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**ADMINISTRATOR JACKSON**

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**EPA declares L.A. River 'traditional navigable waters' (*Los Angeles Times*)**

The designation is crucial to applying Clean Water Act protections to the concrete-lined waterway often regarded as little more than a flood-control channel.
By Louis Sahagun, Los Angeles Times
July 8, 2010U.S. EPA Administrator Lisa Jackson on Wednesday declared the entire concrete-lined Los Angeles River channel "traditional navigable waters," a designation crucial to applying Clean Water Act protections throughout its 834-square-mile urban watershed.

"We're moving away from the concrete," Jackson told more than 200 residents and government officials on the banks of one of the river's heavily polluted tributaries, Compton Creek.

"This is a watershed as important as any other," she said. "So we are going to build a federal partnership to empower communities like yours …. We want the L.A. River to demonstrate how urban waterways across the country can serve as assets in building stronger neighborhoods, attracting new businesses and creating new jobs."

The decision may seem odd to people who know the L.A. River as a flood-control channel of treated water a few inches deep flowing between massive, graffiti-marred concrete banks strewn with rotting garbage and broken glass, and occasionally polluted with chemicals illegally dumped in storm drains and gutters that empty into it.

Jackson said the EPA considered factors beyond whether the river's flow and depth can support navigation from its origins at the confluence of the Arroyo Calabasas and Bell Creek in the San Fernando Valley all the way to San Pedro Bay, a distance of about 51 miles.

Among other considerations, EPA officials said, were recreational and commercial opportunities, public access, susceptibility to restoration, and the presence of ongoing restoration and educational projects.

The designation overturned an earlier ruling by the Army Corps of Engineers that only four miles of the river were navigable, which would have made it easier to develop its upper reaches by eliminating the need for certain federal permits.

"This is an important day, one we've been working toward for years," said poet and writer Lewis MacAdams, founder of Friends of the Los Angeles River. "It is a day when the EPA has essentially redefined the L.A. River and its values. In other words, starting today, a flood control channel is only one of its many characteristics."

David Beckman, senior attorney at the Natural Resources Defense Council, suggested that the shift could affect the way many other river systems are managed.

"The EPA's decision has been closely watched as an indicator of whether similar rivers

throughout the West — dry as a bone one day, a torrent the next — would lose historical protections under the Clean Water Act," he said. "So this is great news. It means less pollution in the river and provides a vital support for community efforts to rejuvenate and restore it."

Los Angeles County Supervisor Mark Ridley-Thomas would not argue with any of that. At the news conference he announced the purchase of a four-acre portion of the Compton Creek riverbed devastated by decades of storm runoff and illegal dumping.

The stretch of creek bed choked with foliage and trash was bought from the nearby Crystal Casino and Hotel with $1.5 million of Proposition 8 funds in an arrangement led by Ridley-Thomas and partners including the environmental group Heal the Bay, the EPA, L.A. County and the city of Compton. The creek bottom is now controlled by a joint-powers entity of the San Gabriel and Lower Los Angeles Rivers and Mountains Conservancy. Public ownership of this parcel will allow for prompt restoration, Ridley-Thomas said.

"We are now launched on a project that will significantly improve the quality of life of the people of Compton and adjacent communities," he said. "I am calling for an ecosystem restoration study of Compton Creek. In the near term, we can look at developing pedestrian and bike access."

It was unclear whether the EPA's announcement would prompt Los Angeles County flood control officials to alter maintenance operations along an 8-mile stretch of Compton Creek, including annual bulldozing of debris and vegetation.

County authorities contend that the operations are needed to protect lives and property during storm season along the creek, which runs through several cities en route to the L.A. River. Compounding problems, the channel's levee systems do not meet federal standards.

Mark Pestrella, deputy director of the Los Angeles County Department of Public Works, said the EPA's decision "opens the door for the federal government to use habitat restoration, for example, as a value that must be taken into account when competing for dollars for various projects."

Among those listening at the news conference was Heather Wylie, a former project manager in the Ventura field office of the Army Corps of Engineers, who lost her job after kayaking down a stretch of the L.A. River in late 2008.

The expedition was in protest of the agency's ruling that year that only a small portion of the river was boat-worthy. She was suspended from her duties and eventually left the agency.

"All I did was go kayaking to make a point about Clean Water Act protections," she said. "I am grateful for the EPA stepping in and fixing this."

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07/09/2010

**Inhofe Urges Jackson To Meet Critics Of Stringent EPA Arsenic Risk Study (Inside EPA)**

Sen. James Inhofe (R-OK) is urging EPA Administrator Lisa Jackson to meet with former EPA science advisers and other key scientists critical of the agency's latest stringent draft assessment of arsenic's cancer risks, warning that the assessment's safety standard is so strict it could have "severe" consequences for relevant agency rules.

Inhofe, ranking member on the Environment & Public Works Committee, sent a June 21 letter to Jackson reiterating his concerns over EPA's proposed new assessment of arsenic, which presents an estimate of arsenic cancer potency 17 times more stringent than the existing number. The strict new proposed risk level is raising concerns among industry because of the stricter drinking water rules -- and many other regulations -- it could drive.

Inhofe's request is another attempt by critics of the arsenic study to intervene and stall EPA's pending assessment. In the letter, Inhofe says that Jackson should meet with critics of the study and heed their advice, including several members of a 2007 Science Advisory Board (SAB) panel that reviewed an earlier draft of the arsenic study. *The letter is available on InsideEPA.com.*

The former advisers claim EPA failed to fully implement their recommendations when it revised the arsenic assessment. Those panel members are now urging the new SAB panel reviewing EPA's latest draft arsenic risk study to consider their concerns, which could weaken EPA's arsenic cancer estimate (*Inside EPA*, July 2).

The former SAB members wrote both EPA and the chartered SAB with their concerns that EPA's latest draft assessment does not adequately respond to their recommendations on how to improve the 2007 draft of the study, including questioning whether the Taiwanese data EPA bases its assessment on are the most appropriate available (*Inside EPA*, June 30).

In addition to the SAB members, Inhofe also asks Jackson to meet with University of Nebraska Medical Center researcher Samuel Cohen who has developed studies suggesting a safe level of arsenic exposure.

Cohen has produced a number of studies suggesting that there is a safe threshold level of exposure to arsenic. EPA's assessments have assumed that there is not; that there is no safe level of exposure. This is in part a science policy decision -- that there is

insufficient evidence about how arsenic causes cancer to move away from the agency's default assumption that there is no safe level of exposure. EPA's latest SAB work group on arsenic concluded during a March meeting that there is not enough data for EPA to move beyond this assumption.

Inhofe says the scientists "are prepared to share their concerns and proposed solutions with you and your staff" for the arsenic assessment. Inhofe does not elaborate on what he means by the scientists' "solutions."

Industry, seeking ways to delay or alter the strict new assessment for fear of the strict rules it could spark has reached out to members of Congress who may be sympathetic, including Inhofe, Sens. Harry Reid (D-NV) and Ben Nelson (D-NE) (*Inside EPA*, April 30).

Inhofe in his letter echoes the concerns over the potential for future strict EPA rules based on the arsenic assessment. "The proposed 17-fold increase in the cancer potency factor from oral exposure to inorganic arsenic will have severe consequences once those values are used by the risk managers in EPA programs -- such as for drinking water and soil cleanup," he wrote. The senator added, "I believe you must take steps to ensure the agency take every reasonable step to produce an assessment that is complete and scientifically defensible."

As of press time July 7, EPA had not responded to Inhofe's letter. An agency spokeswoman did not return a request for comment. -- *Maria Hegstad*

Thursday July 8, 2010

**EPA navigates new policy designating Los Angeles River a 'traditionally navigable waterway' (*89.2 KPCC*)**

6:41 a.m. | Molly Peterson | KPCC
The blue ribbon of water that winds among L.A.'s highways and high rises got good news on Wednesday. Federal authorities decreed the Los Angeles River worthy of environmental protection while visiting one of its feeder creeks in the city of Compton. The policy shift settles a longstanding dispute.

Over and over, public officials – mayors, a county supervisor and the head of the Environmental Protection Agency – repeated the same phrase at the announcement in Compton. "Traditional navigable waterway." EPA chief Lisa Jackson drew knowing laughter and applause when she spoke that shibboleth, a legal phrase freighted with meaning. "What does that mean?" she laughed, too. "That means that we recognize that this is water. Not only is this water, it needs to be thought of as part of our ecological system that services us."

The magic phrase invokes the primary law regulating water pollution in the United States. Jackson says restoration plans, use of the river by watercraft and other factors make clear that the L.A. River must meet the Clean Water Act's strict standards for surface water quality. "It means that the entire 51-mile watershed is protected and it means that areas like Compton Creek will have the full protection of our nation's clean water laws."

That protection was in doubt after the U.S. Supreme Court moved to narrow the Clean Water Act four years ago. The court's decision in a case called Rapanos v. United States confused federal agencies and Western states where snow-fed spring rivers dry up in summer heat. When a rancher sought to fill in some mountain streams that feed the L.A. river, the U.S. Army Corps of Engineers proposed that the river, most of it, wasn't a body of water at all – just concrete used for flood protection.

Then two years ago activist kayaker George Wolfe led a flotilla down river, documented in videos. With kayaks and canoes, Wolfe said he was navigating the river to defend the right of the people of Los Angeles to use it. The Army Corps was not amused. A helicopter clocked yellow and orange boats from above. Get out of the river.

Boaters reasoned if they could float downstream, so could dirty runoff. EPA agreed – calling this river a special case, it took control. In the dry Southwest, dozens of other rivers flow seasonally or in concrete or both.

The Natural Resources Defense Council's David Beckman says the EPA's move at this river spotlights the chaos the Supreme Court's decision created in Western water policy. "So what we need is a change to the Clean Water Act to restore the traditional definitions," Beckman says, "and to make it clear that waterways like the L.A. River and similar ones around the West – arid waterways – are fully protected just like on the east coast."

The NRDC and Beckman are among those pushing such a law. In the Santa Monica and San Gabriel mountains, builders may feel the EPA's decision first. They'll need permits to build roads and homes near seasonal streams.

Heal the Bay's Mark Gold says that will slow growth. "That development pressure should be greatly reduced within those small tributaries that really make such a difference and make those mountains special, that also drain into the L.A. River watershed," Gold says.

At Compton Creek, graffiti tags and cinderblocks are in a dead heat with a stubborn stripe of green plants in the water. EPA administrator Lisa Jackson said her decision tips the scales for urban environmental justice. "We have to think about a river with a concrete bottom that flows through one of our nation's largest cities and through this lovely city as well," Jackson said. "We need to think about urban areas and we need to

make it clear to the residents who live here – our neighbors – how important these issues are."

South L.A. high school students enrolled in Agua University showed how they're learning to test water quality at Compton Creek – one of the L.A. River's major downstream tributaries. In a second announcement Wednesday, L.A. County Supervisor Mark Ridley-Thomas announced the purchase of four acres of soft-bottom river here. "It will facilitate and afford interesting opportunities with economic development," Ridley-Thomas said. "And it should be said with this opportunity comes a significant challenge."

The challenge remains the same – funding for restoration and pollution enforcement is scarce. The EPA's announcement sounds a hopeful note for state and county agencies in the Los Angeles River's watershed. Local activists say that hope will be fulfilled when money flows even bigger than the river does.

07/09/2010

**EPA Seeking To Push States To 'Aggregate' Drilling Facilities' Emissions (*Inside EPA*)**

EPA is quietly drafting guidance to encourage states to better "aggregate" emissions from oil and gas facilities to assess whether they are major pollution sources, after an earlier Obama administration decision to revoke a Bush-era policy allowing disaggregation failed to result in any major permitting changes, sources say.

EPA air chief Regina McCarthy and other agency headquarters officials have been meeting with some states to solicit their input in preparation for issuing the guidance, state sources say. But some Western states are already criticizing EPA's move and say their existing permit programs are sufficiently rigorous.

Officials from at least one Western state -- Wyoming -- recently gave McCarthy and other top EPA officials a tour of an oil and gas site in part to defend the state's existing permitting practices.

At issue is when emissions from often sprawling oil and gas operations must be aggregated, or added together, for permitting purposes. Aggregation is a major issue for the industry because adding together the emissions means that the combined activities could exceed the Clean Air Act minor source permit limit, requiring more onerous major source permits. Disaggregation can reduce total facility emissions and allow minor source permits.

EPA has long used a three-factor approach to determine when to aggregate emissions from sources for the purposes of air act permitting requirements: whether activities are

under control of the same person, whether activities belong to the same industrial grouping, and whether activities are contiguous or adjacent.

But in 2007, former Bush EPA acting air chief William Wehrum issued a policy memo saying the distance between sources at oil and gas facilities -- such as wells -- should be a key factor for determining whether to aggregate emissions.

In September, McCarthy revoked Wehrum's memo, saying it attempted to "simplify" the permitting analysis. "In practice, however, I find individual facts warrant a close examination" of all three criteria EPA should use, not just an emphasis on distance, McCarthy wrote.

Activists have long criticized the Wehrum memo, saying the inter-dependency of oil operations is more important than proximity in determining whether wells should be grouped together. But industry argues that grouping widely dispersed sources is unfair and defies common sense. Industry tried to downplay the impact of McCarthy's Sept. 22 memo when it was issued.

Now some sources say that almost 10 months later, the Obama EPA is dissatisfied that it has prompted few, if any, changes in how states aggregate oil and gas industry emissions.

One state source says aggregation is difficult to apply consistently, given the industry's complexity. For example, many oil and gas activities have "multiple users and buyers of the same product from each well" and often a well and pipeline that feeds it have different owners, so "trying to define a facility boundary is complicated," the source says.

Another state source says EPA's criteria "weren't created with this complex and unique industry in mind. It works well for facilities that kind of stand by themselves," but questions arise with oil and gas facilities connected by pipelines. "The question is, where do you stop?"

**The industry source says despite McCarthy's memo, state permitting practices have not changed.** "Gina's memo fell into the black hole," the source says. "People are still constructing these wells" and not aggregating, so facilities are avoiding the emissions threshold trigger for Clean Air Act new source review (NSR) permits.

The source notes a real tension among states on the issue because they want to promote oil and gas development while avoiding onerous NSR requirements, which include mandates to analyze and install best available control technology (BACT), along with additional modeling and monitoring requirements.

Additionally, beginning Jan. 2, 2011, many oil and gas facilities will be subject to first-time carbon dioxide (CO2) and other greenhouse gas (GHG) permit limits, the source adds. Some facilities will likely exceed the thresholds set out in EPA's "tailoring" rule to

limit permitting because the GHG emitted most is methane, which is 20 times more potent than CO2, and the tailoring rule regulates GHGs based on potency, the source adds.

"If states have to permit [oil and gas] through NSR, that could basically stop future development in its tracks because it takes forever to get . . . a permit, and if they have to do CO2 next year, that will take even longer. Yes, states want to protect [air quality] but they also want the development." Further, the source notes many states do not have the resources to process so many additional NSR permits, which can take several years.

A New Mexico source says that while the state undertook a broad review of aggregation last year, the McCarthy memo "hasn't changed anything in terms of what we've permitted. It hasn't caused a compressor station or a gas plant to all of a sudden . . . aggregate with other things. . . . We're continuing to issue permits based on what we think is appropriate, case-by-case."

But an environmentalist says that oil and gas facilities are major sources of air pollution and need strict air permits. The source says EPA intervention is necessary because parts of the country "are just getting drilled to death, and we have this tool to reduce air pollution and states are thumbing their noses at it."

**As a result of the lack of changes to state oil and gas permitting,** sources say EPA's pending guidance will aim to boost aggregation.

But the Wyoming source says state officials recently sought to convince McCarthy, EPA Region VIII Administrator James Martin and other key agency officials that the state's existing permitting approach is adequate.

The EPA officials June 21 toured a Wyoming oil and gas development. During the visit, the source says, state officials also pressed their point on aggregation and urged EPA to consider different requirements for the West, where there can be miles between different sources. The state wanted to make sure "our concerns are understood because the guidance may not have the perspective of how the West does permitting for oil and gas." Eastern states with oil and gas facilities are generally located closer together, the source says. The aggregation question may not be answered the same way in the East as in the West, the source adds.

Wyoming requires minor sources of oil and gas production to meet "presumptive BACT" that includes installation of pollution controls to reduce emissions during development and operations, according to the state source. "In Wyoming, we have minor source BACT and a lot of time we use presumptive BACT because it allows construction to take place before the permit" is finalized, the source explains.

But the environmentalist criticizes Wyoming's approach because it only applies to new sources, rather than existing sources, a loophole the source says exacerbates the state's severe wintertime ozone violations attributable to emissions from the sector.

At the same time, an EPA Region VIII spokesman downplays the focus of the Wyoming trip on aggregation, noting it was one of a dozen topics discussed. An EPA headquarters air office spokesman declined to discuss the guidance or whether the trip was centered on aggregation, saying the meeting "was a long time in the works" and not "connected directly to anything."

**Meanwhile, environmentalists say they will soon file suit against EPA for failing to take over** a Colorado-issued permit it previously objected to due to concerns over the handling of aggregation.

EPA Administrator Lisa Jackson last October objected to an air permit Colorado issued to Kerr McGee/Anandarko, agreeing with activists that the state did not meet "requirements regarding the need to aggregate interrelated pollutant emitting activities and to appropriately define the source being permitted."

Environmentalists in January filed a 60-day notice-of-intent to sue EPA for failing to take over the permit, and a source says formal legal action is imminent to try to hold EPA's feet to the fire on the issue. They also filed a similar complaint against a New Mexico facility that EPA is reviewing.

Meanwhile, a Colorado source says the state will soon respond to EPA's objections in the permit, declining to elaborate on the aggregation issue while the response is in the works. -- *Dawn Reeves*

## EDITORIAL / OP-ED / COMMENTARY / LETTERS

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### Restoring the L.A. River (*Los Angeles Times*)

In bringing it under the protection of the Clean Water Act, the EPA has looked beyond the river's current condition to its long-past history, and future promise.
July 9, 2010
It's certainly a stretch to describe the Los Angeles River we all know as "traditionally navigable." But the Environmental Protection Agency's welcome designation, which is essential to the river's restoration, overturns previous decisions that made far less sense.

The EPA announcement Wednesday means the river will fall once again within the protection of the Clean Water Act, which, as written, applies vaguely to "waters of the United States." In a 2006 ruling, the Supreme Court unfortunately narrowed that provision to cover only "navigable waters." The court left room for administrative interpretation of what navigable meant, and the U.S. Army Corps of Engineers then chose the narrowest possible definition, saying that rivers must be not only navigable

but "traditionally navigable." Less than four of the river's 51 miles fall within that definition.

In essence, the EPA has restored the meaning of the word "river" in the waterway's title, rather than considering it, as the Corps of Engineers did, simply a flood control channel. Traditionally navigable rivers qualify for federal funding to remove pollutants and to be restored for recreational use. They are owed protection from development that would otherwise bury their tributaries — essential to maintaining flow — or add runoff that would foul their waters all the way to the ocean. Flood control channels, by contrast, are considered good for only one thing — to move water from the mountains to the ocean as quickly as possible.

The irony is that the L.A. River's usefulness for boats and other water craft was diminished by the same concrete liners on its sides and much of its bottom that made it so good at preventing floods. The channels also kept the water from staying in the river longer and raising its depth and prevented groundwater from adding to the flow.

Protection under the Clean Water Act sets the stage for a multitude of ambitious plans, including removing the concrete liners and using modern technology to provide both flood protection and natural habitat that can attract wildlife and encourage human recreation. Plans to create badly needed parks and green spaces along the river — which also would attract new shopping and other commerce — would receive priority consideration. Proposed developments near the headwaters in the San Fernando Valley and along tributaries could neither pollute the river nor bury or harm its tributaries.

The new designation has far-reaching implications for similarly paved rivers throughout Southern California, which were unfairly left out of the nation's water-protection scheme by the Supreme Court and Corps of Engineers. The EPA was right to look beyond the river's current condition to its long-past history, and future promise, as a truly navigable river with all the benefits such waterways bring to the regions through which they course.

