooperatives that will likely be impacted by the rulemaking through ownership at 182 plants that together produce about 100,000 megawatts (MW) of power.

The rulemaking is expected to tamp down on high levels of contaminants in effluent discharges at older coal-fired plants, given that those concentrations are expected to increase due to installation of scrubbers and other emissions controls required under the Clean Air Act.

"The current regulations . . . do not adequately address the pollutants being discharged and have not kept pace with changes that have occurred in the electric power industry over the last three decades," EPA says on its website. "Steam electric power plants are responsible for a significant amount of the toxic pollutant loadings discharged to surface waters by point sources, and coal ash ponds and flue gas desulfurization (FGD) systems are the source of much of these pollutants."

**Agency guidance in 2010 identified FGD systems, which many coal plants** install to control sulfur emissions, and coal ash impoundments as point sources of concern at steam electric plants that burn coal, saying in a memo signed by EPA's wastewater chief Jim Hanlon that many existing NPDES permits are considered inadequate for controlling discharges associated with both the air control technology and ash impoundments.

The ash storage issue is of particular concern especially since the Tennessee spill. Wet disposal is the practice of combining coal waste with water and placing it in surface impoundments. Activists say the practice — currently only regulated by some states, or controlled through voluntary industry efforts — poses risks to the environment and public health because heavy metals in the coal waste tend to leach into and contaminate groundwater, or in the event of a breach in the holding pond.

A 2009 EPA study on coal fired power plants found that most of the newer electric generating units operate dry fly ash handling systems because of EPA's existing new source performance standards (NSPS) for the sector that require no discharge of wastewater pollutants from fly ash water that is transported in pipes.

But the study also suggested some inadequacies in this regulation, noting that even when plants treat wet ash in settling ponds, the effluent — that can be discharged even under the NSPS requirements — still contains levels of metals such as arsenic and selenium at concentrations of concern.

Untreated ash transport waters contain "significant concentrations" of total suspended solids (TSS) and metals, the study says, adding that while treated effluent from ash ponds generally contains low concentrations of TSS, metals are still present in that wastewater.

According to EPA's presentation, options for addressing discharges from FGDs include chemical precipitation, with the possibility of additional biological treatment processes and/or evaporation. EPA estimates the annual costs of these different approaches range from \$0.9 million to \$10.2 million for plants in the 50-600 MW range.

The agency is also weighing strict new rules for coal ash storage sites, including leachate from landfills/ponds containing coal combustion residuals, fly ash and bottom ash. Treatment options for leachate include chemical precipitation with or without additional biological treatment. Cost estimates range from \$0.5 million - \$2.5 million.

Setting a zero discharge option for fly ash and bottom ash would result in increased recycling of wastewater or conversion to a dry storage system, which EPA estimates would cost less than \$3 million per year. — *Bridget DiCosmo*

## Democrats Increasingly Back GOP Calls For NAS Review Of Chemical Risks

A small but growing number of congressional Democrats are backing Republican calls for the National Academy of Sciences (NAS) to review Obama administration chemical risk assessments, putting pressure on an administration that has so far been reluctant to seek such reviews for assessments crafted by EPA and other agencies.

While the Democratic lawmakers are seeking NAS review for assessments conducted under the auspices of the Department of Health and Human Services (HHS), not EPA, any administration agreement to seek reviews could set a precedent for several pending EPA assessments that GOP lawmakers and industry are urging the agency to send to NAS.

In the most recent action, eleven senators, including five Democrats, sent Health and Human Services (HHS) Secretary Kathleen Sebelius a Nov. 15 letter urging her to engage the NAS to review the health risks of formaldehyde. Among the letter's 11 signatories are five Democrats: Sens. Sherrod Brown (OH), Max Baucus (MT), Jay Rockefeller (WV), Debbie Stabenow (MI) and Jon Tester (MT). The six Republicans signing the letter include Sens. Rob Portman (OH), Saxby Chamblis (GA), Johnny Isakson (GA), John Boozman (AR), and Dan Coats (IN).

The senators are concerned that in the National Toxicology Program's (NTP) Report on Carcinogens (RoC) that HHS released earlier this year, the program listed the chemical as a "known human carcinogen" — even though an NAS panel had strongly criticized a similar EPA finding.

"The 12th RoC changed the listing of formaldehyde to a known human carcinogen. It is our understanding that [NAS] released a report in April that questioned both the process used to make this classification — the original EPA health assessment on formaldehyde — and the causal relationship between formaldehyde and certain types of cancer," the letter says.

"We respectfully request that the [HHS] work with the NAS to resolve the question of whether the known human carcinogen listing for formaldehyde is appropriate using the NAS' standard weight-of-the-evidence approach," the senators write Sebelius. "While the 12th RoC was published in June, it is our understanding that there is a precedent for new scientific findings resulting in modified RoC classifications." *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc ID: 2382189)*

Just a few days earlier, the bipartisan House Manufacturing Caucus asked the Obama administration to initiate an NAS review of the "potential health effects" of the widely-used industrial chemical styrene, after the 12th RoC listed the substance as "reasonably anticipated to be a human carcinogen."

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's health effects. Democrats signing the House letter include Ryan, along with Reps. Gene Green (TX), Dan Boren (OK), Sanford Bishop (GA), Jason Altmire (PA), Laura Richardson (CA) and Mike Ross (AR).

