**U. S. Environmental Protection Agency**
# E-Clips
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**ADMINISTRATOR JACKSON**

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**Cabinet secretaries make Final Four picks (*Washington Post*)**

Cabinet secretaries Ken Salazar, Kathleen Sebelius, Lisa Jackson and Tom Vilsack.

*As the March Madness tournament begins this afternoon, President Obama thinks the Kansas Jayhawks will win, but some Cabinet secretaries contacted by The Federal Eye think otherwise:*

EPA Administrator Lisa Jackson: Kansas vs. Syracuse (Kansas wins), Kentucky vs. Villanova (Villanova wins). Winner: Villanova.
Interior Secretary Ken Salazar: Kansas, Villanova, West Virginia, Syracuse. Winner: Kansas.
Health and Human Services Secretary Kathleen Sebelius: Kentucky, Kansas, Syracuse, Villanova. Winner: Kansas (No surprise from the former Kansas governor).
Agriculture Secretary Tom Vilsack: Kentucky, Villanova, Oklahoma State and Kansas State. Winner: Kentucky.
Taking a pass (or, passing the ball?): Education Secretary Arne Duncan (Perhaps due to his call to ban low-performing schools from the tournament?). Defense Secretary Robert Gates ("I almost certain he is too busy for this," a spokesman claimed). Transportation Secretary Ray LaHood: ("He says he's going to the Final Four, but he'll leave making picks to the president," said a spokeswoman). Office of Management and Budget Director Peter R. Orszag ("He doesn't have any," said a spokesman.)
We'll track the picks of these secretaries over the course of the tournament and the winner of this small pool shall win a prize to be determined after the first round of play.
You can also review The Federal Eye's picks here and kudos to NBC's Jimmy Fallon for rooting for The Eye's hometown Siena Saints to go all the way.

March 18, 2010

**Critics on Both Sides of Coal Mining Debate Assail EPA on Mountaintop Regulation (*New York Times*)**

By PATRICK REIS of Greenwire
Critics on both sides of the heated debate over the regulation of mountaintop-removal coal mining lambasted U.S. EPA today for its handling of the issue.

Environmentalists this morning strung a banner saying, "EPA: pledge to end mountaintop removal in 2010," between 20-foot-tall purple tripods outside the agency's Washington headquarters. Six protesters then chained themselves to the tripods' bases and vowed not to leave until EPA Administrator Lisa Jackson agrees to fly over Appalachia to survey environmental damage done by mountaintop mining.

Kate Rooth of the Rainforest Action Network, which organized the protest, said EPA must exercise its full authority under the Clean Water Act to prevent mining companies from blowing apart mountaintops and dumping waste into waterways.

In the Senate, Environment and Public Works Committee Republicans are preparing a report that they say shows EPA is using scrutiny of mountaintop mining to sabotage all coal mining in the eastern United States.

At issue are Clean Water Act permits for mining that are being reviewed by EPA and the Army Corps of Engineers for their effects on Appalachian waters. The corps issues such permits, but EPA has final oversight authority and veto power.

Republicans and coal-state Democrats cried foul last fall when EPA asked the corps to delay issuing 79 permits for additional reviews for Clean Water Act compliance. A set of permits submitted last spring are also awaiting federal approval. EPA is preparing new guidelines for permit applicants but announced two weeks ago that they would be delayed.

Republicans on the EPW Committee say permitting delays threaten the loss of more than 17,000 jobs, imperil 81 small businesses and prevent the production of more than 2 billion tons of coal.

Citing interviews with permit applicants, the Republicans say about 1 in 10 delayed mining permits are for mountaintop projects. Most of the rest are for surface mines, but at least 20 are for underground mines or coal processing facilities, a Republican staffer on the EPW Committee said.

"Although they're doing this in the name of mountaintop-removal mining, they're actually going after all coal mining, including underground permits," the staffer said. "If these permits are so bad for the environment, they should veto them, instead of just holding onto them indefinitely."

Adora Andy, spokeswoman for EPA, said both today's protest and the Senate report are based on a fundamental misunderstanding of EPA's role. The agency, she said, does not determine how much mining goes on in Appalachia, it is responsible for ensuring that projects comply with the Clean Water Act.

"First and most important, EPA has no problem with coal, nor do we regulate mining," Andy said. "EPA does have a big problem with coal pollution in our waters, and we intend to do our job under the law by protecting the water Americans drink, swim in and fish from."

Instead of "holding up" permits, Andy said, EPA is working with coal companies and the Army Corps to reduce the amount of waste dumped or the number of valleys filled.

The agencies are also hitting their deadlines in doing so, EPA said.

According to EPA: Of the 79 permits being held for advanced review, all but six are in the hands of the Army Corps. Of the six passed to EPA, three were approved within 60 days and the rest are still being scrutinized. Of 48 permit applications the Army Corps submitted for EPA review early in 2009, 42 were approved within 30 days.

The Army Corps did not respond to a call requesting comment.

But Senate Republicans maintain EPA is responsible for permitting delays. "The corps is a straightforward agency -- you put in A, you get B," the Republican staffer said. "They were ready to issue most of these permits. The EPA is more political. They're the ones with the agenda."

**EPA to begin study on shale gas drilling (*Reuters*)**

**Story also appeared: *Washington Post***

By Tom Doggett
Reuters
Thursday, March 18, 2010; 10:25 AM

WASHINGTON (Reuters) - The U.S. Environmental Protection Agency was set to announce on Thursday that it will begin to take a closer look at the environmental and human health impact of shale gas drilling, according to a U.S. congressman who wants to see more regulation of the practice.

The study, which could take months to complete, will put the spotlight on the potential dangers of hydraulic fracturing for water supplies and public health at a time when major oil companies such as Exxon Mobil, BP, Statoil and Total are pouring investment into the shale gas sector.

Representative Maurice Hinchey of New York said the EPA on Wednesday night told groups concerned about the drilling technique that the agency would begin the first phase of its study on Thursday.

An EPA spokeswoman confirmed the agency would be making an announcement about hydraulic fracturing on Thursday, but declined to provide further details.

However, the EPA said in notice published Thursday in the Federal Register that the agency's science advisory board would hold a public meeting on April 7 to discuss how the EPA plans to study hydraulic fracturing.

The EPA said in its notice that the agency plans to gather existing data for its study on hydraulic fracturing, seek input from stakeholders, catalog "potential risks" to drinking water supplies and identify data gaps.

Hydraulic fracturing, or "fracking," injects a mixture of water, sand and chemicals into rock formations to stimulate oil and natural gas production.

Some environmental groups claim the technique is unsafe and want the government to regulate it.

Energy companies say improved fracking technology allows them to drill for oil and gas in an environmentally safe manner. They also say there is no evidence fracking has contaminated water supplies.

Analysts have said shale gas could supply more than 100 years of natural gas consumption at current rates, and have called it a "game changer" for the industry.

Hinchey co-authored pending legislation that would require oil and gas companies to disclose the chemicals they use in their fracking processes.

"I applaud the EPA's decision to begin a serious investigation into this matter and will continue working to protect our environment from the chemical concoctions being pumped into the ground by energy companies," Hinchey said in a statement.

EPA Administrator Lisa Jackson told lawmakers last month she would rearrange the agency's budget so the fracking study could be carried out this year. But she provided few details on how it would be conducted.

The House Energy and Commerce Committee also has called on the EPA to investigate the effects of fracking.

"There are compelling reasons to believe that hydraulic fracturing may impact ground water and surface water quality in ways that threaten human health and the environment, which demands further study," the EPA said last month.

(Editing by Lisa Shumaker)

**Is the EPA poised to destroy Earth's habitats? (*Daily Caller*)**

Posted By H. Leighton Steward On Thursday, March 18th, 2010 @ 1:41 PM

The Environmental Protection Agency is on a course that will damage the environment, not protect it. Just observe EPA's willingness to do so while spouting false statements to make its case on regulating greenhouse gases.

EPA's Secretary Lisa Jackson says that if the House and Senate will not pass a cap-and-trade bill, then the agency will move forward to enact ways to reduce greenhouse gases, including CO2.

Unfortunately, she is still clinging to the “science is settled” statement that is now widely known to be false. There are tens of thousands of scientists who have signed a petition belittling the catastrophic global warming forecasts. Even Phil Jones, former Director of the Climate Research Unit at East Anglia University which has been the gold standard of global temperatures, has now publically admitted that the science is not settled. What does Secretary Jackson know that Phil Jones, a 34-year veteran of climate research, does not know? What about EPA climate scientist Alan Carlin who notified the agency he could not find the science to back up the EPA’s claims on man-made global warming?

Secretary Jackson’s pronouncements are not factual, but are purely political and will give the current administration a hefty stream of tax dollars. Those dollars will come out of your pocket if you use electricity, transportation or food.

A preconceived political position has no place in evaluating science. It is flagrantly wrong, will ultimately give science a bad name, and goes against President Obama’s pledge to bring science back to its rightful position when deliberations on scientific issues are being considered.

What does the EPA’s position have to do with impacting habitats, ecosystems, and the food supply? If the agency should eventually be successful in reducing CO2 to pre-industrial levels as many environmentalists desire, the average growth of plants (food) will diminish by 12 percent and the growth of forests by 18 percent. Twelve percent equates to elimination of food for one out of eight people on earth. The Associated Press reported recently that over a billion people are severely malnourished. Since there are 7 billion people on Earth today, then won’t hundreds of millions of those likely die?

Additional atmospheric CO2, a marvelous airborne fertilizer, would be extremely beneficial to Mother Earth and her plant and animal kingdoms. More CO2 causes plants to require less water, thus making them drought tolerant. We can already see that plants are now moving onto the margins of the deserts. The plants also become more resistant to many common stresses.

But, as the EPA has claimed, isn’t CO2 a pollutant that will be an endangerment to mankind? The agency believes the story that CO2 is a major cause of global warming, and then, just as quickly, refuses to bring forth the science to support that position. American taxpayers fund the EPA and yet Secretary Jackson will not reveal the scientific evidence that backs up her position.

No wonder the most recent Gallup poll is showing that 48 percent of the public is skeptical over climate change claims since our paid servants can’t produce any empirical evidence to support the man-made climate change hypothesis.

*H. Leighton Steward is chairman of CO2IsGreen.org [1] and PlantsNeedCO2.org [2].*

**EPA Delay Of GHG Permits To 2011 Prolongs Uncertainty For New Plants (*Inside EPA*)**

3/19/2010
EPA's decision to delay until 2011 its mandate for first-time greenhouse gas (GHG) permitting requirements at stationary sources is prolonging uncertainty for new coal-fired plants aiming to win final permits before the requirements take effect, because industry fears EPA will aggressively stall issuance of final permits until next year.

Still, industry officials are in part welcoming the delay -- announced by EPA Administrator Lisa Jackson in a recent letter to Democratic senators -- because it allows them to go forward with planned modifications at existing facilities this year without worrying about trigging GHG limits. Jackson said existing plants could trigger GHG requirements if they make changes in 2011 or beyond that would trigger permit requirements for other regulated pollutants.

Jackson also said in the Feb. 22 letter that EPA would delay until 2011 the effective date of its proposed "tailoring" rule to exempt sources emitting less than 25,000 tons per year (tpy) of GHGs from Clean Air Act permitting requirements, and that EPA could in the first few years raise the threshold up to 75,000 tpy to focus on only the largest sources.

But industry officials say that Jackson's delay only exacerbates problems for proposed coal-fired power plants and other facilities striving to win Clean Air Act permits so they can begin construction before GHG limits take effect. They also claim that EPA is aggressively and deliberately stalling permits it opposes -- including reopening final permits through administrative orders -- in order to subject those facilities to GHG limits next year.

Adding further uncertainty, an industry source notes, are likely environmentalist challenges before EPA's Environmental Appeals Board (EAB) or in federal court to permits that do get finalized this year without GHG limits due to the likelihood that an adverse ruling could require a new permit with GHG limits. For example, EAB rulings are considered final agency actions, so if the board rejects a permit issued in 2010 next year, that permit would need to be reopened for GHGs.

The industry source says, "For any project that EPA or environmentalists don't support, they will just hold up permits until the end of the year, and they can easily do that" in order to require those permits to include GHG limits in 2011. The source says Jackson has been explicit that permits not final by the end of 2010 will "have to go back and start the process again" by assessing GHG limits to include in the permits.

As an example of EPA delaying permits it opposes, some sources cite the Obama administration's position on the proposed Desert Rock power plant in New Mexico. EPA

last fall sought and won a voluntary remand from EAB of a Bush EPA-issued permit for the plant, which activists opposed for a lack of GHG limits, among other reasons.

EPA sought the remand so it could consider requiring in the permit integrated gasification combined cycle (IGCC), a cleaner-burning technology, which converts coal to gas before burning it, allowing easier capture of GHGs.

Desert Rock's developers now appear to have pulled their financial support, choosing not to appeal the Sept. 24 ruling by the EAB that granted the remand, over concerns that even if they won the court fight the agency would delay the permit on other grounds until GHG limits take effect, an informed source says. Desert Rock's time frame to challenge the ruling in federal court has passed.

Additionally, late last year EPA required two states -- Arkansas and Kentucky -- to reopen what were final coal plant Title V air act permits, in the Arkansas case to reconsider IGCC and in the Kentucky permit, which was already for an IGCC facility, to require the state to consider natural gas in lieu of coal as a cleaner fuel alternative. The agency's orders were in response to petitions by environmentalists (*Inside EPA*, Dec. 25).

Further, EPA acting of its own accord sent a strongly worded letter to Texas regulators last month threatening to object to an air permit for the proposed coal-fired White Stallion Energy Center because the permit failed to consider IGCC or clean fuels under a required best available control technology (BACT) analysis.

The Feb. 10 letter from EPA Region VI to the Texas Commission on Environmental Quality (TCEQ) references the Desert Rock EAB ruling and the other agency actions on IGCC and BACT, noting, "[I]n light of EAB's recent conclusions, we strongly recommend that TCEQ and the permit applicant specifically address any IGCC technology considerations as a part of their BACT analysis."

On clean fuels, the letter says, "We believe the TCEQ should analyze the possibility of cleaner fuels as an alternative primary fuel source." *Relevant documents are available on InsideEPA.com.*

And the agency's letter to the state warns, "If the issues detailed in this letter are not appropriately responded to by TCEQ prior to final resolution of this permitting action, EPA may consider using Clean Air Act authorities to object to the subsequent Title V operating permit for this facility, or other remedies under the statute."

Such a threat from EPA to a state permitting agency is unusual, sources note, because EPA usually only issues Title V objections in response to environmentalists' petitions challenging permits.

Jackson's spokeswoman did not respond to a request for comment.

Environmentalists are downplaying industry's concerns about a delay in issuing GHG permitting requirements, and say Jackson's punting the deadline to 2011 "doesn't change anything." One environmentalist says that of a dozen or so proposed major coal fired power plants, "They'll die of their own weight" either due to air permit flaws or other reasons.

The source adds that a new attempt by Kentucky to avoid responding to EPA's order that the proposed Cash Creek facility consider natural gas in lieu of coal -- where the state early this month issued a new final air permit to address a plant redesign and simultaneously withdrew the permit subject to the EPA order -- "is an end run, a sleight of hand, it doesn't satisfy anything. We will encourage EPA to object again, and we will of course challenge the permit."

Kentucky in a March 5 letter to EPA says, "Given that the [permit] is no longer valid, the division does not find it necessary to specifically address the issues in the administrator's order, as the issues in the order are now moot. By terminating [the earlier permit], the division satisfies the administrator's objection as required."

EPA has 45 days to review the new permit. The industry source says the new permit "solves" the problems raised by EPA in the Title V order because the redesigned facility will turn coal into pipeline quality natural gas.

However, many environmentalists are objecting to the new permit, which did not assess natural gas in lieu of coal, noting in January comments on a draft version, "cleaner alternatives that are less risky and less costly than the proposed plant are feasible now."

Environmental groups are also praising EPA for issuing "some very good [Title V] orders in the states," one source says.

But much like the situation in Kentucky with Cash Creek, they expect responses to those orders to be "in as minimal as fashion as possible, and up to now it remains unclear what EPA will do about that," the source says. Another source expects states to seek to "paper over" EPA's concerns in addition to seeking new approaches, such as in the Cash Creek case, which was reconfigured from an IGCC facility to a natural gas combined cycle plant.

Meanwhile, a state official acknowledges there is uncertainty about what air permits must require now, with EPA and some states demanding that alternatives such as IGCC be considered to reduce already-regulated criteria pollutants ahead of GHG limits. "From a policy standpoint in the near future, most BACT decisions that will be made by state and local governments over the next few years will be on the order of improved energy efficiency and cleaner fuels," the source says. -- *Dawn Reeves*

**Ill. House joins effort to block EPA regs (*Greenwire*)**

Robin Bravender, E&E reporter
03/18/2010
The Illinois House of Representatives yesterday approved a resolution encouraging the U.S. Congress to postpone U.S. EPA's efforts to regulate greenhouse gas emissions from stationary sources.

The resolution, sponsored by Democratic Rep. Dan Reitz, urges Congress to adopt legislation to block EPA from regulating industrial sources' emissions "until Congress adopts a balanced approach to address climate and energy supply issues without crippling the economy."

The agency's pending greenhouse gas rules, the resolution says, would burden progress on the nation's environmental improvement and economic recovery efforts by imposing onerous permitting requirements.

EPA is expected this month to finalize greenhouse gas standards for automobiles, which would trigger Clean Air Act permitting requirements for stationary sources.

Illinois lawmakers are the latest to publicly oppose EPA climate rules. Democrats and Republicans in the U.S. House and Senate have introduced several measures to postpone or block EPA's greenhouse gas regulations.

The Obama administration issued its proposed climate rules after the U.S. Supreme Court ruled in 2007 that EPA has the authority to regulate greenhouse gases as pollutants under the Clean Air Act.

EPA Administrator Lisa Jackson repeatedly has said that EPA is complying with science and the law to protect Americans from the threats of climate change. She insists that the agency plans to gradually phase in permitting requirements in a way that will give businesses and regulators time to plan and will avoid imposing undue economic burdens.

**Unions Hope Pending GAO Report Will Trigger EPA Workforce Overhaul (*Inside EPA*)**

3/19/2010
EPA union officials hope a pending Government Accountability Office (GAO) report on the agency’s workforce analysis will bolster their claims that EPA has failed to adequately plan for staffing needs on air, climate, water and other issues, and that the report will prod the agency or lawmakers to seek a comprehensive new analysis.

“There’s a tremendous need for workforce planning at EPA,” both at headquarters and the EPA regions, a former agency official says. The regions have not adjusted their workforce sizes for years, even though the population and industrial activity in the regions has changed markedly. “Everyone is very reluctant to give up a person,” particularly in areas where activity has decreased, the official says.

GAO is slated to issue its report this month or next, a review of workforce planning processes at EPA, the Department of the Interior and the Forest Service. The review was mandated in the fiscal year 2009 omnibus spending law, which said that workforce plans for the agencies “are in many cases outdated and that no comprehensive review of appropriate staffing needs for the future has been undertaken.”

The report -- originally due for submission to the House and Senate appropriations committee by Dec. 31, 2009 -- is now slated for release by April at the latest, an EPA union official says. The spending law asks GAO to make recommendations for changes at the agencies based on best practices models used by other federal agencies.

“I don’t hope it says anything bad” about EPA, the official says. “But I think it will say EPA has not conducted workforce planning” for its staffing needs either to cope with a slew of upcoming retirements, or for its ambitious agenda in the air, waste, water, climate, toxics, enforcement programs and other areas.

EPA’s unions have previously called for a major new agency workforce analysis to determine the staffing necessary to handle a greenhouse gas (GHG) control regime under a cap-and-trade bill or Clean Air Act rules, saying EPA’s existing staffing levels cannot handle such a massive program (*Inside EPA*, July 31). And they met with members of Congress last month on the topic and to possibly tee up the issue for the FY11 EPA appropriations process, if the GAO report boosts their claims about the need for more agency staff.

The pending GAO report will take a broad, agency-wide approach to reviewing workforce planning across EPA, union sources say. The agency’s lack of an adequate, sweeping assessment of its staffing needs has adverse impacts on a slew of offices not limited to its climate change work, the sources say.

For example, staffing limitations can lead to delays in processing chemical determinations within EPA’s Office of Prevention, Pesticides, & Toxic Substances, according to an informed source, who says the staff limitations may also hinder the agency’s ongoing effort to quickly issue and implement “action plans” to identify chemicals that pose a concern to the public and determine what steps to take to reduce the risks.

The lack of workforce planning also means that EPA’s Office of Enforcement & Compliance Assurance (OECA) does not have the staff it needs, the former agency official says.

The enforcement office has a strong need to be involved in developing and enforcing air, toxics and other rulemakings, the source says. “If you need their support on designing enforceable regulations while also doing their current enforcement work, they simply need more people” in OECA, the source adds.

Sources say that inadequate workforce planning is also causing problems in several other offices, including uneven staffing levels across the regions that may be hindering speedy completion of Superfund cleanups; a backlog of Clean Air Act permitting due to staffing and resource constraints; and the concern -- previously raised by EPA’s unions -- that the agency needs a massive influx of staff to administer a slew of pending GHG rules.

Union officials say they have frequently e-mailed EPA Administrator Lisa Jackson, Office of Administration & Resources Management Acting Administrator Craig Hooks and others in recent months on a number of these issues, including better labor-management relations.

EPA did not respond to a request for comment by press time.

Once GAO releases its report, “we will be in a better position to assess where to go. We already have the indication from GAO that [EPA] has a far different perception of the union’s involvement in the workforce planning process than what is reality,” the union source says. Following the report’s release, EPA’s unions will “continue to hammer home” the need for a workload and workforce analysis of its programs, the source says.

