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ADMINISTRATOR JACKSON

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Crisis forces government, BP to work together (*Washington Post*)

May 14, 2010 Friday
Suburban Edition
A-SECTION; Pg. A06
Maryland
Crisis forces government, BP to work together;
Despite shared goal, officials struggle with relationship
By Juliet Eilperin
Within hours of the massive April 20 explosion on Deepwater Horizon, the U.S. government launched an urgent and carefully managed response to demonstrate its control of the emerging disaster, sending Coast Guard ships to the site, keeping the president informed and posting projections of how an oil spill might affect travel.

What the Obama administration did not realize was how the arcane world of offshore drilling would collide with official Washington as politicians began kibitzing about rig mechanisms on Sunday talk shows and oil executives gave daily briefings about their disaster-management skills. The administration probably had no idea that it would find itself in many ways dependent on a foreign oil company -- both foe and needed friend in the response.

It was a relationship for which neither the White House nor BP was well prepared. And it stands in contrast to the arm's-length distance that the U.S. government kept from Exxon after the Valdez spill in 1989. Thomas A. Campbell, who served as the National Oceanic and Atmospheric Administration's general counsel at the time, said it would have been politically toxic for the government to collaborate: "We weren't able to even talk to Exxon, except on purely technical issues."

Why the change? The success or failure of the Obama administration's response -- involving about 13,000 workers and 460 vessels, along with 1.4 million feet of boom laid against the spreading slick -- depends largely on BP's expertise and technology.

Defining the terms

From the beginning, the oil giant has highlighted the collaborative nature of its relationship with the administration. "BP is hugely appreciative of the cooperation and of what we're receiving at all levels of government, from the very top of the administration down through the unified command and state and local governments," spokesman Andrew Gowers said.

Homeland Security Secretary Janet Napolitano, meanwhile, has tried to distance the

administration from BP, saying, "I wouldn't characterize them as our partner. I would characterize them as the responsible party," adding that the company's role provides a clear mandate: "They've got to kill this well, clean up the ocean and pay the claims."

And as even the first part of this three-pronged mission has eluded the company's grasp, the administration has publicly lambasted BP. Interior Secretary Ken Salazar said, "Our job is basically to keep the boot on the neck of British Petroleum." From the start, the federal government pushed BP to act quickly: The oil giant planned to bring in remote-operated vehicles a few days after the explosion to see what was happening underwater, and Interior Deputy Secretary David Hayes insisted that BP bring them immediately. BP also proposed setting up the unified command center in Houston, a decision Coast Guard and Interior officials overruled, saying the center should be closer to the work site, in Robert, La.

When it comes to stanching the flow of oil, however, the administration has often been reduced to the role of questioner. On the evening of April 27, Salazar spent two hours grilling BP chief executive Tony Hayward and BP America President Lamar McKay on details about the blowout preventer, apparently exhausting their knowledge of the device.

"You've got to talk more to our technical experts, because you're asking questions I can't answer," Hayward said.

Now the government has embedded senior administration scientists at BP's headquarters in Houston, including the heads of three national labs and the director of the U.S. Geological Survey.

Expertise and equipment

The government is relying on BP's expertise and its equipment: Salazar joined Napolitano in calling the Pentagon to ask whether it had better submersible equipment to augment or replace the vehicles that BP had deployed. The answer, according to an administration official, was that the military did not have anything that could operate on the seabed and match the BP equipment's level of precision.

At times BP has pushed back on the administration's demands, including when the Navy proposed bringing in an amphibious vessel at the company's expense. One company official who spoke on the condition of anonymity said BP had urged the government to develop "a realistic shopping list."

But polls show that many Americans do not think highly of either President Obama or BP when it comes to the spill. The Pew Research Center for the People and the Press found that 54 percent of respondents said the administration's response has been only fair or poor, while 63 percent rated BP's performance as fair or poor. A new NBC News-Wall Street Journal poll found that 45 percent of respondents think the government has not done enough in response to the leak, compared with 43 percent who said it has,

with even more negative numbers for BP.

Underlying the administration response is the knowledge that its dependence on BP limits its ability to speak with authority.

"Do you think it will stop today?" a fisherman asked EPA Administrator Lisa P. Jackson when she met with residents in Waveland, Miss., on April 30.

"Sir, we really just can't say when you can stop this leak," Jackson said, adding, "People in this area, we prepare for the worst and hope for the absolute best."

The fisherman began to cry.

"That's when it hit me -- the incredible emotional pressure of not knowing what will happen," she said in an interview. "It's like telling him, 'You will not make money. You're not going to feed your family.' "

Staff writers David A. Fahrenthold, Marc Kaufman, Steven Mufson and Michael D. Shear and staff researcher Madonna Lebling contributed to this report.