July 8, 2010

**A Promise of Cleaner Air (*New York Times*)**

The Obama administration has proposed new air-quality rules that represent another important step in the long, litigious struggle to clean up older power plants. But there is still a considerable distance to go before Americans, especially those in large cities, can enjoy truly healthy air as envisioned by the Clean Air Act of 1970. That will require the administration to keep its promise to seek even tougher standards over the next two years, including restrictions on regulated pollutants like mercury.

The new rules refine and modestly improve on rules issued in 2005 by the Bush administration that were tossed out by a federal court on technical grounds in 2008. The Bush rules were unusually adventurous for an administration that otherwise did little to help the cause of cleaner air. They forced electric utilities to make major new investments in pollution-control technology.

The new rules are tailored to meet the court's objections, and presumably are more likely to survive legal challenge. They are aimed at reducing power-plant emissions of sulfur dioxide and nitrogen oxides produced by more than 900 coal-, gas- and oil-fired units east of the Mississippi. Sulfur dioxide produces deadly soot particles, as well as acid rain. Nitrogen oxides help produce the unhealthy smog that hangs over American cities, especially during oppressive heat waves like the one that has been smothering New York City and other eastern cities this week.

According to the Environmental Protection Agency, the new rules will reduce both pollutants by hundreds of thousands of tons a year and will yield $120 billion in annual health benefits by 2014. Between 14,000 and 36,000 premature deaths would be avoided, as would thousands of nonfatal heart attacks and cases of acute bronchitis.

The rules will also improve visibility in state and national parks and protect ecosystems sensitive to acid rain, including lakes and streams in the Adirondacks. Industry will be forced to undertake further investments in modern pollution controls, and some companies may choose to retire their dirtiest coal-fired plants. But the benefits of the new rules so plainly outweigh their estimated annual costs of $2.8 billion that the electrical utilities seemed resigned to them, however grudgingly.

That is unlikely to be the case with other E.P.A. rules now in the pipeline. Lisa Jackson, the agency's administrator, has promised by next year a rule that would impose controls on power-plant emissions of mercury, which are now unregulated. Industry has opposed such controls as too expensive and is almost certain to do so again. Also in the works are tighter health standards for ozone, due in 2012.

Ms. Jackson's task is to get the new smog and soot rules finalized, then stay the course.

**Our 'navigable' river (*Los Angeles Times*)**

July 9, 2010 Friday
Home Edition
Editorial Desk; Part A; Pg. 20
Our 'navigable' river;
The EPA has looked beyond the L.A. River's present flood control status and seen its future promise.

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July 9, 2010

**Coal and clean air (*Louisville Courier Journal*)**

People throughout the eastern United States could be breathing easier if new pollution controls go into effect on older power plants.

The U.S. Environmental Protection Agency is asking for a more stringent rule on sulfur dioxide and nitrogen oxide emissions from coal plants in 31 states (including Kentucky and Indiana) and the District of Columbia, an effort the agency said will save lives, save money in health care costs and improve educational and economic activity in affected areas downwind of the plants.

In addition to the human misery it causes, downwind pollution from such plants adds burdens on states to comply with clean air standards. The proposed rule has cap-and-trade provisions and could call for older plants to be modernized with scrubbers and other equipment to reduce the targeted dioxides, which form smog, soot and acid rain that blow beyond the range of the plants that produce them.

If enacted, the new controls would act in concert with other state and federal regulations to reduce 2005 levels of sulfur dioxide by 71 percent by 2014, and nitrogen dioxide would decrease by 51 percent.

"This rule is designed to cut pollution that spreads hundreds of miles and has enormous negative impacts on millions of Americans," said EPA Administrator Lisa Jackson. "We're working to limit pollution at its source, rather than waiting for it to move across the country."

A reduction in emissions would lead to other welcome reductions in people's lives. The EPA counts the ways: It estimates the proposed controls could prevent 14,000 to 36,000 premature deaths in a year's time, 23,000 nonfatal heart attacks, 21,000 cases of acute bronchitis, 240,000 cases of aggravated bronchitis and almost 2 million lost school or work days. Additionally, the EPA said the controls would also protect vulnerable ecosystems, including streams in the Appalachians.

While an energy lobbyist told *The Courier-Journal's* environmental reporter James Bruggers the rule would add to electricity costs, because some plants would shut down rather than modernize, the EPA said the $2.8 billion it would cost each year to comply would be far outweighed by the more than $120 billion in annual health and welfare benefits. E.On U.S., which operates LG&E and Kentucky Utilities, also told Mr. Bruggers it didn't anticipate much difficulty in complying with the new rule.

This proposal came about after a federal appeals court ruled two years ago that the Bush administration's 2005 Clean Air Interstate Rule needed to be revised. The EPA rolled out the new rule earlier this week, and will hold public meetings and take public comment for 60 days. The agency hopes to have the new controls in place by next June.

As a community only too familiar with smog alerts, let us hope so, too.

July 9, 2010

**EPA a big part of oil cleanup problem (*Jackson Sun*)**

The Gulf oil spill is a great disaster for the environment. It also illustrates what a great disaster the Environmental Protection Agency has been during this crisis. Syndicated columnist Thomas Sowell's comment about the laws Congress has passed establishing the omnipotent EPA: "Among the greatest external costs imposed in a society can be those imposed politically by legislators and officials who pay no costs whatever, while imposing billions of dollars in costs on others, in order to respond to political pressures from advocates of particular interests or ideologies."

This applies to what the federal government has not done since the sea floor volcano of oil began spewing into the Gulf of Mexico. There were many ships available since the beginning that would suck up the mess and process it to remove up to 98 percent of the oil. But the EPA said they could not put the remaining huge volumes of water back into the gulf that still contain 2 percent oil. This is not only absurd, it caused most of the continuing failure to get the oil off the water before it reached shore.

B. L. Bennett
Bolivar

**Feds out of room for rules you have to obey (*Washington Times*)**

July 9, 2010 Friday
SECTION: B, COMMENTARY; Pg. 3
Feds out of room for rules you have to obey;
How exactly do you follow the laws if nobody can find them?
By Katherine Miller SPECIAL TO THE WASHINGTON TIMES
Somewhere deep within the bowels of a generic government building is a room filled with boxes of papers - papers that directly affect your life. This room would be something like the warehouse at the end of "Raiders of the Lost Ark" - if only that warehouse were backroom storage space behind some cubicles. Instead of tripping over something vaguely interesting like the Ark of the Covenant, you would find the lost copy of the 1980 ASME Boiler and Pressure Vessel Code. EPA state implementation plans, FAA air-worthiness directives and regulations about highway workers' vests all find their final resting place here, in the Incorporation by Reference (IBR) library at the Federal Register - purgatory for the federal government's footnotes, located on North Capitol Street in Washington D.C.

Welcome to the dull, melody-less cousin to "How a Bill Becomes a Law," titled, "How a Federal Rule Ends Up at the Archives."

When the federal government writes a rule or regulation, the Federal Register publishes it. On June 24, for instance, the Register published the 2010 Specifications for the Spiny Dogfish Fishery in the Northeast - a page-turner, no doubt. And those pages add up. Last year, the Federal Register published 68,598 pages of rules and regulations.

Which brings us to the incorporated-by-reference material. When a federal rule cites something that's not a federally authored rule - i.e., the Measurement of Liquid Flow in Closed Conduits Using Transit-Time Ultrasonic Flowmeters - that material becomes, by proxy, part of the federal code and takes on the full force of law. Chief among these documents are things like FAA air-worthiness directives, which specify what each particular plane model needs to be considered up to code and EPA implementation plans for every state.

How many things have been incorporated by reference into the federal code? Nobody's sure.

Seriously. A 2006 publication celebrating the 70th anniversary of the Federal Register estimated that the federal body of law included more than 550 cubic feet of material incorporated by reference, but that's as close to an answer as anyone has. Let that marinate: No one is really sure how many documents have been incorporated into federal law.

Part of the problem, according to Amy Bunk, director of legal affairs and policy for the Register, is that not all of the IBR material is in one place. "Until 2003 ... we stored all the material," she explained. "We just ran out of space. As you can imagine, after 40 years, we just ran out of room."

So, now, after a sojourn in this federal-footnote purgatory, these documents referenced by the federal code are accessioned to the National Archives, where they'll remain indefinitely. Every time the FAA issues an air-worthiness directive, the Boeing Co or Airbus issues a service bulletin. Then that service bulletin is filed and put into a box at the Federal Register, and then that service bulletin goes to the Archives. FAA air-worthiness bulletins from the past decade alone take up four or five shelves worth of space in white boxes; the rest are at the Archives.

How much of this archived content has been superseded over the years? Nobody's sure about that, either.

The FAA frequently issues air-worthiness directives that update old ones. (This makes sense: Old planes need repairs all the time.) According to Ms. Bunk and Miriam Vincent, the other attorney who handles IBR material, there's no good way to know just how much incorporated material has invalidated other incorporated material. It doesn't matter anyway. Federal regulations require that all records be preserved in case of lawsuit and

to fulfill the definition of "archives."

But good luck finding something unless you really know what you're seeking. Mr. Bunk and Ms. Vincent said requests for material without specifics (the week a rule was published or its official title, for example) are extremely difficult.

Electronic archives, which would ease internal searches, are still a Candy Land fantasy. The Government Accountability Office last month released a report assessing the success of the National Archives plan for an Electronic Records Archive - now estimated to cost $567 million. The GAO found that the NARA is unlikely to complete the targeted system by its own goal of 2012. Electronic archives for IBR material are even further behind.

"We're hoping," Ms. Vincent said of the electronic-record project. "It's in its infancy. We think we have the structure."

They're still struggling with legitimate problems for the electronic effort - what do you do with microfilm records when nobody makes microfilm viewers anymore? But it all underscores the core issue. If you want to know the extent of the federal government's reach into your life, it's more than just the code of federal laws. It's more than the Code of Federal Regulations. The federal government is so big that the entire body of binding rules and regulations isn't online, can't be searched easily and occasionally runs out of storage space. And, oh, right: Nobody really knows how big it is.

Katherine Miller is a Collegiate Network Fellow with The Washington Times' Commentary section.

**Climate change: a collective flight from reality (*Washington Times*)**

July 9, 2010 Friday
COMMENTARY; Pg. 1
Climate change: a collective flight from reality;
Historical records reveal the facts about climate change - it's natural
By Roger Helmer SPECIAL TO THE WASHINGTON TIMES
Climate change isn't a threat. CO2 isn't a significant factor. But the action we're proposing to take on climate mitigation will devastate our Western economies and impoverish a whole generation.

Over the last hundred years, mean global temperatures have increased by 0.7 of a degree Centigrade. That's all. The whole climate scare is all about a fraction of a degree. According to Professor Phil Jones of the infamous Climate Research Unit at the University of East Anglia, there has been no significant warming for the last 15 years.

And the slight warming we have seen is entirely consistent with well-established, long-term natural climate cycles. We had the Roman Optimum (warm); the Dark Ages (cool); the Medieval Warm Period; and the Little Ice Age (when they had ice-fairs on the River

Thames in London). Over the last couple of centuries, we've been moving into what seems to be a new 21st Century Optimum. It's rightly called an "Optimum." Generally speaking, human societies do better in warmer weather.

When I raised this with the European Commission, they told me that recent changes were so sharp and rapid that they must be man-made. But 12,000 years ago in the Younger Dryas cold climate period, at the beginning of the current Interglacial, we saw temperature change at 10 times that rate. And there wasn't an SUV to be seen.

When I was at Cambridge in the 1960s, everyone knew that climate was cyclical and was driven largely by astronomical cycles. And there is good evidence that recent decades have also seen warming on Mars and elsewhere in the solar system - pointing to a solar cause.

But the Warmists have the bizarre idea that only CO2 matters. Certainly CO2 is a greenhouse gas, but it's not even the most important one. That's water vapor, and there's nothing we can do about it (as long as the wind blows over the ocean).

I'm horrified that the Environmental Protection Agency has declared CO2 a pollutant. They might as well declare oxygen a pollutant. We are a carbon-based life form, and CO2 is vital to the whole biosphere. Higher levels of atmospheric CO2 drive increased bio-mass formation and improved crop yields.

Al Gore is excited by a correlation between mean temperatures and CO2 levels over the past 600,000 years. He's right about the correlation, but he doesn't mention that the temperature graph leads the CO2 graph by several hundred years. The inescapable conclusion is that temperature drives CO2 - not vice versa.

Over the longer term, the correlation breaks down entirely. Current atmospheric CO2 levels are quite low in geo-historical terms. They have been 10 times as high in the past - and that was during an ice age. There is no tipping point. There is no runaway global warming.

Our efforts to control climate by reducing emissions are doomed to failure. Bjorn Lomborg, author of "The Skeptical Environmentalist" (Cambridge University Press, 2001), has studied the economics of climate change and estimates that the European Union's 20 percent emissions-reduction target will cost around $250 billion a year. Yet the impact by 2100 on global temperatures is likely to be only 0.05 a degree Centigrade - almost too small to measure.

The EU's "Cap 'n' Trade" scheme has been a disaster. It has imposed high costs on industry, achieved little or nothing and introduced very severe distortions into the market. As a conservative, I hate new taxes, but if we had to disincentivize CO2 emissions, a straight carbon tax would be a vast improvement (especially if offset against other taxes to be revenue neutral). It would be fair, inclusive and predictable, and avoid the distortions of Cap 'n' Trade.

They argue that Cap 'n' Trade is "a market-based solution." But it's a wholly artificial market, trading in a virtual commodity, and subject always to the whims of bureaucrats and legislators. The carbon price in the EU has been extremely volatile, and often close to zero. I appeal to America: Look at the European experience before you go down that route.

Don't believe the nonsense about "green jobs." President Obama likes to cite the Spanish experience. But recent reports from Spain show that most of the green jobs created were ephemeral, while high costs meant that each new green job cost two or more jobs in the real economy. They talk about the economic opportunities presented by green industries. But how can you achieve economic growth by doubling the cost of electricity?

So while the oil gushes in the Gulf of Mexico, and "peak oil" makes headlines, should we do nothing and pollute ad lib? Of course not. We should be very concerned about energy security. We should reduce our dependence on imported fossil fuels from unstable political regions.

At the margin, renewables have a role to play, if and when the price is right. But for the foreseeable future (at least until we get nuclear fusion), the mainstream base-load power we need to run our homes and our industries (and perhaps our electric vehicles) must come largely from nuclear and coal. Both the U.K. and the U.S. have coal reserves. We need to dig it up and burn it - and not worry about CO2. CO2 is not a pollutant. It's practically airborne fertilizer.

Roger Helmer is a member of the European Parliament for the East Midlands, England.

**AIR**

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**County fails EPA's air standard (*SalemNews.net*)**

By TOM GIAMBRONI
POSTED: July 9, 2010
LISBON - Columbiana County is among five Ohio counties found to have air pollution in excess of revised federal standards being enacted by the U.S. Environmental Protection Agency.

According to a story in the Columbus Dispatch, the county's air quality for sulfur dioxide exceeds the new maximum standards of 75 parts per billion an hour, the first such revision in regard to SO2 in nearly 40 years. The current standard is 140 parts per billion over 24 hours.

The story said the county was one of five that has estimated SO2 pollution in excess of the new standards, with the others being Belmont, Jefferson, Meigs and Morgan counties.

SO2 is produced primarily by coal-fired electric plants and some large industrial plants, along with motor vehicles. SO2 is a key component of smog, soot and acid rain, and also contributes to respiratory illnesses.

The new standard could raise electricity rates for some coal-fired electric plants forced to install improved expensive air pollution scrubbers to reduce SO2 emissions, while others

are simply opting to close plants come 2017. Companies found in non-compliance would also be required to take similar measures.

Heidi Griesmer of the Ohio EPA said whatever changes that come to the state will be gradual under the timetable established by their federal counterparts. Griesmer said they are required to install air monitors in the counties and collect data until 2014. Once that has been accomplished, the OEPA will have another three years to develop an action plan for complying with the new standards.

The state already has an air pollution monitor station in some locations, including East Liverpool.

The Associated Press contributed to this story.

Jul 8, 2010 10:18 pm US/Central

**Fracking Debate Catches Ear Of EPA (*CBS 11*)**

Melissa Newton
FORT WORTH
Its a concern for many living in the Barnett Shale.  The drilling debate drew hundreds of people to a meeting Thursday night in downtown Fort Worth.

The Environmental Protection Agency is discussing a massive new study on the safety of hydraulic fracturing, a process used to extract minerals from the ground.

It's a big concern in the small Denton County town of Dish.  "On top of our air quality we've had some water quality issues" said Mayor Calvin Tillman.

George Tillotson said his daughter, Amber Smith, has a contaminated water well. Her well sits 500 feet from a drilling site in Dish.

"Ever since they fracked the well they've had issues... My granddaughter has headaches that they can't explain."

"Just associating dirty water with nearby oilfield activity is not enough to say there is a relationship there" said Richard Varela, Sr. Vice President of TIPRO.

According to industry experts, hydraulic fracturing is not only safe, but necessary in the Barnett Shale.

"Rocks like shale are so tight that if you drill through them they won't give up gas unless you fracture them" Varela said.

To do that, drilling companies use a geled water solution, but some fear what's in that solution is contaminating their water supply.

"There is much evidence that there is damage from hydraulic fracturing" said Faith Chatham of the DFW Regional Concerned Citizens.

"We don't know if it is actually contaminating the water or not" said Candice Brewer, President of the Texas chapter of the National Association of Royalty Owners, "There haven't been scientific studies."

That's exactly what the EPA plans to do. The agency will soon launch a nationwide study on the impact the fracturing process could have on drinking water, human health, and the environment.

"That's going to help longterm but it's not going to help my daughter" Tillotson said, "It's not going to help her at all."

The EPA gathered public input from more than 400 people who signed up to speak, Thursday. The results of the study will not be available until late 2012.

**Air Quality Action Day Forecast on July 9 in the Liberty/Clairton Region (*Centre Daily Times*)**

Pennsylvania Department of Environmental Protection
July 8, 2010 5:51pm EDT
HARRISBURG, Pa., July 8 — /PRNewswire-USNewswire/ -- The Department of Environmental Protection and its regional air quality partnerships have forecast an air quality action day for Friday, July 9, in the Liberty/Clairton region. The air quality forecast predicts Friday will be code ORANGE for fine particulate matter.

The Liberty/Clairton region in southeastern Allegheny County includes Clairton, Glassport, Liberty, Lincoln and Port Vue boroughs.

The U.S. Environmental Protection Agency's standardized air quality index uses colors to report daily air quality. Green signifies good, yellow means moderate, orange represents unhealthy pollution levels for sensitive people, and red warns of unhealthy pollution levels for all.

Fine particulate matter, or PM 2.5, has a diameter of less than 2.5 micrometers, about one-thirtieth the diameter of a human hair. These particles can get deep into the lungs and can cause significant health problems. PM 2.5 has been determined to be most closely associated with health effects related to increased hospital admissions and emergency room visits for heart and lung disease, increased respiratory symptoms and disease, and decreased lung function.

Ground-level ozone, a key component of smog, forms during warm weather when pollution from vehicles, industry, households and power plants "bakes" in the hot sun, making it hard for some people to breathe.

On air quality action days, young children, the elderly and people with respiratory problems, such as asthma, emphysema and bronchitis, are especially vulnerable to the effects of air pollution and should limit outdoor activities.

To help keep the air healthy, residents and businesses are encouraged to voluntarily limit certain pollution-producing activities by taking the following steps:

These forecasts are provided in conjunction with the Air Quality Partnership of the Delaware Valley, the Southwest Pennsylvania Air Quality Partnership, the Lehigh Valley/Berks Air Quality Partnership, and the Susquehanna Valley Air Quality Partnership.

For more information, visit www.depweb.state.pa.us, keyword: Air Quality Partnership.