Another union official says that unions could use the GAO report as a tool to urge lawmakers to boost funding for EPA in its fiscal year 2011 appropriations bill so that it can fund more staffing positions. “Or they could put language in [the funding bill] saying that workforce planning must be done,” the source says.

“I think we’ve about reached the limit of doing more with less. There’s a point at which there’s a collapse,” the first union official says. The lack of adequate workforce planning affects the “whole gamut” of EPA operations including administrative functions, rule writers and scientists, the source says, even though many of those roles are “things we have to keep in-house. It’s pretty hard to contract out” rulemaking duties, the source notes.

EPA’s unions met with members of Congress Feb. 21 to advocate for stronger labor-management relations at the agency, including coordinated efforts on workforce planning and several other issues.

The American Federation of Government Employees (AFGE), representing EPA staff, provided lawmakers with an 18-page document outlining their top priorities for improving labor relations at the agency.

In a section headlined “Problems” the union says that it “remains concerned” about EPA’s fiscal procedure of pursuing “investments” and “disinvestments” to program offices. Under EPA’s current workforce system, the agency generally adds employees to investment areas and subtracts them from disinvestment areas whose current levels -- barring changes since they were established -- are based on the agency’s 1989 workforce and workload analysis. *Relevant documents are available on InsideEPA.com.*

The union says EPA should ensure it is “properly allocating its workforce and ensuring that its staff has the appropriate knowledge, skills and abilities” by complying with what its says are previous “consistent” GAO recommendations to update and use both workload and workforce analyses.

AFGE in November 2008 also submitted a white paper on EPA to President Obama’s transition team saying the agency has yet to determine the number of employees it needs to “accomplish its mission objectives and how to best allocate its employees among EPA’s strategic goals and geographic locations.”

The first union source says EPA’s staff also face a related problem in that a large number of workers are at or near retirement age, meaning in two to three years “you’ll see a much higher rate of retirements” at the agency. “You need to bring new people on board now to learn the programs and bring them up to speed,” the source says, but adds that EPA does not appear to have a strong plan for addressing the retirements. -- *Anthony Lacey*

**Critics on both sides assail EPA on mountaintop regulation (*Greenwire*)**

Patrick Reis, E&E reporter
03/18/2010
Critics on both sides of the heated debate over the regulation of mountaintop-removal coal mining lambasted U.S. EPA today for its handling of the issue.

Environmentalists this morning strung a banner saying, "EPA: pledge to end mountaintop removal in 2010," between 20-foot-tall purple tripods outside the agency's Washington headquarters. Six protesters then chained themselves to the tripods' bases and vowed not to leave until EPA Administrator Lisa Jackson agrees to fly over Appalachia to survey environmental damage done by mountaintop mining.

Kate Rooth of the Rainforest Action Network, which organized the protest, said EPA must exercise its full authority under the Clean Water Act to prevent mining companies from blowing apart mountaintops and dumping waste into waterways.

In the Senate, Environment and Public Works Committee Republicans are preparing a report that they say shows EPA is using scrutiny of mountaintop mining to sabotage all coal mining in the eastern United States.

**Democratic Senators To Investigate EPA Civil Rights Office Staff Disputes (*Inside EPA*)**

3/19/2010
Democratic Virginia Sens. Mark Warner and James Webb have quietly launched investigations into contentious personnel disputes within EPA's Office of Civil Rights (OCR) that some agency sources claim are undermining EPA Administrator Lisa Jackson's effort to overhaul the office and boost EPA's environmental justice focus.

EPA official Susan Morris wrote separate letters to the senators urging their intervention following OCR Director Karen Higginbotham's Feb. 3 decision to remove Susan Morris, the former OCR assistant director for affirmative employment and diversity, from her slot and place her in a new, non-supervisory slot. Morris claimed she was removed from her position because of a "false accusation" from Higginbotham (*Inside EPA*, Feb. 19).

In a March 1 response to Morris, Warner writes, "I realize this is a matter of frustration and concern for you" and says that he is taking his inquiries on the issue above EPA's head directly to Office of Personnel Management.

Webb sent a separate March 9 letter responding to Morris, saying he is forwarding her complaints about the OCR staffing dispute to EPA "for their consideration and response and have asked that they keep me informed of their progress in this matter."

Still pending is a discrimination complaint Morris filed with the Equal Employment Opportunity Commission (EEOC) and a Jan. 28 petition Morris sent to EPA's Office of Inspector General to investigate OCR's failure to issue annual reports on the agency's equal opportunity employment practices.

"For many years at EPA, a group of managers have misused and abused their authority by going after employees who are not a part of their group or agenda," Morris said in her letter to Warner.

She also said that the practices ongoing in OCR show the managers' "disregard for the civil rights and welfare of the federal employees within the agency, as well as those who protest from communities covered under Title VI" of the Civil Rights Act, which prohibits the discriminatory use of federal funds.

The latest allegations threaten to place additional pressure on Higginbotham, who civil rights activists have called to be removed in the wake of revelations stemming from an appeals court ruling that found a "consistent pattern of delay" by EPA in responding to Title VI complaints. And EPA sources warn that the personnel disputes are hampering Jackson's effort to overhaul the office and speed up complaints processing.

EPA and civil rights sources have criticized Jackson's decision to keep OCR Director Higginbotham in place, as well as the agency's promotion of other key figures behind the agency's maligned record in investigating discrimination.

For instance, Yasmin Yorker, an official previously directly responsible for handling Title VI complaints, has been promoted twice since a U.S. Court of Appeals for the Ninth Circuit ruling in *Rosemere Neighborhood Association v. EPA* that highlighted the agency's longtime inaction on the complaints. Helena Wooden-Aguilar, the lead investigator on the discrimination complaint at issue in *Rosemere*, was placed in charge of the Title VI office, Yorker's previous role.

In a related development, the agency has rewarded Yorker, by March 15 granting her a "Bronze Medal," which an internal EPA e-mail describes as "one of the agency's highest honor awards," at an awards ceremony for employees in the administrator's office. Specifically, EPA awarded Yorker and colleague Tom Walker for their years of work updating a two-page, 11 question form designed to screen EPA grant beneficiaries who might use agency funds in a discriminatory manner

The issue is important because Jackson has made resolving stalled discrimination complaints pending in OCR a top priority as part of her agenda to increase the agency's focus on environmental justice, saying it will help EPA "advance its mission of protecting human health and the environment" and help the agency restore its credibility with minority and other community groups. But the personnel conflicts in the office threaten to undermine her efforts.

Although she has not commented publicly on the personnel disputes, Jackson is aware of the issues within OCR, telling *Inside EPA* "you've been asking about this for a while" in a brief March 4 interview before declining to comment further.

An EPA spokeswoman said the agency is processing Webb's letter.

Higginbotham, a career EPA employee, did not reply to a request for comment, but in 2007 she told plaintiffs suing over the stalled civil rights complaints that she plans to develop new agency guidance, based on Department of Justice best practices, to address the backlog of outstanding civil rights complaints.

A second agency spokeswoman also recently said that the administrator "has made it clear that the Title VI program needs to be reformed and revitalized. She hired a senior adviser for Civil Rights, previously in charge of implementing Title VI across the federal government at the Department of Justice and with more than a decade of experience in the field, to ensure that this office and this process better serves the American people." -- *Jonathan Strong*

**EDITORIAL / OP-ED / COMMENTARY / LETTERS**

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Examiner Editorial:

**EPA stifles new gains in energy development (*The Examiner*)**

March 19, 2010 It would be simpler if President Barack Obama leveled with energy industry officials and the American people and admitted he's doing everything in his power to suffocate this country's ability to find and develop critically needed new energy supplies.

But instead of being honest about it, Obama hides behind misleading rhetoric about the wonders of "green" energy, even as his minions erect a multitude of new bureaucratic roadblocks to the development of the oil and natural gas resources needed to keep American homes heated, factories humming and laptops processing. These new resources could create millions of new jobs, generate trillions of dollars in tax revenue, and spark economic expansion in rural areas like western Pennsylvania and upstate New York that have known only decline for generations.

Last week, it was Interior Secretary Ken Salazar announcing that no new permits will be issued for Outer Continental Shelf development until 2014, at the earliest. Salazar also has used bureaucratic obfuscation to delay new energy development on western lands. There are billions of recoverable barrels of oil and trillions of cubic feet of natural gas in those areas, enough to put the U.S. well on the way to complete energy independence. Obama is instead spending billions of tax dollars on renewable energy resources that can't possibly supply even one-fourth of this nation's critical energy needs for many decades to come.

This week, it's Lisa Jackson, Obama's Environmental Protection Agency head, putting another pillow over the face of the energy industry: a "comprehensive research study to investigate the potential adverse impact that hydraulic fracturing may have on water quality and public health." Her agency will spend $1.9 million on the first year of the study and unspecified amounts in years thereafter. Hydraulic fracturing is when water and minute amounts of nontoxic chemicals are injected deep underground into rock formations to free previously unreachable stores of oil and gas.

The technology opens up immense natural gas resources like the Marcellus Shale area of economically blighted rural regions of western Pennsylvania, New York, Maryland and West Virginia.

Jackson forgot to mention “concerns” about hydraulic fracturing come only from environmental groups seeking to stop all uses of fossil fuels like oil, coal and natural gas. Jackson’s announcement followed the Washington, D.C., premiere of the anti-fossil fuel “GASLAND” propagandamentary produced by some of these same groups. Two more facts Jackson didn’t mention: Never in the 60-year history of hydraulic fracturing has it been linked to a single proven public health threat to water quality; and the EPA has already studied hydraulic fracturing, most recently in 2004, when it found no threat.

Clearly, this new study is about stopping fossil fuel development, not protecting public health.

**Impeach the president? (*Washington Times*)**

March 19, 2010 Friday
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Impeach the president?;
The 'Slaughter Solution' would violate the Constitution
By Jeffrey T. Kuhner SPECIAL TO THE WASHINGTON TIMES
The Democrats are assaulting the very pillars of our democracy. As the debate on Obamacare reaches the long, painful end, House Speaker Nancy Pelosi is confronting a political nightmare. She may not have the 216 votes necessary to pass the Senate's health care bill in the House.

Hence, Mrs. Pelosi and her congressional Democratic allies are seriously considering using a procedural ruse to circumvent the traditional constitutional process. Led by Rep. Louise M. Slaughter, New York Democrat and chairman of the House Rules Committee, the new plan - called the "Slaughter Solution" - is not to pass the Senate version on an up-or-down vote. Rather, it is to have the House "deem" that the legislation was passed and then have members vote directly on a series of "sidecar" amendments to fix the things it does not like.

This would enable House Democrats to avoid going on the record voting for provisions in the Senate bill - the "Cornhusker Kickback," the "Louisiana Purchase," the tax on high-cost so-called "Cadillac" insurance plans - that are reviled by the public or labor-union bosses. If the reconciliation fixes pass, the House can send the Senate bill to President Obama for his signature without ever having had a formal up-or-down vote on the underlying legislation.

Many Democrats could claim they opposed the Senate bill while allowing it to pass. This would be an unprecedented violation of our democratic norms and procedures, established since the inception of the republic. Article 1, Section 7 of the Constitution stipulates that for any bill to become a law, it must pass both the House of Representatives and the Senate. That is, not be "deemed" to have passed, but actually

be voted on with the support of the required majority. The bill must contain the exact same language in both chambers - and in the version signed by the president - to be a legitimate law. This is why the House and Senate have a conference committee to iron out differences of competing versions. This is Civics 101.

The Slaughter Solution is a dagger aimed at the heart of our system of checks and balances. It would enable the Democrats to establish an ominous precedent: The lawmaking process can be rigged to ensure the passage of any legislation without democratic accountability or even a congressional majority. It is the road to a soft tyranny. James Madison must be turning in his grave.

Mr. Obama is imposing a leftist revolution. Since coming to office, he has behaved without any constitutional restraints. The power of the federal government has exploded. He has de facto nationalized key sectors of American life - the big banks, financial institutions, the automakers, large tracts of energy-rich land from Montana to New Mexico. His cap-and-trade proposal, along with a newly empowered **Environmental Protection Agency,** seeks to impose massive new taxes and regulations upon industry. It is a form of green socialism: Much of the economy would fall under a command-and-control bureaucratic corporatist state. Mr. Obama even wants the government to take over student loans.

Yet his primary goal has always been to gobble up the health care system. The most troubling aspect of the Obamacare debate, however, is not the measure's sweeping and radical aims - the transformation of one-sixth of the U.S. economy, crippling tax increases, higher premiums, state-sanctioned rationing, longer waiting lines, the erosion of the quality of medical care and the creation of a huge, permanent administrative bureaucracy. Rather, the most alarming aspect is the lengths to which the Democrats are willing to go to achieve their progressive, anti-capitalist agenda.

Obamacare is opposed by nearly two-thirds of the public, more than 60 percent of independents and almost all Republicans and conservatives. It has badly fractured the country, dangerously polarizing it along ideological and racial lines. Even a majority of Democrats in the House are deeply reluctant to support it.

Numerous states - from Idaho to Virginia to Texas - have said they will sue the federal government should Obamacare become law. They will declare themselves exempt from its provisions, tying up the legislation in the courts for years to come.

Mr. Obama is willing to devour his presidency, his party's congressional majority and - most disturbing - our democratic institutional safeguards to enact it. He is a reckless ideologue who is willing to sacrifice the country's stability in pursuit of a socialist utopia.

The Slaughter Solution is a poisoned chalice. By drinking from it, the Democrats would not only commit political suicide. They would guarantee that any bill signed by Mr. Obama is illegitimate, illegal and blatantly unconstitutional. It would be worse than a strategic blunder; it would be a crime - a moral crime against the American people and a

direct abrogation of the Constitution and our very democracy.

It would open Mr. Obama, as well as key congressional leaders such as Mrs. Pelosi, to impeachment. The Slaughter Solution would replace the rule of law with arbitrary one-party rule. It violates the entire basis of our constitutional government - meeting the threshold of "high crimes and misdemeanors." If it's enacted, Republicans should campaign for the November elections not only on repealing Obamacare, but on removing Mr. Obama and his gang of leftist thugs from office.

It is time Americans drew a line in the sand. Mr. Obama crosses it at his peril.

Jeffrey T. Kuhner is a columnist at The Washington Times and president of the Edmund Burke Institute, a Washington think tank. He is the daily host of "The Kuhner Show" on WTNT 570-AM (www.talk570.com) from noon until 3 p.m.

**Hard questions for Holder (*Washington Times*)**

March 19, 2010 Friday
B, COMMENTARY; Pg. 3
Hard questions for Holder;
Time to defend - not dodge - his views on terror war
By David Davenport SPECIAL TO THE WASHINGTON TIMES
It's been a rough few months for Attorney General Eric H. Holder Jr., and he should face more tough questioning when he reports for the Senate Judiciary Committee oversight hearing on Tuesday.

In the legal war on terror alone, he has been under fire for scheduling the trial of Khalid Shaikh Mohammed in civil court in New York rather than in a military tribunal; for Mirandizing the Christmas Day bomber suspect; for trying to relocate Guantanamo detainees where people don't want them; for dragging his feet before finally revealing at least nine lawyers in his department who formerly represented terrorist detainees; and, most recently, for reporting that he failed to disclose in his confirmation hearings seven briefs in which he participated as a lawyer, including ones involving the war on terror.

Even with health care and the economy as the front-burner issues in Mr. Obama's first year, no Cabinet officer's department has generated more smoke than Mr. Holder's. Senators - even the president himself - should be examining these several problems and asking whether Mr. Holder is really up to the job or, perhaps worse, whether these issues add up to an agenda to tip the legal scale sharply in favor of detainee rights and away from national security concerns.

Let's start with the latest flaps because, taken together, they seem to raise questions of legal philosophy at the Department of Justice. In November, Sen. Charles E. Grassley, Iowa Republican, asked Mr. Holder to identify department lawyers who may have

conflicts of interest for having represented detainees. In a surprisingly cool response, Mr. Holder said he'd consider it and then sat on it for three months. Finally, last month, he provided an incomplete answer, admitting there were at least nine department lawyers who had represented detainees, identifying just two of them.

Then the department acknowledged this week that Mr. Holder had failed to disclose some of his own work on several briefs, including one on behalf of enemy combatant Jose Padilla, during his confirmation hearings as attorney general, calling it an oversight. A case that went all the way to the Supreme Court would seem to be difficult to forget or overlook.

It does seem to be a fair concern why Mr. Holder, who works for a president promising the most transparent administration in history, would stonewall the Senate and even now fail to provide a complete response on who in his department represented detainees and their current responsibilities. Those who questioned his response, however, prompted quite a sideshow as several prominent lawyers came forward to defend the obligation of an attorney to represent unpopular causes. This neatly sidesteps the real question, which is not whether these lawyers acted properly before they came to Justice, but rather, why Mr. Holder chose to hire so many of them and what they are doing now. Believe me, had the Securities and Exchange Commission hired a suite of Fortune 100 general counsels to enforce securities laws or the **Environmental Protection Agency** a table full of lawyers from oil companies, such questions would be asked.

Other hard questions Mr. Holder should have to answer include why he feels a lawyer with no prosecutorial experience - who as a human rights advocate referred to military commissions as "kangaroo courts" and said freeing terrorists is a legal "assumption of risk" we must be prepared to take - is qualified to represent the department on detainee matters. Or, for that matter, what Mr. Holder's hiring of these nine lawyers or his signing of Padilla's brief might tell us about his own view of detainee rights. After all, because some of those briefs were not produced for his confirmation, that was a conversation the senators did not have with him when it counted.

There are two schools of thought about the legal war on terror. One essentially starts from the premise that terrorist suspects, enemy combatants and detainees should not be tried as "criminals" and are not entitled to the full panoply of constitutional rights afforded to U.S. citizens. Instead, they should be tried in military tribunals, with more limited rights. A very different view, held by many human rights advocates, is that terrorist suspects should be treated as one of our own citizens, even at the risk of returning enemy combatants to the field to attack again.

The U.S. Senate, and the American people, have every right to know who is setting policy for the legal war on terror and in which of these directions they are headed. Mr. Holder would do well to bring less foot-dragging and more forthright answers to these legitimate questions when he comes before the Judiciary Committee next week.

David Davenport is a research fellow at the Hoover Institution.

**AIR**

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**Commissioners ask EPA for looser air standard (*San Marcos Local News*)**

March 18th, 2010
STAFF REPORT
Hays County commissioners unanimously came out in support of the loosest new ozone standard proposed by the federal government this week, though they sent a letter to the Environmental Protection Agency (EPA) this week urging the agency to consider even less-stringent ways to determine if the county is in compliance with the federal Clean Air Act.

The county would likely fail to comply with the Clean Air Act even at the loosest proposed standard — 70 parts of pollutants per billion (ppb) — because the air quality monitoring device EPA would use to measure compliance, located in Travis County, already has recorded ozone levels above 70 ppb. However, even if there were an EPA air quality monitoring device in Hays County, the agency still would still assess the county's compliance by examining the highest ozone readings in the five-county Austin-Round Rock Metropolitan Statistical Area (MSA).

"We urge the EPA to consider the populations of each county according to 2008 U.S. Census data: Travis (998,543), Williamson (394,193), Hays (149,476), Bastrop (73,491) and Caldwell (36,899)," said the commissioners court's letter to EPA. "A non-attainment designation for the smaller counties would be not only costly, but would be a serious impedance to timely infrastructure development, job creation, economic health, and prospects for future growth. Granted there is significant commuting among the five counties for work, school, and play. Therefore, we request that some limited requirements or consequences for less populated counties be considered in lieu of an across-the-board non-attainment designation."

Hays County officials urged EPA to apply a "secondary standard" to the county instead. The secondary standard would differ substantially from the primary in averaging time, level and form, and would be designed to mitigate a pollutant's effect on soils, water, crops, vegetation, wildlife, economic values, personal comfort and other factors.

"As one of the smaller counties in the Austin-Round Rock Metropolitan Statistical Area, we urge the EPA to set the secondary NAAQS (National Ambient Air Quality Standards) for ozone at the upper end of the recommended range — 15 (parts per million)-hours — in order to mediate the impact a higher standard could have on a county of our size,"

said the county's letter to the EPA. "We believe this lower level, in conjunction with all regional efforts being undertaken, will protect the public health and our environment."

The current ozone NAAQS stipulates a ground level limit of 75 ppb, a value established by the EPA under the Bush Administration in 2008 despite the unanimous recommendation of the EPA's Clean Air Scientific Advisory Committee (CASAC). CASAC had advised that the limit be set no higher than 70 ppb. The EPA had never disregarded a unanimous recommendation of CASAC since the latter's establishment in 1977.

According to Capital Area Council of Governments (CAPCOG) Air Quality Program Coordinator Bill Gill, if Hays County and other regions fell out of compliance with the new ozone standards, taxpayers would have to spend more for enforcement activities at the state and local level. Gill said there is some federal funding available for states to use in dealing with EPA air quality non-attainment issues, and he said local governments get less federal money for that purpose.

"With the new standards, they're getting so restrictive, that pretty much all urban areas are looking at possible non-attainment — especially, if they set the standard at the lower end of that range, at 60 ppb, I think just about everybody will be at non-attainment," Gill said.

CAPCOG is composed of elected officials representing a ten-county area, which includes those from the Austin-Round Rock MSA.

Hays County might have to initiate mandatory vehicle emissions testing if EPA declares it to be in non-attainment with the new NAAQS. Vehicle emissions inspections would probably be administered by the county and the Texas Department of Public Safety (DPS), a state agency.

Gill said that in the event of Hays County's noncompliance with the new NAAQS, the state, through the Texas Commission on Environmental Quality (TCEQ), would probably not mandate special fuel additives at local gas stations, but may establish stricter air pollutant emissions rules for some businesses, like cement plants and facilities using large quantities of paint and ink. There are at least three cement plants in the Buda area.