U.S. NEWS
MAY 13, 2010, 4:03 P.M. ET

EPA Finalizes Greenhouse Gas Rules for Industrial Facilities (*Wall Street Journal*)

By SIOBHAN HUGHES

WASHINGTON—The Obama administration Thursday finalized rules to curb greenhouse-gas emissions from power plants, cement manufacturers, and other industrial facilities, in a move that will force companies to invest in new pollution-control equipment to fight climate change.

The Environmental Protection Agency said beginning in July 2011, any newly planned large facilities, defined as those releasing 100,000 or more tons of carbon dioxide a year, will have to hold permits to emit greenhouse gases. Large facilities that undergo modifications that would increase emissions by 75,000 tons or more will be subject to permitting requirements earlier, beginning in January 2011.

The regulation still faces likely legal challenges from critics who say the EPA lacks the authority to distinguish between large and smaller emitters. Congress is preparing another challenge, with Sen. Lisa Murkowski (R., Alaska), planning to arrange a Senate "disapproval resolution" vote by June 7, according to spokesman Robert Dillon. "I don't think any of the concerns she has about the regulation have changed," he said.

Limiting the concentration of greenhouse gases in the atmosphere is a cornerstone of the Obama administration's environmental agenda. EPA Administrator Lisa Jackson found last year that rising gas concentrations create the risk of more heavy downpours and flooding, more frequent and intense heat waves and rising sea levels. A 2007 Supreme Court decision had ordered the EPA to determine whether a public danger existed and come up with regulations if necessary.

Companies had fought against greenhouse-gas rules, citing the costs of new equipment and confusion surrounding what counts as the most up-to-date technology to control emissions.

"The approach could delay or cancel much-needed business investment," said Cal Dooley, the president of the American Chemistry Council, in a statement. He urged Congress, which has been tangled up over how to combat global warming, to pass legislation.

The EPA has said it plans to come up with guidance on the "best available control technology," but has been slowed by a battle between environmentalists and companies over how to proceed. The debate includes whether to treat natural gas as a control technology—a step that would reshape U.S. industry and could steer the country away from coal—or whether natural gas should give way to costlier but cleaner wind and solar projects.

"I wish I could tell you they were coming out next week," Gina McCarthy, the EPA's assistant administrator for air and radiation, told reporters on a conference call. "We still have a great deal of work to do on those."

Companies with pending applications must lock in approval from state permitting authorities before Jan. 2, 2011, for modification plans to put off dealing with the new regulations. "This rule basically does not grandfather applications that are in the process," Ms. McCarthy said.

Last year, the EPA had proposed tailoring greenhouse-gas rules in a fashion that would apply the rules to many more kinds of sources, with facilities emitting as little as 25,000 tons subject to regulations. The agency backed off in the face of criticism that state permitting authorities would be overwhelmed with the volume of new permitting requests--including from never-before regulated entities such as large apartment buildings.

The EPA said that it plans to next year propose phasing in the rules to include facilities that release as little as 50,000 tons of greenhouse gases per year. By the end of 2015, the agency aims to complete a study on the effects of applying the regulations to even smaller sources. The study will provide the basis for completing another rule by April 2016. The agency said it may decide that some smaller sources need to be "permanently excluded" from greenhouse-gas regulations.

State regulators praised the EPA for giving states time to adjust.

"States are pleased that EPA is phasing in these requirements so that agencies have sufficient time to closely align their programs with the federal permitting rules, thereby assuring a smooth and rational transition to the daunting but important challenges of regulating greenhouse gases from these industrial facilities," said Bill Becker, the executive director of the National Association of Clean Air Agencies, in a statement.

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Renewed cleanup for bay promised (*Annapolis Capital*)

Feds to make 'unprecedented' effort to save ailing Chesapeake
By PAMELA WOOD, Staff Writer
Published 05/13/10
WASHINGTON - Top officials from the federal government made clear yesterday that they are making a renewed effort to restore the health of the troubled Chesapeake Bay. Pamela Wood — The Capital Lisa P. Jackson, administrator of the Environmental Protection Agency, talks about the federal government's renwed efforts to clean up the Chesapeake Bay. She spoke at a news conference in Washington.

They unveiled a series of goals for bay cleanup - as well as steps to reach them - that will restore the estuary's health by 2025.

In an event under sunny skies at an island park on the Anacostia River, Environmental Protection Agency Administrator Lisa P. Jackson promised an all-out effort from federal agencies.

"We plan to devote unprecedented resources and unmatched efforts," Jackson said.

Jackson and colleagues from the White House, the military and the departments of Agriculture, Interior and Commerce laid out an action plan for the Chesapeake Bay.