Media contact: John Repetz, 717-787-1323

SOURCE Pennsylvania Department of Environmental Protection

**Texas Offers Refinery Permit Changes on EPA Challenge (*Bloomberg Businessweek)***

July 08, 2010, 4:27 PM EDT
By Katarzyna Klimasinska

July 8 (Bloomberg) -- Texas's environmental regulator, which oversees more than one-fourth of U.S. refining capacity, proposed changes to air permits targeted by the Environmental Protection Agency for failing to comply with federal law.

The plan would allow refiners and chemicals producers to voluntarily seek state permits setting emissions limits on specific processing units, the Texas Commission on Environmental Quality said today. The U.S. EPA said earlier this year that permits for operations owned by such companies as Chevron Corp., Valero Energy Corp. and BP Plc didn't comply with the Clean Air Act because pollution limits were only for whole plants.

The state proposal is "the way to resolve the dispute," said Patricia Finn Braddock, a partner at law firm Fulbright & Jaworski LLP in Austin, Texas, which represents owners of some of the 122 plants with permits challenged by the EPA. Texas Governor Rick Perry sent a letter to President Barack Obama in May saying the EPA's actions were "unwarranted" and would "kill good American jobs."

Matthew Tejada, executive director at Air Alliance Houston, said the Texas proposals isn't "anything of great significance" because companies probably won't voluntarily forgo their current state permits. Tejada's group, formed in April, seeks to reduce air pollution in the Houston area.

The EPA is reviewing the Texas commission's proposal, said Dave Bary, spokesman for the federal agency.

--Editors: Tony Cox, Tina Davis.
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07/09/2010

**EPA Interstate Pollution Rule Offers Limited Trading To Avoid Legal Pitfalls (*Inside EPA*)**

EPA's recently released proposal for a cap-and-trade program to cut nitrogen oxide (NOx) and sulfur dioxide (SO2) emissions from power plants in 31 states would dramatically limit the ability of utilities to trade emission credits, in a bid to avoid legal challenges to EPA's authority on trading programs, an issue that sank a Bush-era version of the rule.

Even with EPA's expressed confidence in the legality of its proposed replacement for the Bush administration's Clean Air Interstate Rule (CAIR) trading program, a key

lawmaker is warning the rule is "complicated" and open to litigation. Sen. Thomas Carper (D-DE) says that while he welcomes EPA's July 6 proposed Clean Air Transport Rule (CATR), Congress should pass his bill to create a similar regional NOx and SO2 cap-and-trade program.

EPA is also acknowledging that its proposal would fail to ensure that every area of the country would reduce pollution sufficiently to come into compliance with the agency's national ambient air quality standards (NAAQS), and EPA's top air official says additional pollution cuts from other sources will be necessary for that goal.

States and environmentalists are offering early praise for the proposal, though they might push for EPA to set tighter caps on the two pollutants in the final version of the rule. Industry however is raising early concerns that EPA's "inflexible" attempts to limit pollution credit trading may boost costs and hinder compliance.

EPA is proposing to require 31 states and the District of Columbia to cut power plant emissions of NOx -- a precursor to ozone formation -- and SO2, which contributes to particulate matter (PM) pollution. The rule would require emission cuts starting in 2012, with a goal of cutting SO2 emissions by 71 percent over 2005 levels by 2014. Under the rule, NOx emissions would have to be reduced 52 percent over 2005 levels by 2014.

CATR would replace CAIR, a cap-and-trade system to cut NOx and SO2 in 28 states and the District of Columbia. Following lawsuits, the U.S. Court of Appeals for the D.C. Circuit remanded that rule to EPA in a 2008 ruling, which questioned the agency's basis for the trading program. The court found that the rule illegally failed to quantify upwind states' relative contributions to the non-attainment by downwind states of federal air quality standards. EPA previously said it was working to address the legal flaws the court found in CAIR.

EPA is expressing confidence that by limiting trading in its replacement proposal, combined with extensive research on the rule's potential emissions cuts and other safeguards, CATR will withstand the type of legal challenge that saw CAIR remanded to the agency. The agency offers a preferred approach for reducing NOx and SO2 and takes comment on two alternatives. *Relevant documents are available on InsideEPA.com.*

Under EPA's preferred approach, the agency would set a state-specific pollution cap for each state subject to the rule, and power plants would be able to buy allowances to enable them to pollute in excess of their state's emissions limit for SO2 and NOx up to a maximum of 10 percent excess emissions per state. The system would also allow limited emissions trading within states beneath the state-specific limits established by the rule.

Under an alternative approach, states could opt for a state-specific cap, but with emissions trading only within the state. Under a second alternative, EPA would set a

pollution limit for each state in combination with allowable emission limits for each power plant, but allowing for some averaging of emissions across multiple power plants.

EPA air chief Regina McCarthy said on a July 6 conference call that some flexibility is necessary to account for wide variations in electrical demand, so setting permanent caps for power plants would not be preferable.

McCarthy told EPA's Clean Air Act Advisory Committee Feb. 3 that EPA is "not going to make the mistakes of the past" and that the CAIR replacement will withstand legal scrutiny. The agency in its proposal discusses the legal history behind CAIR's remand and justifies the new proposal as consistent with the Clean Air Act.

McCarthy on the July 6 conference call said the cap-and-trade system proposed would be legally defensible because the emission limits for each state are the product of "many, many months of modeling" to quantify what level of cuts is necessary to meet regulatory standards. A few areas would be unable to attain NAAQS under the rule because of intractable problems with pollution that cannot be addressed by a transport rule, she said.

In contrast, the Bush EPA based CAIR on cost-effectiveness, rather than quantified emissions cuts to achieve air quality goals, McCarthy said, making it more vulnerable to suits under the Clean Air Act's "significant contribution" clause, which says that states must address their contribution to other state's noncompliance with air rules.

**However, any degree of emissions trading is seen by environmentalists as controversial,** especially the trading of emissions across state lines, if its fails to achieve emissions cuts from specific pollution sources.

The National Association of Clean Air Agencies (NACAA), which represents state and local air regulators, has said that any CAIR replacement should include some pollution control technology mandates, in addition to any trading. This approach would ensure that major pollution sources do not impair attainment in a downwind area, NACAA says.

EPA says the rule would exceed CAIR by cutting SO2 by 6.3 million tons and NOx by 1.4 million tons compared to 2005 levels by 2014, in combination with other federal measures designed to cut SO2 and NOx. McCarthy said the agency selected 2005 as a base year because that was the year CAIR became operative.

It is unclear how the proposal compares with an annual cap under Carper's bill of 1.39 million tons of NOx during the period 2012-14, and 3.5 million tons of SO2 during the same period -- in particular because the caps in Carper's bill, S. 2995, do not factor in emission cuts from other federal measures that EPA is relying on. Carper argues that his bill would help avoid delays in reducing pollution that could spring from a lawsuit over CATR.

McCarthy on the conference call cautioned that the rule "doesn't compare directly with Senator Carper's intent," in seeking to meet future regulatory standards, and hence no "apples-to-apples" comparison is possible.

Carper said in a July 6 statement that the EPA proposal "underscores the need for Congress to step up to the plate and pass legislation that adequately addresses this complex and critical issue." Carper said that his proposed emissions cuts are steeper than those proposed so far by EPA. Some activists had urged EPA to propose stricter caps than Carper so that if his bill does not become law there would be a strict regulatory backstop.

Still, one industry source says EPA appears to have "substantially increased" the stringency of CAIR in the proposed replacement. "It is clear that technical experts in state regulatory bodies, grid operators and industry will be studying this rule very closely from a reliability perspective," the source says.

The American Lung Association in a July 6 statement said that the proposal "ensures greater pollution reductions" than CAIR, and environmental groups also issued statements supporting the plan.

**States are offering tentative praise for the proposal but suggesting they could call for stricter caps** in their upcoming comments on CATR. Laurie Burt, commissioner of Massachusetts' environment department and chair of the Ozone Transport Commission of states, said, "We are relying on EPA to set the most stringent caps that are feasible in the final transport rule to ensure additional emission reductions." Burt said those additional emission reductions are necessary to meet what is expected to be EPA's stricter final ozone NAAQS due in August.

On the conference call, McCarthy said the proposal would not secure all the pollution cuts necessary to meet EPA's air standards. "[W]e don't have all of the solutions in place clearly for ozone," she said, adding that CATR would not ensure that all areas will meet applicable agency standards for fine PM.

EPA will issue a second CATR in summer 2011 to include tougher emissions limits to take into account the new ozone NAAQS, plus EPA rulemakings in other areas such as New Source Performance Standards for power plants, to be proposed in March, and a new PM NAAQS due for proposal in February. -- *Stuart Parker*

07/09/2010

**Key Senate Democrats May Be Preparing Multiple Utility-Only Carbon Plans (*Inside EPA*)**

Key Senate Democrats appear to be developing separate proposals for a utility-focused carbon price as an alternative to broader climate legislation, amid continuing questions over who -- besides Senate Majority Leader Harry Reid (D-NV) -- will be the point person on the effort in the chamber.

According to several sources closely tracking the issue, Sen. John Kerry (D-MA) is quietly developing new utility-focused language in an effort to prepare a fallback to the broader climate and energy discussion draft he floated with Sen. Joseph Lieberman (I-CT).

Senate Energy & Natural Resources Committee Chairman Jeff Bingaman (D-NM), meanwhile, told reporters following a June 29 bipartisan meeting of senators at the White House that he has been developing draft language for the utility sector but that he will only introduce it if it can get adequate support.

One source close to the utility industry suggests that multiple approaches could lead to confusion. "I am just hoping they can figure out in next couple of days who is taking the lead" on the effort, the source says, noting that a utility-only approach may be the last potentially viable option for moving carbon controls this year.

Kerry's office did not respond to multiple inquiries on the issue, and Lieberman's office provided a general statement saying only that the senator and his staff are "actively working to advance a climate and energy bill" for consideration after the July 4th recess.

Talk of a utility carbon price approach -- or even multiple utility-centric plans -- comes with the Senate climate and energy agenda still foggy after the June 29 White House meeting where President Obama urged action on a carbon price but did not tie himself down to the details, according to lawmakers present.

Questions still open after the meeting include the relationship of oil spill language to a broader climate and energy package, and the extent lawmakers will wade into the issue of utility controls for non-greenhouse gas pollutants -- a priority for some lawmakers, including Sen. Tom Carper (D-DE).

After that meeting, Kerry and Lieberman reiterated their openness to scaling back their climate discussion draft, though Lieberman called a utility-focused plan just "one approach" on the table.

Adding to the mix, Sen. Olympia Snowe (R-ME) June 29 issued a statement describing a utility-focused climate bill as "one possibility" for moving forward a "uniform nationwide system solely on the power sector." Snowe is working with Bingaman on his proposal, according to a source. The starting point for the discussion is a 17 percent cut in emissions by 2020, and there is interest in including a hard cap on allowance prices, the source says.

**A Senate source stops short of acknowledging that competing utility-only plans** may be in the works but adds, "It would be our preference that does not happen." It appears that Bingaman now has a turn "at bat" on the issue, another Senate source says, while cautioning that major deviations from compromises reflected in the Kerry-Lieberman draft risk slowing the process further.

If a utility-centric plan is to gain momentum, the extent to which it offers Clean Air Act relief will become a critical point of contention, according to sources both on and off Capitol Hill. Industry sources and environmentalists have been predicting that under such a scenario, industry calls for additional air law flexibility for the sector on non-greenhouse gas controls are likely. "That will probably be on the table," says one source close to utilities. As an example, the source cites Sen. Richard Lugar's (R-IN) recently floated energy proposal, which includes language that would exempt from some emissions control mandates power plants that agree to a date certain for retirement.

However, a key representative of state and local air quality regulators is warning that the officials may oppose federal legislation to create a "utility-only" carbon price -- as some are suggesting the Senate may consider -- if the bill becomes a venue for weakening existing Clean Air Act authority for criteria pollutants and air toxics.

"We would be better off not seeing legislation passed if the price of legislation is restricting the climate program to only utilities and scaling back authorities currently in law to regulate criteria pollutants from the utility sector," says Bill Becker, executive director of the National Association of Clean Air Agencies, a group that represents state and local air quality regulators.

While calling talk of narrowing carbon controls to the utility sector "disappointing but certainly understandable" given an increasing time crunch on Capitol Hill ahead of November mid-term elections, Becker calls a possible weakening of the Clean Air Act provisions for so-called conventional pollutants in exchange for limits on greenhouse gases is "not a deal worth cutting."

One source close to utilities says talk of a power sector-focused cap-and-trade approach is prompting an array of questions within the industry, including over how the carbon emissions cap in the legislation would be adjusted to regulate just one sector. The source says calls for additional Clean Air Act concessions are likely to be "on the table."

**EPA transport rule sets fast-track for compliance (*Power-Gen Worldwide*)**

In a proposal aimed aimed at cutting emissions from power plants in 31 states and the District of Columbia, the U.S. Environmental Protection Agency (EPA) Transport Rule announced on July 6 calls for reductions in sulfur dioxide (SO2) and nitrogen oxide (NOx) emissions that drift across state lines. Emissions reductions would come into

force by 2012, just one year after the rule is finalized. By 2014, the rule, along with other state and EPA actions, is expected to reduce power plant SO2 emissions by 71 percent over 2005 emissions. Power plant NOx emissions would drop by 52 percent over 2005, according to EPA.

The proposed rule would replace EPA's 2005 Clean Air Interstate Rule (CAIR), which was thrown out by a federal court in 2008. EPA will take public comment on the proposed new rule for 60 days following publication in the Federal Register.

Compliance

EPA anticipates that power plants may use several different avenues to attain regulation standards. Power plants may operate already installed control equipment more frequently, use low sulfur coal, or install control equipment such as low NOx burners, selective catalytic reduction, or scrubbers (flue gas desulfurization). According to EPA, the annual direct costs to the power sector of complying with the proposal is $2.8 billion.

Gina McCarthy, EPA assistant administrator for air and radiation, said EPA doesn't foresee many power plants shutting down as a result of the rule. She also indicated that the rule affects not only coal-fired plants, but all electric-generated units that are fossil-fueled.

Melissa McHenry, spokesperson for American Electric Power (AEP), said that based on preliminary review of the new EPA rule, AEP should be in good shape to address the rules near term.

"We're wrapping up a very significant environmental retrofits program we started in 2004. A lot of our large power plants are already prepared for controls with SO2 and NOx."

McHenry said some older plants will need to be retired since the cost of a scrubber to reduce air emissions would be more than the value of the plant itself. Still others will convert to lower sulfur coals, or install SO2 scrubbers.

Block Andrews, strategic environmental solutions associate with Burns & McDonnell, said the EPA's requirements will be challenging for many power plants to achieve.

"EPA claims that if we operate at the maximum design level, as well as adding some fuel switching, then we can get there. My gut feel is that it's going to be difficult. If we assume that EPA is right, I believe the reductions that may be required by 2012 will be difficult to achieve without additional controls, Trona (Na3H(CO3)2·2H2O) or sodium bicarbonate (NaHCO3)."

Favor for Natural Gas?

One suggestion EPA put forward for power plants to meet the new guidelines is a switch to low-sulfur coal. W. Randall Rawson, president and CEO of the American

Boiler Manufacturers Association, said he sees this as a disguised move toward promoting using more natural gas.

“There are a lot of other regulations in the pipeline that are anti-coal. I think that’s the thrust of the government these days: to not necessarily accommodate cleaner coal, but to do away with coal altogether,” Rawson said.

Andrews said the short time frame EPA has established limits companies from switching either to natural gas or a lower sulfur coal by the deadline.

“Many companies and municipalities have a contract with a coal supplier that could run through 2014, so such a change can’t take place overnight. With natural gas, you have to get the right permits; you simply could not get the replacement of gas in a timely manner.

Andrews said the adjustments plants make will be limited due to the time crunch. “By 2012, you certainly couldn’t put in a scrubber.” He said markets for Trona and sodium bicarbonate are small and could be swamped. “The only other option is to run your unit less.”

Rawson said the implementation of the new rules will be achievable but costly to those affected.

“We have the boiler technology and the boiler-related equipment and systems technology to get it done.” But on a short time line, “it’s going to be expensive,” Rawson said.

A Challenge for EPA

Jeff Holmstead, a former EPA air administrator and now a partner at Bracewell & Giuliani LLP and counsel to the Electric Reliability Coordinating Council, said it has been “a challenge for EPA to develop a rule that achieves the air quality objectives of the previous CAIR rule while preserving the flexibility and cost-effectiveness of its original design.”

In its fact sheet, EPA states: “The rule would not disrupt a reliable flow of affordable electricity for American consumers and businesses.” However, Holmstead said the rule’s increased stringency could make affordable electricity something more difficult for power companies to provide.

He said technical experts in state regulatory bodies, grid operators and industry will be studying this rule very closely from a reliability perspective. “Hopefully, the rule won't set up an unfortunate choice between environmental compliance and keeping the lights on,” Holmstead said.

PPL Generation, based in Allentown, Penn., is already prepared to comply with the new regulations. In addition to converting its Martins Creek, Northampton County, coal-fired

power plant to natural gas in 2007, PPL has also installed $1.5 billion in pollution scrubbers at its two Pennsylvania coal plants since 2005 in anticipation of new regulations being enforced.

"That work is going to put us in a pretty good position to meet what we expect to be the requirements of the new regulations," PPL spokesman George Lewis told The Morning Call newspaper.

More information on the proposed rules and details on how to comment on the proposal are available at http://www.epa.gov/airtransport.

07/09/2010

**Key Lawmaker Argues Recent NEPA Ruling Compels Pipeline GHG Analysis (*Inside EPA*)**

House energy committee Chairman Henry Waxman (D-CA) is citing a recent federal district court ruling to argue the State Department is legally required to assess the potential increases in greenhouse gas (GHG) emissions from the production of Canadian tar sands before it approves a controversial pipeline project to transport the carbon-intensive fuel source to U.S. refineries.

The State Department has so far declined to review the GHG impacts in Canada of bringing to the U.S. market major new supplies of tar sands oil, the production of which is significantly more energy intensive than conventional petroleum. Environmentalists argue importing more supplies of tar sands into the U.S. will undermine the fight against climate change, targeting the pipeline as perhaps the most visible example of the country's rising dependence on what Waxman terms the "dirtiest source of transportation fuel currently available." Some labor unions, however, including the Teamsters, are pushing the Obama administration to quickly approve the pipeline project, saying it will bring needed construction jobs.

In a July 2 letter addressed to the State Department's lead official on the pipeline project, Waxman says the department is bound to consider the climate impacts of increased tar sands production not just in the U.S., but in Canada as well. To back his case, he cites both Council on Environmental Quality (CEQ) guidance on implementing the National Environmental Policy Act (NEPA), as well as a recent ruling by the U.S. District Court for the District of Columbia that said federal agencies must consider the "transboundary effects" of their decisions. *The letter is available on InsideEPA.com.*

In its March 3 decision in *Government of the Province of Manitoba, et al., v. Salazar, et al.*, the court ruled that the Interior Department (DOI) failed to fulfill its legal obligations under NEPA by not assessing the environmental impacts a water pipeline project in North Dakota could have within Canada.

In light of the case law and CEQ's previous guidance, "The State Department's position [on Keystone XL] is legally highly vulnerable and it does not make sense," Waxman asserts in his letter. "The whole purpose of NEPA is to ensure that federal agencies understand the potential environmental consequences of a proposed government action and consider alternatives that would avoid or minimize such consequences. That purpose cannot be fulfilled here absent a detailed analysis of the full global warming impacts of the Keystone XL project."

**At issue is the State Department's pending permit for the Keystone XL pipeline,** which would have the capacity to transport up to 900,000 barrels per day of tar sands oil from the Canadian province of Alberta to refineries in Texas more than 1,600 miles away.

In accordance with NEPA, the department released a draft environmental impact statement (EIS) on the project in April, but declined to consider the GHG impacts of the project either within the U.S. or in Canada as a result of increased tar sands production, arguing that neither internal regulations nor a related executive order "require [the department] to analyze the environment or activities outside the United States."

The department took comment on the draft EIS until July 2. An interagency review to determine whether the project is in the U.S. "national interest" is set to be completed July 16.