"Dallas and Houston have been in non-attainment for forever and they still have a lot of business, so it's not like it just runs people out of business," Gill said. "It just may cost certain businesses. If you don't have a lot of air pollution associated with what you're doing, you don't have a lot of combustion or coatings-type of operations, then it may not have that much impact on you at all."

Gill said a non-attainment air quality designation by EPA results in the Texas Department of Transportation (TxDOT) and metropolitan planning organizations (MPOs)

spending more money to do the increased administrative work required to keep federal transportation dollars flowing.

“When an area goes into non-attainment, it gets more difficult to build roads, because there is a provision that kicks in called ‘transportation conformity,’” Gill said. “And that is, you can’t build any significant roadway projects unless you’ve already got it approved as part of what they call a ‘conforming transportation plan.’ And that means you’ve got to conform with your air quality plan and you have a budget that says your emissions cannot exceed this level. And so, TxDOT and the local transportation planning agencies have to go through this process to evaluate all the planned roadways and make sure that they’re not going to cause that budget to be exceeded. Because if they do, then you’ve got a finding of non-conformity, and the EPA can take away your transportation dollars.”

CAPCOG has two air quality monitors in Hays County, one in Bastrop County, and two in Williamson County, though the devices do not meet EPA regulatory standards and are only operated during ozone season, which is from April to October.

Hays County Precinct 4 Commissioner Karen Ford (D-Dripping Springs) drafted the letter, which expresses the court’s position on EPA’s proposed primary ozone standard range. The letter “urges” and “encourages” the EPA several times, but never recommends or demands.

Ford represents Hays County in the Central Texas Clean Air Coalition (CTCAC), which is composed of representatives of eight cities and five counties in the Austin-Round Rock MSA. Ford said CTCAC members were not able to reach a consensus regarding EPA’s proposed ozone standard. Ford said Williamson and Bastrop Counties rejected the EPA’s proposed range in favor of the current 75 ppb standard, and Caldwell County did not weigh-in.

“I think what really got my vote on this was the part of the letter that stated that the EPA needs to really look into these outside sources when it relates to emissions and smog in our community,” said Hays County Precinct 3 Commissioner Will Conley (R-Wimberley). “Because that’s out of our hands, and they need to take that into consideration and take other things into consideration before putting Hays County into non-attainment. So, I’m not necessarily happy about the new standard, and I think particularly in these times, that it should remain where it is, at 75 (ppb), but at the very least, don’t go any lower than 70, and take some of these other things into consideration to give us a real chance for attainment … We don’t contribute all that much, so why penalize us when the source of pollution seems to be coming predominately from other areas and other places within the region?”

The EPA’s is soliciting comments from citizens and elected officials regarding its proposed standards. The comment period ends March 22.

The EPA is expected to finalize the ozone standards in August 2011, and states will have until 2013 to complete emission reduction plans.

“I think everybody will certainly accept the fact that there are economic benefits from improved air quality and less health problems,” Gill said. “How that weighs out against the cost of compliance and regulation — that’s up for discussion, I guess.”

**Nebraska joins other states in EPA challenge (*Associated Press*)**

*March 19, 2010 6:25 AM ET*

LINCOLN, Neb. (AP) - Nebraska has joined several other states in filing a challenge to the Environmental Protection Agency's finding that greenhouse gases are great enough to threaten public health and should face restrictions.

The EPA in December issued an "endangerment" finding about carbon dioxide and other greenhouse gases that allowed it for the first time to make rules restricting emissions under the Clean Air Act.

Alabama, Texas and Virginia last month asked a federal appeals court to review the finding.

Nebraska and 11 other states on Thursday followed suit.

State Attorney General Jon Bruning says the EPA has no authority to impose such strict emissions regulations. He says such restrictions could hamper Nebraska's agriculture industry and small businesses.

**A dozen states join Cuccinelli to fight EPA (*Watchdog*)**

Posted By admin On March 18, 2010
By Seth McLaughlin
RICHMOND—A dozen Republican and Democrat attorneys-general have joined Ken Cuccinelli in his fight against the Environmental Protection Agency’s regulation of greenhouse gases.
“Attorney General Bruning of Nebraska is circulating a motion to intervene on our side of the case,” the Virginia Attorney General Cuccinelli told The Old Dominion Watchdog during an interview in his office on Friday. “And I think you will see bipartisan support for the effort.”

“When we are done, I hope we will have over ten on our side,” the Republican said.

On Thursday, Bruning released a statement announcing he and the attorneys general of 11 other states have filed motions to challenge the EPA’s December ruling that said

carbon dioxide and other greenhouse gases from power plants, cars and factories "threaten the public health and welfare of the American people."

"This finding is the first step toward expansive regulation of greenhouse gases that will adversely affect states and their economies," Bruning said, in a written statement.

Last month, Cuccinnelli asked a federal appeals court in the District of Columbia to review the EPA's ruling. Texas and Alabama also filed challenges on the same day.

Now, the federal court has grouped together the appeals from all 15 states, filed by 13 Republicans and two Democrats: Democrat James Caldwell of Louisiana and Jim Hood of Mississippi.
The motions come after coalition of 16 states and New York City in December asked a federal appeals court to allow it to intervene in a lawsuit attacking U.S. EPA's stance.

**States Urge EPA To Issue Fee Guideline In Final GHG Permit Tailoring Rule (*Inside EPA*)**

3/19/2010
State agencies are reviving their calls for EPA to include in its final "tailoring" rule establishing greenhouse gas (GHG) permit limits a provision setting a minimum fee for the permits, in order to guarantee a baseline source of funding for states that will be responsible for issuing federal GHG permits under delegated Clean Air Act authority.

The agencies' push comes as an industry coalition is separately urging EPA to exempt from the permitting proposal sources of synthetic fluorinated GHGs, which have a high global warming potential (GWP) -- a measure of how much a given mass of a GHG contributes to climate change -- but are generally emitted at very low volumes. The coalition fears their sources would all trigger GHG permit limits under the method EPA's proposal.

At a March 4 American Law Institute-American Bar Association (ALI-ABA) conference in Washington, DC, Bill Becker, the executive director of the National Association of Clean Air Agencies (NACAA), which represents state and local air agencies, said EPA should set a presumptive fee for permits that will be required under the rule, which details when GHG limits will apply in prevention of significant deterioration and Title V Clean Air Act permits.

The issue is particularly pertinent in states that by state law cannot exceed federal requirements, including whatever fee EPA could set. The Clean Air Act permit trigger for conventional pollutants is 100 or 250 tons per year (tpy). The final tailoring rule will exempt sources that emit less than 25,000 tpy of carbon dioxide equivalent (CO2e) from GHG permit limits, though EPA recently said it may initially set a 75,000 tpy threshold through 2013.

Even though EPA is offering flexibility in its approach to imposing GHG permit limits, states continue to raise concerns about the massive new costs and resource constraints they face writing and issuing federal GHG permits under delegated air act authority. For that reason, they are urging EPA to set a presumptive fee for GHG permits, which states say would guarantee a minimum revenue stream to help pay for the major new workload.

“There should be . . . some modest permit fee for greenhouse gases,” Becker said at the ALI-ABA conference. “It’s not as explicit in EPA’s rulemaking as we think it should be.”

EPA says in the proposed version of the tailoring rule that it is refraining at this time from amending regulations to establish a presumptive fee for GHGs. “We believe that the best approach at this time is to allow each state to determine how best to satisfy the fee adequacy requirement under the existing process, for EPA to monitor the situation, and be prepared to exercise oversight authority if necessary,” says the proposal.

But Becker countered that the agency should establish a presumptive fee, albeit minimal, that states could then build on. “We’re talking a nickel or a dime a ton to help us get through the paper work,” he said, adding in a follow-up email March 8 to *Inside EPA* that many states are restricted from going beyond federal requirements and therefore “might have more difficulty adopting an additional fee to address GHG issues.”

Becker’s comments reflect concerns states raised during the comment process for the rule. “Both as a matter of equity and a matter of law, EPA has the responsibility of ensuring that state and local permitting authorities have adequate resources in place to address the additional permitting workload that flows from the threshold EPA adopts before the threshold becomes effective,” according to NACAA’s Dec. 28 comments.

Without a specific presumptive fee in the document, states that have laws barring them from exceeding federal requirements could be forced to use whatever fee EPA sets. So if the agency fails to set a permit fee there is a danger that such states could struggle to impose their own fees on future GHG permits.

Meanwhile, the multi-industry National Climate Coalition (NCC) said at the ALI-ABA conference that it wants EPA to amend the proposal to address concerns that sources of synthetic fluorinated GHGs with high GWP but low overall emissions rates may trigger GHG permits even if they emit less than 25,000 tpy.

Robert Wyman, an attorney at Latham & Watkins who represents the NCC, said at the conference that EPA’s proposal to calculate the trigger for permitting requirements based on CO2e rather than actual volume of the pollutants emitted themselves would have the “paradoxical effect” of expanding, rather than tailoring, the requirement that sources of synthetic fluorinated GHGs be subject to GHG permitting requirements under the rule.

This effect would occur because the synthetic fluorinated GHGs -- which include perfluorocarbons (PFCs), hydrofluorocarbons (HFCs) and sulfur hexafluoride (SF6) -- have a very high GWP, which refers to the ratio of heat trapped by one unit mass of the GHG to that of one unit mass of CO2 over a specified time period, despite their tendency to be emitted in very low volumes. Therefore, the synthetic fluorinated GHGs may easily surpass the CO2e limit even if the emissions are below 25,000 tpy. NCC also raised these concerns in comments on the tailoring proposal.

NCC in Dec. 23 comments on the tailoring rule said EPA should take a "bifurcated approach," under which it would measure the synthetic fluorinated GHGs based on mass, consistent with thresholds in the air act, and apply CO2e or another equivalency metric, if at all, to only the naturally occurring GHGs, which include CO2.

**Court Backs Novel Bid By New Plant Owners To Escape NSR Liability (*Inside EPA*)**

3/19/2010
A federal court in Illinois is backing a novel industry argument allowing new owners of a power plant to escape liability for alleged violations of EPA's new source review (NSR) rules committed by prior owners, finding that because the new owners had only purchased the generating assets of the plant, rather than the corporate entity, they are not liable for alleged violations committed by the prior owner.

The ruling also marks a departure from another high-profile district court ruling that EPA and environmentalists have hoped to use to force power plants and other emitters to install new emissions control technologies to address past violations.

U.S. District Judge John W. Darrah in a March 9 order in *United States of America, et al. v. Midwest Generation LLC* dismissed a large portion of the government's suit against Midwest Generation alleging NSR violations after finding that the company, which purchased the facilities after the modifications occurred, is not responsible for the actions of the prior owner. *The ruling is available on InsideEPA.com.*

The finding could be one of the first to limit liability for new power plant owners and hinges on the fact that Midwest Generation purchased only the facility's equipment from Commonwealth Edison in 1999 and not the corporate entity.

The company successfully argued that because it did not buy the corporate entity, it did not have responsibility for decisions that were previously made to undertake plant changes without obtaining NSR permits, which require state-of-the-art pollution controls during major modifications. "This is unique" in NSR enforcement litigation, one source says, explaining Midwest Generation argued it "just bought a piece of equipment" rather than an entire corporate entity, and therefore cannot be held liable for earlier decisions.

This argument was persuasive to Darrah, who in his March 9 ruling granted large parts of the company's motion to dismiss. "Plaintiffs have failed to state any basis for liability on nine out of 10 of their [prevention of significant deterioration (PSD)] counts due to the undisputed fact that Midwest Generation did not own or operate the sources at issue when the alleged violations occurred. Therefore, plaintiffs are not entitled to any relief on those claims -- injunctive or otherwise," the ruling says.

Darrah in his ruling also found that the NSR violations at issue were time barred by the general federal five-year statute of limitation because the violation was a one-time event, declining a request from EPA and states to endorse a position set by a federal court in Indiana which held in *United States v. Cinergy* that power plant operators could be held liable for violations that occurred prior to the statute of limitations on the theory that they are "continuing violations."

Darrah in his ruling does, however, cite other courts' decisions to back his position that alleged NSR violations are one-time events. "Other circuits have addressed the issue and expressly declined to adopt plaintiffs' continuing-violation theory," he wrote, citing *National Parks Conservation Association v. Tennessee Valley Authority,* where the U.S. Court of Appeals for the 11th Circuit held that the air law "indicates that violations of the preconstruction permitting requirements occur at the time of construction, not on a continuing basis." He also notes the 5th Circuit in *New York v. Niagara Mohawk Power Corp* cited the 11th Circuit ruling "with seeming approval."

"Further, multiple district courts in this circuit and others have addressed this very issue and held that PSD provisions only pertain to the construction or modification of plants -- not their subsequent operations."

However, the court division on the issue could make it possibly ripe for Supreme Court review, one environmentalist says."Courts are split, though it seems to us a logical thing that these permits you are operating under, the statute of limitations doesn't start ticking when you get the permit, because you continue to use it for the life of the facility," the source notes.

A second environmentalist calls the decision "wrong and unfortunate" and says groups will push EPA to appeal.

But an industry source says because the case was not entirely dismissed, EPA may simply amend its complaint to a form that the judge might accept.

The government in its initial Aug. 27, 2009, complaint says, "As a result of defendant's operation of the generation units following these unlawful modifications and the absence of appropriate controls, massive amounts of [nitrogen oxide, sulfur dioxide and/or particulate matter] pollution each year have been, and continue to be, released into the atmosphere."

Environmental groups and the state of Illinois intervened on EPA's behalf in the case, and the judge's order did not dismiss other allegations that Midwest Generation had violated additional Clean Air Act provisions, including Title V operating permits, fine particulate matter limits, opacity and other issues.

A Midwest Generation source declined to comment on the ruling, noting the case continues. -- *Dawn Reeves*

**Texas Doubts On EPA Ozone Science May Hint At Suit Over Strict NAAQS (*Inside EPA*)**

3/19/2010
Texas may be laying the groundwork for a lawsuit challenging EPA's proposed tightening of the agency's ozone national ambient air quality standard (NAAQS) if EPA issues a final standard within the range of the proposal, observers say, based on Texas environmental officials' recent criticisms of the science underlying the agency's plan.

At a Feb. 25 hearing of Texas' House Committee on Environmental Regulation, officials from the Texas Commission on Environmental Quality (TCEQ) argued that some studies cited by EPA in its proposed stricter ozone standard do not show significant health effects, and may even suggest that ozone is "health-protective." A TCEQ spokesperson declined to respond to a request for comment on a potential lawsuit.

A state GOP source largely backs TCEQ's criticism of the science behind EPA's proposal, raising concerns about the economic cost that EPA's proposed tightening of the NAAQS could have on the state.

Texas Gov. Rick Perry (R) is already one of several parties that have filed a lawsuit in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA's greenhouse gas (GHG) endangerment finding, due in part to Perry's concern about the cost of GHG regulations that the scientific finding will trigger. On the ozone proposal a Perry spokesperson says, "It is too early to comment on what we might do until the new standard is finalized."

But the recent state legislature hearing may offer early indications of Texas' arguments in a future lawsuit over EPA's upcoming NAAQS revision. The agency proposed on Jan. 7 to tighten the existing 2008 ozone standard of 0.075 parts per million (ppm) issued by the Bush administration down to a range between 0.060 parts per million (ppm) and 0.070 ppm.

EPA's proposal is within the range recommended by agency staff and its Clean Air Scientific Advisory Committee, but TCEQ said at the hearing that science behind the proposal is questionable. States, industry and environmentalists filed suit over the 2008 ozone standard, but that case is in abeyance pending EPA's reconsideration of the

NAAQS. The agency has said it intends to issue its final standard by a non-binding Aug. 31 deadline.

At the hearing, EPA Region VI Administrator Al Armendariz gave a presentation citing significant public health and economic benefits of lowering the standard, including reduced incidence of chronic bronchitis, nonfatal heart attacks, and missed work days. *Relevant documents are available on InsideEPA.com.*

But TCEQ toxicology official Michael Honeycutt in a separate presentation at the hearing questioned the studies on which EPA relied to determine the level of ozone exposure at which such adverse effects occur, saying that most epidemiological studies used by EPA and scientific advisers do not show significant health effects. “Some studies can be interpreted to show ozone is actually health-protective,” according to Honeycutt’s presentation.

One environmentalist familiar with the state legislature hearing says the TCEQ presentation seems like an early attempt to establish a scientific basis for a lawsuit over the final ozone NAAQS, because the presentation focused on opposition to the federal plan, rather than suggestions for how to improve air quality in the state.

“That’s really the only halfway valid reason for spending so much time from an extraordinarily strained [TCEQ] staff arguing the science, except to lay the ground for a future suit, and that’s really a poor use of taxpayer money,” says the source, adding that TCEQ’s objections were already considered by EPA’s advisers years ago when the state brought them up during the scientific review for the 2008 standard.

**EPA, Activists Set Deadline For Decisions On Contentious NSR Air Plans (*Inside EPA*)**

3/19/2010
EPA has signed deadline agreements with environmentalists to issue long-pending final decisions on several Western states’ air quality plans that include controversial Bush-era new source review (NSR) reforms, with activists hoping EPA will disapprove the plans as a way to strike the reforms which were upheld by a federal court.

The deadlines will require EPA to propose and issue between later this year and 2012 final decisions on the Western state implementation plans (SIPs), which are air quality blueprints for meeting federal air quality standards. EPA committed to the deadlines to resolve a suit environmentalists filed last year over the agency’s failure to meet a Clean Air Act duty to either approve or deny a SIP within 18 months of its submission to EPA.

Environmentalists will urge EPA to disapprove the plans for including the Bush-era NSR reforms, arguing the changes they have long opposed violate several provisions of the

air act, including anti-backsliding and demonstration of reasonable further progress toward meeting ambient air quality limits.

However, the outlook for their bid is unclear at best because the Obama EPA in recent separate actions is upholding SIPs in Ohio and Wisconsin that include the Bush-era reforms to the NSR program.

NSR requires the installation of strict pollution controls at new major pollution sources or major sources making modifications in areas out of attainment with national ambient air quality standards. The Bush EPA made changes to the NSR program in 2002 that were the creation of plant-wide applicability limits, an actual-to-projected-actual emissions test and a “2-in-10” option for choosing an emissions baseline for the purposes of triggering NSR.

Activists challenged the changes, claiming they unlawfully rolled back the program. But the U.S. Court of Appeals for the District of Columbia Circuit in a 2005 ruling in *New York v. EPA* upheld several of the changes.

The Western SIPs at issue were submitted as far back as 1999, and EPA’s new settlement with WildEarth Guardians sets a deadline for deciding on the SIPs, submitted by the Western states of Colorado, Montana, Utah and New Mexico. *Relevant documents are available on InsideEPA.com.*

While the SIPs address a variety of air pollution issues, the primary focus of the litigation is to have EPA reject the SIPs incorporating the Bush-era NSR revisions, one environmentalist says.

**EPA Readies Fix For Flaw In Study Overestimating Clean Air Act Benefits (*Inside EPA*)**

EPA is planning a quick fix to address a major flaw in a forthcoming report on the costs and benefits of the Clean Air Act that may exaggerate the air act’s overall benefits by 10 to 20 percent, a key air official says.

Jim DeMocker of EPA’s Office of Air & Radiation told a March 15 conference call that the agency has designed a tentative method to correct serious errors in the report, which is mandated under section 812 of the air law. DeMocker told members of the agency’s Advisory Council on Clean Air Compliance Analysis that EPA intends to fix the possible over-estimation of benefits from cutting fine particulate matter (PM2.5) before it issues the final report.

Without the fix, the flaws mean the report could exaggerate the overall study's findings on the air law's benefits between 10 and 20 percent, DeMocker has said (*Inside EPA*, Feb. 26).

The problem is due to EPA's reliance to date on a flawed 1990 emissions inventory to assess benefits in a scenario where the 1990 Clean Air Act amendments never became law, DeMocker told the council. To resolve the issue, EPA will seek to avoid inaccuracies for non-point sources of pollution, known as area sources, by using a 2002 National Emissions Inventory as the basis for its scenario for a world without the air act.

EPA will also exclude dubious benefits figures entirely that stem from so-called primary PM2.5 emissions -- those emitted directly from facilities, not formed by precursor chemicals in the atmosphere -- from non-power plant point sources, DeMocker said, in order to further improve the report's accuracy.

Members of the panel generally welcomed the proposed fix for the estimation flaw, although they stressed that EPA must explicitly explain the statistical fix it employs in the eventual section 812 report, due in September. Some panel members warned they would be happier with the report if EPA re-runs a key computer model using revised assumptions, but DeMocker said this is unlikely due to time and resource constraints.

DeMocker said that EPA Office of Air & Radiation Assistant Administrator Regina McCarthy was briefed on the proposed fix March 15, and is anxious that the report not be unduly delayed.

**Activists Fear Flexibility In Mercury Controls Could Worsen Air In South (*Inside EPA*)**

3/19/2010
Environmentalists fear that a bipartisan bill to cut mercury and other emissions from utilities could worsen air quality in the South, if the legislation includes an option floated to allow facilities to "average" their emissions and not have to meet the strictest pollution controls at all times.

Glen Hooks, Arkansas-based regional director for Sierra Club Beyond Coal Campaign that opposes new coal-fired power plants, told a March 17 teleconference that it is critical the legislation at issue impose the same percentage mandates for mercury emission reductions at all plants, without any flexibility such as so-called averaging. He said that requiring the same limits at each facility would address long-standing regional variability in pollution controls and air quality.

"I've always been a little bit leery of, 'Hey we can make some improvements of one area of the country and not other areas of the country' because historically it turns out to be

areas like mine that don't get the newer technology and the stricter controls," he said of the South.