The plan represents the agencies' official response to an executive order issued by President Barack Obama one year ago. Obama charged the agencies to step up their bay-saving efforts.

The key elements of the plan had mostly been unveiled in draft reports issued over the course of the past year. Some were announced at the time the executive order was issued.

And the key elements of the plan also were worked into a legal settlement, announced Tuesday morning, of a lawsuit brought by the Chesapeake Bay Foundation.

The federal government's plans include:

- Developing a "pollution budget" that assigns maximum pollution levels to different pollution sources and different sections of the bay.
- Setting new rules governing polluted runoff from urban stormwater and from large farms with animals.
- Implementing bay-friendly practices on federal land in the bay's watershed, including military installations.
- Setting two-year goals for reducing pollution, with progress marked each year.
- Making sure enough pollution-reduction practices are in place in 2025 to have at least 60 percent of the bay and its rivers and creeks meeting water quality standards.
- Restoring streams and wetlands, planting trees along streams, opening up fish migration routes, putting more conservation practices on farms, improving public access to the bay.
- Bringing back oysters in at least 20 sections of the bay.
- Restoring populations of brook trout and wintering black ducks, as well as continue the recovery of blue crabs.

"Today's strategy is a map to guide us down the long road ahead," Jackson said. "I look forward to taking that journey with all of you."

Federal officials couldn't put a price tag on all of this.

But an EPA spokesman said that in the current fiscal year, federal agencies are spending $250 million directly on the bay - and there are proposals for a major boost in that sum next year.

Agriculture Secretary Tom Vilsack noted that up-front costs of helping the bay will reap rewards down the line, especially as a healthy bay means boosts in tourism, recreation and other spending.

"There is an economic benefit that will accrue," Vilsack said.

The nonprofit Chesapeake Bay Foundation predictably found much to like in the announced plans, given that those plans are in the lawsuit settlement as well.

Foundation President Will Baker said the plan is a "strong, coordinated, prioritized set of commitments."

Favorable comments also were issued by Gov. Martin O'Malley ("an unprecedented level of federal cooperation and leadership for the Chesapeake Bay") and the Choose Clean Water Coalition ("a new era for restoration").
But others weren't as impressed.
Tommy Landers of the advocacy group Environment Maryland said "the proof will be in the pudding" and the federal government needs to follow through on its promises.
Bay author and noted critic Howard Ernst said it has taken way too long to get this kind of bay-saving strategy in place.
"The time for delay has passed and action is required under the existing law," he said. "In fact, action is long overdue."
See the Executive Summary: Strategy for Protecting and Restoring the Chesapeake Bay Watershed:

EPA Announces New Clean Air Act Rules (Epoch Times)

By Shahrzad Noorbaloochi
Epoch Times Staff
Created: May 13, 2010 Last Updated: May 13, 2010

The Environmental Protection Agency (EPA) announced today that it will phase in a policy requiring permits for stationary sources that are increasing greenhouse gas (GHG) emissions by certain thresholds.

After a long debate, the EPA decided how to handle GHG emissions from power plants and oil refineries, which release 70 percent of the greenhouse gases from stationary sources, not vehicles.

The policies will start in January 2011 with the enforcement of permitting requirements for GHG for facilities that get Clean Air Act permits for other pollutants. Permits include information on which pollutants the facilities release, how much they can release, and what must be done to reduce the company's pollution. Plans to measure and report the air pollution emitted are mandated.

By July 2011, permitting requirements will affect all new facilities with GHG emissions that exceed 100,000 tons per year (tpy), and modifications at existing facilities that emit at least 75,000 tpy.

According to the EPA press release, "Approximately 900 additional permitting actions covering new sources and modifications to existing sources would be subject to review each year." At least 550 new sources will have to obtain permits for GHG emissions.

The policy came after what EPA Administrator Lisa P. Jackson called "extensive study, debate, and hundreds of thousands of public comments." The agency held a 60-day public comment period, and got 450,000 comments.

Capito Joins Effort to Protect Coal From New EPA Rules (*The State Journal*)

Posted Thursday, May 13, 2010

The congresswoman and others are asking the U.S. Environmental Protection Agency to stop their attempt to add regulatory barriers coal permitting.

U.S. Rep. Shelley Moore Capito, R-W.Va., joined 22 other members of Congress in asking the U.S. Environmental Protection Agency to withdraw what legislators described as an attempt to add regulatory barriers to the issuing of coal permits in Appalachia.

"In noting the far-reaching effects of this guidance on the people who live and work in central Appalachia, we ask that you withdraw the April 1, 2010, guidance and process pending applications under existing rules and regulations while seeking comment from the public on the proposed changes through the formal rulemaking process," the letter to EPA Administrator Lisa P. Jackson said.