Waxman, however, points to longstanding NEPA guidance issued by CEQ directing federal agencies and departments to consider the environmental ramifications of their policies abroad. Waxman also notes CEQ's recent draft guidance directing agencies to incorporate climate change considerations into their EIS', and asks the department to withhold a final decision on the pipeline until that guidance is finalized; 50 House Democrats asked the same thing in a June 23 letter to Secretary of State Hillary Clinton.

If approved, Waxman maintains that the pipeline project would seriously hinder Canada's ability to reduce its own carbon footprint, given that fuels derived from tar sands may emit as much as a third more GHGs than those from conventional oil, according to recent studies, and that the Canadian government itself projects tar sands production will account for just under half of the country's growth in emissions over the next decade. "Yet the draft EIS does not address these concerns."

"The State Department should ask EPA, in consultation with the Department of Energy, to provide an estimate for lifecycle emissions for tar sands," Waxman writes. The department "should then issue a supplement to the draft EIS that would allow for public comment on the estimate and an associated analysis of the full transboundary environmental effects," with the supplemental draft EIS "informed by and consistent with final CEQ guidance on addressing climate change under NEPA."

**An attorney with Earthjustice, one of several environmental groups challenging** the tar sands pipeline, praises Waxman for drawing attention to the district court's

decision in *Manitoba*, which the source argues is but the latest court confirmation that -- while NEPA does not apply to projects undertaken entirely abroad -- "when there's a direct connection between a project that takes place in the U.S. and impacts that happen over the border in Canada, agencies must take that into account."

In the *Manitoba* case, DOI maintained it had no duty to take a "hard look" at the potential impacts of a water pipeline because NEPA does "not require assessment of environmental impacts within the territory of a foreign country," the district court's ruling notes.

Judge Rosemary Collyer, however, dismissed DOI's position, citing CEQ's NEPA guidance on her way to concluding that the law "requires agencies to consider reasonably foreseeable transboundary effects resulting from a major federal action taken within the United States." Accordingly, she wrote, the department "must include in its analysis the impact in Canada."

In a footnote, Collyer goes on to suggest that, while lawyers for DOI had argued CEQ's NEPA guidance "is not binding on agencies or entitled to substantial deference by courts," that fact "does not sap it of all persuasive authority."

Critics of the pipeline project say their legal arguments against the State Department's EIS are also bolstered by a 2003 federal court ruling in California. In *Border Power Plant Working Group v. Department of Energy (DOE)*, the court ruled DOE violated NEPA by not assessing in its EIS increases in GHG emissions from Mexican power plants that would result from its approval of cross-border transmission lines that would carry electricity into Southern California.

While the Earthjustice attorney says the legal rulings bolster efforts to force a review of the pipeline's projected climate impacts, the source says it is unlikely the interagency review of the project set to be completed July 16 will bring much good news for environmentalists.

"It's unclear how meaningful the agencies' input can be when they don't have the full and final information on what the impacts of the project will be," the attorney says. Based on past pipeline reviews, "it seems like a rubber stamp process." -- *Charles Davis*

**BP OIL**

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**Angle: BP relief program is 'slush fund' (*Nevada Appeal*)**

WASHINGTON (AP) — Republican Senate candidate Sharron Angle said Thursday she was wrong in calling BP oil's $20 billion victims' compensation program “a slush fund,” backtracking just hours after her widely criticized remark.

Angle told a Las Vegas radio station on Wednesday that President Barack Obama strong-armed BP executives to set up the fund after the April 20 oil rig explosion that sent gallons of oil spewing into the Gulf of Mexico. The worst oil spill in the nation's history has affected all five Gulf Coast states and scores of businesses, such as fishing and tourism.

Appearing on KXNT, Angle agreed with a caller who said Obama forced BP executives to establish the fund.

“Government shouldn't be doing that to a private company and I think you named it clearly, it's a slush fund,” Angle said.

On Thursday, Angle issued a statement saying she was wrong.

“Having had some time to think about it, the caller and I shouldn't have used the term 'slush fund'; that was incorrect,” Angle said. “My position is that the creation of this fund to compensate victims was an important first step — BP caused this disaster and they should pay for it.”

Her Democratic rival, Senate Majority Leader Harry Reid, seized on the comment, and Obama ridiculed her for it at a fundraiser for Reid Thursday night in Las Vegas.

“I'm sure she meant 'slush fund' in the nicest possible way,” said Obama, without mentioning Angle by name.

Reid spokesman Kelly Steele said: “Angle's anti-government rants are entirely consistent with her opposition to the $20 billion escrow account — a fund designed explicitly to prevent taxpayer bailouts and make BP clean up their own mess — as well as her position that we should dismantle the EPA in the middle of the worst environmental disaster in American history.”

Angle has previously been forced to backtrack on her suggestion that Washington phase out Social Security and Medicare in favor of private accounts. She now says she favors dedicated Social Security dollars and private accounts.

Angle is not the first Republican to try to take back her words about BP oil.

During hearings last month, Texas Rep. Joe Barton apologized to a BP executive for what he called a “shakedown” of the private company. Republican House leaders immediately issued a statement disagreeing with Barton. Threatened with the loss of his seniority, the Texas lawmaker withdrew his apology.

Obama met with BP executives at the White House last month and emerged from the meeting with a $20 billion commitment from the company to pay fishermen whose businesses were affected and to clean up the Gulf.

BP publicly backed the plan.

“From the outset, we have said that we fully accepted our obligations as a responsible party. This agreement reaffirms our commitment to do the right thing,” BP chief executive officer Tony Hayward said when announcing the plan.

During her interview, Angle also said the entire industry shouldn't have to pay for the spill. Only BP is funding the victims' fund.

“Everyone in the petroleum industry shouldn't be penalized for one bad person's actions. It would be like throwing us all in prison because one person committed murder. And that's exactly what's going on here,” she said. “It's an overreaction by government for not the right reasons. They're actually using this crisis ... to get in cap and trade and every fine and penalty and slush fund, like you said.”

Angle, a former state lawmaker, seemed to suggest the oil industry was regulated by the EPA. Offshore drilling, however, was overseen by the Minerals Management Service, a part of the Interior Department.

“The problem with even the EPA is that it's all about money. It's a taxing, fining agency. What we really needed was a management agency,” said Angle.

Angle's remarks were first reported Thursday on The Washington Post's website.

**EPA: Moderate health concerns with Gulf air (*Associated Press*)**

By CAIN BURDEAU (AP)

NEW ORLEANS — The Environmental Protection Agency says the air in some places along the Louisiana coast poses a health risk to vulnerable people.

The EPA says recent air sampling shows a moderate health risk in Venice and Grand Isle, two Louisiana towns about 50 miles from the Deepwater Horizon oil spill site.

The agency says anyone unusually sensitive to low-quality air should avoid "prolonged or heavy exertion."

EPA's warning comes as concerns grow that the Gulf oil spill may be fouling not just the water and shores but also the air.

The agency says the levels of chemicals found in air samples have not been linked directly to the BP spill. But odor-causing pollutants associated with oil have been detected.

Online:

EPA response on BP spill air quality: http://www.epa.gov/bpspill/air.html

07/09/2010

**EPA Faces Mandate For New Dispersant Rules Under House Oil Spill Bill (*Inside EPA*)**

A key House panel has approved a bill that directs EPA to toughen its requirements for the use of oil dispersants -- including eliminating pre-approvals and requiring disclosure of chemical compositions -- while clarifying the agency's authority in responding to oil spills, lifting economic and environmental damage caps and implementing a host of additional policy changes in response to the BP oil spill in the Gulf of Mexico.

The House Transportation & Infrastructure Committee on July 1 approved by voice vote the wide-ranging "Oil Spill Accountability and Environmental Protection Act of 2010," H.R. 5629, the first proposal for regulatory revisions in response to the spill to emerge from a House committee.

Other panels, including Energy & Commerce, Natural Resources and Judiciary, are crafting their own measures to respond to the spill, but it remains unclear how the various measures will be combined and when they will move to the House floor. *Relevant documents are available on InsideEPA.com.*

The committee also adopted one contentious amendment that lifts the exemption from stormwater permitting requirements for oil and gas project construction granted by the 2005 energy law. Introduced by Rep. Michael Arcuri (D-NY), whose district includes a growing number of natural gas hydraulic fracturing operations, the amendment drew objections from committee ranking member John Mica (R-FL), who said he was concerned about how the amendment was drafted, as well as from Democratic Rep. Harry Teague (NM), who said it was unfair to require oil and gas companies to procure the same construction permits as real estate developers and could cost his district jobs.

Committee Chairman James Oberstar (D-MN) proceeded with a voice vote on the amendment -- the only such time he did not ask that an amendment be withdrawn in the face of GOP objections -- noting that the exemption was added to the 2005 law by the Energy & Commerce Committee, even though they do not have jurisdiction over water issues, and arguing that it was necessary to return the law to where it was before the

2005 energy law passed. "That was an end-around . . . on the Clean Water Act," Oberstar said of the exemption.

Arcuri's amendment was the only one adopted outside of a package of seven amendments that Oberstar and Mica said they agreed to beforehand that passed together at the outset of the markup.

Several other amendments were offered and withdrawn, with their authors vowing to try again to implement their desired changes to the bill.

Rep. Jerrold Nadler (D-NY) introduced and withdrew an amendment that would have immediately halted the use of dispersants in response to the ongoing oil spill in the Gulf of Mexico and any future spills, until completion of a study of their health and environmental effects required elsewhere in the bill. Nadler said he feared EPA was not doing enough to ensure the health and safety of workers responding to the spill, comparing it to workers who assisted in the clean-up of Ground Zero after the Sept. 11 terrorist attacks and are still suffering poor health because of contamination at the site. "It seems the most elementary thing we can do," Nadler said of studying dispersant safety before using them further.

The committee bill would require several new actions from EPA regarding approval of dispersants, which are toxic chemicals that help break up oil slicks and spread oil particles throughout the water column. EPA has faced heavy criticism -- emphasized by Nadler and several other committee members at the hearing -- for the extent to which it did not have a full picture of dispersants' environmental and health effects before approving their use.

Under H.R. 5629, EPA also would be required to implement a new rulemaking within 15 months to revise the National Contingency Plan product schedule, which lists approved dispsersants that can be used in response to a spill. The bill requires the agency to continuously increase the minimum effectiveness and toxicity testing criteria of dispersants on the product schedule; receive independent testing of those measures provided by manufacturers; and establish quantity thresholds beyond which use of dispersants would not be allowed.

So far, in response to the ongoing Gulf spill, more than 1.6 million gallons of dispersant have been dumped in the Gulf -- an unprecedented quantity, about which EPA acknowledges the long-term effects are unknown.

The bill also rejects the pre-approval of dispersants. In crafting new regulations, EPA "shall require the approval of the Federal On-Scene Coordinator, in coordination with the Administrator, for all uses of a dispersant," according to the bill. H.R. 5629 also repeals relevant sections of the Code of Federal Regulations that pre-approve dispersants.

The bill also would require public disclosure of more information about dispersants, including their chemical components. Rep. Howard Coble (R-NC) introduced and withdrew an amendment that would have allowed companies to keep such information confidential, citing concerns that industry has raised about losing a competitive advantage on intellectual property rights if proprietary mixtures are made public. Oberstar said he would work with Coble to amend the bill language to ensure companies' intellectual property rights are protected.

07/09/2010

**House Spill Response Plan Could Spur New Fracking 'Best Practice' Permits (*Inside EPA*)**

Pending House legislation to respond to the BP oil spill in the Gulf of Mexico could greatly expand regulation of the drilling practice hydraulic fracturing, or fracking, by creating a broad federal permitting program for oil well control design that could require "best practices" including the installation of safety control technologies at fracking sites.

Republicans and Democrats on the House Energy & Commerce Committee are already raising questions about how the bill, H.R. 5626, defines the wells that would be covered. The bill introduced June 29, known as the Blowout Prevention Act, would give authority to either EPA, the Interior Department or Energy Department for require best practices in permits for "high-risk wells," with a primary focus on offshore oil rigs.

But industry officials are concerned that the bill appears to be "a stealthy way to introduce potential federal regulation of onshore drilling," a legal source says. The permitting program and mandates for best practices and controls that could extend to fracking, an onshore energy practice largely exempt from regulation.

The bill could also influence EPA's upcoming study of fracking, which could inform short-term, non-binding actions to reduce risk, including fracking best management practices and other guidance (*see related story*).

The source says the bill could be a "game changer" in the debate over fracking regulations by opening up the industry to new permitting requirements to adopt best practice measures. Fracking has a long-running exemption from regulation under the Safe Drinking Water Act, enacted in the 2005 energy law. Some states have developed fracking rules, and industry would prefer that states remain the primary authority over fracking.

The permitting program that the bill would create could establish a set of best practices for the casing and cementing of on- and off-shore wells by establishing a permitting system to require the "use of safe well control technologies and practices for the drilling of high-risk oil and gas wells," according to the bill.

High-risk wells include "an onshore oil or gas exploration or production well in the United States, identified pursuant to criteria established by the appropriate federal official, that, in the event of a blowout, could lead to substantial harm to public health and safety or the environment." The president would decide whether to designate the permitting authority with EPA, DOI or DOE. *The bill is available on InsideEPA.com.*

Republicans and Democrats raised concerns about the bill's definition of "high-risk wells" at a July 1 hearing of the energy panel's environment subcommittee, though the specific issue of fracking was not brought up. "[M]y concern is as an unintended consequence this legislation is going to affect onshore in ways that we haven't thought through, because we're all thinking offshore right now," Jim Matheson (D-UT) said at the hearing.

Fracking is the controversial practice whereby fluids containing water, sand and chemicals are injected underground to break rock formations and release hard-to-reach gas. While industry says the practice, which has been used for decades, is safe, its growing use around the nation to extract natural gas from unconventional formations is prompting increasing concern that it may be contaminating local drinking water supplies.

H.R. 5626 is significant because it appears to be "the vehicle for the Congressional response to" the BP spill and House leadership seems intent on pushing the bill before the August recess. Rep. Henry Waxman (D-CA), chair of the energy panel, introduced the bill last month with environment subcommittee chair Rep. Edward Markey (D-MA) and oversight panel chair Rep. Bart Stupak (D-MI). -- *Aaron Lovell*

07/09/2010

**Spill Bill Rider Revives Fight Over Oil, Gas Construction Permit Exemption (*Inside EPA*)**

A little-noticed rider to pending House oil spill response legislation would end the oil and gas industry's exemption from construction stormwater permitting requirements, reviving a long-dormant debate in Congress over the exemption and sparking industry fears about a slew of other anti-oil industry measures being attached to the bill.

Environmentalists praised the amendment and cited the BP oil spill in the Gulf of Mexico as bolstering their calls for stricter regulations of all aspects of the onshore and offshore oil and gas industry.

The 2005 energy law established the oil and gas industry's exemption from Clean Water Act National Pollutant Discharge Elimination System (NPDES) permit requirements imposed on other construction activities. Rep. Michael Arcuri (D-NY) July 1 successfully offered an amendment to strike that exemption during the House Transportation &

Infrastructure Committee's (T&I) markup of pending oil spill response legislation, H.R. 5629.

The amendment, approved by voice vote, drew praise from environmentalists who say that requiring NPDES permits will help to control sediment pollution from construction of onshore oil and gas wells.

Industry sources say the 2005 energy law exemption for the oil and gas industry from NPDES construction permit requirements is justified because oil and gas operations have a much smaller environmental footprint than traditional construction, such as building subdivisions or shopping centers. Industry also says that delays associated with having to obtain a permit could prevent the industry from being able to drill in a timely enough fashion.

One industry source also warns that the rider could signal a broader push from environmentalists to use the spill to achieve long-sought policy changes, because the 2005 energy law exemption is unrelated to the Gulf of Mexico oil spill. "Right now the potential scope of this energy legislation, it could be so vast and extensive that anything could be a part of it," an industry source says. "What this amendment more or less showed last week was an issue that's completely unrelated to oil spills . . . was adopted by a committee with virtually no debate."

But supporters of the rider reject industry claims that applying for NPDES permits would be unduly burdensome, and say the oil spill highlights the need for strict regulation of the oil and gas industry.

More than a dozen activist groups wrote to T&I Chairman James Oberstar (D-MN) urging him to support the rider, which he did at markup. Oberstar noted during the hearing that controlling sediment runoff at oil and gas construction sites can typically be addressed with construction of plastic fencing, and environmentalists have pointed out that the state of Colorado has implemented similar regulation without affecting the prevalence of drilling in that state.

In their undated letter, the environmental groups said the Gulf of Mexico oil spill justifies stricter regulation of all aspects of the oil industry, arguing, "If drilling is to continue across the country, regulations must be strengthened and loopholes must be closed." *The letter is available on InsideEPA.com.*

According to the groups' letter, "As BP's oil slick grows in the Gulf of Mexico, it's time to take action to protect all of America's waters -- offshore and onshore -- from future devastation." Major groups that signed the letter include Clean Water Action, the Natural Resources Defense Council (NRDC), and the Wilderness Society.

A number of smaller local and regional groups also signed the letter, including the Texas-based Denton Citizens for Responsible Drilling and the North Fork Ranch Landowner's Association in Colorado.

Urging support for his amendment, Arcuri cited natural gas drilling in the Marcellus Shale in his upstate New York district and the need to ensure that the drilling does not damage the environment -- a concern for activists. "Development [of] this natural gas is the potential to bring tremendous economic benefit to my state in this fairly rural region that I represent. But I always say that we must be absolutely careful that we don't rush or fast track the natural gas extraction in a way that threatens our greatest natural resource, our abundant supply of clean water," he said.

Arcuri's water permitting rider was the only amendment voted on during the markup, aside from a bipartisan package that committee leaders had agreed in advance to support (*see related story*).

Environmentalists say they hope House leaders support including the exemption rider in whatever final oil spill package makes it to the House floor, but they are less optimistic that a similar amendment could be added to a Senate bill, leaving its final inclusion up to a conference committee.

In the meantime, it is unclear when the Obama administration might act on EPA rules addressing the exemption. The Bush EPA had developed rules to codify the 2005 energy law exemption, but the U.S. Court of Appeals for the 9th Circuit in a 2008 ruling in *NRDC, et al. v. EPA* remanded those rules to the agency.

Environmentalist and industry sources say they have seen little activity from the agency to rewrite those rules. Under law as it stands now, the industry source says, oil and gas construction operations are permitted under state law and do not require federal NPDES permits for uncontaminated stormwater; industry has crafted best practices guidelines to design construction sites so as to avoid stormwater contamination.

**BP: Gulf oil spill could be stopped this month (*Washington Post*)**

By Joel Achenbach
Washington Post Staff Writer
Thursday, July 8, 2010; 8:47 AM
The end may be near for the runaway gulf oil well, according to the most optimistic statement yet from a BP executive.

The long-anticipated "bottom kill" of the well -- a massive dose of mud and cement shot through a relief well now being drilled in order to stop the gushing of oil from the well that exploded nearly three months ago -- could take place before the end of July.

"In a perfect world with no interruptions, it's possible to be ready to stop the well between July 20 and July 27," BP managing director Bob Dudley said in an interview with the Wall Street Journal.

The relief well is currently moving almost parallel to the blown-out "Macondo" well, just 12 feet away laterally, and with only about 200 feet to go before it reaches the interception target.

The final approach is slow and painstaking. The engineers aboard the Development Driller III will penetrate the rock formation only 10 feet at a time before withdrawing the drill bit and sending down a probe that detects the magnetic signal of the steel casing and pipe in the Macondo well.

Dudley offered a similarly optimistic timeline to NBC Wednesday as he toured the drill ship Discoverer Enterprise . But top BP spokesman Andrew Gowers on Thursday morning sought to temper public expectations, saying the company hasn't changed its target date of an August completion of the well-killing operation.

"It is true that we are proceeding on exactly the same schedule as before, which means that it is most likely to happen in the first half of August," Gowers said in an-email. "You will note Bob Dudley's comment to the Journal that it is theoretically possible but UNLIKELY that it could happen a bit sooner." Retired Coast Guard Adm. Thad Allen, the national incident commander, has also been more cautious, saying he prefers to underpromise rather than overpromise. "While it's nice to be slightly ahead of schedule, I'm sticking to the middle of August because we don't know the condition of the wellbore until we penetrate her," Allen said Wednesday.