Hooks' remarks were on an Environmental Integrity Project teleconference to release its new report on mercury emissions, "Dirty Kilowatts: America's Top Fifty Power Plant Mercury Polluters." The report says Texas has seven of the 50 highest-emitting plants in the country by total pounds and Alabama has four; Georgia, Louisiana and Arkansas each have two. *The report is available on InsideEPA.com.*

"There's a trend that I've spotted in this report that I think is unmistakable," Hooks said. "Southern states are increasing their mercury emissions in numerous examples, and the second part is these same Southern states are seeking to add more dirty coal plants on top of the ones they already have." He said that mercury emissions are a particular concern for women of child-bearing age and children and that federal policy must ensure "safe levels for everybody in America."

Hooks said he would prefer to see Congress pass pending legislation to impose a strict new 90 percent control on mercury emissions, ahead of a rulemaking that EPA is developing to impose a maximum achievable control technology standard on the utility sector.

Sens. Thomas Carper (D-DE) and Lamar Alexander (R-TN) recently introduced a bill, S. 2995, to reduce power plant mercury emissions by 90 percent and set up a cap-and-trade program for criteria pollutants. Observers have raised concern in the past that differing mercury standards at different facilities would lead to localized hotspots with higher pollution, a leading concern with the vacated Bush-era clean air mercury rule trading program.

Michael Durham, the President and CEO of ADA-Environmental Solutions, which develops and sells emission control technology, said at a March 4 Senate Environment & Public Works Committee hearing that if the bill is altered to allow more flexibility for plants by allowing different plants -- either at the same or different site -- to average their emissions, the overall stringency of the cap would not allow any facility to achieve less than 70 percent reductions.

Carper and Alexander seemed open to the idea. In response to calls for averaging, Carper said that the bill as it is written would provide EPA with some flexibility, allowing averaging emissions from different units at a single facility. And he said, "We'll have to see if there is some reasonable way to do a bit more" (*Inside EPA*, March 12).

But Hooks said on the environmentalists' teleconference that the issue of uniform standards is critical because several Southern states -- including Georgia, Louisiana, Texas and Mississippi -- are considering adding more coal-fired power plants to their fleet.

**Mich. enforcement lacking, group says (*Greenwire*)**

(03/18/2010
The Michigan Environmental Council yesterday asked U.S. EPA to investigate deficiencies in the state's enforcement of the Clean Air Act, saying that the local program is underfunded and failing to fine polluters.

Less than half of the state's pollution sources are getting a full appraisal before they are reissued discharge permits and many complaints are going unanswered, MEC said. The program, funded by the polluters it regulates, is also lacking a full budget, added James Clift, MEC's policy director.

"We're over a million dollars short, that's about 10 or 12 additional bodies that we are supposed to have implementing the Clean Air Act," Clift said.

MEC hopes that a federal evaluation will result in a "notice of deficiency" that would force the state's compliance or risk losing federal highway funds (Jim Harger, *Grand Rapids Press*, March 17). **-- PV**

## CLIMATE CHANGE / GLOBAL WARMING

**No bans on trade in bluefin tuna, polar bear (*Washington Post*)**

March 19, 2010 Friday
Regional Edition
A-SECTION; Pg. A03
Maryland
No bans on trade in bluefin tuna, polar bear;
CONSERVATION VS. COMMERCE Global conference rejects U.S.-backed proposals

By Juliet Eilperin
In the contest between commerce and conservation, a global conference this week aimed at protecting imperiled wildlife seems to be giving commerce the upper hand.

Delegates gathered in Doha, Qatar, on Thursday rejected proposals pushed by the United States to impose restrictions on trade in polar bears and Atlantic bluefin tuna, despite arguments that **climate change** was endangering the polar bears and that bluefin tuna has been fished to precipitously low levels. The group earlier defeated a measure aimed at exposing problems in the global shark trade.

The 175 nations represented at the Convention on International Trade of Endangered Species of Wild Fauna and Florawww.washingtonpost.com/wp-dyn/content/article/2009/11/28/AR2009112801066.htmlesdelegates so far two-and-a-

half if the trade of restricted everything from and to This year's meeting is -- the blue fin tuna, ,, long with the polar bear--the for polar bears a number of said 'served as that given The www.washingtonpost.com/wp-dyn/content/article/2010/03/03/AR2010030301436.html, the assistant interior secretary for fish and wildlife and parks, who left Washington on Thursday night to lead the U.S. delegation, said the administration was "deeply disappointed" in the two votes but was still considering how it could press its case. Any vote can be reconsidered until the last day of the meeting, and delegates have yet to vote on new protections for red and pink corals, tigers, elephants and several shark species.

"The fact is these things, more often than not, take more than one round to get where you want to get," Strickland said.

Japan, which imports nearly 80 percent of commercially traded Atlantic bluefin, led a concerted effort to torpedo the measure. It said such restrictions are best left to the International Commission for the Conservation of Atlantic Tunas (ICCAT), which has set catch quotas for the fish for decades.

"They worked it hard, as they have other international conservation issues, such as whaling," Strickland said. "We're going to be contesting Japan and its position on this."

Joseph Hennon, a spokesman for the European Commission, said the new focus on bluefin had shifted the attitudes of some European Union members, which have started thinking about the long-term economic implications of overfishing. "If there's no fish for them, there's no fishery," he said.

Long-term sustenance

In both trade bans that delegates considered Thursday, U.S. officials and environmentalists argued that the world needs to stop bringing these animals to the market to sustain them over the long term.

Andrew Wetzler, who directs the Wildlife Conservation Project at the Natural Resources Defense Council, an advocacy group, said the polar bear could benefit if nations such as Canada, which allows the killing of 300 polar bears a year for international trade and trophy hunting, stopped sponsoring commercial hunts.

"You need to reduce all the stresses on that population to give it the best chance of survival possible," Wetzler said, adding that he was encouraged that Canada had just announced that it would scale back its hunt in Baffin Bay by 40 bears over the next four years.

A 2007 U.S. Geological Survey estimated that the population of polar bears would decline by more than 70 percent within 45 years as their sea-ice habitat melts. In 2008, the United States listed the polar bear as threatened under the Endangered Species Act.

The U.S. proposal to list polar bears on Appendix I of the convention, which dictates a total trade ban, failed by a vote of 48 to 62, with 11 abstentions.

The proposal by Monaco and the United States to list Atlantic bluefin on Appendix I failed, with 20 in favor, 68 against and 30 abstaining.

The adult population of eastern Atlantic and Mediterranean bluefin tuna has declined 74 percent over the past half-century, much of it in the past decade, and the population has dropped 82 percent in 40 years in the western Atlantic.

"This was a case of just plain ignoring the science for short-term economic gain," said Susan Lieberman, director of international policy at the Pew Environment Group, in an interview from Doha.

**Seeks global approach to pact (*Washington Times*)**

March 19, 2010 Friday
A, POLITICS; Pg. 4
EU climate chief urges U.S. to act;
Seeks global approach to pact
By Monica Martinez THE WASHINGTON TIMES
The European Union's point woman on global warming Thursday pressed the U.S. government to step up its efforts to forge an international climate deal, arguing that both the EU and the U.S. will reap benefits from an accord.

"In the end, we think that those who will be leading this economically will also be the ones who will lead politically in the world of the 21st century," said Connie Hedegaard, EU commissioner for climate action. "Those who become the most energy-efficient will also benefit economically."

Ms. Hedegaard helped chair the December U.N. climate change gathering in Copenhagen, one that even organizers said fell far short of its original expectations. President Obama's major energy policy, including a "cap-and-trade" system to curb greenhouse gas emissions, faces an uncertain future in the Senate after passing the House last summer.

And new opinion surveys in the United States find growing skepticism among voters about some of the claims of the dangers of global warming.

A Gallup poll released earlier this week found that popular concern about many top environmental issues is at a "20-year low." It also found that public worries over eight green-related issues - from air pollution to the state of rain forests - have dropped by as much as nine percentage points in the last year alone.

In an address at the National Press Building, Ms. Hedegaard said the United States and the EU would receive a number of benefits from a joint effort to revive a global approach to climate change.

"If we do this intelligently, we can pick tools in addressing climate change that at the same time will benefit energy security, it will benefit environment, it will benefit air quality and it will benefit gross and innovation," she said.

If the United States fails to lead, she warned, "others will harvest gains." Ms. Hedegaard said China, South Korea, Brazil and India are moving quickly to deal with climate change. She added it was "crucial" for Washington to send a signal to developing economies of its commitment and willingness to act.

Ms. Hedegaard said the EU's new strategy is expected to help make Europe the "most climate-friendly region in the world" by cutting emissions by 20 percent in the next decade, compared to emissions levels in 1990. She said the European bloc would even increase the reductions to 30 percent if other major nations agree to corresponding cuts..

The next U.N. climate summit will take place at the end of the year in Cancun, Mexico. The EU climate minister said participating nations "must manage expectations carefully" and "focus on specific deliverables" to avoid the disappointments that came in the wake of the Copenhagen gathering.

"If it fails this time, then there will be a risk," Ms. Hedegaard said. "If nothing came out of U.S., where would that leave the rest of the world?"

**EPA Changes To HCFC Plan May Undermine Future GHG Trading Efforts (*Inside EPA*)**

3/19/2010
EPA's recent rule amending a cap-and-trade program for ozone-depleting hydrochlorofluorocarbons (HCFCs) sets a negative precedent for a future agency greenhouse gas (GHG) trading program because the changes may make industry less willing to participate and might raise legal uncertainties over trading, industry and academics say.

"Having been fooled in the past by the government, or seen others fooled, companies will be reluctant to engage in and incur any investments otherwise contemplated by these regulatory schemes," according to a recent *amicus* brief that economic experts filed in a lawsuit over the rule changing allocations under the HCFC trading program. "By creating uncertainty about the government, the EPA's conduct threatens the viability of cap and trade schemes more generally."

EPA could help restore industry confidence in trading by reverting to the agency's previous approach to the HCFC allocation, sources say. But more generally, Congress could also consider including guidance in any legislative cap-and-trade plan for GHGs to ensure that EPA cannot suddenly change its trading systems in mid-stream, sources say.

The Feb. 16 *amicus* brief is part of an industry lawsuit filed in the U.S. Court of Appeals for the District of Columbia Circuit over a 2009 EPA rule adjusting the allowance system for its HCFC trading program.

The trading program -- established by the Bush EPA in a first set of rules issued in 2003 -- is designed to meet U.S. commitments under an international treaty, the Montreal Protocol, which requires party countries to phase out production and consumption of a range of ozone-depleting substances, including HCFCs.

Cap-and-trade programs, such as the agency's HCFC program, impose pollution limits and allow companies to either install pollution controls or buy emission credits to meet the caps. EPA is seeking $5 million in its fiscal year 2011 budget to use existing Clean Air Act authority to issue new source performance standards for GHGs that may include a cap-and-trade system, and pending climate legislation would create a GHG trading program.

In 2003, EPA set rules for allocations for emission credits under the HCFC trading program and allowed companies to trade allocations among themselves and also among the three different HCFCs governed under the rule. The rule allowed the allowances to be transferred for just one year or transfer them permanently through a trade in "baseline" emissions, which were based on companies' 1994-1997 emissions.

A second rule, proposed in 2008 under the Bush administration, suggested maintaining this approach, but also took comment on reverting back to companies' pre-trade baselines or disregarding companies' baselines entirely. But the Obama EPA Dec. 15 issued a rule effective Jan. 1 that found that permanent inter-pollutant trading was unlawful, and reverted back to the allowance allocations first issued to the participating companies.

Industries that were relying on the permanent transfer of allowances filed lawsuits over the 2009 rule -- *Solvay Fluorides, LLC, et al v. EPA* and *Arkema Inc. v. EPA* -- that have been consolidated.

In their *amicus* brief to the court, the economic experts argue that the Obama administration's changes to the HCFC program could undermine industry confidence in other emissions trading markets, including potential GHG trading programs that are under debate in Congress and under consideration by EPA.

"[P]articipants in this and future cap and trade regulatory schemes will likely base their conduct on the precedent set by the EPA's behavior," and will be reluctant to take part

in the trading that is the basis for these regulatory plans, according to the brief, filed by Robert H. Gertner and Casey B. Mulligan, professors at The University of Chicago, Michael J. Moore, a professor at the University of Virginia and Tracy R. Lewis, a professor at Duke University. *Relevant documents are available on InsideEPA.com.*

"These adverse effects will be amplified as the government seeks to adopt cap and trade market processes more broadly in other areas, such as in controlling [GHG] emissions," the brief says. The court accepted the brief March 3.

An attorney for the *amici* says EPA's change of course in the HCFC rule is significant both because it could undermine certainty necessary for effective cap-and-trade markets generally and because it could hurt political will to pursue trading in GHG legislation. Even if Congress or EPA goes ahead with a cap-and-trade system for GHGs, companies may be unwilling to buy in to trading and instead opt for GHG reductions, which would undermine the efficiencies that could be gained from trading, the source adds.

One industry attorney agrees that the HCFC rule could have negative effects on industry's willingness to rely on EPA trading rules in the future -- including any climate cap-and-trade program.

The HCFC rule is significant in the context of GHGs because a climate cap-and-trade would likely rely on inter-pollutant trading among GHGs, similar to inter-pollutant trading among HCFCs at issue in the lawsuit, the source says. In the HCFC rule, EPA found that the Clean Air Act bars permanent inter-pollutant trading, which could be read as an implicit prohibition of inter-pollutant trading in other contexts as well, the source says.

The attorney for the amici says the HCFC rule is not necessarily a death knell for GHG trading, but it is a hurdle that EPA must address if it is to launch a strong climate trading program. "I wouldn't say its a nail in the coffin, but I would certainly say that any uncertainty or any sudden changes [to the HCFC allowances] signal . . . that the undertaker is at least building a coffin," the source says. "[T]o the extent that we don't want that coffin completed . . . EPA should certainly consider the economic impact of changes to the cap-and-trade regime."

The source says Congress could guide EPA against sudden changes to allowances in a future GHG trading plan, but warned that lawmakers should not be too prescriptive. "Congress should be loathe to impose specific directions on the executive branch, but should certainly give them guidance as to how to enact the legislation in order to give the industry some comfort as to how EPA will operate under the legislation," the source says.

However, an economy-wide cap-and-trade legislative plan for GHGs already appears to be faltering in Congress. For example, some say a climate bill being crafted by Sens. John Kerry (D-MA), Lindsey Graham (R-SC) and Joseph Lieberman (I-CT) could take a more sector-based approach, beginning with requirements for power plants and

including separate requirements for other sectors, such as GHG rules for mobile sources.

In the HCFC litigation, Arkema Inc. and Solvay Fluorides, LLC/Solvay Solexis -- companies that were relying on the allowances -- are arguing that the rule is arbitrary and capricious because it reverses EPA's prior policy without a reasoned analysis, contrary to law because it claims inter-pollutant trades are illegal, and impermissibly retroactive because it invalidates prior trades, according to recent briefs they filed with the D.C. Circuit.

The companies say the rule is "divorced from current market realities," in a Feb. 16 joint brief in the case. "The bottom line is that after years of encouraging market participants to adapt to changes in relative demand among HCFCs by trading allowances between pollutants, and professing concern about 'preventing disruption' to market demand, EPA has triggered a reset button that returns the market to how it appeared in the years 1994-1997."

The companies also sought an expedited briefing schedule and partial stay of the rule to prevent the reallocation of allowances, arguing that the rule would cause Arkema $44 million and Solvay $15 million in lost sales in 2010.

The court in a Jan. 21 order denied the motion for a stay, arguing that the petitioners did not satisfy the stringent standards for a stay. However, the court granted the request for an expedited briefing schedule, requiring briefing to be completed by early April.

EPA has not yet filed its brief on the merits of the case. However, in its Jan 15 brief in opposition to the plaintiffs' motion for a partial stay of the rule the agency defended its actions as legal. The agency's rule makes clear that "it was not wedded -- and certainly not obligated -- to use any system that continued the baselines established in the 2003 rule, let alone a system that gave permanent effect to inter-pollutant transfers."

EPA argues that the rule cannot be retroactive as the plaintiffs claim, because it applies only to HCFC production and consumption that occurs after Jan. 1, 2010.

The agency also argues the rule is not a reversal of its previous position because EPA never promised that inter-pollutant trades would be recognized in future rules and there is nothing in the statute that requires the agency to do so. Previous court rulings also say that agencies are free to change course in policy as long as it explains why it is necessary, and EPA has explained its position in this rule, the brief says. -- *Kate Winston*

**Industry Pushes For Key Confidentiality Provisions In EPA GHG Registry (*Inside EPA*)**

3/19/2010
Industry is reviving concerns that EPA's greenhouse gas (GHG) reporting rule requires companies to submit data that could reveal valuable manufacturing process data, and is urging the agency to expand confidential business information (CBI) protections through an upcoming rulemaking to amend the reporting requirements.

"We want to maintain the confidentiality of information and we think that can best be done by keeping that process data in our facilities," said Jean Sweeney of 3M Company at a March 4 American Law Institute-American Bar Association (ALI-ABA) conference in Washington, DC, adding that EPA could instead obtain any further company information needed to administer the GHG reporting rule through site visits to facilities.

At the ALI-ABA event, Reid Harvey of EPA's Office of Air & Radiation acknowledged industry's concerns over the CBI impacts of the GHG reporting registry. He said the agency intends sometime in 2011 to initiate its upcoming rulemaking that will attempt to resolve industry's concerns over CBI under the registry.

CBI has long been a contentious part of EPA's GHG reporting rule, which took effect Jan. 1. For example, the American Petroleum Institute (API) and National Petrochemical & Refiners Association (NPRA) sued EPA in the U.S. Court of Appeals for the District of Columbia Circuit challenging several aspects of the rule, including, "Failing to provide alternative compliance methods under the rule for confidential business information."

The D.C. Circuit recently granted EPA's motion to hold the suit -- and separate litigation filed by other groups over other provisions of the rule -- in abeyance pending the outcome of settlement talks. API and NPRA did not oppose the motion but warned that they may file for an emergency stay of the reporting rule if the talks fail to resolve in a timely manner their concerns over the various provisions they are challenging.

The GHG reporting rule says that while the agency will protect information on facilities' GHG emissions if it qualifies as CBI under federal regulations, "in general, emission data collected under [the Clean Air Act] sections 114 and 208 shall be available to the public and cannot be withheld as CBI." The sections cover EPA's authority to impose information collection requests on industry, and both sections say that data collected under those sections must be public unless industry can show that release of the data would reveal trade secrets.

CBI determinations for emissions data that industry submits to EPA are typically made on a case-by-case basis by the agency. However, EPA said in its final GHG reporting rule that "such an approach would be cumbersome given the scope of this rule and the potential inconsistencies across reporters and source categories and the compelling need to make data that are not CBI, or are emissions data, available to the public."

The agency said in response to a wide range of CBI concerns that a critical factor in whether data can be designated CBI is whether it is necessary for the agency to verify emission reports.

But 3M's Sweeney said that EPA should only require companies to report actual GHG emissions and allow them to maintain data on business processes on-site instead of reporting it. She urged EPA to "ensure provisions to maintain confidentiality" and "accomplish the goal of efficient and accurate greenhouse gas measurement in a way that still allows industry to be competitive and sustainable in the global marketplace."

Sweeney said that providing a large amount of public data to EPA through the GHG reporting registry could reveal crucial trade secrets, undermining American companies' competitiveness.

In addition to the settlement talks over the registry, EPA's pending CBI rulemaking could provide industry with an opportunity to bid for the CBI protections it says are necessary to protect trade secrets.

EPA says it is developing a rulemaking to "proactively" determine which data it collects through the registry should be CBI, according to EPA's October 2009 Action Initiation List of recently launched rulemaking efforts. EPA in the list estimates that the agency will be able to issue a direct final rule within 12 months or less.

The rule will "make CBI and emissions data determinations for the categories of data collected" for the registry and may establish classes of information that are not emissions data and do qualify as CBI, the list says.

**California Regulators Move Closer To Tightening GHG Reporting Threshold (*Inside EPA*)**

3/19/2010
California regulators appear closer to lowering the annual greenhouse gas (GHG) emissions threshold that triggers facility reporting requirements -- from 25,000 metric tons annually to 10,000 tons -- a move that could put pressure on EPA to lower its 25,000 ton reporting threshold to ensure consistency.

The threshold is not only critical for thousands of state facilities that would be newly captured in the reporting program, but it is also generally seen as an indicator of which facilities regulators will eventually target for mandatory GHG emission-reduction regulations, or permits.

The California Air Resources Board (CARB) March 12 issued a notice about the potential GHG-reporting rule changes, which are scheduled to be discussed at a March 23 workshop. The rules are slated to be adopted by CARB at an October meeting, as part of a package of other climate change program regulations, including the state's cap-and-trade program. *CARB's notice is available on InsideEPA.com.*

“This proposal is being considered because of the need to monitor emissions leakage (i.e., emissions from capped sources transferring to sources below the proposed cap-and-trade emissions threshold of 25,000 tons) and ensure the program is achieving expected emission reductions,” the March 12 CARB notice states.

The new threshold would include facilities “consuming 180 million standard cubic feet of natural gas, or 980,000 gallons of diesel fuel, as examples.” The notice adds that third-party verification of the reports would not be required for the smaller facilities, in contrast to CARB’s general mandate for third-party reporting.

Changing to a 10,000 ton threshold would make California consistent with the proposed Western Climate Initiative (WCI), a regional cap-and-trade program that includes seven western states and four Canadian provinces. But only California and three of the Canadian provinces say they will be able to launch their cap-and-trade programs required for the WCI by the planned 2012 deadline.