**The congressional calls for the administration to seek NAS review of NTP findings** comes as EPA is facing similar calls from Republicans for NAS to review some of its pending chemical assessments, which have drawn concern from industry and others that they could drive costly regulatory requirements.

Language included in the House version of EPA's spending bill for fiscal year 2012 seeks to halt the release of at least one major EPA chemical risk assessment — for arsenic — until NAS has had a chance to review it and has backed recently announced program reforms.

While it is not clear whether administration officials will agree to any requests for NAS reviews, EPA officials have so far opposed having any more of their draft risk assessments subjected to NAS review. During a hearing last month, EPA research chief Paul Anastas opposed the House spending bill language, noting that the NAS panel did not recommend EPA delay issuing additional risk assessments.

"It is important to note that the NAS report viewed the implementation of their recommendations as a multi-year process," he said in his testimony. "For example, the NAS stated 'it is not recommending that EPA delay the revision of the formaldehyde assessment to implement a new approach.'" — *Maria Hegstad*

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## TSCA Hearing Unlikely To Spur New Momentum For Chemical Law Reform

The Senate Environment & Public Works Committee's (EPW) long-awaited hearing later this week on a Democratic bill to reform the Toxic Substances Control Act (TSCA) is unlikely to spur fresh momentum for the bill, sources say, due to a number of continuing hurdles including partisan gridlock and lack of industry incentive for reform.

Still, many supporters of reform hold out hope for a bill this session, saying bipartisan Senate legislation could spur action in the House.

EPW and its toxics panel's legislative hearing, slated for Nov. 17, will be the first following a long-running series of bipartisan stakeholder talks focused on various aspects of TSCA reform, though it is uncertain how input from the sessions will be addressed at the hearing, sources say, or whether the bill will move this Congress.

While the hearing includes officials from state government, environmental groups, unions and industry, there are no administration officials — from EPA or other agencies — slated to testify at the event. "EPA needs to be at the table with instructions from the White House" for the legislative discussions to be useful, an industry source says. EPA has also been largely absent from the stakeholder talks, sources have said (*Inside EPA*, June 24).

A legal source says that the divided Congress is unlikely to reach agreement on chemicals law reform legislation. "TSCA reform is tough on a good day. In an election year, it's Mission: Impossible."

The panel is slated to discuss S. 487, the Safe Chemicals Act, introduced in April by EPW toxics panel Chairman Frank Lautenberg (D-NJ). The bill would reform TSCA by collecting more information on chemicals in commerce, revising the safety standard in the statute and paring back the rules for confidential business information.

The legislation has the backing of many environmental, medical, labor and other groups supportive of toxics law reform, who have also said the bill could come up for a committee vote this year.

The hearing represents the first opportunity for lawmakers to raise issues and ask questions following the conclusion of a series of stakeholder talks over the last few months, which were held by Lautenberg and EPW ranking member James Inhofe (R-OK), and included input from industry and environmental groups.

But industry concerns with S. 847 are "woven all through the bill," which means significant revisions will be needed to produce a bill acceptable to business groups, according to the industry source.

The legal source tracking the issue doubts the bill could advance without support from industry, adding that the hearing is "somewhere between window dressing" and an opportunity to tee up key issues.

The source also says industry lacks an incentive to work towards TSCA reform. While more states have taken up individual chemicals management reform, this might not necessary stop unless a stronger federal law includes adequate preemption provisions, the source says. "That has not brought industry to the table."

Although EPA Administrator Lisa Jackson unveiled the agency's priorities for TSCA reform, the legislation stalled in 2010 amid concerns about increased agency regulation of the chemical industry.

With TSCA reform stalled, sources have said state efforts to address toxic chemicals will "accelerate and expand," creating a patchwork of state policies that could be difficult for industry to navigate (*Inside EPA*, Oct. 7).

But some of the state efforts have stumbled because of concerns about how the new rules could harm the chemical sector and cause job losses, which also makes the actions less of a driver, the legal source says.

Further, EPA toxics chief Steve Owens is leaving the agency later this month, which will create a political vacancy at the Office of Chemical Safety & Pollution Prevention at EPA, which could slow the process, the industry source says. President Obama is yet to announce a nomination to replace Owens as EPA toxics chief.

**Still, one environmentalist is optimistic that the Senate could craft a bipartisan bill** and says that might spur action in the House, which is yet to take up the issue. Republicans on the House Energy and Commerce Committee's leadership suggested earlier this year they might be open to holding hearings on TSCA reform. The environmentalist also argues that polling consistently shows that TSCA reform has strong support among the public.

And the industry source says the recent stakeholder talks on chemicals law reform were "substantive and constructive," but says it is unknown how the bill might be changed as the result of the talks, which mean it is unclear how the talks might impact the Nov. 17 hearing. "You can't be reacting to anything new because you don't know what it is," the source says, but added many industry groups are open to further talks.

At the hearing, EPW's full committee and toxics subcommittee will hear testimony from Ted Sturdevant, the director of the Department of Ecology in Washington state, which has an active chemicals program; Charlotte Brody, director of chemicals, public health and green chemistry for the labor-environmentalist BlueGreen Alliance; and Richard Denison, senior scientist with the Environmental Defense Fund.

GOP witnesses include Cal Dooley, president of the American Chemistry Council, and Robert Matthews, of law firm McKenna Long & Aldridge. — *Aaron Lovell*