The blown-out well will be intercepted at a point where there is both a 9-inch steel casing and a 7-inch pipe inside of it. It is unknown whether the oil and gas is flowing inside those structures or in the space between them, or both. Oil and gas may be surging between the original wall of the hole and the outside of the steel casing -- a space that was cemented before the well erupted April 20. Or the flow could be taking place in the "annulus" between the casing and the pipe. Or it could be within the pipe itself -- or some combination of all that.

More than one mud shot may therefore be necessary in order to to fill the spaces where hydrocarbons are surging to the surface. After the mud comes cement. Each mud and cement shot could take a week to 10 days, Allen said.

The uncertainty about the condition of the well, along with the possibility of tropical storms that can disrupt operations, confounds any firm prediction of when the gusher may be terminated from below.

High seas in the past two weeks have slowed efforts to hook up a new containment system for capturing leaking oil, but they have not so far slowed the drilling of the two

relief wells by two large rigs that are each floating about half a mile from the Discoverer Enterprise, which is directly atop the Macondo well.

Officials expect seas to calm further by the end of this week, with favorable weather in the short-term forecast.

## ENFORCEMENT

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07/09/2010

### EPA Survey Seen As Tentative Step To Addressing Workforce Criticisms (*Inside EPA*)

EPA is circulating to senior enforcement, permitting and other managers a survey of the "challenges" they face with existing agency workloads, which EPA union officials see as a tentative step toward addressing their long-running calls for the agency to conduct a major new workforce analysis to identify staffing shortfalls.

However, one union official says that the survey falls short of their request in a number of ways. For example, the survey is being sent to senior managers and not individual front-line staff, which the source says could skew the results without adequate union input. Further, the survey is limited to six core EPA functions and does not represent the type of broad agency-wide workload and workforce analysis unions believe is sorely needed, the source adds.

EPA is pursuing a "Workload Benchmarking Study" that the agency describes as a "first step" in responding to recommendations from its Inspector General (IG) and the Government Accountability Office (GAO) that the agency improve its process for tracking changes in workload and use that data to determine workforce needs.

According to an EPA primer on the study, EPA also recognizes unions' concerns related to potential workload disparities across programs or regions. As a result, EPA's study will seek a "solid set of information" as a baseline for next steps to better understand the level of work effort for six functional areas of the agency and the major workload drivers. EPA recently sent the survey to its front-line managers.

The six EPA functions that the survey is targeting include: scientific research, environmental monitoring, regulatory development, permitting, enforcement and financial management, according to the survey. EPA has contracted Booz Allen Hamilton to gather data from the survey, which the agency will use to determine how to address concerns from GAO, the IG and others on EPA's workload and workforce limitations.

But EPA in the survey cautions it is not to be seen as workload modeling, nor a full scale evaluation of full-time equivalent (FTE) employees. "The survey is designed to capture best estimates of workload level of effort as a snapshot over the past calendar year for federal EPA employees directly reporting to EPA managers," according to the survey. *Relevant documents are available on InsideEPA.com.*

"The survey is NOT designed to require in-depth analyses, an employee by employee evaluation, or match existing budget or performance data. This study is also NOT intended to capture EPA's remaining workload outside the six functional areas included in this survey," according to the agency.

EPA asks questions about the workload in each of the six targeted areas. For example, it asks how much time enforcement staff spend on major tasks including inspections and developing and managing questions. For the scientific research category, the survey asks questions such as how much time employees spend on core work, including "integrating scientific knowledge, data and tools needed to review, attain and maintain protective standards." Managers in all six groups are asked to report how many FTEs report to them.

The union official says the survey is a "preliminary effort on EPA's part to see where the problems might be, but they could easily get surveys back saying there's no problem." The source says the lack of involvement by front-line employees could lead to incomplete information in the survey responses.

A second union official says EPA would gain much more benefit from a comprehensive workload and workforce analysis to track the work employees are doing and how long it takes them to do those tasks. That in turn could inform improved planning for EPA's workforce needs in the coming years to handle both a growing agency regulatory agenda and also an expected slew of retirements of EPA employees.

The American Federation of Government Employees has warned that a lack of adequate workforce planning means that EPA does not have an accurate idea of the staff and resources it needs.

A recent GAO report was also critical of the agency's workforce planning. That report said EPA -- which has about 17,000 full-time equivalent employees and 6,000 contract employees -- had not conducted a workforce analysis to determine optimal staffing levels and distribution in nearly 20 years.

But top EPA officials are downplaying prospects they will meet calls for a sweeping new workforce analysis to determine its staffing needs for ambitious climate, water and other work, saying instead that they will work to trim duplicative programs and take other steps to improve resource management.

Deputy Administrator Bob Perciasepe says the agency has made no decision on whether to conduct the study, but he told *Inside EPA* May 26 that EPA is looking at ways it could improve management of its personnel.

Perciasepe added that EPA's leadership is hesitant to pursue a burdensome major new agency-wide workforce needs and planning analysis -- which would be the first since the 1980s -- when such a study would not necessarily yield a beneficial outcome (*Inside EPA*, May 28). -- *Anthony Lacey*

**GRANTS**

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July 8, 2010

**City to go after $500,000 EPA grant (*Desert Sun*)**

K Kaufmann
The Desert Sun
Palm Desert could become a Climate Showcase Community with bike- and pedestrian-friendly neighborhoods; community gardens; energy-efficient, retrofitted houses; and energy self-sufficient model homes if the city wins a $500,000 grant from the U.S. Environmental Protection Agency.

The City Council will consider giving staff the go-ahead to apply for the grant when it meets at 4 p.m. today in the Civic Center Council Chamber, 73-510 Fred Waring Drive.

The deadline for applications is July 26, according to a staff report.

The federal program, which will award up to $10 million in grants, is aimed at creating community pilot projects that reduce greenhouse gas emissions while promoting local economies and public health, according to the staff report.

The proposed project in Palm Desert would cover a mostly residential area totaling 160 acres running from Fred Waring on the north to Highway 111 on the south, and San Pablo Avenue on the east and Monterey Avenue on the west, the report said.

Components of the project would include turf buyback programs to replace lawns with desert landscaping; community gardens and fruit-sharing programs to harvest citrus trees in the area; a bike-share program; and the construction of an affordable, energy self-sufficient model home.

If the city wins a grant, it will have to provide matching funds, which staff said could be at least partly achieved through staff time and city resources already committed to green and redevelopment programs.

With the council about to go on summer recess until Aug. 26, the agenda also includes several items authorizing staff to move forward with key city projects:

**The new visitor center:** The council will be asked to approve a budget of $200,000 to upgrade and redecorate the 2,000-square-foot space at 73-470 El Paseo, which will become the city's new visitor center this fall, after staff vacates the current Visitor Center on Highway 111.

City officials on Tuesday signed a contract to lease that building to the Palm Springs Art Museum, which will turn it into a mid-valley extension of the museum.

**El Paseo Wi-Fi:** The council will vote on whether to spend about $57,000 to provide free wireless Internet service for the El Paseo shopping district, from Portola Avenue on the east to Highway 74 on the west.

The council approved an upgrade to the city's Internet service in June to create the Wi-Fi zone. Today's vote will cover hardware, software and installation for the project.

**Desert Willow expansion:** The council may vote to authorize City Manager John Wohlmuth to sign a contract for construction of the kitchen expansion at the city-owned Desert Willow Golf Resort.

Bids on the project, which is budgeted at $2.95 million, are due to be opened July 20.

Additional Facts
Special study session to be held today

The Palm Desert City Council will hold a special study session at 2 p.m. today in the Administrative Conference Room at City Hall, 73-510 Fred Waring Drive.

The council will hear a proposal from the College of the Desert Child Development Center for funding from the city's child care impact development fee.

COD is looking for help with funding a $1.8 million upgrade to its Child Development Center, which serves children of students at the school, and is also used for training students in its early childhood education program.

The impact fee, created five years ago, is levied against all new commercial development in the city and is earmarked for improving and expanding child care facilities.

To date, the city has collected more than $1.5 million, but has spent only about $200,000 of the stockpiled funds.

COD officials said they would not ask for a specified amount.

Both the study session and regular council meeting at 4 p.m. are open to the public. Information: (760) 346-0611

**HUMAN HEATH**

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07/09/2010

**EPA, CDC Crafting Pilot Program To Elevate Health Considerations In NEPA (*Inside EPA*)**

EPA Region IV and the Centers for Disease Control & Prevention (CDC) are crafting a pilot program to determine whether coordinated actions between the agencies will help enhance public health considerations and mitigate harmful project impacts when agencies conduct National Environmental Policy Act (NEPA) and other environmental reviews.

While the agencies are still working to resolve some implementation issues, "once we have all the kinks out of the way and figured out a framework to make this happen," the agency envisions the effort going national, says a Region IV source familiar with the program.

The EPA/CDC partnership is the latest indication that the Obama administration and others are seeking to elevate consideration of human health impacts when conducting NEPA reviews. Earlier this year, the National Academy of Sciences convened a panel -- sponsored by EPA and the Department of Health & Human Services -- to develop guidance for conducting health impact assessments (HIAs) of public- and private-sector projects, in much the same way that agencies conduct environmental assessments under NEPA. The panel had its first meeting in March and is expected to issue its guidance next year.

In addition, the Health Impact Project -- a recent collaboration between the Robert Wood Johnson Foundation and the Pew Charitable Trusts -- in early June announced $1 million in grants to six projects to conduct HIAs at the state and local levels.

But the efforts to raise health impacts in NEPA and other actions are controversial, with critics noting the additional step may only further delay what are often complicated projects that already take too much time to win permits.

Still, a source with the Pew project calls the EPA/CDC partnership a "fantastic effort" by the agencies to pool their resources. "It is a good-faith effort to look at the way EPA

treats health. . . . There are folks at CDC committed to HIA and people at EPA seem very willing to work on this issue."

The pilot program stems from an agreement signed earlier this year requiring the agencies to "seek to advance efforts in achieving mutual environmental public health goals and strengthening the bridge between environmental and public health impact assessment." It will seek to "enhance the collective understanding of linkages between proposed changes in the built and natural environment and ensuing human exposures and potential health outcomes so as to better inform decision-makers." *Relevant documents are available on InsideEPA.com.*

According to the document, the program is intended to determine whether this type of coordination between EPA and CDC will enhance public health considerations and mitigation within NEPA and other environmental assessment processes that guide decisionmaking.

The agreement is not limited to NEPA but notes at its "cornerstone," the agencies will "leverage" their comments on NEPA reviews, as well as activities subject to presidential executive orders on children's health and environmental justice. "The partners are especially committed to safeguarding the environmental health of populations that are particularly vulnerable to hazards in the built and natural environment -- children, the elderly, people with disabilities and those at high risk due to socioeconomic conditions," the agreement says.

The two-year agreement requires the agencies to conduct a minimum of two "joint agency reviews" per year to systematically review a NEPA analysis, after establishing the evaluation framework.

The agencies are now working on developing a performance evaluation framework to assess and document the outcomes of the projects, as well as criteria to identify NEPA reviews to use as pilots, the EPA Region IV source says. The agencies have not yet identified specific health outcomes they will consider, the EPA source says, but the agreement says possible areas can include air quality, water quality, social and economic resources, subsistence resources, environmental justice, children's health and land use considerations.

The EPA Region IV source adds the agencies are seeking to identify priority sectors for appropriate reviews such as transportation and energy projects, and are considering a high-speed rail transit project as an initial pilot to help develop the criteria.

The source says the agreement arose from recent EPA efforts to look at HIA combined with the opportunity to have a CDC staff detail at the region. "CDC had the capacity and know-how, and we had the need," the source says.

EPA and CDC will be presenting their baseline findings at an American Public Health Association meeting in November that the source says should include a series of case studies and results.

**MINING**

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07/09/2010

**EPA Agrees With Industry By Avoiding UIC Permit For Mining Site (*Inside EPA*)**

EPA has decided not to require an underground injection control (UIC) permit for discharges at a controversial Michigan mine, avoiding a move that industry had said could have expanded UIC requirements to a number of industry sectors nationwide that had never before been regulated under the program.

At issue is Kennecott Eagle Mineral Co.'s copper and nickle sulfide Eagle Rock Mine in Michigan's Upper Peninsula. The company in February redesigned its treated water infiltration system (TWIS) in an effort to avoid Safe Drinking Water Act (SDWA) UIC requirements, and EPA said in a July 1 letter to the company that the redesign freed it from the need for a permit. The company initially proposed to construct its TWIS with perforated disposal pipes covered by earthen mounds to insulate them from freezing, but earlier this year proposed to redesign the system to insulate the pipes with Styrofoam and a plastic cover. *The letter is available on InsideEPA.com.*

"Based upon our review of the modified TWIS design, the lateral perforated piping that constitutes the fluid distribution system is above ground and is thus not a subsurface system," EPA Assistant Administrator for Water Peter Silva wrote in the letter.

Kennecott contended that even its initial TWIS design -- which consisted of a grid of horizontal pipes laid on top of the ground and covered with five-foot mounds of sand and topsoil -- should not have triggered UIC requirements because the pipes were placed at grade. But the company applied for a UIC permit in 2006 anyway, in an effort to cooperate with EPA's contention at the time that such a permit was necessary. In February, believing the UIC process was taking too long, Kennecott submitted to EPA and the state its proposed redesign, arguing that it no longer required a UIC permit.

The decision over whether the new system needed a UIC was elevated to EPA Headquarters, from Region V where the mine is located, because of its potential reach. Industry sources had worried that if Kennecott would have required a UIC permit, it could have expanded the program's scope to variety of additional industries.

At issue, EPA sources have said, was the definition of a "subsurface fluid injection system" -- one of four categories of wells that trigger UIC permits. Federal regulations

define such a system as "an assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground."

The Kennecott TWIS, which has already been permitted under state law, is being constructed, along with the rest of the mine site, which is expected to begin operating next year, a company source says. Silva in the letter reminds the company that EPA still could pursue enforcement actions if the system demonstrates harm to water quality. "As you know, EPA retains authority under SDWA, as well as other law, to take any necessary action to address possible contamination from the TWIS that may endanger underground sources of drinking water regardless of the design of the unit or its permit status. . . . We will continue to coordinate with the State to determine whether any federal response action with respect to the TWIS is necessary," he writes.

Local environmentalists and members of the Keweenaw Bay Indian Community, which uses Eagle Rock as a ceremonial site, have tried to block the mine and argued that the company's redesign should not free it from UIC requirements. Environmentalists argued that because the system was designed to return treated wastewater to groundwater that could affect drinking water supplies -- protection of which is the primary aim of the UIC program -- it needed a UIC permit regardless of where the pipes were located.

A local environmentalist says EPA's decision that a UIC permit is not required should be considered "final agency action" and open to a federal court challenge, but adds that activists are still considering their next move. "We're disappointed in this outcome, and we're considering our legal options at this point. . . . It's too early for us to have made any real determination about next steps," the source says.

Rep. Bart Stupak (D-MI), whose district includes the mine site, says in a press release that the lack of federal authority over Kennecott's TWIS highlights the need for potential revisions to Michigan laws, but does not say whether he agrees with EPA's decision. "With it now clear that the federal government does not have jurisdiction in permitting the mine, it is imperative that the state of Michigan re-evaluate its sulfide mining law to ensure every precaution is being taken to ensure sulfide mining is done safely in Michigan," Stupak says.

Kennecott welcomed EPA's decision, which it said in a news release "provides clarification important for the community as mine facility construction proceeds." The company highlighted its receipt of state permits, and noted that its TWIS is "similar to systems used by many Michigan agricultural and other industrial operations, also regulated by State authority."

**PESTICIDES**

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**EPA fines Monsanto $2.5 million for selling mislabeled bags of GMO cotton seeds (*Associated Press*)**

**Story also appeared: *KIAH-TV Houston***

By Associated Press
5:52 AM CDT, July 9, 2010
ST. LOUIS (AP) — Monsanto Co., the world's biggest seed company, has agreed to pay the U.S. Environmental Protection Agency a $2.5 million penalty for selling mislabeled bags of genetically engineered seed.

The EPA says it is the largest fine ever imposed under a law that regulates pesticides and fungicides.

Between 2002 and 2007, Monsanto improperly sold its Bollgard and Bollgard II cotton seeds in 10 Texas counties where the seeds were banned, according to the EPA. The cotton seeds are regulated as pesticides because they kill insects, and the seeds were banned in parts of Texas to avoid growing pest resistance to them. The ban has since been lifted.

Monsanto informed the EPA it was selling seeds in the 10 Texas counties, even though the company was supposed to label the seeds as banned in those areas, the EPA said. Monsanto later changed its cotton seed labels to reflect the ban.

JULY 8, 2010, 5:52 P.M. ET

**Monsanto to Pay $2.5 Million for Distributing Modified Seed in Restricted Area Article (*Wall Street Journal*)**

By SCOTT KILMAN
Monsanto Co. will pay a $2.5 million civil fine for failing to tell farmers about the Environmental Protection Agency's planting restrictions on its genetically-modified cotton.

The St. Louis crop biotechnology giant ran afoul of the EPA, which regulates crops that are genetically modified to make their own pesticide, by distributing its Bollgard insect-resistant cotton seed in several Texas panhandle counties despite EPA-imposed planting restrictions there.

Monsanto's Bollgard seed contains genetic material from a common soil micro-organism called Bacillus thuringiensis, or Bt, which makes a natural toxin fatal to certain insects that attack crops such as cotton and corn.

As a condition of clearing Bollgard for commercialization, the EPA blocked the planting of the seed in some places where it might encourage the evolution of insects able to survive exposure to the Bt toxin, which is widely used by organic farmers. The grower's instructions prepared by Monsanto failed to alert farmers as required to the EPA's planting ban involving 10 Texas counties.

Monsanto disclosed its mistake, which began in 2002, to the EPA in 2007. The agency lifted the planting restrictions on the Texas counties in September 2008.

"People who manufacture and distribute pesticide products must follow the federal registration requirements," Steve Owens, of the EPA's Office of Chemical Safety and Pollution Prevention, said in an EPA statement

UPDATE 2-

**Monsanto fined $2.5 mln on pesticide/seed misbrand (*Reuters*)**

Thu Jul 8, 2010 4:11pm EDT
* Sold cotton seeds without certain planting restrictions
* Seeds contained genetically engineered pesticides
* Largest settlement ever under U.S. insecticide act (Adds Monsanto comments, details)
By Carey Gillam

KANSAS CITY, Missouri, July 8 (Reuters) - Monsanto Co (MON.N) has agreed to pay a $2.5 million fine for misbranding biotech cotton seeds in what regulators called the largest settlement of its kind for violating U.S. insecticide law.

Monsanto, the world's largest seed company, violated the Federal Insecticide, Fungicide and Rodenticide Act when it sold and distributed some cotton seed products in a way that violated restrictions Monsanto had told the U.S. Environmental Protection Agency it would adhere to, the EPA said.

Between 2002 and 2007, more than 1,700 times nationwide, Monsanto distributed or sold Bollgard and Bollgard II cotton seed products containing genetically engineered pesticides without the planting restrictions required by the EPA to protect against pest resistance, the agency said.

"People who manufacture and distribute pesticide products must follow the federal registration requirements," said Steve Owens, assistant administrator for EPA's Office of Chemical Safety and Pollution Prevention. "These requirements are critical to preventing the development and spread of insect resistance."

Monsanto said the problems occurred due to an oversight in issuing a grower guide that was supposed to contain a statement prohibiting planting the cotton in 10 specific

counties in Texas where insect resistance management was a concern and Monsanto's biotech cotton was not allowed. The grower guide did not contain the required language. Monsanto said it discovered the error in 2006 and reported it to EPA.

"As a result of this matter, we have implemented new internal review processes to prevent such errors in the future," said Rob Nixon, who leads Monsanto's stewardship program.