CARB is also proposing to impose new reporting requirements for emissions from several sectors, including iron and steel, nitric acid, oil and natural gas, glass and lime, and pulp and paper products. Producers and importers of certain industrial gases would also face new reporting requirements. In addition, producers and importers of natural gas and transportation fuels would be required to report emissions from downstream use of those fuels.

A representative of the California Manufacturers & Technology Association (CMTA) -- a broad coalition of companies opposed to GHG rules -- did not immediately respond to a request for comment, but the organization is expected to raise strong opposition, because it would subject thousands of California facilities to the reporting rule that currently are outside the regulation’s scope. The current CARB 25,000-ton threshold captures 609 facilities.

“Obviously, it would potentially impact a whole bunch of other people significantly,” says an industry source. “There are a whole bunch of manufacturing facilities that have smaller heaters and furnaces and those kinds of things that might be impacted.”

Utilities in the state have expressed contrasting positions on the 10,000 ton threshold when CARB initially broached the idea last year, with some companies, such as Sempra Energy, saying that the change would capture three times the number of facilities than the current threshold at high cost with little or no GHG emission-reduction benefit.

An EPA spokeswoman says the agency “is not currently considering changing the reporting threshold for the mandatory GHG reporting rule. Any changes to the reporting requirements including a change to the reporting threshold would go through the standard notice and comment rulemaking process.”

EPA says its current reporting rule captures about 10,000 large facilities across the country, which covers about 85 percent of the nation's GHG emissions.

**Court Suspension Allows EPA To Seek Deal On GHG Reporting Rule (*Inside EPA*)**

3/19/2010
A key appellate court has granted EPA's request to suspend several lawsuits over its contested greenhouse gas (GHG) reporting rule to try and administratively resolve industry and environmentalists' challenges to the rule, though industry warns it may still ask the court for an emergency stay of the rule if it cannot reach a settlement with EPA.

The recent U.S. Court of Appeals for the District of Columbia order granting abeyance is one of a number of suspensions sought by EPA that the court has approved in the past few weeks, including abeyance of several litigated air rulemakings affecting the chemical manufacturing, coal processing and petroleum refining industries. EPA also has a handful of other requests before the court asking it to hold in abeyance a number of other suits over air rules.

EPA is required to file status reports on settlement talks at 90-day intervals beginning May 24, the order says. The court's Feb. 22 order granting abeyance of the GHG reporting rule lawsuits gives EPA the opportunity to try and reach a settlement with industry and environmental groups that sued over major provisions of the rule.

For example, the Environmental Defense Fund (EDF) in a Feb. 8 statement of issues raised a number of concerns with the rule including its failure to require GHG emissions reporting from all sectors of the economy by exempting coal mines, ethanol production, food processing, industrial landfills and several other facilities.

The American Petroleum Institute (API) and the National Petrochemical and Refiners Association (NPRA) also sued EPA over the rule, asking in a Feb. 8 statement of issues whether the agency acted arbitrarily and capriciously by setting a March 31 deadline to discontinue the use of best available monitoring methods; requiring that annual reports mandated by the rule be submitted by March 31 of each calendar year; failing to provide alternative compliance methods for confidential business information; and a number of other criticisms of the rule.

Other industry groups also filed suit over the rule, with the Utility Air Regulatory Group (UARG) saying EPA failed to propose for comment various monitoring, recordkeeping and reporting requirements. The American Chemistry Council (ACC) also filed suit, challenging various definitions and the scope of provisions in the rule.

In response to the suits, consolidated as *API, et al. v. EPA*, the agency filed a Feb. 5 partially unopposed motion to hold the cases in abeyance so that the parties involved

may pursue settlement discussions and EPA may evaluate five pending administrative petitions for reconsideration of the GHG reporting rule.

The groups that filed the petitions for reconsideration with EPA are the American Public Gas Association; API; the Energy Recovery Council; UARG and EDF. All those groups filed lawsuits in the D.C. Circuit over the rule, in addition to suits brought by ACC, the Fertilizer Institute and Kinder Morgan CO2 CO., LP.

“EPA and the petitioners in these cases would like an opportunity to engage in settlement discussions, to assess whether some or all of the issues in these cases can be resolved without the need for adjudication by the Court. Further, an abeyance will provide EPA an opportunity to consider the administrative petitions for reconsideration now pending before the agency,” the agency said in its motion, recommending a status report be filed every 90 days.

All the petitioners except API and NPRA did not oppose the motion. API and NPRA filed a Feb. 19 statement of non-opposition to the motion for an abeyance “provided that such an abeyance does not prejudice the ability of API and NPRA to seek an emergency stay of portions of the greenhouse gas reporting rule challenged in this case.”

Meanwhile, EPA has won abeyance in a number of other lawsuits challenging agency air rules. For example, the D.C. Circuit Jan. 26 granted a joint motion filed by ACC and EPA to hold in abeyance a lawsuit over an Oct. 29 national emission standards for hazardous air pollutants (NESHAP) for chemical manufacturing area sources, so that the agency can complete its review of an administrative petition for reconsideration of the regulations.

The court March 9 also granted EPA’s unopposed motion to hold in abeyance a lawsuit, *UARG v. EPA*, challenging the agency’s Oct. 8 standards of performance for coal preparation and processing plants.

And the court Jan. 27 granted a joint EPA and API motion to hold a lawsuit over the agency’s Oct. 28 petroleum refinery NESHAP in abeyance with 120-day status updates due beginning May 27.

EPA also won a Feb. 12 court order granting its joint motion with plaintiffs to hold in abeyance a lawsuit filed over Nov. 13 designations that two Utah counties are out of attainment with the agency’s 2006 24-hour national ambient air quality standard for fine particulate matter. The suit, *ATK Launch Systems, Inc. v. EPA*, is now in abeyance pending the outcome of a similar suit ATK Launch Systems filed in the 10th Circuit over the attainment designations. EPA has moved to dismiss the 10th Circuit suit and the plaintiffs have opposed the motion.

EPA in a Jan. 11 motion also asked the court to remand and stay another suit, *UARG, et al. v. EPA*, in which industry is challenging the agency’s Sept. 22 rule staying a

controversial Bush-era “grandfathering” rule allowing certain Clean Air Act new source review (NSR) permits to use large particulate matter as a “surrogate” for fine particles (PM2.5) -- a practice critics say leads to weaker pollution controls. Critics of the surrogacy policy say that it does not require a sufficiently accurate assessment in permit applications of true PM2.5 emissions, which are widely thought to be the most harmful type of particulate. EPA Feb. 4 issued a proposed repeal of the grandfathering NSR policy.

UARG in a Jan. 20 response opposed remand of the lawsuit, saying EPA “offers no substantial basis for its motion.” If, however, the court grants remand then UARG asks that the court also vacate the Sept. 22 rule staying the grandfathering policy. If the court opts to remand the record without vacating the stay rule and holding the suit in abeyance, UARG asks that the court limit the remand and abeyance to no more than 30 days. -- *Anthony Lacey*

**Energy commission launches geoengineering task force (*Greenwire*)**

Jenny Mandel, E&E reporter
03/18/2010
The bipartisan National Commission on Energy Policy has created a task force to examine research and policy issues associated with geoengineering -- modifying the environment on a large scale to change the Earth's atmosphere.

The task force aims to make recommendations to Congress and the Obama administration this summer.

"We cannot rule out the possibility that climate change will come upon us faster and harder than we can manage," said Jane Long, co-chairwoman of the new group and associate director of Lawrence Livermore National Laboratory's Energy and Environment directorate. "Prudence dictates we try to create more options to help manage the problem and learn whether these are good options or bad options."

Long is slated to testify today at a House Science and Technology Committee hearing on domestic and international research on geoengineering. Chairman Bart Gordon (D-Tenn.) is working on legislation to establish a federal research program on the subject, likely within the Energy Department (*ClimateWire*, Feb. 26).

"The exploration of geoengineering must be bipartisan, international, and transparent in order to properly address these complex challenges," Gordon said in a statement on the new task force. "The bipartisan National Commission on Energy Policy will provide an essential forum for intelligent discourse on viable policy options informed by science."

Stephen Rademaker, the other co-chairman of the commission and a former State Department official who now works at BGR Government Affairs, said the task force

would look at the appropriate U.S. role in geoengineering to address an "international policy void" on the issue and reduce the risks associated with a haphazard global approach.

"Some geoengineering techniques ... can, in theory, be implemented cheaply and quickly, but naturally it is important to be alert to the potential unintended consequences," he said.

The task force, which encompasses experts in science, technology, national security, ethics and other fields, met for the first time last week. NCEP Research Director Sasha Mackler is the staff lead for the group.

Other members of the task force:

- James Anderson, Harvard University professor of atmospheric chemistry.
- Richard Benedick, senior adviser at the Joint Global Change Research Institute, and former chief U.S. negotiator for the Montreal Protocol.
- Ken Caldeira, senior scientist with the Carnegie Institution.
- Joe Chaisson, research and technical director with the Clean Air Task Force.
- Stephen Gardiner, associate professor, the University of Washington's philosophy department.
- David Goldston, director of government affairs at the Natural Resources Defense Council and former staff director for the House Science Committee.
- Steven Hamburg, chief scientist at the Environmental Defense Fund.
- David Keith, director of ISEEE Energy and Environmental Systems Group, Earth Sciences University of Calgary.
- Ron Lehman, director of the Center for Global Security Research, Lawrence Livermore National Laboratory.
- Frank Loy, former undersecretary for global affairs, State Department.
- Granger Morgan, engineering professor, Carnegie Mellon University.
- Daniel Sarewitz, director of the Consortium for Science, Policy and Outcomes, Arizona State University.
- Thomas Schelling, professor emeritus, University of Maryland.

- John Shepherd, professorial research fellow in earth system science, University of Southampton, and chairman of the Royal Society's geoengineering report.

- David Victor, professor at the School of International Relations and Pacific Studies, University of California, San Diego.

- David Whelan, Boeing Integrated Defense Systems chief scientist and vice president of Boeing Corp., and former director of the tactical technology office of the Defense Advanced Research Projects Agency.

- David Winickoff, assistant professor in the Department of Environmental Science, Policy, and Management, University of California, Berkeley.

**MINING**

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**EPA issues initial decision on Red Dog permit (*Greenwire*)**

03/18/2010
U.S. EPA has informed Canadian mining company Teck Resources Ltd. that it can continue extracting zinc, lead and silver at the Red Dog Mine in rural northwest Alaska as the agency considers an administrative appeal to the mine's wastewater discharge permit.

Teck has sought permission to excavate another pit, claiming the company has nearly exhausted resources at the main Red Dog site and would otherwise need to end production later this year. The mine is the world's largest producer of zinc concentrate.

Mine opponents appealed the Red Dog permit last month, saying polluted discharges from the mine could harm spawning grayling. The appeal was filed by two tribal councils, the Northern Alaska Environmental Center, Alaska Community Action on Toxics and five residents of nearby villages (*Greenwire*, Feb. 18).

"It's our position that as of March 31 they will have a permit that we have written that will allow them to continue operations at Red Dog Mine, including development of the Aqqaluk deposit," said Patty McGrath, regional mining coordinator at EPA.

Though EPA has given Teck permission to move forward with development, the company remains constrained by a previous wastewater permit as the agency considers the appeal. That will prevent the company from developing the Aqqaluk deposit, which is thought to contain enough metal for 20 more years, said Jim Kulas, the mine's environmental and public affairs manager.

"Right now, we will have a permit that will have conditions we can't comply with," he said (Rocha/Rosen, *Reuters*, March 17). **-- GN**

**PESTICIDES**
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**EPA plans to improve flea and tick treatments after thousands of pet deaths (*Justice News Flash*)**

2010-03-19 04:52:13 (GMT) (JusticeNewsFlash.com - Justice News Flash, Product liability)
Legal news for product liability attorneys. The EPA is planning to improve the safety of flea treatments, which have killed or injured thousands of pets.
Product liability attorneys alert- The EPA plans to make flea and tick products safer for dogs and cats.
Washington, D.C.—The U.S. Environmental Protection Agency (EPA) http://www.epa.gov/ announced on Wednesday, March 17, 2010 that they plan to make products intended to treat dogs and cats for fleas and ticks safer for our furry friends. Each year the flea and tick products have killed hundreds of pets and injured tens of thousands others, as reported by MSNBC.

The EPA has received a total of 44,263 reports of harmful reactions related to topical flea and tick products in 2008, which has almost doubled from 28,895 in 2007. Skin irritations, vomiting, seizures and even death were among the reported reactions. Pet owners also reported that their pets have suffered welts on their skin, drooling excessively, shaking uncontrollably, inability to control their legs, and neurological problems all after using the flea and tick treatments.

The EPA became involved after increasing number of complaints from pet owners were brought to their attention. Pet owners claimed that the “spot-on” products have caused the adverse reactions in their pets. The EPA is pledging to implement more ridged guidelines for testing and evaluations among flea and tick treatments. They will also be reviewing the treatment labels to determine which ones will need clarification on how to use the treatment.

The EPA released a 29-page report, which stated the majority of problems arose in smaller dogs that weight 10 to 20 pounds. Other incidents occurred when pet owners mistakenly gave the treatment intended for a larger dog to their smaller dog. Most of the problems occurred in the Chihuahuas, Shih Tzus, miniature poodles, Pomeranians and dachshund breeds. Cats also have been mistakenly given treatments that were intended for dogs. The EPA is hoping that clearer labels will help pet owners to not continue to make these mistakes that put their furry friend in danger.

Legal News Reporter: Nicole Howley-Legal news for product liability lawyers.

Written by Nicole · Filed Under Justice News Flash, Product liability

**EPA: More pets injured by flea and tick products (*Associated Press*)**

**Story also appeared: *Washington Post***

By MATTHEW DALY
The Associated Press
Thursday, March 18, 2010; 1:07 AM

WASHINGTON -- Products intended to treat cats and dogs for fleas and ticks kill hundreds of pets each year and injure tens of thousands, the Environmental Protection Agency said Wednesday as it outlined plans to make the products safer.

The EPA said it will develop stricter testing and evaluation requirements for flea and tick treatments that are applied to a pet's skin. The agency also will begin reviewing labels to determine which ones need to say more clearly how to use the products.

The EPA's effort follows increasing complaints from pet owners that the "spot-on" products have triggered reactions in dogs and cats, ranging from skin irritation to neurological problems to deaths. Cats and small dogs appear particularly vulnerable, the EPA said, especially when given products intended for larger animals.

Steve Owens, assistant administrator of EPA's Office of Prevention, Pesticides and Toxic Substances, said new restrictions will be placed on flea and tick products, with additional changes for specific products likely - including possible changes in some product formulas.

"These are poisons," Owens said. "These are products designed to kill fleas and ticks - and they do their jobs."

The EPA is committed to better protecting the health and safety of pets and families, Owens said, but added that pet owners "need to carefully read and follow all labeling before exposing your pet to a pesticide."

The agency announced last April it was increasing scrutiny of topical flea and tick products because of the growing number of bad reactions reported.

The EPA said it received 44,263 reports of harmful reactions associated with topical flea and tick products in 2008, up from 28,895 in 2007. Reactions ranged from skin irritations to vomiting to seizures to, in about 600 cases, death of an animal.

An EPA spokesman said he did not have a breakdown of how many deaths were dogs and how many cats.

Dog and cat owners say their pets have suffered burns and welts on their skin; started to drool excessively; begun to shake uncontrollably; lost control of their legs or experienced other neurological problems after using the flea and tick treatments.

A 2009 study by the American Society for the Prevention of Cruelty to Animals reported that the majority of illnesses linked to proper use of topical flea and tick products were mild. Cats were more susceptible than dogs to illnesses and deaths from misuse of the products, the report said.

"The important take-home message is that although adverse reactions can occur with all flea and tick products, most effects are relatively mild and include skin irritation and stomach upset," said Dr. Steven Hansen, ASPCA veterinary toxicologist and senior vice president for animal health services.

Pet owners should keep using the products as directed when faced with a flea infestation, Hansen said.

Georgia-based Merial Ltd., which makes the popular Frontline tick and flea treatment, defended its product and disputed the EPA data.

"The number of adverse events reported for Frontline has remained consistently low since the product's introduction in 1996," the company said in a statement e-mailed to reporters. The vast majority of reactions are minor, the statement said.

In a 29-page report, the EPA said the majority of problems for dogs occurred in smaller dogs, weighing 10 to 20 pounds. Some incidents occurred when products intended for larger dogs were given to smaller animals, the report said. Chihuahuas, Shih Tzus, miniature poodles, Pomeranians and dachshunds were among breeds where problems occurred the most, the EPA said.

Similarly, many problems for cats occurred when they were given treatments intended for dogs. The EPA is likely to require companies to revamp labels to clarify that products intended for dogs should never be used on cats, Owens said.

On the Net:

EPA report on protecting pets:http://www.epa.gov/pesticides/health/pets.htm

Mar 18, 2010

**Pet flea and tick agents: Consumer safety tips (*USA TODAY*)**

01:55 PM
Several readers asked about the safety of spot-on flea and tick agents after the U.S. Environmental Protection Agency released its report on improving labeling on the products Wednesday. Thousand of pets are harmed each year from the products and others die.

I use on it my two dogs and did some leg work today because I live in a heavily infested tick area and use a spot-on treatment on my dogs. The EPA investigation concluded certain pets – small dogs between 10 and 20 pounds – are most susceptible to problems, including rashes, vomiting, diarrhea and seizures. Incidents reported by consumers rose from 28,895 in 2007 to 44,263 in 2008, a 53 % rise. Most of the problems were minor, such as skin rashes, but about 600 dogs and cats died in incidents reported in 2008.

The EPA's Steve Owens said new instructions and warnings are expected on labels soon, adding if those steps don't decrease the problems the EPA might take extra steps.

The Center for Public Integrity said in a press release Wednesday it revealed serious problems with spot on treatments to the EPA 15 months ago. That report can be read here. The Center's investigation in December 2008 focused on spot-on products containing active ingredients from the pyrethroid family of chemicals, which are synthetic relatives of pyrethrins, extracted from the chrysanthemum plant.

Curious about what's in your pet's on-spot agent? This website can help you compare the products. Some can not be used on cats and dogs should not be near cats for a period of time after being treated.

**READERS:** I follow the weight guidelines on the packaging, but I play it safe. My chowhound male tips into next higher weight dosage. I haven't put him on the higher dose because it's enough for a dog 20 pounds heavier. Any precautions you take?

**Pesticide Industry Warns EPA's Draft Spray Drift Guide May Be Unlawful (*Inside EPA*)**

3/19/2010
Pesticide manufacturers and agriculture groups are charging that EPA's proposed guidance tightening labeling requirements to protect against exposure to spray drift may

be unlawful because it sets a new protection standard that is at odds with federal pesticide law and it does so without conducting a formal rulemaking.

Industry, including pesticide makers, grower groups and other, argues that the safety standard included in the labeling guidance -- prohibiting drift that “could cause adverse effects” and “could cause harm” -- is in conflict with the standard in the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA), which requires regulators to ensure that pesticides “will not generally cause unreasonable adverse effect on the environment.”

One state agency says the proposed standard could lead to frivolous lawsuits against farmers over pesticide use, which could lead to action by regulators with little proof of harm. *Relevant documents are available on InsideEPA.com.*

EPA announced the changes to labels regulated under FIFRA in a Nov. 4 *Federal Register* notice, “Draft Guidance for Pesticide Registrants on Pesticide Drift Labeling,” and asked for comments on three documents including a pesticide registration notice (PRN) on the labeling changes, an interpretation document and a second PRN with questions for stakeholders and additional information.

Agency officials said late last year that the agency was planning to foster “strong, enforceable labels” for pesticides with the guidance. EPA took comment on the guidance through March 5.

The documents are part of a broader agency effort to address the risks of spray drift. In addition to the guidance, the agency said it would also evaluate the risks of individual pesticides and their uses to determine whether additional regulatory limitations, such as restrictions on droplet or particle size, nozzle height, or weather conditions, are needed to protect human health, endangered species, water resources and other sensitive sites from potential harm, according to a Nov. 4 EPA press release.

The agency’s use of pesticide law to address spray drift comes as agency officials say they are unlikely to address spray drift in pending efforts to require chemical applicators to obtain first-time Clean Water Act permits when spraying on or near waters.

The agency effort to address spray drift was a response to an Oct. 14 petition filed by a coalition of activist groups, including Pesticide Action Network North America (PANNA), United Farm Workers, Physicians for Social Responsibility, Moms Rising, Pineros y Campesinos Unidos del Noroeste, and others, that asks for stricter rules to reduce exposure to spray drift, arguing the agency is required to establish the buffer zones under the Food Quality Protection Act and executive orders on children’s health and environmental justice. The petition asks EPA to set “no-spray buffer zones” around schools, residential areas, parks and daycare centers for the “most dangerous and drift-prone” compounds, including organophosphates, and EPA took comment on the petition at the same time as the spray drift labeling guidance.

Activists who petitioned the agency say they are not opposed to the label changes proposed by EPA, but reiterate calls for no-spray buffer zones to fully protect children from exposure.

But industry groups are warning that EPA's draft guidance may be unlawful. CropLife America, which represents pesticide manufacturers, argues in March 5 comments that the FIFRA standard must be upheld and applied to spray drift labeling and says "it is not clear on what basis EPA would purport to apply a different standard only to spray drift label language."

**EPA finds anti-flea and tick products safe for pets (*Greenwire*)**

03/18/2010
A nine-month government investigation into anti-flea and tick products for dogs and cats will not result in them being pulled from the market, though labels are expected to change. The investigation follows a spike in the number of pets getting sick or dying in 2008.

U.S. EPA found that while the spot-on products are safe, the labeling is "inadequate." Some consumers were giving the wrong doses to smaller dogs or treating cats with products meant for dogs.