St. Louis-based Monsanto said subsequent evaluation determined that no resistance had occurred in the counties in question, and in 2008 the EPA lifted the restriction and authorized the planting of Bollgard II in those counties.

"This agreement shows that when a company violates the law by distributing misbranded pesticides, EPA will take action," Cynthia Giles, assistant administrator for the agency's Office of Enforcement and Compliance Assurance, said in a statement. (Reporting by Carey Gillam; Editing by Bernard Orr, Gary Hill)

07/09/2010

**Industry Eyes Challenge To New EPA Bid To Limit Pesticide Safety Claims (*Inside EPA*)**

Chemical industry groups are considering new plans to challenge EPA guidance that expands the limits on some pesticide safety claims on product labels and, for the first time, in brand names and trademarks -- eight years after the industry first vowed a constitutional challenge to EPA's policy but which was shelved after the agency dropped the issue in favor of higher-priority homeland security concerns.

A legal challenge is "always an option," says one industry source. While industry sources say it is still too soon to say whether they will challenge a final version of the guidance, when EPA first proposed the policy in 2002, industry groups threatened a constitutional challenge, charging that agency limits on brand names and trademarks violated their First Amendment free speech rights and Fifth Amendment property rights.

State officials, however, are warning that EPA's proposed approach does not go far enough in limiting "false or misleading" claims, charging that the agency should expand the list of words that are barred from labels and brand names, while also extending the limitations to so-called "minimal risk" pesticides that are exempted from the limits.

At issue is EPA guidance clarifying the agency's standards on false and misleading pesticide labels, an effort that has languished since first being proposed in 2002. The agency May 19 issued a *Federal Register* notice calling for comment on a revised version of a pesticide registration (PR) notice on false or misleading pesticide product brand names, which the agency first proposed in March 2002.

EPA originally set a June 18 deadline for comments on the draft guidance but in a June 17 *Federal Register* notice extended the deadline through Aug. 17 in response to industry calls for more time to seek "regulatory and legal support" for their view that changes of the type proposed in the draft PR notice "can only be accomplished by EPA, if at all, through issuing a regulation," according to June 1 comments collectively filed by American Chemistry Council, Biopesticide Industry Alliance, Consumer Specialty Products Association, CropLife America, and ISSA.

"EPA has a high burden to explain why it proposes to depart from decades of long-settled precedent," the comments say. *Relevant documents are available on InsideEPA.com.*

Like the 2002 draft guidance, the revised measure expands the number of safety terms that are considered to be "false" or "misleading," and that are barred by agency regulations under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), including "green," "pro," and "bio-ganic." The agency is barring the use of these terms to describe the product's composition or efficacy.

But the agency now says it plans to expand the limitation on use of such terms not only to language on a pesticide label but also to product brand names and company trademarks. And the agency is vowing for the first time to enforce the requirements, giving the industry two years to take corrective action or face enforcement.

The guidance defines corrective action as changing the name of the product, producing scientific evidence supporting the truth of the claim, or providing a disclaimer on the label denouncing that the claim is true. "Occasionally, some applicants, registrants and distributors have considered or adopted product brand names (or placed company names or trademarks within or in close proximity to product brand names) that run counter to current Agency regulations concerning false or misleading claims [under agency regulations and FIFRA]," EPA says in the draft guidance.

EPA says that registered trademarks are not exempt from FIFRA requirements "simply because it was registered as a trademark. Consequently, a registered trademark that is false or misleading pursuant to FIFRA would still render a product misbranded under FIFRA," the draft PR notice says.

EPA says the guidance is necessary because while current FIFRA regulations do not allow the use safety claims such as "natural" or "safe," the agency has had repeated problems with enforcing this rule, even after informing registrants they are in violation of FIFRA. Some companies have tried to dodge the requirement by changing the company name to include the same word that makes a false safety claim, then placing the new company trademark close to the product brand name on the label, EPA says.

An EPA spokesman says the agency reinvigorated the guidance, set aside in 2002 before it was finalized due to higher priority homeland security interests, to "protect competitors that play by the rules with respect to product names."

**EPA's past efforts to limit product brand names prompted significant industry push-back.** In 2002, Safer Inc., a subsidiary of Woodstream Corporation, warned that the agency's proposed policy amounted to a limitation of its First and Fifth Amendment rights, was "arbitrary" and "capricious," "contrary to good public policy," and "beyond EPA's authority under FIFRA." Safer Inc. -- a name that would likely not survive EPA's new policy -- urged EPA to convene negotiations to come up with a new approach, charging that the agency's "actual practice" has been to allow certain pesticides registrants to make safety claims though their brand names, creating an "uneasy truce" with the industry.

One industry source said the some of the proposed restrictions in the guidance present a deviation from existing policy and that EPA needs to acknowledge the "context" in which certain words in pesticides labels are meant to be taken. "What we really want is to help EPA understand that not every use of a word like 'pro' is intended for use by the professional market," the source said.

The comments also argued that EPA did not introduce supporting documents to show that any current pesticide names, which industry sources say have been granted approval from EPA for years, pose "imminent risk of injury to man or the environment."

A source with the American Chemistry Council said the group intends to address in its public comments the potential impact of the proposed rule, saying EPA underestimates the sheer number of products that will be affected by having to change their brand names or possibly be removed from the market-suffering loss of long-term market.

"The draft PR notice will have a massive economic impact," the industry group Responsible Industry for a Sound Environment, (RISE) argued in their June 2 comments requesting an extension of the public comment period for the draft guidance. "If issued as proposed, it will require many registrants to change the names of products and entire product lines that were approved by EPA. Nowhere has EPA evaluated the scope of this potential economic impact."

But an EPA spokesman said that though the scope of the PR notice applied to all products, a 2002 EPA review showed fewer than 1 percent of 20,000 federally registered products were problematic.

Meanwhile, state officials in New York, Oklahoma, and Indiana, who could use the proposed policy to tighten their own requirements, say the guidance does not go far enough because it fails to address the class of "minimal risk" pesticides exempt under FIFRA's section 25(b) exception, products that the state sources say are badly in need of regulation.

"Through our interaction with the public, 25(b) products create more label wording problems/ issues than what EPA describes as registered products," say May 24 public comments filed by Oklahoma's Pesticide Safety Education Program.

New York State Department of Conservation's Bureau of Pesticide Management say in June 17 public comments that these products, though not federally regulated, are "often false and misleading."

These products tend to "play a lot more loosely" with state labeling practices and other rules than their counterparts who are subject to federal rules, a source with Indiana's Pesticide Review Board.

In addition, state sources say EPA should add words such as "sustainable" and "organic" to the list of those examples the agency proposes are false and misleading. -- *Bridget DiCosmo*

**SUPERFUND**

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07/09/2010

**Federal Court Holds State Agency Liable Under Superfund For Stormwater (*Inside EPA*)**

A federal court has found the Washington State Department of Transportation (WSDOT) potentially liable as an arranger of hazardous waste disposal under Superfund law because the department designed a highway stormwater runoff system that contributed to the contamination of local waterbodies.

The impact of the ruling could be significant because it comes at a time when EPA is looking to beef up its regulation of stormwater discharges and under the court's logic "everyone who constructs a parking lot" could be potentially liable under Superfund, one lawyer following the issue claims.

At issue in the case *United States v. WSDOT* is the Commencement Bay-Nearshor Tideflats Superfund Site in Tacoma, WA, which consists of several areas where waterway sediment is contaminated with hazardous substances. The U.S. government filed a complaint against WSDOT under Superfund in an attempt to recover costs related to cleaning up the contaminated sediment, claiming, among other things, that the department's ownership and operation of the highway was a basis for holding it liable under the law.

"The United States contends that the highway runoff from I-5, SR705, and/or SR509 contains hazardous substances, including phthalates, heavy metals, including cadmium, lead, zinc, and nickel, and petroleum hydrocarbons," the U.S. District Court for the Western District of Washington notes in the June 7 ruling. "The United States alleges that highway runoff containing hazardous substances is and has been transported from

I-5, SR 705 and SR 509 by drainage structures and disposed of in the Thea Foss and/or Wheeler Osgood Waterways."

WSDOT argued discharges from the state highway stormwater collection systems are exempt from Superfund liability because they are authorized by the Clean Water Act and are therefore federally permitted releases. The department also argued it is not liable under Superfund as an operator or arranger of hazardous waste disposal because "it lacks sufficient control over contaminants or other materials" that enter the highway stormwater runoff.

But the federal government countered "by arguing that WSDOT arranged for disposal by designing, constructing, and operating drainage systems whose sole function was to collect highway runoff and dispose of it into nearby water-bodies," that "WSDOT had actual knowledge that the runoff that it was discharging contained hazardous substances," and that "WSDOT has the ability to redirect, contain, and treat its contaminated runoff."

The court said it was "persuaded by the U.S.'s arguments" because WSDOT designed the drainage systems for a "specific purpose," namely discharging the highway runoff into the environment. "WSDOT argues that it did not have control of the hazardous substances" but "it did have control over how the collected runoff was disposed of."

Regarding the question of whether the releases were federally permitted under the Clean Water Act, the court said there was a dispute as to whether WSDOT is in compliance with the Clean Water Act permits and whether the releases were outside their scope, making it "imprudent to decide [the] issue at this stage of litigation."

The court granted the U.S. motion for partial summary judgment finding WSDOT a potentially responsible party under Superfund but denied its motion for partial summary judgment in regard to federally permitted releases.

In a July 1 blog commenting on the ruling, Seth Jaffe, of the law firm Foley Hoag LLP, suggests that "[m]aybe EPA doesn't need to bother with new stormwater regulatory programs" because in light of the ruling "it can just issue notices of responsibility to everyone whose discharge of phosphorus has contributed to contamination of a river or lake."

"If one were a conspiracy theorist, one might wonder if EPA were using this case to gently encourage the regulated community to support its recent efforts to expand its stormwater regulatory program," Jaffe says. "Certainly, few members of the regulated community would rather defend Superfund litigation than comply with a stormwater permit."

**TOXICS**

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Jul 09, 2010

**Builders sue EPA over lead paint rule (*USA TODAY*)**

Builders are challenging a new federal rule that requires contractors be certfied in lead-safe practicies if renovating pre-1978 homes.

The National Association of Home Builders filed a lawsuit Thursday against the Environmental Protection Agency for removing the "opt-out" provision in its Lead: Renovation, Repair and Painting (LRRP) rule, which went into effect April 22.

The Environmental Protection Agency will be running ads, such as this one, to inform the public about a new rule that requires renovators working on pre-1978 homes to be specially trained to handle lead. The rule took effect April 22.
CAPTIONBy EPAThe rule applies to all homes built before lead was banned in 1978, but the opt-out provision, which expired July 6, allowed contractors to bypass homes where no pregnant women or children under age 6 lived.

"Removing the opt-out provision more than doubles the number of homes subject to the regulation," NAHB chairman Bob Jones, a home builder and developer in Bloomfield Hills, Mich, said in a statement, adding it "extends the rule to consumers who need no protection."

EPA's Wendy Hamnett told Green House that about 38 million homes, half of pre-1978 ones, have lead. Of 129 million U.S. housing units, 76.5 million were built before 1980, according to the Census Bureau.

Under the rule, contractors (whether plumbers, painters or carpenters) who are not certified to handle lead can face fines of up to $37,500 daily for work on pre-1978 homes. The homeowners themselves do not face fines.

"We want people to take it seriously," Hamnett said about the new rule to prevent lead-caused health problems such as lowered IQ in children and memory problems in adults.

Joining the NAHB's petition, filed in the U.S. Court of Appeals for the D.C. Circuit, is the The Hearth, Patio & Barbecue Association, the National Lumber and Building Material Dealers Association and the Window and Door Manufacturers Association.

The groups estimate that the extra costs for lead-safe practices average $2,400 per job. They say a complete window replacement, for example, requires the contractor to install thick vinyl sheeting around the work area both inside and outside the home, adding $60 to $170 in costs for each window.

In contrast, the EPA estimates these practices could add $8 to $167 to most interior jobs.

**Colorado delays decision on drilling-waste change until EPA weighs in (*Denver Post*)**

By Bruce Finley
The Denver Post
Posted: 07/09/2010 01:00:00 AM MDT
Updated: 07/09/2010 01:24:23 AM MDT

Colorado oil- and gas-drilling regulators deferred a decision Thursday on whether to roll back a new waste-disposal rule, choosing to wait for federal guidance.

If the Colorado Oil and Gas Conservation Commission agrees to change the rule — which would mark the first change of the rules initiated under Gov. Bill Ritter aimed at protecting the environment — oil and gas companies could bury bulky plastic liners they use to wrap drilling sludge in pits by their rigs.

Environment advocates contend the pit liners ought to be treated as solid or hazardous waste and disposed of at landfills. The liners are coated with residues from drilling, including benzene and other petroleum distillates, amounting to as many as 35 barrels of waste on a single liner, said Mike Freeman, an Earthjustice attorney representing the Colorado Environmental Coalition, National Wildlife Federation and other groups.

"Every other industry doing business in Colorado manages to clean up its pit liners and comply with the law. There's no reason the oil and gas industry can't do the same," Freeman said.

"The oil and gas industry should not be allowed to use other people's property as mini-dumps just to boost the companies' bottom lines," he said. ". . . When you bury toxic waste in the ground, it comes back to haunt you."

Colorado's revised oil and gas rules took effect in April 2009. Companies have called them onerous, drawing support from Republican political candidates. Yet Colorado remains the regional leader in issuing drilling permits and new activity, with 819 new wells this year.

State oil and gas commissioners voted 8-1 to wait until after the U.S. Environmental Protection Agency completes a requested opinion before holding a hearing to consider a possible rule change.

The Colorado Petroleum Association had petitioned for a rule change. Industry leaders contend companies, including Exxon Mobil, are having a hard time disposing of liners efficiently.

Some county landfill operators are telling companies they lack space for the bulky liners, forcing companies to pay higher fees to dispose of liners in neighboring counties or out of state, said Jep Seman, the attorney representing the CPA.

"We're really pleased (the matter) was set for a hearing," Seman said. ". . . Our companies are left in a conundrum. . . . Some of their costs are starting to mount."

A few companies, including British Petroleum, now operate drilling sites without waste pits. Another company, Williams Production RMT, on Thursday received a state award for its innovative practice of recycling pit liners.

Williams' operators clean used liners on site, then package them and deliver them to recyclers, who use them to make plastic products and fuel for cement kilns.

*Bruce Finley: 303-954-1700 or bfinley@denverpost.com*

**EPA delays lead paint certification enforcement (*Brandon Valley Challenger*)**

By From staff reports
The Environmental Protection Agency's (EPA) decision to delay enforcement of the new Lead Renovation, Repair and Paint Rule* will provide the necessary time to get more remodelers and other home building professionals trained. It will also give the EPA more time to get the word out to consumers about the importance of hiring a certified remodeler, according to the Home Builders Association of the Sioux Empire (HBASE).

Homes that were built before 1978 may have dangerous lead-based paint on the walls, doors, windows and sills. Therefore, when this paint is disturbed during a remodeling job it has the potential to put the homeowners at risk for serious health problems. The key to protecting the occupants during a home renovation is to use lead-safe work practices by containing the dust inside the work area. Lead in dust is the most common way people are exposed to lead.

Learning disabilities, hearing loss and violent behaviors are a few of the effects lead paint can have on young children. Pregnant women who are exposed to high levels of lead increase their chances of complications during pregnancy and also run the risk of having a child with brain damage.

In a revised guidance memo released June 18, the EPA acknowledged that remodelers in many parts of the country have been unable to obtain the required training to comply

with the rule – a problem that the National Association of Home Builders (NAHB) has urged the agency to solve since the rule was announced two years ago.

The issue came up in May after floods devastated parts of Tennessee and there weren't enough certified remodelers to complete much needed home repairs. NAHB and its state homebuilders associations, including the South Dakota Home Builders Association, proposed a delay in enforcing the rule.

The EPA uses a variety of methods to determine whether businesses are complying, including inspecting work sites, reviewing records and reports and responding to citizen tips and complaints. EPA may file an enforcement action against violators seeking penalties of up to $37,500 per violation, per day. The proposed penalty in a given case will depend on many factors. The EPA has policies in place to ensure penalties are calculated fairly.

Remodelers, electricians, heating and air conditioning technicians and other contractors must adhere to lead-safe work practices, including special equipment filters and a ban on open flames. Individual contractors must apply to enroll in a training class by Sept. 30 and complete the training by Dec. 31, 2010.

"This rule potentially affects about 79 million homeowners. That's how many homes were built before 1978, when lead paint was banned," said NAHB Chairman Bob Jones. "We need significantly more contractors certified than the 300,000 who have taken the training course, and we also need to make sure that affected homeowners understand the importance of hiring a certified contractor."

Home building professionals can enroll in an upcoming lead certification training course at the HBASE office by calling 361-8322 or online at www.hbasiouxempire.com. The upcoming June 30 course in Sioux Falls is full but another one has been scheduled for July 20 at the HBASE office. The July 20 course will be the eighth course offered by the HBASE (open to members and non-members).
Published: July 09. 2010 6:00AM

07/09/2010

**Industry Elevates Criticism Of EPA Chemical 'Concern' List To White House (*Inside EPA*)**

Chemical industry officials are elevating to the White House their concerns over EPA's pending list of chemicals of "concern" under the Toxic Substances Control Act (TSCA), warning Obama administration officials that the list could stigmatize the listed substances and questioning the criteria for selecting chemicals on the list.

Industry representatives from the American Chemistry Council (ACC), ExxonMobil, BASF and others met June 16 with White House Office of Management & Budget (OMB) and EPA officials to discuss the agency's proposed rule to create a first-time TSCA section 5(b)(4) chemicals of concern list. The list would identify substances that

EPA believes are of concern and could require additional testing requirements for those chemicals.

Activists have also met with OMB over the list, with representatives from the Natural Resources Defense Council, Environmental Defense Fund and Autism Society holding a June 4 meeting with OMB and EPA officials over the list. Calls to the environmental groups were not returned by press time.

EPA sent the proposed rule to OMB May 12, and according to the White House's website the advance notice of proposed rulemaking will be published in the *Federal Register* in September.

EPA is proposing to add twelve chemicals to the list of substances that may present an unreasonable risk of injury to human health or the environment, including plastic hardener bisphenol-A, multiple phthalates, and polybrominated diphenyl ether flame retardants, according to EPA. The listings are part of the agency's ongoing chemical action plans, which seek to use existing TSCA authority to address chemicals of concern.

At the OMB meeting, the industry representatives detailed a number of concerns with EPA's use of and approach to the TSCA section 5(b)(4) listing authority, pointing out that the agency has never before chosen to exercise the authority. "What is the incremental value for health and environmental protection with this list?" asks a source with ACC.

Industry is also raising questions about what purpose the rule may serve and why it has not been used by the agency since TSCA was enacted in 1976, the ACC source says. The source says the list was originally intended to identify chemicals subject to significant new use rules under section 5 of TSCA.

At the meeting with OMB, the industry officials used the example of the plastic softeners phthalates to illustrate their concerns with EPA's proposal. Some of the listed chemicals are not even currently being produced, the source says, and adds that other phthalates may safety be used in applications like green buildings, but their inclusion on the list could lead to "market deselection" in favor of other products.

A listing would have no regulatory impact beyond potential extra testing requirements. But with the "stigma" of being included on the list without followup regulatory action, the section 5(b)(4) list leaves chemicals in "regulatory limbo" as EPA does not indicate if it is pursuing regulatory action under TSCA, the ACC source says.

The source says there are already significant questions about the chemicals on the list, particularly from retailers. "At the minimum, we think it is incumbent on the agency to provide guidance to the public on what [the section 5(b)(4) list] is or what it is not, and how it should be used," the ACC source says.

The industry officials also raised questions about the potential "proliferation of lists" on chemicals, because TSCA reform proposals in Congress would also establish lists of chemicals for which EPA would be required to take expedited action. In particular, a House draft bill introduced in April by Energy & Commerce Committee Chairman Henry Waxman (D-CA) and Rep. Bobby Rush (D-IL) includes a list of chemicals targeted for action.

Industry also says EPA has not yet released the criteria for how chemicals are being chosen for the list or accompanying chemical action plans. The source says EPA could propose a rule with criteria for adding chemicals to the list and then pursue separate rulemakings for each chemical -- an approach industry would prefer -- or could simply propose the rule and criteria and include the initial list of 5(b)(4) chemicals.

07/09/2010

**Open Government Advocates Say Obama Regulatory Review Order Is Dead (I*nside EPA*)**

Open government advocates say a long-pending Obama administration bid to revise a Clinton-era executive order (E.O.) to require more transparency and potentially lessen the White House's role in reviewing EPA and other agencies' rules appears dead, replaced by a narrower directive outlining transparency goals that had been expected as part of the revised E.O.

In a further disappointment for the advocates, the memo that is seen as replacing a revised order focuses on transparency of government actions and does not address White House review of agency rulemakings.

President Obama drew support from activists when he issued a memo days after taking office in which he outlined his desire to review E.O. 12866, which outlines the White House Office of Management & Budget's (OMB) role in regulatory reviews. Open government advocates have long criticized OMB as a barrier to the strictest possible EPA rules, arguing that OMB has stalled or watered down rules, including EPA's first-time coal waste disposal proposal issued in May.

But while the White House took comment from federal agencies and the public on possible revisions to the Clinton-era order, President Obama never issued a revised order and appears to have no plans to do so.

Instead, advocates say a memo quietly issued in mid-June by White House regulatory review chief Cass Sunstein may serve as the administration's response to comments on revising the order. In the June 18 memo, Sunstein -- head of OMB's Office of Information & Regulatory Affairs (OIRA) -- sets out guidance for disclosure and

simplification of the regulatory review process. *The memo is available on InsideEPA.com.*

One source with the activist group OMB Watch says that while OMB has been "tight-lipped" about its plans for revising E.O. 12866, the group believes the Sunstein memo signals "the death of more official efforts to overhaul the regulatory process. Many expected the principles outlined in the memo to be included in an overdue executive order on regulatory review." But now, those advocates do not expect a formal revision to E.O. 12866.

One open government advocate says the Sunstein memo "may be just a less formal version" of policies expected in the revisions.

An OMB spokeswoman says, "At this time, E.O. 12866 is the governing document on this issue. It's up to the president to decide whether or not to issue another E.O. on this."

Obama in his Jan. 30, 2009, memo launching the process of reviewing E.O. 12866 sought recommendations on the relationship between OMB reviewers and the agencies, advice on developing guidance for disclosure and transparency, how to encourage public participation in agency regulatory processes, and suggestions on the role of cost-benefit analysis, among other issues (*Inside EPA,* Feb. 26, 2009).

Sunstein in his new memo references a portion of Obama's memo that requires OMB to develop an open government directive, tasking OIRA with reviewing existing policies for impediments to open government "and, where necessary, issue clarifying guidance and/or propose revisions to such policies, to promote greater openness in government." But the memo does not touch on OMB's role in reviewing agency rules.

Rather, Sunstein says that the goal of the 12-page memo is to "set out guidance to inform the use of disclosure and simplification in the regulatory process" and asks federal agencies to follow several principles in determining whether to use full disclosure, summary disclosure or a combination of the two.

Sunstein writes, "Summary disclosure is the best method for informing consumers at the point of decision. Full disclosure is the best method of allowing groups and individuals access to a broad range of information, allowing them to analyze and disseminate that information in creative ways, and to use it to inform private and public decisions or otherwise to promote statutory goals. The two approaches may well be complementary."

In a June 29 blog, OMB Watch says, "Advocates for improved regulation, including OMB Watch, as well as industry representatives, had been anticipating a broader and more formal declaration of policy from President Obama." The group adds, "It is unclear why the administration may have chosen to address these issues through the Sunstein memo, rather than through executive order. Sunstein's memo lacks specificity in certain

areas, raising questions about its intent and scope." For example, the group says that the memo appears to best apply to consumer regulation but is designed to apply broadly, and that the ability to enforce the memo is unclear.

If the Sunstein memo marks the unofficial end of the process to review and revise E.O. 12866 then it marks another disappointment for activists because it fails to address OMB's role reviewing EPA and other agencies' rules. Activists have long claimed that OMB is responsible for stalling or weakening EPA rules.

For example, the Center for Progressive Reform (CPR) strongly criticizes OIRA for its role in weakening the agency's recently proposed first-time Resource Conservation & Recovery Act (RCRA) rule for coal waste disposal. In a recent blog, CPR's Rena Steinzor calls on OIRA to "operate in bright sunshine, disclosing fully its communications with the agencies so the public can see its impact on rules and other administrative activities."

CPR notes that OIRA had 43 closed-door meetings on the EPA proposal, including 30 with industry groups opposed to the rule, and that it allowed other government agencies to take "bites out of" EPA's proposal. "We got this rare glimpse behind the OIRA curtain because EPA -- not OIRA -- posted the interagency comments on its website, undoubtedly seeking to inform the public of what had transpired. OIRA has refused to post similar documents on other rules and even refuses to disclose the papers showing the changes it made to the agency's original draft, in direct violation of the executive order," according to Steinzor's blog.

OMB Watch in its February 2009 comments on Obama's memo called for revisions to E.O. 12866 that would require OIRA to give agencies much more deference on rulemakings and to halt its current practice of reviewing rules "with a fine tooth comb," according to a source with the group.

The group argued, "If the Obama administration embraces this concept of deference to agencies, a new executive order will be very different from past executive orders and could fundamentally transform the rulemaking process. . . . It should also lead to less-intense disagreements over key elements of the process such as the use of cost-benefit analysis. This is because the agencies will have the authority to decide when and if to use such tools . . . [a]nd OIRA's role would shift to providing the principles to guide use of such tools for agencies that decide to use them."

While the OMB Watch source says the group did not expect OIRA to "abdicate" its power in a new E.O., the group did hope the revision would result in "a less interventionist role for OMB and a more collaborative/supportive role."

However, Sunstein's memo does not envision a change of roles for OIRA and in fact, is seen by some as critical of other agencies that fail to be transparent at a time when OIRA is facing heavy criticism for its behind-the-scenes role in delaying and weakening EPA's coal waste RCRA proposal.

A second source says that revisions to E.O. 12866 are thought to be "really dead" and in light of that, "What I do find outrageous is that Cass wags his fingers at the agencies but is not in compliance with 12866 himself."

The OMB Watch source agrees, saying, "OMB needs to practice what it preaches." -- *Dawn Reeves*

07/09/2010

**Industry, States Urge New EPA Research To Justify Lead Clearance Rule (*Inside EPA*)**

EPA is reopening the comment period on its proposed revisions to clearance and testing requirements in its lead renovation, repair and painting (RRP) rule, while industry, North Carolina's health agency and the U.S. Navy are all calling on EPA to conduct new research to justify the complex clearance requirements.

EPA announced in the *Federal Register* July 7 that it would reopen for 30 days the comment period for its proposed lead clearance and testing requirements under the RRP rule after being asked for an additional 90- to 120-day comment extension by the National Association of Home Builders (NAHB).

The proposed rule includes requirements for the cleanup of lead-based paint following renovation work. The proposal includes new requirements to test for lead dust after renovations covered by the RRP rule, including jobs involving the removal of plaster through "destructive means" or the removal of paint using machines like power sanders and abrasive blasters. *Relevant documents are available on InsideEPA.com.*

The NAHB in June 3 comments requested the additional time to properly peer-review the specific data requested in the proposed rule and to conduct further research into the new obligations to homeowners and contractors.

The group also argues EPA should reopen the docket for the rule "to allow affected industries and other interested stakeholders to conduct the necessary field research and formally submit it to the docket," as well as to satisfy EPA's obligations under the Data Quality Act, its peer review policy and its data quality guidelines.

"Furthermore, NAHB urges EPA to allow any interested parties an opportunity to comment on any subsequent research submitted in response to this proposed rule by conducting another public comment period subsequent to any research submitted," according to the home builders' comments.

Meanwhile, the North Carolina Department of Health & Human Services advised EPA not to proceed with the rule, citing its own experience with a state-based lead

renovation rule. "Without any conclusive health-based studies on which to base these extra requirements, the [North Carolina Health Hazards Control Unit] must urge EPA to wait on adding these changes to the regulation," the July 2 comments say. "Wait until the regulation is more accepted and the newly regulated community has gained more experience in working lead-safe."

The state agency also recommends further testing to see if there is a justification for the clearance requirements. "We suggest that EPA may wish to conduct studies on the work done under the current regulation to determine if the additional clearance or dust wipe testing are even necessary," the comments say.

The Naval Facilities Engineering Command, which is responsible for planning and construction of all U.S. Navy shore facilities, in July 2 technical comments also argues that the "complexity of clearance procedures should not be increased without sufficient supporting research" provided by EPA.

The comments question the understanding of "the physical variability of dust loadings and lead concentrations" in a room," and says variability in the research suggest further research is needed before the rule is proposed.

Other comments from contractors and property management firms questioned the additional abatement responsibilities that they would need to undertake under the proposed rule.

07/09/2010

**EPA Prepares Response To Key National Academy Risk Recommendations (*Inside EPA*)**

EPA's Risk Assessment Forum (RAF) is methodically preparing the agency's response to three major reports from the National Academy of Sciences' National Research Council (NRC) that recommend significant changes in EPA's risk assessment practices, which undergird many of the agency's regulations.

A key milestone in the development of EPA's responses is an upcoming intra-agency colloquium where risk assessors from across the agency will meet next October to address some of the most difficult to address recommendations from the academy, RAF Chairman Ed Ohanian said at a July 1 meeting of EPA's Science Advisory Board (SAB) in Washington, D.C.

EPA sponsored the development of each of the documents, "Toxicity Testing in the 21st Century, Phthalates and Cumulative Risk Assessment: The Tasks Ahead," and "Science and Decisions: Advancing Risk Assessment." Each contain recommendations

on some of the most fundamental aspects of risk assessment practice, as well as some of its most pressing challenges.

The NRC report on toxicity testing, published in 2007, lays out a strategy for advancing toxicology and using emerging technologies to better understand human health hazard, a key component of risk. The second report, on conducting cumulative assessments, published in 2008, addresses a key challenge of risk assessment -- recommendations on how to assess mixtures of chemicals, as environmental exposures often occur -- instead of one chemical at a time.

The most recent report, "Science and Decisions," calls for sweeping and sometimes controversial recommendations, it urges assessors to work closely with risk managers from the outset of an assessment to provide more solution-oriented assessments and recommends performing assessments of non-cancer hazards more like cancer hazards are presently conducted. It also recommends expanding the use of strict "linear" default assumptions about substances' toxicity beyond EPA's current use when assessing many carcinogens.

But since the reports were issued, other organizations have been moving ahead of the agency to respond to many of the recommendations. A group of mostly industry and state risk assessors organized by the Alliance for Risk Assessment held its first meeting in March to discuss the report. Many there voiced concerns about some of the recommendations, particularly regarding the report's calls for unified dose-response methods and expansion of conservative cancer assessments. They plan two more meetings, the next in October, and eventually a published response. The industry-funded International Life Sciences Institute -- Health and Environmental Sciences Institute is also preparing a similar effort to address toxicity testing.

Now the RAF -- which is comprised of top agency scientists -- has compiled a list of the reports' recommendations, "potential implementation mechanisms and potential groups to lead efforts," according to slides presented at the SAB's July 1 meeting. *The slides are available on InsideEPA.com.*

Each of the recommendations have been studied in an effort to determine if EPA is already addressing them, could in the near future address them, or if further research or discussion is necessary. For those particularly challenging recommendations, the RAF is preparing for a colloquium this fall. The organizers hope to bring in about 100 risk assessors from across the agency to hash out how best to respond to the recommendations, Ohanian said.

He described the colloquium as a "huge effort," where agency risk assessors will determine short-term and long-term responses to the recommendations. RAF is preparing for the colloquium by creating two technical panels to examine two of the thorniest issues in the recommendations. Each panel will prepare a paper for the colloquium examining recommendations from the "Science and Decisions" report. One will address unified cancer and noncancer dose-response methods and the other, the

use of defaults in risk assessment. Another RAF technical panel, handling cumulative risk assessment approaches, is reviewing the phthalates and other reports, including recommendations from the Science Advisory Board and other advisory panels. All of the "discussion papers" will be considered at the colloquium in October, Ohanian said.

**WATER**

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**EPA investigating wastewater treatment plant in Lyman (*Spartanburg Herald Journal*)**

From staff reports
Published: Friday, July 9, 2010 at 3:15 a.m.
The Environmental Protection Agency is investigating a wastewater treatment plant that belongs to the town of Lyman.

The wastewater treatment plant at 160 Groce Road is capable of pumping about 4 million gallons per day into the Middle Tyger River.

Dawn Harris-Young, a spokeswoman for the EPA regional office in Atlanta, confirmed that the EPA is in the preliminary stages of an investigation on allegations of “improprieties” at the facility.

Lyman Mayor Rodney Turner would not comment on the matter, saying it would be inappropriate because the investigation is ongoing.

He said he does not believe the public is at risk.

No warning signs have been posted by the EPA or the S.C. Department of Health and Environmental Control.

News Channel 7 reported that Turner told the station three workers no longer are employed by the town.

Channel 7 also reported that Tim Atkins, a former employee, said water quality at the plant was not up to standard, so data were falsified.

“It’s an old plant that needs a lot of upgrades. We weren’t getting the quality of samples we’re supposed to get because we didn’t have equipment that worked. And I don’t want to get anyone in trouble, but I was just doing what I was told to do so that we had some clean samples,” Atkins said. “We never did anything that would harm people or the environment.”

07/09/2010

**States Push EPA To Strengthen Mercury MACT To Limit Water Quality Harm (*Inside EPA*)**

State regulators are urging EPA to take the novel step of considering water quality impacts of mercury emissions from power plants when setting its upcoming air toxics rule for the plants, one of several steps that states hope will result in stricter emissions limits than EPA might otherwise have set and which they hope will help achieve water quality limits for the neurotoxin.
State officials raised the novel approach at a landmark meeting among officials from 18 Northeast, Midwest and Mid-Atlantic states and EPA officials held in Philadelphia late last month over integration of air, water and waste programs for limiting mercury, according to sources involved in the effort.

The sources say officials from the states are now drafting a letter to EPA formalizing their request. While the states' requests to EPA are still being drafted and remain in flux, sources say they are expected to highlight the agency's untested authority to account for water quality impairments and other ecological harms when setting maximum achievable control technology (MACT) requirements for power plants and other sectors, in addition to the technology availability approach that EPA generally uses.

State sources say they hope the rule will cut emissions by 95 percent compared to current levels -- stricter than the 90 percent goal activists have long sought -- but a limit that some states say is essential if they are to achieve water quality limits. State water regulators in the Northeast and other states have struggled for years to achieve water quality limits for mercury but have been unable to because much of the mercury stems from power plant emissions from outside their boundaries.

In 2007, seven Northeast states crafted a landmark regional water pollution load limit -- known as a total maximum daily load (TMDL) -- where the states noted a need for an up to 98 percent reduction in atmospheric deposition of mercury to waterbodies in the region to meet its standards.

"Although all states are impacted, the New England states and New York are unable to meet federal and state surface water quality standards and state fish consumption thresholds without substantial reductions in atmospheric deposition of mercury from air emissions originating outside of our region," regulators from those states say in a June 2 letter to EPA Administrator Lisa Jackson previewing the meeting. *The letter is available on InsideEPA.com.*

Industry officials, however, warned that any effort to regulate mercury emissons from power plants under the TMDL was likely unlawful -- and argued that the emissions should be addressed under the air act.

Although the Bush administration crafted a rule limiting mercury emissions, many state officials said it was not strict enough to achieve their water quality goals -- and the rule was vacated by federal courts. The Obama administration is now revising the rule.

**Northeast states then petitioned EPA under section 319(g) of the Clean Water Act (CWA)** to convene a first-of-its-kind conference to bring together seven states that collaborated on crafting the TMDL for mercury, along with 11 upwind states that were shown to be contributing mercury pollution to the region.

The June 22-23 conference in Philadelphia included participation from high-level officials in those states as well as from EPA headquarters and regional offices; an EPA spokeswoman says a meeting summary will be released within the next few weeks. Participating states included the seven states that compiled the Northeast TMDL -- Connecticut, Maine, New Hampshire, New York, Rhode Island, Vermont and Massachusetts -- and 11 states that are contributing mercury pollution to the region -- Pennsylvania, New Jersey, Ohio, West Virginia, Maryland, Michigan, Virginia, Indiana, Kentucky, North Carolina and Illinois.

The 18 participating states are now working on a joint statement they hope will influence EPA and get past the upwind/downwind state divisions that have contributed to adversarial relationships in the past. "We're not finger pointing; we're hand-holding," a second state official says.

Sources present at the meeting say that EPA reiterated its pre-meeting stance that it expected states to develop additional "collaborative" approaches to limit depositions of the neurotoxin now that it was crafting a new emissions rule for utilities (*Inside EPA,* May 14) .

"Their position was very clear repeatedly throughout the conference: 'Our job is to get your guys together,'" one state source says. Other sources say EPA did not tip its hand on new activities during the meeting.

But states pushed EPA at the meeting to implement more aggressive MACT rules, including novel use of air toxics authority to set emissions limits strict enough to prevent ecological harm and attain water quality standards.

EPA generally sets MACT standards based on the performance of the top 12 percent of sources in a given category, but state sources say they likely will encourage EPA to ensure that metric is used as a "floor" rather than "ceiling" on the stringency of the pending rules. One source argues that because the pollutant is regulated in just a few states, few power plants are currently fitted with mercury control technologies, meaning that greater reductions would be technologically achievable than an analysis of how plants are currently performing would demonstrate.

State sources also point to language in the air act that allows for considerations beyond air quality in setting the standard. One source notes that EPA has authority under Clean

Air Act section 112, which governs air toxics regulations, to account for more than just technology limits in deciding where to set a standard, including "any non-air quality health and environmental impacts." The source says this could include fish-tissue criteria and water quality impacts. The source says the use of such justifications has not been tested and that EPA officials at the meeting suggested they had not previously considered implementing them in the pending utility MACT.

**The source says states would also like to see EPA speed the reviews it is normally required** to conduct every eight years to address residual risks that remain after the rule is implemented -- and to ensure those reviews also consider water quality, environmental and health risks when setting the so-called residual risk standard.

The source says that implementing a stronger standard from the outset would be preferred, so as not to leave revisions of the rule to the whims of a future administration. "If it's not a top priority for some future EPA, timelines for review can slip quite a bit," the source says.

The source notes that because so few power plants are operating with mercury controls in place, a purely technology-based standard would not appropriately capture the level of reduction that could be cost-effectively achieved. Several state participants also noted that state law or orders from governors prevented their environmental agencies from implementing stricter standards than EPA, using that as an additional justification for the agency to take an aggressive approach in setting its MACT standards.

Other ideas discussed at the meeting included the potential for EPA to establish a cross-discipline "clearinghouse" of information on sources of mercury pollution and means to address them, as well as potential for the agency to develop model legislation for states hoping to do more to limit mercury. There also was discussion of whether the Toxic Substances Control Act could be used to force companies to use alternatives to mercury in production, where substitutes were available. -- *Nick Juliano*

07/09/2010

**Groups Scramble To Craft Fracking 'Best Practices' Ahead Of Federal Action (*Inside EPA*)**

States, industry and environmentalists are developing suggested best management practices (BMPs) for hydraulic fracturing, or fracking, in anticipation that a pending EPA study of the drilling practice could result in the agency developing short-term, non-binding recommendations to reduce the risks from fracking.

Some legal and industry sources however question whether recommendations from the EPA study may be "mooted by current events," such as states and industry moving

ahead with the implementation of BMPs, and a possible congressional requirement for BMPs at wells.

Earlier this year, EPA said its upcoming study of fracking could inform some non-mandatory, short-term measures to reduce environmental risk from fracking, including BMPs and other guidance to address concerns that fracking harms water quality. EPA's Science Advisory Board (SAB), which is reviewing EPA's plan for the fracking study, says EPA should focus on BMPs that are currently employed and those practices that would better protect groundwater.