The spot-on products in question are liquid solutions applied topically, usually once a month. EPA is asking the producers to clearly distinguish which medicines are meant for dogs or cats, even calling for different names for each product. But none of the products will be pulled from the shelf. Spot-on companies say they are open to the suggestions and will change the labels as necessary.

EPA also found potential problems with some of the "inert" ingredients and could ban them in the future (David Kerley, ABC News, March 17). **-- JP**

**RECYCLING**
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**EPA rewards Clifton recycling program (*North Jersey.com*)**

Friday, March 19, 2010
BY ANGELA DAIDONE

Clifton Journal

Clifton can add another feather in its cap for being among the best in environmental consciousness.

The City has been recognized by the Environmental Protection Agency for outstanding partnership in EPA recycling programs, and will be presented with the award in Virginia later this month.

"We've had a unique and successful program here for quite a few years, and it's always good to receive such an honor," said Al DuBois, municipal recycling coordinator.

This isn't the first time Clifton has been recognized for its efforts in keeping the City green and clean.

According to DuBois, Clifton has received 15 awards in the past 10 years, among them the Environmental Quality Award for its solid waste program in 2007.

"That's the highest honor the EPA offers," said DuBois, adding that the City prides itself on improving its programs and community outreach each year.

"We're most proud of our educational program [in recycling]," he said, explaining that reusability, "refillability," source reduction, and composting are the major components in educating the community.

"It's not enough to ask people to recycle bottles and cans, or to use a composter. We want them to understand what impact it actually has," said DuBois.

Different colored glass, for example, melts at different temperatures so its uses when recycled vary, he said, requiring a need for initial separation. And plastics, such as water bottles and laundry detergent containers, still have to be treated in recycling plants, and thus, are not saving energy or reducing gas emissions, DuBois said.

"Education is key," he said, adding that the City's office has worked with civic groups, schools and the local chapters of the Sierra Club, among others. "Most people don't know that a simple act, like leaving grass clippings on the lawn after mowing, not only reduce the need for recycling, but yield a greener, healthier lawn."

Likewise, he said, composting food scraps, like egg shells, coffee grinds and fruit peels, cuts down dramatically solid waste.

"And it's great for your garden," he said.

Since joining the EPA's Waste-Wise program in 1994, Clifton has consistently emerged as one of the nation's top models for replication in recycling efforts. In past years, Clifton

has been recognized for advancements in climate change, electronics recycling, waste reduction programs, and environmental sustainability.

For a comprehensive list of the City's programs, visit www.cliftonnj.org.

## SOLID WASTES

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### EPA Waste Chief Advocates Precautionary Approach To Aid Equity Focus (*Inside EPA*)

3/19/2010
EPA's top waste official says that the key to furthering environmental justice is to craft a solid workable policy for implementing the precautionary principle -- the concept that favors regulation to protect human health in the absence of certainty on environmental risks.
But the idea is likely to stir a strong adverse reaction from industry and other critics who have long opposed the precautionary approach, saying that EPA should focus on regulating in areas where there is demonstrated risk. And Sen. James Inhofe (R-OK), ranking member on the environment committee, used a March 17 hearing on childrens' health to reiterate his long-standing opposition to the precautionary approach.

Mathy Stanislaus, head of EPA's Office of Solid Waste & Emergency Response, said at a March 17 symposium on "Strengthening Environmental Justice Research and Decision Making" that the agency needs to find a way to use the precautionary principle in such a way that it can be applied uniformly and fairly to prevent disproportionate impacts from occurring in the first place.

"We can't wait until we have all the conclusive interpretive science to make a decision," Stanislaus said. "The real problem that that emerged from the environmental justice movement [is], how do you make the decision to prevent harm, even in the absence of conclusive evidence? I challenge you all, in your deliberations, to [consider] how to operationalize the precautionary principle."

Stanislaus told *Inside EPA* in a brief interview after his remarks that the agency has not determined how it might take the precautionary principle and craft it into an official policy, but rather he was imploring the gathered stakeholders to come up with ideas for how to operationalize the concept of preventative regulation. "Obviously, it's an open question," Stanislaus said. "It's something that has come up to us, so I just want the people to deliberate around it and when I come back [to the symposium] on Friday, deliver their response."

The symposium, held in Washington, DC, was cosponsored by EPA, the Center for Disease Control and Prevention, the National Institute on Occupational Safety & Health, and several other federal agencies and non-governmental organizations.

Stanislaus' remarks come as Inhofe reiterated his opposition to the precautionary principle at a March 17 Senate environment panel hearing on a recent report by the Government Accountability Office (GAO) on EPA's consideration of the effects of chemicals on children, who have higher sensitivity to contaminants than adults.

GAO's report said that the agency should balance its conclusions with the conclusions of advisory groups when considering chemical risks to children -- a suggestion that Inhofe said was outside the agency's authority. *The report is available on InsideEPA.com.*

"What the report does not fully address is the fact that EPA must always balance recommendations on children's health with objective scientific standards, legal requirements, and practical realities," Inhofe said. "Advisory groups do not have to base their recommendations on risk: they can base their opinion on the use of precaution. They do not have to balance economic impacts and resource limitations: federal agencies do."

**TOXICS**

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**On Eve Of Bill, Advocates Split Over Endocrine Focus In TSCA Reform Bid (*Inside EPA*)**

3/19/2010

As lawmakers prepare to introduce long-awaited legislation reforming the Toxic Substances Control Act (TSCA), key environmentalists and public health activists are split on how the bill should prioritize efforts to address endocrine disrupting chemicals -- a division that could complicate congressional efforts.

Some key public health advocates are questioning whether a forthcoming bill to reform the law will deal adequately with endocrine-disrupting chemicals because the coalition driving support for the bill puts too much weight on addressing persistent bioaccumulative toxins (PBTs) rather than endocrine disruptors.

"If it's not in TSCA [reform], we're going to be in real trouble," one endocrinologist says. The source says that prioritizing PBTs may mean that some well-known endocrine disruptors, such as phthalates and bisphenol-A, which are not persistent but can impact the human endocrine system, may not receive the kind of priority focus that many believe is needed.

But a source with the Safer Chemicals, Healthy Families coalition and other reform proponents say endocrine disruption is “very important” and is addressed in several ways in the coalition’s platform, including a call for it to be considered as a harmful endpoint in chemical safety determinations made by EPA under a reformed TSCA.

The concerns are being raised ahead of a bill expected to be introduced by Sen. Frank Lautenberg (D-NJ) that would overhaul TSCA, and on the heels of a slew of Senate and House oversight hearings on the bill. At a March 9 hearing of the Senate Environment & Public Works Committee’s Subcommittee on Superfund, Toxics & Environmental Health, Lautenberg said he would soon introduce the bill.

Even before Lautenberg introduces his long-awaited bill, other lawmakers have been ramping up efforts to strengthen oversight of endocrine disrupting chemicals, which either mimic or block the normal functioning of hormones, causing a variety of developmental and other health effects. The chemicals have been shown to cause developmental problems in many animals, including the development of mixed-gender sex organs in aquatic species. Human exposure can occur from contaminated water and food from chemicals used in industrial processes and consumer products.

In Congress, Rep. James Moran (D-VA) -- who is set to chair the appropriations subcommittee that oversees EPA -- and Sen. John Kerry (D-MA) are pushing legislation that would force agencies to address the risks of endocrine disrupting chemicals. The United Steelworkers recently sent the lawmakers letters backing their legislation. *The letter is available on InsideEPA.com.*

Moran and others concerned about endocrine disruption have long criticized EPA’s current program requiring the agency to screen chemicals for their endocrine effects, which Congress authorized in the 1996 Food Quality Protection Act (FQPA) and Safe Drinking Water Act but which EPA is only now implementing.

The endocrinologist who tracks the issue says not specifically focusing on the chemicals in a reformed TSCA would be a “disastrous omission,” and “gives industry a free ride to maintain the status quo” if the endocrine disruptors are treated like other chemicals. The source points to a first-time “scientific statement” released last summer by the Endocrine Society, which vowed to lobby to limit exposure to endocrine-disrupting chemicals (EDCs), for more research into their effects and for the use of the precautionary principle in policymaking.

“There is a shift in focus away from only being concerned about persistent chemicals and towards massively produced chemicals,” the source says.

Further, the source says a robust focus on endocrine-disrupting chemicals in TSCA reform is important because of the slow pace of EPA’s endocrine disruptor screening program. The source says TSCA reform needs to acknowledge that endocrine disruption occurs at extremely low doses at the developmental stages and can result in adverse effects later in life, and that many of the chemicals of concern have a short-half

life. The bill should include some sort of screening or test proposal for the chemicals, the source says.

The source also calls for greater cooperation with the activist groups advocating for reform, and asks for a “more open and transparent” process that includes ideas from researchers in the area.

But sources with the coalition and other proponents of TSCA reform point out that the group is calling for endocrine disruption to be considered an endpoint in chemical safety determinations done by EPA under a reformed TSCA, which would require additional testing. “It’s very important,” a coalition source says of the chemicals.

While the coalition’s platform does not specifically mention endocrine disruption, it does advocate for immediate action on chemicals of concern, including PBTs. “Exposure to other toxic chemicals, such as formaldehyde, that have already been extensively studied, should be reduced to the maximum extent feasible,” according to the platform.

In addition to singling out PBTs for immediate action, the coalition also urges action on “chemicals that have already been very well-characterized both on the hazard and exposure side, and are high on both,” according to the coalition source. Sources say these criteria could include some endocrine disruptors.

“It is important to pay particular attention to PBTs because the consequences are particularly difficult to deal with,” another TSCA reform proponent not affiliated with the coalition says, adding that the low-dose effects of many endocrine disruptors are “not necessarily different from other modes of action, like [those of] lead or mercury,” which would be covered under the broader reforms of TSCA.

The platform also urges the use of the newest science and methods, which supporters say could include key measurements of endocrine-disrupting chemicals. “The National Academy of Sciences’ recommendations for reforming risk assessment at the [EPA] should be adopted,” according to the platform. “Regulators should expand development and use of information gleaned from ‘biomonitoring,’ the science of detecting human chemical contamination, to inform and impel efforts to reduce these exposures.”

The coalition source says these new methods would include recommendations about low-dose effects and when the timing of an exposure is a factor, both of which would address endocrine disruptors. Those sorts of changes would “be more embedded in the details of how risk assessment is done,” the coalition source says.

**EPA Brushes Off Industry Request To Delay Methanol Risk Assessment (*Inside EPA*)**

3/19/2010

EPA appears poised to decline a request from the methanol industry to delay the agency's risk assessment of the fuel pending review of a controversial Italian laboratory that provided a key study EPA relied on in labeling the substance a "likely carcinogen."

EPA research chief Paul Anastas said in an interview March 10 that he has "not seen a reason to delay anything" regarding the methanol risk assessment. A spokesman for the Methanol Institute declined to comment.

Anastas' comments come as one EPA source is defending the agency's risk assessment, arguing that the agency has other studies showing the additive's cancer risks, including a Japanese study industry has been urging EPA to consider.

The agency's draft Integrated Risk Information System cancer assessment of methanol relies in large part on a study from a controversial Italian lab, the European Ramazzini Foundation (ERF), which found evidence of cancer in lab rats following their exposure to methanol. Unlike American labs, which conduct studies for at most two years, ERF conducts lifetime cancer assessments, tracking its rodents until the end of their natural lives.

Industry, however, has argued that ERF's data is confounded by lung infections that the foundation's pathologists misdiagnosed as cancer -- and that EPA's use of the studies has led to overly strict cancer assessments in both the methanol assessment and the draft ethyl tertiary butyl ether assessment, another fuel additive. ERF's data could also be used in EPA's pending risk assessment of another fuel additive, methyl tertiary butyl ether.

The Methanol Institute, representing the international methanol industry, has called for a pathology working group to review all of ERF's slides in its methanol study. Because the National Institutes of Environmental Health Sciences (NIEHS) is traveling to ERF next month to conduct a review of its pathological procedures, the institute is urging NIEHS to expand its review into a full working group. An NIEHS spokeswoman did not return a request for comment by press time.

The industry institute also sent letters to Anastas asking the agency to delay its risk assessment until NIEHS releases the results of its review.

Meanwhile, the EPA source is defending the agency's draft finding that methanol is a "likely carcinogen," noting that the ERF study is not the only toxicological data linking methanol exposure with cancer -- as industry has claimed. The source says that a study performed by the Japanese New Energy and Industrial Technology Development Organization (NEDO), which industry has been urging the agency to consider, also shows statistically significant evidence of cancer in lab animals.

The source says the NEDO studies were not published or translated into English. The Methanol Institute had the NEDO studies translated and provided them to EPA,

whereupon the agency had them peer reviewed before discussing them in the draft methanol study.

But the agency source says that a translated summary of a 1987 NEDO study, indicating no methanol-related incidence of cancer, does not portray the full results of the study.

**WATER**
**==========**

**EPA to study gas drilling's effect on water (*Washington Post*)**

March 19, 2010 Friday
Regional Edition
A-SECTION; Pg. A08
Maryland
EPA to study gas drilling's effect on water
By Juliet Eilperin
The Environmental Protection Agency announced Thursday that it will launch a $1.9 million study into how drinking-water supplies are affected by hydraulic fracturing, a method used to turn shale rock into natural gas wells.

The practice, which has been used for decades, unlocks natural gas by shattering shale rock with high-pressure blasts of water, chemicals and sand. Starting a well requires millions of gallons of water and results in some leftover water that is contaminated; drilling companies say it can be safely contained, but environmentalists argue that this residue could endanger public drinking supplies.

Paul T. Anastas, assistant administrator for the **EPA's** Office of Research and Development, said **EPA** "research will be designed to answer questions about the potential impact of hydraulic fracturing on human health and the environment."

Natural gas companies and environmental advocates said they welcomed the study. William F. Whitsitt, executive vice president for public affairs at Devon Energy Corp., which engages in hydraulic fracturing, said he hoped that the **EPA** would reach out to state officials who have overseen the activity.

"When there are concerns about hydraulic fracturing, we take them very seriously," he said.

PennEnvironment Director David Masur said that while research is welcome, his group expected the federal government to take a precautionary approach when it comes to

having contaminated water stored beneath drinking-water supplies. "We want the facts, and this is the start of getting that," he said.

MARCH 18, 2010, 2:54 P.M. ET

**EPA Launches Hydraulic Fracturing Study on Water Supplies (*Wall Street Journal*)**

By IAN TALLEY
WASHINGTON—The Environmental Protection Agency Thursday launched a study to determine whether a key oil and natural gas production technique called hydraulic fracturing is contaminating water supplies.

While environmentalists are concerned that the process may be causing groundwater contamination and are calling for federal oversight, the industry says there is no proof and it is already adequately regulated.

At issue are new natural-gas reservoirs deep below the earth's surface that companies such as Chesapeake Energy Corp. and XTO Energy Inc. say could multiply the available domestic reserves of a resource that has a fraction of the greenhouse-gas emissions of its fossil fuel cousins, coal and oil.

"Our research will be designed to answer questions about the potential impact of hydraulic fracturing on human health and the environment," said Paul Anastas, assistant administrator for EPA's Office of Research and Development. "The study will be conducted through a transparent, peer-reviewed process, with significant stakeholder input," he said in a statement.

Reps. Diana DeGette, (D., Colo.), and Maurice Hinchey, (D., N.Y.), cosponsors of legislation to bring hydraulic fracturing under EPA regulation, said the study would be a significant step in ensuring drinking water is protected.

The American Petroleum Institute said in a statement, "We expect the study to confirm what 60 years of experience and investigation have already demonstrated: that hydraulic fracturing is a safe and well understood technology for producing oil and natural gas."

Lee Fuller, head of the petroleum-industry group EnergyInDepth, said that if the review "is based on objective, scientific analysis, it will serve as an opportunity to highlight the host of steps taken at every wellsite that make certain groundwater is properly protected."

Facing increasing pressure from some Democratic lawmakers and environmentalists, the EPA said in its proposed budget earlier this year it planned to conduct a study of the process.

Previous studies by the EPA—including one review of the process for coalbed methane extraction at much shallower levels—haven't found hydraulic fracturing carries a risk of water contamination.

Although the states regulate the actual process of hydraulic fracturing—known as fracking—the EPA already regulates the waste-water systems that either re-inject it into reservoirs or send it to waste-treatment facilities.

Last month, Steve Heare, director of the EPA's Drinking Water Protection Division, said at a conference he hadn't seen any documented cases that the fracking process was contaminating water supplies.

Bill Kappel, a U.S. Geological Survey official, said at the same conference that contamination of water supplies is more likely to happen as companies process the waste water from hydrofracking. In some instances, municipal water systems that treat the water have reported higher levels of heavy metals and radioactivity.

"Treatment of the [waste] water hasn't caught up with the hydrofracking technology," Mr. Kappel said.

Although legislation in the House and Senate to bring greater federal oversight of the hydrofracking process hasn't gained momentum, Mr. Heare said even if such proposals are approved, it wouldn't likely have a dramatic effect on regulation. States would still have the right under the Safe Drinking Water Act to use their own regulatory standards.

**Write to** Ian Talley at ian.talley@dowjones.com

March 18, 2010

**EPA Begins Study of Fracturing's Effects on Water Supplies (*New York Times)***

By KATIE HOWELL of Greenwire

U.S. EPA announced the start today of a study examining the effects of a controversial oil and gas production technique known as hydraulic fracturing on water supplies.

"Our research will be designed to answer questions about the potential impact of hydraulic fracturing on human health and the environment," EPA Assistant Administrator Paul Anastas said in a statement. "The study will be conducted through a transparent, peer-reviewed process, with significant stakeholder input."

Hydraulic fracturing is a decades-old technology used by the petroleum industry to improve production at aging wells by blasting water, chemicals and sand or plastic beads into a wellbore at high pressure. The technique has grabbed public attention as

the industry has used it to tap vast stores of domestic natural gas, and drillers have poured into Pennsylvania and New York to tap the potentially vast Marcellus Shale formation.

"Understanding the risks that hydraulic fracturing poses to drinking water supplies is critical to guiding future policies and regulations that will safeguard the public," Rep. Maurice Hinchey (D-N.Y.) said in a statement heralding the study's launch.

Hinchey pushed for the congressionally authorized EPA study and has also been a key player on a bill (**H.R. 2766** (pdf)) that would mandate federal regulation of fracturing under the Safe Drinking Water Act.

The new study is being praised by environmentalists who criticized a 2004 EPA probe whose results were skewed, they say, by data collected selectively from sources with a vested interest in the oil and gas industry.

"Independent, unbiased scientific inquiry into hydraulic fracturing is critical," said Amy Mall, a senior policy analyst for the Natural Resources Defense Council. "We are very pleased that the EPA is responding to families across the country who are concerned that oil and gas development is contaminating their drinking water."

Industry also welcomed the new study, saying it would prove claims that fracturing technology is safe.

"Assuming the study's methodology is technically sound, its evaluations are science-based, and its conclusions are peer-reviewed, there's really only one credible outcome this project can produce," said Chris Tucker, a spokesman for the industry-backed group Energy in Depth. "And -- spoiler alert -- it's not the one that opponents of responsible shale gas exploration are clamoring for."

The American Petroleum Institute and America's Natural Gas Alliance likewise expressed confidence the study would pacify critics of fracturing.

"We expect the study to confirm what 60 years of experience and investigation have already demonstrated: that hydraulic fracturing is a safe and well understood technology for producing oil and natural gas," API said in a statement.

The trade group added, "While the technology has been used for more than a half century, its continued use is crucial. It is enabling access to massive new supplies of natural gas trapped in shale formations across the United States."

EPA's new study will get a start with $1.9 million in funding and will be designed by the agency's Office of Research and Development and guided by the EPA science advisory board.

House Energy and Commerce Committee Democrats are continuing with their probe into chemicals used by hydraulic fracturing companies. Meanwhile, H.R. 2766 and Senate companion legislation (**S. 1215** (pdf)) that would require federal regulation of fracturing are languishing.

"While we eagerly await the results [of the EPA study], we also think there is sufficient information for Congress to move ahead to protect drinking water by closing the Halliburton loophole and ensuring that hydraulic fracturing is regulated under the Safe Drinking Water Act," NRDC's Mall said.

**Regulators Ramp Up Plans For Nutrient Limits In Mississippi River States (*Inside EPA*)**

3/19/2010
EPA and state officials are ramping up their efforts to craft strict numeric nutrient limits for waters that flow into the Mississippi River, clearing the way for broader adoption of the risk-based water quality criteria along the lines of a controversial agency measure in Florida that is already drawing broad concerns that it will result in costly controls.

But despite the concerns over EPA's proposed limit for Florida, environmentalists are stepping up their pressure on EPA and states to address the issue in the Mississippi watershed and the Gulf of Mexico.

During a March 16 meeting, officials told environmentalists who have petitioned EPA to set water quality criteria for the Mississippi River basin and the Gulf that they are working with officials in Ohio, Illinois and Iowa to craft first-time numeric water quality criteria for nutrients.

"They're systematically establishing [numeric standards] and working with states, or forcing them in some cases to establish them," according to one environmentalist who attended the meeting. The source said that EPA did not offer a time frame for when they would begin focusing on numeric limits for those states, but said they would be issuing the criteria "sooner rather than later."

At the same time, officials in several other states -- including Wisconsin, Minnesota and Michigan -- are taking their own steps to develop criteria for phosphorous, though so far none are seeking to address nitrogen.

The environmentalist who was present at the meeting said EPA water chief Peter Silva and Ephraim King, head of the Office of Science and Technology within EPA's water office, said their strategy for addressing nutrient pollution in the Mississippi and Gulf of Mexico was to continue establishing numeric criteria on a state-by-state basis. "In Florida this is a hot topic, and it looks like Ohio is on the list, along with Illinois and Iowa, and so they're systematically working up and down [the Mississippi River]."