Fracking is a process in which water, sand and chemicals are injected into rock formations such as shale to crack the rock and release natural gas and oil. Sources say best practices could cover the entire fracking process, including well construction, fracking fluids, chemical storage, waste issues and other parts of the process.

One legal source who has worked with industry says a stakeholder advisory committee that will accompany the EPA study "could be the best place to find consensus" on fracking BMPs, adding that industry and environmental groups that are not wholly against the practice could find common ground on BMPs.

The study could also gain traction if a new House bill expands federal authority over fracking by setting new best practice requirements in well construction permits, sources say (*see related story*).

But sources caution EPA's study could be overtaken by existing action on BMPs. A key trade association is developing a set of technical BMPs for the fracking process, an activist-investor group is pressuring companies to adopt a set of general BMPs and environmental groups have been compiling information about BMPs on the web. A group that works with state drinking water regulators is also poised to develop a set of BMPs for regulators.

One industry source questions whether the EPA study will be able to add much to the discussion when it is released, considering the ongoing work by industry and the states, and further hopes the study will take into account the work on BMPs being done. "I hope the study recognizes this is already underway," the source says.

For example, the source points to a set of guidance documents in development by the American Petroleum Institute (API). The group has released three technical documents on best practices: The first focuses on developing a site, as well as reclamation and restoration issues; the second focuses on well construction and integrity guidelines; and the third focuses on best practices for managing the water used in the process. A forthcoming document will cover a multitude of other issues dealing with environmental impacts at the surface, an informed source says.

Larger oil and gas companies have developed their own internal guidelines that the legal source says are often more stringent than the API guidelines for fracking.

However, API's guidance does offer protection against claims of negligence and provides a set of BMPs for smaller companies.

Chevron in an April 21 letter to SAB made a pitch for the upcoming EPA study to take into account industry and states' existing work on BMPs, including the API guidance and other efforts. For example, Chevron cited the company's participation in developing API's BMPs and said the company is "ready to share expertise and information with EPA as needed." *Relevant documents are available on InsideEPA.com.*

There are challenges to developing the BMPs. The industry source says BMPs for fracking, including those developed by API, "tend to span a variety of options to do the same thing," because a practice that is preferable in one geographic area may not be feasible in another. It also takes effort to keep the BMPs updated and reflective of the latest developments in technology and how these modifications should be applied to the practice, the source says.

Still, new BMPs would also provide state regulators with additional information to better regulate fracking, sources say. A 2009 analysis of existing state fracking programs conducted by the Groundwater Protection Council (GWPC), a group of state ground water regulatory officials, recommends the development of BMPs for fracking, because they "would assist states and operators in insuring continued safety of the practice; especially as it relates to hydraulic fracturing of zones in close proximity to ground water, as determined by the regulatory authority."

GWPC is also poised to develop BMPs for regulators that would look at the "checks and balances" of regulating the practice and take into account advances in technology, according to a source familiar with the effort. "How can a state evaluate these technologies in terms of effectiveness and how well they can protect groundwater?"

**Environmentalists are also pushing for individual companies to adopt a set of general BMPs** developed by the Investor Environmental Health Network (IEHN), which includes investment managers and activist groups. In a March 26 letter to the Science Advisory Board, IEHN executive director Richard Liroff includes a number of potential BMPs, but does note the group is not seeking to "micromanage" companies' fracking practices.

Such best management controls could include using fracking fluids with the lowest toxicity that still meet function and cost requirements; recycling and reusing wastewater and reducing use of freshwater; and offering greater public disclosure of the chemical constituents of fracking fluid, among others.

Earlier this year, shareholders put forth BMP resolutions at a number of company meetings, including Exxon/Mobil, Cabot Oil & Gas and others, and received votes of up to 42 percent supporting the moves. "Since a resolution addressing a new environmental issue . . . typically receives supporting votes only in the single digits, the enormous votes for these resolutions amply document the considerable concern within

the investor community about the lack of corporate disclosure of hazards and precautionary policies and practices," according to a June 9 IEHN statement.

A source with the group says "more robust adoption" of BMPs could help prevent any environmental damage. For example, monitoring water quality before drilling would establish a baseline that could protect companies against liability by proving that the water was contaminated prior to the drilling operation, the source says.

The legal source says the shareholder resolutions are "broadly worded," but says they could lead to individual companies releasing more information the fracking process and their positions on regulatory proposals, as well as discussing environmental impacts -- much like similar resolutions on climate change. But companies may be less likely to provide the information because fracking is "personal to the company" and "localized in potential impacts," the source says.

Other activist groups are also looking to compile BMPs for fracking, including a new initiative from the Sierra Club and Earthjustice to pull together various BMPs on fracking, according to an activist source.

But the industry source says activists have used similar tactics in the past, including the development of BMPs for land use during an uptick in coal bed methane development in the Western United States. The source says industry spends time to combat the efforts because oftentimes the BMPs have "no technical understanding of the limitations of the options" compared to industry BMPs. -- *Aaron Lovell*

07/09/2010

**States, Industry Ready Bid To Amend Water Act's 'Point Source' Definition (*Inside EPA*)**

Several states and the agriculture industry are readying separate efforts to amend the Clean Water Act's (CWA) definition of "point sources" subject to the law's jurisdiction in order to stem a tide of court rulings in recent years expanding the universe of sources requiring permits.

A key driver for the efforts is EPA's pending effort to finalize National Pollution Discharge Elimination System (NPDES) general permits for some chemical spraying activities and possible changes to a general permit for discharges from marine vessels. Both permits were mandated by federal courts that threw out EPA regulations exempting the source categories from CWA requirements -- and creating significant new permitting burdens for regulators and permittees.

Industry sources have raised special concern about the appellate ruling that created the mandate for spraying permits, charging that the court's reasoning in *National Cotton*

*Council, et al. v. EPA* could broaden the definition of what is considered a "point source" subject to permit requirements.

"It is clear that but for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a 'point source,' the U.S. Court of Appeals for the 6th Circuit says in its 2009 ruling.

Industry sources say this reasoning could open the door to permitting activities that were previously considered to be exempted from permit requirements as non-point sources, including fertilizer applications, some releases from livestock operations and air pollution depositions from power plants and other industrial sources. If EPA is required to trace back pollutants to when they were discharged as a point source, virtually anything could eventually fall down this "slippery slope," an industry source said following the ruling.

While industry officials expressed concern about the potential effects of the ruling, a key industry source says officials are weighing a lobbying effort to address the issue. "We haven't started the process yet. We've been trying to think about where our friends are," the source says.

State sources are raising similar concerns, pointing to EPA's pending spraying permit. One state source familiar with the preliminary discussions among state officials on the issue says while EPA's draft spraying permit does not create particularly onerous burdens, it raises a larger question of whether having dual regulations under the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) and the CWA is the best way to manage pollutants.

"We're asking, if you have both FIFRA and the [CWA], is there a way to pull all the way back and focus more broadly -- is there a way to address this issue that's easier?" the source says. "We're looking at the statute, and states are hopeful that we can have that broad conversation. I think EPA . . . understands the predicament that states are in."

"What states want is to have a conversation [about the CWA's scope] now that the court has ruled -- let's look at the issue," the state source says. "We can create a statutory framework that can get the same amount of environmental protection, but that's easier" to develop rather than catching up to court-ordered deadlines.

**The source says the states have not developed their argument to the point where they have firm,** specific recommendations on ways to amend the CWA, but says the issue of having courts expand the scope of the law by throwing out exemptions based on the broad language of the statute -- and the states' resultant need to develop more permits and compliance assurance efforts at their expense -- is an urgent one.

The source notes that over the years the types of discharges required to obtain NPDES permits has steadily grown from direct point dischargers into waterways -- such as

wastewater treatment facilities, power plant and industrial operations -- to stormwater runoff, concentrated animal feeding operations, marine vessels and pesticide sprayers. The latter two categories are being regulated as a result of court rulings, the state source says, which means that unless the definition of a point source is clarified there could be more rulings in the future expanding the NPDES program.

A case in point are vessel discharges, which the agency is now required to regulate after the 9th Circuit in 2008 vacated EPA's long-standing rule exempting the sources from permit requirements. Once EPA issued a permit, both industry and environmentalists sued, but the litigation in the D.C. Circuit has remained on hold while EPA and the various parties hold settlement talks. EPA asked the court June 28 for an additional abeyance, saying that the agency, the state of Michigan, several environmental organizations and the Canadian Shipowners Association believe they are close to reaching a settlement. EPA is asking the court to keep the litigation on hold until Sept. 8.

The agriculture industry source says that while officials have not yet begun to strike up a dialogue with EPA or the states on the issue of the CWA's definition of a point source, industry shares the states' concern that the steadily expanding universe of point sources is a problem that has to be addressed. "If [courts] expand EPA's authority to call things a point source then you're also expanding their jurisdiction, and that's subject to consequences," the source says. "We don't know how we're going to get agriculture and food production done in this country."

The industry source says it is unknown whether EPA might be amenable to limiting CWA's jurisdiction by narrowing the definition of point sources, but notes that the Obama administration's efforts to create more stringent agricultural runoff controls in the Chesapeake Bay watershed may indicate EPA would likely oppose limits on the scope of the act, even if only for political reasons. -- *John Heltman*

07/09/2010

**Industry Fears EPA Raising Fish Consumption Rates In Water Decisions (*Inside EPA*)**

Industry representatives are expressing concern with new EPA policies for considering fish consumption rates in water quality decisions, fearing the agency's emphasis on protecting vulnerable communities that consume higher-than-average amounts of fish could result in overly stringent regulatory requirements.

In its most recent articulation of its approach, EPA last April quietly finalized a long-awaited guidance to states for implementing the agency's landmark 2001 human health water quality criteria for mercury based on fish tissue levels, where it urged states and tribes to consider "the fish being consumed by various subpopulations (e.g., sport

anglers, subsistence fishers) as well as culturally and economically diverse communities."

The agency finalized a similar guidance in December 2008, but the Obama administration began a formal review of the guidance when it took office in January 2009. The Office of Management & Budget completed its review of the document earlier this year and EPA now says it took effect in April.

While EPA in 2001 derived the water quality criterion based on a default fish intake rate for the general population of 17.5 grams/day of uncooked fish, the April guidance says states and tribes "may use a different intake rate based on local or regional consumption patterns and are encouraged to use consumption rates that are protective of a range of culturally and economically diverse communities." *The guidance is available on InsideEPA.com.*

The guidance instructs permitting authorities to use certain population data when considering an average fish consumption level on a sliding scale of priority, specifically saying to "use local data protective of culturally and economically diverse communities when available; use data reflecting similar geography or population groups; use data from national surveys; and use EPA's default fish intake rates."

EPA also appears to be adopting a similar approach in its review of state water quality criteria. EPA Region X -- which covers Alaska, Idaho, Oregon, and Washington -- June 1 disapproved Oregon's 2004 revised human health criteria for 103 toxic pollutants due to studies and state efforts that show some tribal members in the state eat 10 times more fish than EPA's default consumption value. EPA said the consumption rate exposes tribe members to more pollutants from contaminated fish, and said the state needs to pursue stricter water criteria.

The industry source says Obama administration officials added consideration of "culturally and economically diverse communities" after they withdrew and amended a version of the guidance that Bush administration officials finalized in December 2008. But the source says the terms leaves itself open to interpretation and could lead to more stringent requirements for permittees. If a permitting authority assumes a higher consumption level, for example, it will mean dischargers will have to lower the concentrations of mercury in their effluent in order to lower the concentration of mercury in fish to protect populations who rely on fish consumption for subsistence.

Native American communities often rely on wild fish populations for subsistence as a matter of cultural tradition, and as a general matter it has been shown that lower-income households have higher consumption levels of wild-caught fish. But if a fish consumption level is based on "economically diverse" communities, a permitting authority may be compelled to assume a higher fish consumption level based on the presence of low-income households, which they say may be a dubious assumption, the source says.

"What they don't explain is how to define that," the source says. "It's one thing to say there's a Native American population in a particular area, but when you get into economic diversity -- it's an issue we'll have to talk about."

The industry source says an example of the effects of the culturally and economically diverse communities clause in the guidance can be found in Region X's recent decision to reject Oregon's proposed criteria.

The source says that could lead to troublesome burdens on industry, however, because that criteria is applied statewide, not just in the watersheds where the Oregon tribes live. "One thing we've been saying all along is you have to grapple with the issue in a way that has site-specific requirements," the source says. "But in Oregon, [EPA seems] to be saying we need to do this for the whole state. That has a lot of impact."

EPA's long-awaited guidance for implementing its fish tissue criterion is also significant in that it instructs state and tribal regulators on how to implement the agency's first-time risk-based criterion based on fish tissue levels of a contaminant, rather than on a water column value.

**Feds ban boat sewage in Chatham Harbor, Mass. (*Boston Globe*)**

July 8, 2010
BOSTON --Boats sailing through Pleasant Bay and Chatham Harbor are being banned from discharging sewage.

The Environmental Protection Agency has approved a request from the state to designate the waters a "no discharge area."

Massachusetts Environmental Secretary Ian Bowles said the designation adds to the administration's goal of barring the discharge of boat sewage in all of the state's coastal waters.

Bowles said the ban protects one of the most diverse and productive marine habitats on the East Coast.

The EPA is considering a similar ban from Gloucester to Salisbury.

More than a dozen locations in Massachusetts have already been designated "no discharge areas" as have all state marine waters in Connecticut, Rhode Island, and New Hampshire.

Online:

No Discharge Areas in New England: http://www.epa.gov/ne/eco/nodiscrg/index.html

**EPA Hears Citizen Concerns, Industry Assurances About Gas Drilling (*KERA*)**

Shelley Kofler, KERA (2010-07-09)
FORT WORTH, TX (KERA) - Almost 600 crowded a Fort Worth hearing Thursday night to tell the EPA what they want from a study on hydraulic fracturing. That's the drilling process used to produce natural gas from the Barnett Shale in North Texas. The EPA's national study will look at the effects of the drilling on drinking water.

More than 9,000 wells are now producing natural gas from the Barnett Shale, a geological formation beneath at least 17 North Texas counties. The EPA predicts that within a decade shale gas will comprise more than 20% of the total US gas supply.

But as production has grown so have concerns, and those concerns resonated through the EPA hearing as residents like Sharon Wilson, from Wise County, stepped up to the mic.

"If hydraulic fracturing is safe why does Halliburton need indemnification language releasing them from liability of any kind?" Wilson asked.

Wilson is among those who want the EPA to force gas producers to reveal the makeup of chemical fluids used in the so-called "fracking" process. That's where water, sand and fluid are forced down into the shale. The pressurized injection opens fissures in the rock allowing the gas to flow. Wilson believes the drilling fluids pose a danger to groundwater and the environment.

Many industry advocates suggest the concerns are overblown.

Candace Brewer represents a group earning royalties from natural gas drilling. She told the EPA she's unaware of any drinking water contamination from hydraulic fracturing. She seemed to caution the EPA against federal regulations that would step on state authority.

Texas Railroad Commission Chair Victor Carrillo also wanted to make it clear that his agency - not the EPA- is Texas' chief regulatory authority over oil and gas production.

"Regulating oil and gas activities have traditionally been the province of the states which have had effective programs in place for decades. Congress should maintain the status quo," Carrillo testified.

But many drilling critics believe the Railroad Commission is biased toward industry and they want the EPA to forcefully step in.

Tim Ruggiero owns ten acres in Wise County. He says he's living proof the state isn't protecting the public.

"I am one of those cases of contaminated drinking water. It's why I'm here tonight," Reggiero told the EPA.

Ruggiero says he tested his water just before and after gas producers began drilling on his property. He says water samples collected after the drilling started contain an unknown chemical similar to the gas additive MTBE. Ruggiero also complains of air contamination and state agencies unwilling to take action.

"It's virtually turned our life upside down. We can no longer just turn on the tap and drink water. We now have to bring in water at additional cost," he said.

Ruggiero says the appraised value of his house has also plummeted from $250,000 in 2004 to $78,000 following drilling this year.

The EPA plans to hold similar hearings in Colorado, Pennsylvania and New York. The testimony will help shape a study on hydraulic fracturing that begins this fall. The EPA will have preliminary results on how it affects drinking water by the end of next year.

That timeline clearly frustrated some like Robert Snoke, chairman of the Rosemont Neighborhood Association in Fort Worth. He challenged the EPA saying, "You are going to wait until I see something coming out of my faucet that's purple? Then I'm to call you? Well it's too late if it's in my water."

Those like Snoke want more industry scrutiny now. Industry representatives say they want enforcement following a thorough review based on science.

**Chatham latest, but not last, no-discharge area (*Cape Cod Times*)**

By Susan Milton
smilton@capecodonline.com
July 09, 2010
CHATHAM — Shore by shore, most of New England is nearing the shared goal of banning the discharge of human waste from boat toilets into coastal waters.

Pleasant Bay yesterday became the latest — but not the last — body of water to be designated a "no-discharge area" for marine toilets.

"What a great day for Pleasant Bay and a great milestone for the towns," said Carole Ridley, coordinator for the Pleasant Bay Alliance, which was created by the bay's four towns — Chatham, Orleans, Harwich and Brewster.

The alliance proposed the designation a year ago.

In two years, the entire Massachusetts coast is scheduled to be designated a no-discharge zone to eliminate that threat to water quality, according to state and federal officials during a brief ceremony that brought selectmen, harbor masters and other officials to Jackknife Point in Chatham.

Waterways already designated no-discharge areas include Buzzards Bay, Cape Cod Bay and several Cape harbors.

Later this summer, the federal Environmental Protection Agency plans to approve including the state-proposed area along the North Shore, from Gloucester to Salisbury, said Stephen Perkins, director of the Office of Ecosystem Protection in the EPA's New England region.

Next summer, the EPA hopes to designate Mount Hope Bay near Fall River, the Outer Cape from Monomoy Island to Provincetown and, after working with passenger ferry operators, all of Nantucket Sound.

"And then we'll be done," said Todd Callaghan of the Massachusetts Coastal Zone Management Office, which works with the EPA on such designations.

In New England, Perkins said, the EPA is close to achieving its dream of having a no-discharge zone from Connecticut to Portland, Maine.

State waters in Connecticut, Rhode Island and New Hampshire are already designated no-discharge areas. Because of its extensive coastline, Maine is focusing first on designating major boating areas such as Casco Bay, Perkins said.

Before approving a designated area, EPA insures enough pump-out stations for marine toilets are available. The Pleasant Bay stations are in Round Cove in Harwich, Ryder's Cove in Chatham and at Nauset Marine East, Callaghan said.

The bay currently draws about 2,160 boats, of which 124 are large enough to have a marine toilet, according to the EPA.

**EPA investigating wastewater treatment plant in Lyman (*Spartanburg Herald Journal*)**

From staff reports
Published: Friday, July 9, 2010 at 3:15 a.m.
The Environmental Protection Agency is investigating a wastewater treatment plant that belongs to the town of Lyman.

The wastewater treatment plant at 160 Groce Road is capable of pumping about 4 million gallons per day into the Middle Tyger River.

Dawn Harris-Young, a spokeswoman for the EPA regional office in Atlanta, confirmed that the EPA is in the preliminary stages of an investigation on allegations of "improprieties" at the facility.

Lyman Mayor Rodney Turner would not comment on the matter, saying it would be inappropriate because the investigation is ongoing.

He said he does not believe the public is at risk.

No warning signs have been posted by the EPA or the S.C. Department of Health and Environmental Control.

News Channel 7 reported that Turner told the station three workers no longer are employed by the town.

Channel 7 also reported that Tim Atkins, a former employee, said water quality at the plant was not up to standard, so data were falsified.

"It's an old plant that needs a lot of upgrades. We weren't getting the quality of samples we're supposed to get because we didn't have equipment that worked. And I don't want to get anyone in trouble, but I was just doing what I was told to do so that we had some clean samples," Atkins said. "We never did anything that would harm people or the environment."

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