The source was cautiously optimistic about EPA's response but withheld judgment on whether it would satisfy activists' demands. "At least symbolically, they've demonstrated a real interest and commitment," the source says. "But the [proof] is in the pudding."

An EPA spokeswoman would neither confirm nor deny EPA's plans. "There was no discussion [during the meeting] of . . . EPA's recommended approach for resolving [the environmentalists'] petition," the spokeswoman said. "There was a general status update discussion of numeric criteria development nationally."

Under the Clean Water Act (CWA), states draft and EPA approves water quality criteria -- risk-based limits that regulators use, along with waterbodies' designated uses and antidegradation policy -- to set enforceable water quality standards and permit limits. But most states have long opted for a "narrative standard," which allows discharges to continue so long as there is no discernible effect on the waterbody, rather than a stricter numeric standard.

Environmentalists and others say the issue is critical in the Mississippi and other large watersheds, where high levels of nitrogen and phosphorous contribute to elevated levels of algal bloom, which eventually eutrophy, lowering dissolved oxygen levels and contributing to large "Dead Zones" in the Gulf of Mexico and elsewhere.

They sued EPA to set numeric criteria for nitrogen and phosphorous in Florida and separately petitioned EPA to set similar critieria, as well as an aggregate pollution limit, known as a total maximum daily load (TMDL), for the Mississippi River and the Gulf of Mexico

But EPA's proposed criteria for Florida, issued earlier this year, is drawing broad concerns from industry and other dischargers who fear it will result in costly new control requirements at wastewater treatment plants that will be passed on to consumers, limit the use of fertilizer and other steps.

Wisconsin officials are already flagging similar cost concerns, where a proposed numeric criteria for phosphorous is expected to cost between $80 million and $440 million, with 35 facilities expected to see more stringent effluent limitations, according to briefing papers crafted by state regulators. "The affordability of meeting projected effluent limits is a concern for many municipal and industrial wastewater dischargers," the briefing paper says. *Relevant documents are available on InsideEPA.com.*

The state's Natural Resources Board March 16 approved an upcoming series of public hearings on the proposed phosphorous criteria, along with standards to dictate how the criteria will be implemented in CWA permits. The state's director of the bureau of watershed management proposed a rule change to create phosphorus water quality criteria for streams, inland lakes, and Great lakes, "as required by [EPA]," according to the briefing papers.

Wisconsin's move comes after environmentalists last year filed a notice of intent to sue EPA over the agency's failure to promulgate criteria in Wisconsin, charging that EPA has failed to protect state and downstream waters. An environmentalist says the state's current effort will likely stave off any suit.

According to the information packet, Wisconsin's proposal is "very similar" to criteria Minnesota has promulgated for lakes, adding that Minnesota is now in the process of developing proposed criteria for rivers and streams.

Illinois is in the process of developing phosphorus criteria for streams and rivers, which would stand alongside its current phosphorus criteria for lakes and Lake Michigan. Michigan and Iowa are developing criteria, but to date have not issued a public proposal. But none of the states has proposed criteria for nitrogen, though some have for ammonia, the paper says.

Despite concerns about the new critieria's costs, environmentalists are stepping up their efforts to pressure EPA to act. At the March 16 meeting with the water office, they delivered more than 42,000 signatures to EPA in support of their petition to establish numeric nutrient criteria for states in the Mississippi River watershed -- a petition to which EPA has not yet responded.

In addition, the Clean Water Network, a broad coalition of 1,200 non-governmental organizations concerned with water quality issues, announced at a March 15 Capitol Hill briefing that it planned to pursue a number of legislative, administrative and litigation strategies to raise the watershed's profile and improve water quality in the basin.

Among other things, the group is calling for legislative and regulatory means of curbing nonpoint sources of nutrient pollution, pressuring Congress or the administration to establish a central coordinating entity to manage the watershed, challenging point source permits throughout the basin, and continuing to seek a numeric limit on nutrients throughout the basin.

Reneé Hoyos, executive director of the Tennessee Clean Water Network, said the goal of raising the profile of the Mississippi to the level of attention that the Chesapeake Bay or Great Lakes have is a central prerequisite to an effective and long-term solution to the nutrient pollution in the river and Gulf.

For example, the Administration has issued a major executive order issued on the Chesapeake Bay that sought a multi-state TMDL for nutrients and commands states to address nonpoint sources of pollution to meet those goals. In the Great Lakes, by contrast, EPA has a Great Lakes program and Congress has passed the Great Lakes Legacy Act, which has been supported by a bipartisan group of powerful lawmakers, including Sen. Carl Levin (D-MI) and George Voinovich (R-OH).

"One of the things we think would be really important is that the Mississippi River receive some kind of protection and funding similar to what the Chesapeake Bay and

Great Lakes receive," Hoyos said. "We think it's really important that they have some kind of method of protection, some kind of overriding coordinating body that the agencies are all talking together at some point to coordinate their efforts." -- *John Heltman & Erica Martinson*

**Cardin's Draft Chesapeake Bill Limits Citizen Suits But Fails To Calm Farmers (*Inside EPA*)**

3/19/2010
Sen. Ben Cardin (D-MD) has revised his Chesapeake Bay cleanup bill to limit citizen enforcement suits against farmers, but the bill is still under fire from industry critics because it retains broad new permitting authority for states and EPA and does not spare previously exempt farms from citizen suits outright.

The draft Cardin bill obtained by *Inside EPA* says no citizen enforcement suits "shall be brought . . . against an agricultural producer" for permits and other requirements related to the state cleanup plans the bill requires. The bill does not include any similar limitations for other sectors like construction. *The draft is available on InsideEPA.com.*

A source with the Chesapeake Bay Foundation (CBF) cautions that the bill's exact citizen suit language is still in flux. "The citizen suit provision has been one of the issues that is most controversial . . . the intent is to not change at all the underlying provisions in the Clean Water Act (CWA), with the sole exception of citizens being allowed to sue states for not following their cleanup plans," the source says.

Under the draft bill, anyone can sue a state if it is not following its plan to meet nutrient reductions required by a Bay-wide pollution control limit -- known as a total daily maximum load (TMDL) -- the bill authorizes EPA to establish. The agency is already crafting a TMDL for the bay under its existing authority, but many advocates believe have the authority codified could supplement EPA's existing authority to craft the limit.

To help states implement the cleanup plan, the bill provides them new authority to require strict CWA section 402 permits for "any discharge from a pollution source" located within that state, which would encompass any activity that alters the physical, chemical or biological integrity of jurisdictional waters.

The bill also provides EPA the authority, if states are not meeting cleanup goals, to withhold implementation funds and even take over a state's cleanup program, including requiring 402 permits for some nonpoint sources.

Industry and Republican critics of the legislation say 402 permits are a bad idea for nonpoint sources that have long been exempt from the requirements. "To say that nonpoint sources aren't suited for 402 permits is an understatement," one industry source says.

The critics also fear EPA is eager to exercise its authority to take over state cleanup plans, whereas they are seeking to retain state authority over regulation of nonpoint sources. The industry source argues states ought to retain sole authority over nonpoint sources because nonpoint pollution is highly site-specific, and local authorities are closer to the circumstances they are regulating.

But the CBF source says the new 402 authority for nonpoint sources is only “one tool in the toolbox” and states “completely” retain the choice of using it. The source also emphasizes EPA’s authority is only a backstop if a state refuses to meet cleanup goals, noting that EPA can only rescind a state’s authority after a “detailed” process that affords the state many opportunities to improve its cleanup results.

While limiting citizen suits, the draft language is still drawing industry criticism because it fails to spare previously exempt farms outright. An industry source says under the draft bill, a previously nonpoint source exempt from citizen suits becomes a point source subject to citizen suit enforcement if a state or EPA chooses to exercise its authority under the bill to require a section 402 permit for that source. In that case, a source previously exempt from citizen suits can face citizen suit enforcement just like any point source.

What the bill appears to prevent are citizen enforcement suits over discharges from pollution sources for which the state has not required a section 402 permit, so long as they are following other requirements like nutrient management plans. Even in that case, “nothing in this provision shields farmers from a suit claiming ‘noncompliance’,” the industry source says.

But while criticizing the bill, industry sources are for the first time praising Cardin, who they say has provided extensive outreach to groups opposed to the bill. “I really mean that -- we appreciate him keeping the dialogue going . . . my hat’s off to him,” the industry source says.

A Cardin spokeswoman says, “The Bay bill is still under discussion and Senator Cardin has been conducting meetings with a variety to stakeholders, including farmers, developers, scientists, local governments and environmentalists. The meetings have been very positive and we making solid progress.”

**EPA Plan May Fill Gap In Activists’ Bid To Regulate CO2 Under Water Act (*Inside EPA*)**

3/19/2010
EPA is poised to consider whether to issue guidance to states on how to determine whether to list ocean waters as impaired by acidification due to increased carbon dioxide (CO2) emissions and other factors, and how to limit those emissions -- a move

that could eventually fill a key gap in activists' effort to regulate the greenhouse gas (GHG) under the Clean Water Act.

EPA and the Center for Biological Diversity (CBD) March 10 signed a legal settlement under which the agency agreed to sign a *Federal Register* notice March 15 seeking comment on how to address ocean acidification under section 303(d) of the water law -- which requires states to develop biennial lists of waters that are impaired and then requires them to craft pollution control plans, known as total maximum daily loads (TMDLs), for cleaning up the waters. *The legal settlement is available on InsideEPA.com.*

EPA would have to complete a memo by Nov. 15 describing how it intends to proceed with a section 303(d) program.

Activists hope that by listing waters as impaired due to CO2 emissions, it will provide additional leverage to regulate the GHG under the water act. They have also recently launched a similar effort to regulate black carbon under the water law, citing a need to reduce soot emissions to protect sea ice and glaciers -- part of territorial seas protected by the water act -- which are at risk of melting from global warming caused by GHG emissions.

Many states and environmentalists have also already sought to require increased water act regulation of power plant emissions that deposit nitrogen and mercury on waterbodies. But industry officials charge that such regulation is unlawful.

In the upcoming *Federal Register* notice, EPA will seek comment on whether it should issue guidance regarding the listing of waters as threatened or impaired for ocean acidification, according to the settlement agreement. The notice will include a request for comment on approaches for states to determine if waters are threatened or impaired by ocean acidification, including whether or how states might incorporate into their analysis information other than site-specific measurements; how states might aid in monitoring ocean acidification and its impacts on marine life and ecosystems; and recommendations for a TMDL for waters impaired by acidification, according to the settlement.

Should EPA eventually decide to issue the guidance, it could eventually play a key role in environmentalists' efforts to regulate CO2 under the water act, though one environmentalist says this may still be a way off.

The agency is also currently considering a parallel effort pushed by CBD to determine whether its risk-based water quality criteria for ocean acidification is protective enough to address rising pH levels due to increased CO2 emissions. Under the water act, regulators craft water quality criteria -- which are risk-based limits that regulators use, along with waterbodies' designated uses and antidegradation policy -- to set enforceable water quality standards and permit limits.

As a result, if EPA decides to strengthen its current criterion -- which were last set in 1976 -- it could result in more waters being listed as impaired, a result any guidance could help address.

“If EPA creates a more stringent standard, then it is more likely that states will need to designate their waters as threatened or impaired,” a CBD source says.

“If EPA does revise the water quality criteria, then all of the states will be required to . .. update their water quality standards to meet the new information, and that is the point where the guidance comes into play. It will help states figure out if their waters are impaired or threatened, and water quality standards are the measure of that.”

But the source cautions that EPA’s review of its water quality criteria may not necessarily result in stricter limits. “EPA agreed to evaluate the water quality criteria for acidification but did not necessarily agree to tighten it,” the CBD source adds. EPA is scheduled to indicate how it will proceed on the criteria review next month.

The CBD source says the group hopes the guidance will ultimately lead to a TMDL that will require reductions in air emissions of CO2 -- a novel use of the water act to cut CO2 emissions. TMDLs limit the amount of pollutant a discharger can put into impaired waters. But the source notes that EPA and states have “a lot of flexibility to implement a TMDL” and that requiring air emission cuts is “the goal.”

In addition to uncertainty on EPA policy, the CBD source also cautions that any EPA guidance is unlikely to be completed before states complete their current cycles for completing their 303(d) lists. Although CBD has petitioned several states to list additional waters as impaired due to acidification in their current cycles, the environmentalist says any ultimate EPA guidance will be issued too late for that.

“Each state has a different [listing] process and a lot of them are in a comment period right now, so frankly the guidance will come out too late to affect them, but this is a continuing issue and we plan to continue to petition the states,” the source says.-- *Dawn Reeves*

**EPA Wins Time To Defend Rejection Of Novel Sediment Trading Program (*Inside EPA*)**

3/19/2010
EPA’s Environmental Appeals Board (EAB) has given the agency until later this year to defend its decision to dismiss a novel pollutant trading program for total suspended solids (TSS) -- a measure of sediment levels -- for an Idaho wastewater treatment plant in a case that could determine whether such trading programs might be attempted elsewhere.

In a March 10 decision, EAB granted a motion by EPA Region X to extend until Sept. 8 the deadline to respond to an October petition by the city of Twin Falls, ID challenging the agency's decision to reject its proposed TSS trading program. At the same time, EAB also granted Region X's motion to dismiss as moot a petition filed by the Idaho Conservation League (ICL), which challenged a separate trading regime for phosphorous. *Relevant documents are available on InsideEPA.com.*

Region X, in its motion, says it intends to issue a modified National Pollutant Discharge Elimination System (NPDES) permit for the Twin Falls Wastewater Treatement Plant that would exclude both the phosphorous and TSS trading programs, suggesting the city could then file a consolidated petition to the board in the fall that would bring both matters before the board simultaneously.

Region X's 2009 NPDES permit for the Twin Falls plant included a trading mechanism for phosphorous and set an effluent limit for TSS at 30 milligrams per liter (mg/L). EPA issues NPDES permits for Idaho because the state does not have delegated Clean Water Act authority.

But the city charges that EPA's TSS limit is significantly stricter than the 52 mg/L limit set in the final pollution control plan -- known as a total maximum daily load (TMDL) -- for the portion of the Snake River into which the facility discharges.

In its July 14, 2009 comments on the draft permit, the city proposed that Region X include a trading program for TSS, based on an Idaho Department of Environmental Quality (IDEQ) policy that says any pollutant for which there is a draft or final total maximum daily load (TMDL) can be traded. A TMDL is a calculation of the maximum amount of a pollutant that a waterbody can receive and still meet water quality standards.

Under the proposed trading program outlined in the city's comments to EPA, the City of Twin Falls would enter into an agreement with the Twin Falls Canal Company -- a water supply company that is a significant nonpoint contributor of TSS to the Snake River -- whereby the company would reduce its TSS discharges by filling irrigation canals, thus generating credits that it could sell to the wastewater treatment plant. While a larger, basin-wide trading mechanism would be the traditional means of developing a trading program, the city says, such a program "is not necessary to meet the city's needs."

But Region X rejected the TSS trading plan. Christine Psyk, deputy director for EPA's Office of Water & Watersheds in Region X, told *Inside EPA* in a March 11 interview that although the region supports the concept of water quality trading, it rejected the TSS trading proposal because there is no extant research to indicate how such a scheme would work. Whereas nutrient trading has been researched and is applied in NPDES permits nationwide somewhat regularly, there is no corresponding research to determine to what extent the removal of sediment from one portion of a waterbody effects overall water quality if discharges remain the same elsewhere, she said.

“EPA has a policy that supports trading, and we support water quality trading in the Snake [River] system,” Psyk said. “But trading has to be developed in such a way that is rigorous and ensures that trading meets water quality targets and supports the trend towards water quality improvement. The work for TSS has not been developed.”

Several sources familiar with the EAB case say the proposed TSS trading deal is the first such proposal made by a point source for TSS. One source with ICL said they were unaware of another point source anywhere attempting to enter into a trading program for TSS. Psyk also said the proposal by the city is, to her knowledge, the first such trading proposal for TSS, and as far as frameworks are concerned she is unaware of an existing trading model that the agency or the city could follow for such a proposal.

But the city in its EAB petition claims such a rejection violates EPA policy statements favoring the use of trading programs to meet water quality standards. For example, the city points to a 2008 guidance titled Water Quality Trading Toolkit for Permit Writers, in which EPA suggests that a permit writer should develop a trading program if they can.

**Vermont Warns EPA Review Of ‘Climate’ TMDL Erodes Regulatory Certainty (*Inside EPA*)**

3/19/2010
Top Vermont officials are warning that EPA’s decision to reconsider a pollution limit it approved for Lake Champlain to account for climate change impacts before the limit expires in 2013 undermines regulatory certainty and calls into question “any” other pollution limits -- known as a total maximum daily load (TMDL) -- EPA has backed.

“EPA seems to have abandoned the approach it once called an important environmental milestone,” Vermont Department of Environmental Conservation Commissioner Justin Johnson says in a March 9 statement. “This leaves us wondering if we should rely on any of EPA’s TMDL approvals as we make significant investment decisions to clean up Vermont’s waters.”

EPA announced March 8 that it plans to reconsider a controversial phosphorus pollution limit that it approved for Lake Champlain in Vermont in 2002 to address environmentalists’ lawsuit charging that the agency needs to consider changing climate conditions in the TMDL.

The agency asked a federal district court in Vermont for more time to file briefs in *Conservation Law Foundation (CLF) v. EPA and Vermont Agency of Natural Resources (ANR)* because it is reconsidering its 2002 approval of a phosphorus limit for the lake. The agency says it needs more time “to discuss with the parties the terms of a remand of the approval decisions.” *Relevant documents are available on InsideEPA.com.*

CLF is challenging the agency's approval of a TMDL in a novel effort to force regulators to consider climate change and its impacts on wet weather flows when setting the TMDL. CLF says it has evidence that the agency was at the time fully aware of the future effects of climate change on water flows and activities in the lake, and should have taken that into account in the TMDL, even if the issue was not raised by commenters at the time.

If successful, the suit could set a new bar for how regulators set TMDLs, which limit discharges from both point and nonpoint sources into impaired waters. In some cases, consideration of climate change impacts could result in significantly stricter discharge limits, such as when increased precipitation could result in increased levels of polluted runoff. But in cases where climate change creates drier conditions, it could result in in less runoff and fewer pollutants contributing to impairment or increase concentrations of pollutants.

EPA in a desk statement says that the re-evaluation "offers the opportunity to consider more recent data on precipitation trends and associated increased tributary flows and phosphorus loadings." The agency also said that Vermont is already scheduled to reopen the TMDL in 2013, so "it does not make sense to spend limited resources in court litigating about a TMDL that is going to be redone in any case."

But Vermont Gov. Jim Douglas (R) and other state officials say EPA's decision calls into question the agency's approval of such water pollution limits and leaves the state questioning how it should spend its environmental cleanup budget, according to a March 9 press release. The state has spent more than $50 million to implement the Lake Champlain phosphorus TMDL, the governor said in the statement, in addition to $56 million in federal funds.

In a March 9 brief, Vermont ANR says it does not oppose EPA's motion seeking more time, but disagrees with the reasons, saying EPA should neither reconsider the 2002 decision, nor "that EPA should seek remand of that approval decision."

The state also filed a brief fighting claims that regulators need to consider climate change when setting the TMDL. "Predicted increases in precipitation and runoff in the Northeast, even if available and known at the time of the Lake Champlain TMDL approval, would result in increases in the lake's total loading capacity, rendering the current Lake Champlain TMDL conservatively protective," the brief says.

"Altered flow regimes could affect the design of stormwater treatment systems and other pollution control projects, but this is an implementation matter, not part of the Lake Champlain TMDL subject to EPA approval. . . . Altered water temperature and water levels are not factors which have been shown to affect lake phosphorus," the brief says.

**EPA begins study of fracturing's effects on water supplies (*Greenwire*)**

Katie Howell, E&E reporter
03/18/2010
U.S. EPA announced the start today of a study examining the effects of a controversial oil and gas production technique known as hydraulic fracturing on water supplies.

"Our research will be designed to answer questions about the potential impact of hydraulic fracturing on human health and the environment," EPA Assistant Administrator Paul Anastas said in a statement. "The study will be conducted through a transparent, peer-reviewed process, with significant stakeholder input."

Hydraulic fracturing is a decades-old technology used by the petroleum industry to improve production at aging wells by blasting water, chemicals and sand or plastic beads into a wellbore at high pressure. The technique has grabbed public attention as the industry has used it to tap vast stores of domestic natural gas, and drillers have poured into Pennsylvania and New York to tap the potentially vast Marcellus Shale formation.

"Understanding the risks that hydraulic fracturing poses to drinking water supplies is critical to guiding future policies and regulations that will safeguard the public," Rep. Maurice Hinchey (D-N.Y.) said in a statement heralding the study's launch.

Hinchey pushed for the congressionally authorized EPA study and has also been a key player on a bill (**H.R. 2766**) that would mandate federal regulation of fracturing under the Safe Drinking Water Act.

The new study is being praised by environmentalists who criticized a 2004 EPA probe whose results were skewed, they say, by data collected selectively from sources with a vested interest in the oil and gas industry.

"Independent, unbiased scientific inquiry into hydraulic fracturing is critical," said Amy Mall, a senior policy analyst for the Natural Resources Defense Council. "We are very pleased that the EPA is responding to families across the country who are concerned that oil and gas development is contaminating their drinking water."

Industry also welcomed the new study, saying it would prove claims that fracturing technology is safe.

"Assuming the study's methodology is technically sound, its evaluations are science-based, and its conclusions are peer-reviewed, there's really only one credible outcome this project can produce," said Chris Tucker, a spokesman for the industry-backed group Energy in Depth. "And -- spoiler alert -- it's not the one that opponents of responsible shale gas exploration are clamoring for."

The American Petroleum Institute and America's Natural Gas Alliance likewise expressed confidence the study would pacify critics of fracturing.

"We expect the study to confirm what 60 years of experience and investigation have already demonstrated: that hydraulic fracturing is a safe and well understood technology for producing oil and natural gas," API said in a statement.

The trade group added, "While the technology has been used for more than a half century, its continued use is crucial. It is enabling access to massive new supplies of natural gas trapped in shale formations across the United States."

EPA's new study will get a start with $1.9 million in funding and will be designed by the agency's Office of Research and Development and guided by the EPA science advisory board.

House Energy and Commerce Committee Democrats are continuing with their probe into chemicals used by hydraulic fracturing companies. Meanwhile, H.R. 2766 and Senate companion legislation (**S. 1215**) that would require federal regulation of fracturing are languishing.

"While we eagerly await the results [of the EPA study], we also think there is sufficient information for Congress to move ahead to protect drinking water by closing the Halliburton loophole and ensuring that hydraulic fracturing is regulated under the Safe Drinking Water Act," NRDC's Mall said.

**The State Report (*St. Petersburg Times*)**

Florida
March 19, 2010 Friday
B; Pg. 10B
The state REPORT
'REFERENDUM' QUERY IS LOADED, GELBER SAYS

No shock here: The Republican-led Senate passed Senate President Jeff Atwater's proposal (SB 2742) asking voters in November if the federal government should have a balanced budget amendment. Party-line vote: 26-13. But Democrats didn't like the idea of using the ballot to take "nonbinding public opinion polls," in the words of Sen. Chris Smith, D-Fort Lauderdale. Said Sen. Don Gaetz, R-Niceville: "It's never wrong to ask the people what they think." Sen. Dan Gelber, D-Miami Beach, said this referendum "is more of a push poll" that's biased and won't shed much light on what people think. Gelber read the language: In order to stop the uncontrolled growth of our national debt and prevent excessive borrowing by the Federal Government, which threatens jobs, robs America and our children of their opportunity for success, and threatens our national security, should the United States Constitution be amended to require a

balanced federal budget without raising taxes? The measure still has to be taken up by the House.

One last question:

Who runs state?
Middle school students would be required to take a civics class and pass an end-of-course test under a bill (HB 105) that unanimously passed the Florida House on Thursday. Students would have to pass the final exam to be promoted to high school. Lawmakers said the requirement is needed because many citizens don't know the difference between a state legislator and member of Congress.

Waterways plan loses key provision

The U.S. **Environmental Protection Agency,** facing heated criticism and pressure from the Florida congressional delegation, is delaying a key component of its plan to clean up Florida's waterways. U.S. Rep. Adam Putnam announced the decision Thursday that the **EPA** is withdrawing the downstream values protection - the most debated and most stringent part of the new nutrient pollution rules announced in January - and seeking a third-party scientific review. It's a major reversal for the **EPA.**

Waivers for risk, but not negligence

The trial lawyer lobby is seeing at least a ray of hope that this session isn't a complete disaster, as some predict. The Senate Judiciary Committee agreed to a compromise measure that allows parents to sign liability waivers for their children. SB 2440 would let parents waive inherent risk but not gross negligence, as the House version states. The theme parks didn't agree with the result, but most litigation reform advocates acquiesced to the change. However, the Senate committee had no appetite for trial lawyer-backed amendments on the issue of "slip and fall" lawsuits, SB 2440. Chairman Sen. Joe Negron, R-Stuart, withdrew an amendment to make businesses keep records on accidents, instead offering language to conform with the House version (HB 689), which passed with overwhelming support.

Marc Caputo and John Frank, Times/Herald Tallahassee Bureau; Associated Press

**EPA to scrutinize water risk from fracturing (*Houston Chronicle*)**

By TOM FOWLER
March 18, 2010, 10:21PM
The U.S. Environmental Protection Agency will do a detailed study of hydraulic fracturing, the technique used to extract natural gas from dense shale formations, to determine whether it poses risks to surface and ground water.

The study has been expected for some time, but the EPA formally announced its plans Thursday, saying it has $1.9 million set aside for the study this year with more funds possible next year.

“Our research will be designed to answer questions about the potential impact of hydraulic fracturing on human health and the environment,” Dr. Paul Anastas, assistant administrator for the EPA's Office of Research and Development, said in a prepared statement. “The study will be conducted through a transparent, peer-reviewed process, with significant stakeholder input.”

Hydraulic fracturing involves drilling into a formation and injecting water mixed with sand and chemicals under high pressure. The mixture cracks open the shale while the sand holds open the fractures, allowing the natural gas to flow more freely to the surface.

The chemicals make up a small part of the overall mix — less than 0.5 percent by volume — but often include hazardous substances such as acids and compounds found in cleaners and antifreeze.

While fracturing has been used for decades, concerns about its environmental effects have risen in recent years as its use has spread to Eastern states — where exploration has been limited in the past — and to more populated areas in the West.

In a number of communities from Pennsylvania to Colorado and Wyoming, some landowners near natural gas drilling operations say their drinking water has been contaminated by fracturing fluids or natural gas.

Industry leaders insist no instances of ground water contamination have been linked conclusively to the fracturing process, and that the EPA study will reaffirm their belief. They note that the gas formations are typically hundreds of feet below drinking water aquifers and that it's in the industry's best interest to be a good neighbor.

“We expect the study to confirm what 60 years of experience and investigation have already demonstrated: that hydraulic fracturing is a safe and well understood technology for producing oil and natural gas,” the American Petroleum Institute said in a statement.

Environmental groups also said they're glad to see the EPA moving forward with the study. The EPA issued a report in 2004 saying fracturing isn't a threat to drinking water, but some groups have said that study was biased by the Bush administration's tight relationship with the energy industry.

Lauren Pagel, policy director for the Earthworks Oil and Gas Accountability Pro-ject, said she hopes this EPA study looks at the entire oil and gas drilling life cycle and not just the injection of fluids into the ground.

A number of the water contamination claims around the country are linked to surface spills of fracturing fluids or possibly defective well construction that allowed natural gas or drilling fluids to leak into water supplies.

“We're not opposed to oil and gas drilling by any stretch of the imagination, but it needs to be done right,” Pagel said. “I think we all know in every industry there are good actors, who live up to the letter and the spirit of the law, and bad actors who don't.”

Hydraulic fracturing is not subject to federal drinking water laws but is regulated by state laws. The disposal and storage of all water and fracturing fluids that come back out of a gas well — called produced water — is covered by federal law.

The House Energy and Commerce Committee started its own investigation of hydraulic fracturing last month, saying it asked for and received data about the process from several companies involved in fracturing jobs, including Halliburton, BJ Services and Schlumberger.

So far, that inquiry seems to have focused on the use of diesel in fracturing fluids.

Rep. Gene Green, D-Houston, a member of the committee, said he supports the EPA's “commitment for a science-based, peer-reviewed and transparent study on hydraulic fracturing.” He added that it would be premature for Congress or the administration to consider legislation or regulation affecting hydraulic fracturing until the study is complete.

The proposed legislation Green referred to, known as the Frac Act, would require drilling companies to apply for fracturing permits and reveal the contents of the fluids they use.

A spokesman for one of the bill sponsors, Rep. Maurice Hinchey, D-N.Y., said the congressman is pleased with the study but will continue to push the bill forward.

The EPA is still determining the scope of the study and will discuss its design in meetings of its science advisory board on April 7 and 8 in Washington. The study will likely take several months.

Jennifer Dlouhy contributed from Washington.

*tom.fowler@chron.com*

**Putnam: EPA delaying some new rules for Florida waters; calling for scientific review (*Southeast AG Net*)**

by Dan – March 18th, 2010

WASHINGTON – Congressman Adam Putnam today welcomed an announcement from the Environmental Protection Agency (EPA) that it will delay a portion of its new and complex rules for nutrients in Florida waters and will invite a third party scientific review of the standards.

"EPA promised to review the rigor of their science when they met with me and other members of the Florida congressional delegation earlier this month," said Putnam. "It appears they may have known their science was lacking. This has been an example of the danger of them charging ahead on a tight deadline with thousands of technical standards for every Florida water body when Florida's Department of Environmental Protection (DEP) and the Florida Water Management Districts don't believe those standards are supported by science."

In a letter to the Florida DEP, (Click here to view letter) the EPA said it expects to delay implementation of "downstream protection values" for nutrients in waters until 2011 and that it will consult with the FDEP on the scope of the scientific review. The agency also said it expects to announce further details regarding the scientific review in April.

In February Putnam organized a letter to EPA from 20 members of Florida's congressional delegation, calling for the agency to extend its comment period for the proposed rules, which are scheduled to begin going into effect later this year. In response, EPA Administrator Lisa Jackson met with the Florida delegation earlier this month to discuss their concerns. "In that meeting it was clear that there was inadequate communication between the state and federal regulators. I urge Administrator Jackson to come to Florida and sit down with FDEP Secretary Michael Sole to see firsthand and better understand the issue from Florida's perspective."

Putnam noted that "Every single Floridian faces higher stormwater and sewer costs per month if the EPA's numbers are adopted without better review. Thank goodness they seem willing to review the flaws in their science on this portion of the proposed rule, now let's get the state regulators and federal regulators to work together on the best plan for our state. The EPA administrator should come to Florida to better understand this issue.

"I am especially grateful for the leadership from the rest of the Florida delegation. Both senators and a bipartisan group of House members are integrally involved in resolving this issue."

Since 2001, Putnam has represented Florida's 12th Congressional District, which includes most of Polk County and portions of Hillsborough and Osceola counties.

**EPA calls for more study on State Dept. Shore training facility (*Baltimore Sun*)**

Step could push construction into next year

By Paul West | paul.west@baltsun.com
March 19, 2010
WASHINGTON
- Federal environmental officials are recommending a more thorough study of a controversial State Department security facility on Maryland's Eastern Shore, a step likely to delay construction into next year.

The plan to build a training center for diplomats on 2,000 acres of privately owned farmland in Ruthsburg has been pushed back several months by local opposition that caused some politicians to backpedal from their support.

Now, a new caution flag, raised in a letter late last week from the Environmental Protection Agency, could prompt a lengthier review that would almost certainly postpone a final decision on the project for months with the potential to derail it entirely.

The agency "believes that the project may adversely affect the aquatic and terrestrial environment, including wetlands and, potentially, endangered species," wrote Jeffrey D. Lapp, associate director of the EPA's regional Office of Environmental Programs in Philadelphia.

The environmental agency told the General Services Administration, which oversees federal construction efforts, that "it might be prudent" to start preparing an environmental impact statement, a more time-consuming process than the less-stringent one that the GSA is conducting.

"We value the important counsel of the EPA on this proposed development and are confident the public process will lead to the appropriate and correct avenue moving forward," said Gina Blyther Gilliam, a GSA spokeswoman.

The project had been placed on a fast track toward construction, a process that initially excluded the EPA from the formal review. Lapp confirmed in a telephone interview Thursday that if the GSA were to follow the EPA's advice, the environmental agency would, by law, become more directly involved.

**Bay foundation's view**

Jenn Aiosa, a senior scientist at the Chesapeake Bay Foundation, said it was impossible to predict how long it would take to complete an environmental impact statement and that the period varies greatly. But, she said, "they usually are on the order of years, not just months, because it does take time to collect and analyze a wide variety of data."

The foundation recently said it was concerned that the proposed facility would conflict with efforts to protect and restore the bay.

In a letter to the GSA last month, the group's Maryland executive director, Kim Coble,

said the federal agency's current environmental assessment should demonstrate that the security facility would not increase water pollution and should provide "a full review of all reasonable alternatives" to the project.

The EPA has already provided informal advice about complying with federal environmental regulations. In those discussions, the GSA was told that a "key issue" of more complete review is an evaluation of alternatives.

"In that vein, we suggest that GSA demonstrate that other properties were identified through an adequate investigation and found impracticable or to have potentially more significant environmental impact," Lapp wrote.

**Urging alternatives**

The advice echoes a frequent complaint of critics on the Shore.

They maintain that a more suitable location for the facility - which would include multiple training tracks for evasive driving maneuvers, mock urban areas for counterterrorist drills and explosive pits where small bombs would be detonated - could be found on existing federally owned land, including active military facilities or those that are being abandoned as part of a base-relocation process.

Officials with the building administration have told residents at several public hearings that they surveyed existing federal property within a 150-mile radius of Washington as required by the State Department and could not identify a place that met the State Department's needs as well as the Queen Anne's County location.

At present, the GSA and the State Department would make the final decision about whether to build the campus-like Foreign Affairs Security Training Center in an isolated rural area about a 30-minute drive from the Bay Bridge.

Environmentalists have been among those most strongly opposed to the project, which has drawn criticism over concerns related to excessive noise, increased traffic congestion and possible harm to local property values.

**Kratovil's support**

Democratic Rep. Frank Kratovil, whose district includes the proposed site, urged the GSA to stick with its current timetable.

"Let's allow the process to work," Kratovil said in a statement, adding that a decision about whether to conduct a more thorough review could come later, if questions and concerns remain unresolved.

Kratovil, like other state and federal elected officials, has dialed back his initial enthusiasm for the project in response to local criticism.

The congressman, who faces a tough re-election fight this fall, said he still believes the facility could provide the region with "a significant economic boost" for "decades to come." He said a decision on whether "legitimate concerns" can be mitigated should be based on "facts and merits, not on politics or misinformation."

Initially, GSA officials had hoped to acquire land by late spring for the $100 million-plus project, which would largely be built with money from the federal stimulus program. But last month the agency outlined a slightly different timetable, with a decision sometime in August or September.

By law, a more stringent environmental impact statement must consider a full-range of "ecological, aesthetic, historic, cultural, economic, social, or health impacts," according to the federal government. It is required for projects that would have a significant effect on the quality of the human environment.

**EPA to investigate oil, gas well impact (*Observer Reporter*)**

**3/19/2010 3:32 AM**

The U.S. Environmental Protection Agency said Thursday it will investigate the potential adverse impact that hydraulic fracturing for oil and gas wells may have on water quality and public health.

The announcement of the study brought a favorable response from both environmentalists and gas industry officials alike.

Hydraulic fracturing is a process that drills vertical and horizontal cracks underground that help to withdraw gas or oil from coalbeds, shale and other geological formations. It is the method used by natural gas exploration and production companies that are extracting gas from the Marcellus Shale strata that stretches from New York state across Pennsylvania and into West Virginia.

While each site is unique, the process in general involves vertical and horizontal drilling, taking water from the ground, injecting fracturing fluids, chemicals and sands into the formation, withdrawing gas and separating and managing the remaining water.

The EPA said it is conducting the study to address concerns that hydraulic fracturing may impact ground water and surface water quality in ways that threaten human health and the environment. The agency said it is reallocating $1.9 million for the fiscal year 2010 Appropriations Act and requesting funding for FY 2011 in President Obama's budget proposal.

"Our research will be designed to answer questions about the potential impact of hydraulic fracturing on human health and the environment," said Dr. Paul T. Anastas,

assistant administrator for EPA's office of research and development. "The study will be conducted through a transparent, peer-reviewed process, with significant stakeholder input."

An EPA spokeswoman said later Thursday that the peer review would be conducted by the Scientific Advisory Board, an independent, federal advisory committee. She said the agency wants to present study findings by the end of 2012.

The EPA is in the early stages of designing its hydraulic fracturing research program, which will allow for input from all involved parties.

In 2004, the EPA gave hydraulic fracturing its stamp of approval, but its study has been criticized as politically motivated and scientifically unsound. In November, with the passage of the $32 billion Interior and Environment Appropriations Bill, lawmakers asked the EPA to revisit hydraulic fracturing and study the relationship between hydraulic fracturing and drinking water, "using a credible approach that relies on the best available science."

Myron Arnowitt, state director of Clean Water Action, an environmental group based in Pittsburgh that has been critical of Pennsylvania's regulation of hydraulic drilling, said Thursday he was encouraged that the EPA was starting a new study on hydraulic fracturing's effects on water.

"We're hoping they will be more comprehensive than their past work," Arnowitt said in reference to the agency's 2004 study. "We hope they'll be looking at the number of cases (of water contamination) that are out there."

Matt Pitzarella, spokesman for Range Resources, whose Southpointe-based Appalachian division has one of the largest Marcellus Shale drilling operations in the region, said Range and other gas drillers are supportive of the new study.

"This would be the second study the EPA has done in the last six years," Pitzarella said. "We're confident that their findings will be comparable with the first study."

MARCH 19, 2010

**EPA Begins Study Into Hydraulic Fracturing (*Wall Street Journal*)**

By IAN TALLEY and SIOBHAN HUGHES
WASHINGTON--The Obama administration on Thursday indicated that it is moving on two fronts to gain information about a key oil and natural-gas production technique that is viewed as essential for boosting gas supplies but that critics fear could contaminate drinking water.

The U.S. Environmental Protection Agency launched a study to determine whether "hydraulic fracturing" is contaminating water supplies. U.S. Interior Secretary Ken Salazar told a House panel that he is considering requiring oil and gas companies that drill on federal lands to disclose the chemicals used in the practice, which involves pumping water, sand and chemicals under pressure into deep underground wells. The technique breaks open underground rock, releasing the gas within.

"It is an issue that we are looking at," Mr. Salazar told a U.S. House appropriations subcommittee when asked whether the Obama administration would require such disclosures. While Mr. Salazar said he didn't have "a definitive response," he added that alerting communities about the chemicals used in hydraulic fracturing would be "a good way for oil and gas companies to go." He said that "if the public does not know what is being injected," then that "is ultimately going to hurt the natural gas industry."

The issue has been drawing the federal government's attention as new techniques allow access to vast gas supplies in underground rock formations known as shale. The shale regions -- concentrated in states including Texas, Louisiana, Pennsylvania and New York -- have become a focus in the energy world, with major companies snapping up shale-gas developers. Companies such as Chesapeake Energy Corp. and XTO Energy Inc. say the supplies could multiply the available domestic reserves of a resource that produces fewer greenhouse-gas emissions than coal and oil.

While environmentalists are concerned that the process for accessing the underground gas may be causing groundwater contamination and are calling for federal oversight, the industry says there is no proof and it is already adequately regulated. Companies also say that while the chemicals aren't publicly disclosed -- because they are commercially sensitive -- they are disclosed to local regulators.

"Our research will be designed to answer questions about the potential impact of hydraulic fracturing on human health and the environment," said Paul Anastas, assistant administrator for EPA's Office of Research and Development. "The study will be conducted through a transparent, peer-reviewed process, with significant stakeholder input," he said in a statement.

Reps. Diana DeGette (D., Co.) and Maurice Hinchey (D., N.Y.), cosponsors of legislation to bring hydraulic fracturing under EPA regulation, said the study would be a significant step in ensuring drinking water is protected. But Mr. Hinchey went further on Thursday, urging the Interior Department to require disclosures of drilling fluids used on federal lands.

"You could require operators on federal leases, federal lands, to publicly disclose all of the chemical compounds that are used in drilling," Mr. Hinchey told Mr. Salazar. "Such a requirement would help set a national standard for disclosure."

The American Petroleum Institute said in a statement, "We expect the study to confirm what 60 years of experience and investigation have already demonstrated: that

hydraulic fracturing is a safe and well understood technology for producing oil and natural gas."

Lee Fuller, head of the petroleum-industry group EnergyInDepth, said that if the review "is based on objective, scientific analysis, it will serve as an opportunity to highlight the host of steps taken at every wellsite that make certain groundwater is properly protected."

Facing increasing pressure from some Democratic lawmakers and environmentalists, the EPA said in its proposed budget earlier this year it planned to conduct a study of the process.

Previous studies by the EPA -- including one review of the process for coalbed methane extraction at much shallower levels -- haven't found hydraulic fracturing carries a risk of water contamination.

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**Asheville area activists call for CTS investigation (*Asheville Citizen Times*)**

Not too late to do 'right thing'
By Mike McWilliams • March 19, 2010
SKYLAND — Activists are calling for investigations by Congress and the N.C. Attorney General's Office into the handling of pollution at the former CTS plant site on Mills Gap Road.
About 50 people gathered Thursday at a Skyland fire station on Concord Road to hear a presentation outlining alleged mistakes and cover-ups by agencies charged with studying the environmental impact of land at the CTS/Mills Gap Road sites.
Tate MacQueen, who led the presentation, also criticized a recent report by the N.C. Division of Public Health, which concluded, among other findings, that private well samples collected from 1999 through January 2008 did not indicate potential for adverse health effects because people are no longer using the private wells or the levels in the wells that are still in use are too low to cause harm.

The chemical trichloroethylene, or TCE, was found in a drinking water well near the site. At that time, residents were given bottled water and then connected to municipal water. TCE is an industrial solvent and suspected carcinogen.

“One of the thing that's imperative to understand is that everybody involved in this that are decision makers, it's never too late to do the right thing,” MacQueen said. “It's never too late to find redemption, and we're going to be calling on some people to do the right thing.”

MacQueen said Buncombe County officials knew as early as 1987 about a contaminated well, but did not inform the property owners. MacQueen showed the crowd a letter dated 1995 from the EPA to CTS that the site had been removed from the agency's Superfund site and that the land was OK for development.

EPA testing first discovered contamination in soil and stream samples in 1990, but the groundwater wasn't tested.

“Because of that mistake, the EPA Region IV is compromised because how can they negotiate with CTS if CTS can say, ‘You're the ones who told us it was OK,'” MacQueen said.

Patricia Pinner, who lives within a mile of the former CTS site, said her well has tested negative for TCE since 2007. Penner, however, still wants to be connected to municipal water, given the difficulty in tracking groundwater movement.

“There's just now way to tell how or when you're going to tap into (the contamination),” she said. “I'm not saying it's a matter of time, I just think it's a risk that's too high to be taken.”

The CTS plant manufactured industrial switches and resistors for more than 20 years before closing in 1986.

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