Specifically, the 23 members of Congress -- five Democrats and 18 Republicans -- cited the EPA's interpretation of laws and regulations governing the quality of water flowing from mining sites, and they challenged the agency's authority to change the rules without public input and peer review.

The letter called on the agency "to undertake a more prudent and transparent course of action through the formal rulemaking process."

The letter said the EPA's decision "has jeopardized the future of mining operations, the sustenance of local communities, and ultimately, access to a reliable domestic source of energy within Central Appalachia and the entire country."

Last week in a separate letter, West Virginia Democrats Nick Rahall and Alan B. Mollohan and Virginia Democrat Rick Boucher asked the EPA to reconsider the new water quality standards. The congressmen said the EPA acted without considering the policy's implications and is treating Appalachia differently than other parts of the country.

Boucher also signed the May 11 letter. Rahall and Mollohan did not.

Joining Capito and Boucher in sending the letter were U.S. Reps. Harold Rogers, R-Ky.; Bill Shuster, R-Pa.; Tim Bishop, D-N.Y.; Zack Space, D-Ohio; Glenn Thompson, R-Pa.; Marsha Blackburn, R-Tenn; Charlie Wilson, D-Ohio; Aaron Schock, R-Ill; Brett Guthrie, R-Ky.; Cynthia Lummis, R-Wyo.; John J. Duncan, R-Tenn.; John Shimkus, R-Ill.; Don Young, R-Alaska; Ed Whitfield, R-Ky.; Geoff Davis, R-Ky.; Tim Murphy, R-Pa.; Parker Griffith, R- Ala.; Doug Lamborn, D-Colo.; Fred Upton, R-Mich.; Denny Rehberg, R-Mont.; and Phil Roe, R-Tenn.

EPA Puts Forth Two Very Distinct Options for Regulating Coal Ash (*Knoxville Metro Pulse*)

By Frank N. Carlson

Wednesday, May 12, 2010

Last Tuesday, about 16 months after a coal ash pond at the Kingston Steam Plant ruptured and spilled a billion gallons of sludge in Roane County, the Environmental

Protection Agency finally put forward its first proposal for regulating coal ash at the federal level. In fact, it put forward two plans—one that seemed aimed at pleasing environmental groups and another apparently geared towards industry—and EPA head Lisa Jackson called on the public to help determine which to adopt.

This is not a common practice, says Lisa Widawsky, a lawyer with the Environmental Integrity Project, an environmental nonprofit based in Washington, D.C. She says the EPA would typically issue one rule, and that its decision to offer two options may be indicative of the pressure it faced from industry and states that wish to regulate ash themselves. In the proposal, Widawsky says the EPA didn't present a preference for one option over another, but they did include "a lot of new data about the grave risks to human health and the environment when coal ash is not stringently regulated."

Both proposals fall under the Resource Conservation and Recovery Act. The first, known as Subtitle C and preferred by environmental groups, would classify coal ash—also known as coal combustion waste or coal combustion residue—as a special waste, imposing requirements on its disposal, transportation, storage, and handling. This would mean utilities and landfills disposing or storing ash would have to obtain a federal permit, which the Tennessee Department of Environment and Conservation could issue. To do so, the landfill would have to be located a certain distance from the water table, have synthetic and clay liners, groundwater monitoring, a leachate collection system, dust controls, and long-term financial assurances to guarantee the owners could handle a cleanup should one be necessary. The rule would require retrofitting existing wet-storage ponds, like the kind that breached at Kingston in December 2008, effectively phasing out their use altogether in favor of dry storage. If any of these rules were violated, the state or federal government could step in to enforce compliance.

The second, Subtitle D, is favored by the American Coal Ash Association, and would be considerably less robust: It would label coal combustion residue as solid, non-hazardous waste, and suggest guidelines for its treatment but not provide federal enforcement of those guidelines. A permit would not be required for disposal, although states could create a permit process, as they are able to do now. The primary means of addressing guideline violations would be through citizen lawsuits.

"It's very clear that there's only one proposal of these two that is protective of human health and the environment, and that is the Subtitle C proposal," Widawsky says. "The Subtitle D proposal is full of holes."

Both proposals would allow recycling of ash, a crucial sticking point for this $10 billion a year industry. But ACAA executive director Tom Adams says Subtitle C would carry with it a hazardous-waste stigma, limiting the material's reuse. "As you look at trying to market these products and develop more use of this product, as opposed to seeing it go to disposal, you're really dealing with a delicate situation," Adams says. "Once you get a hazardous-waste stigma, that really turns off people who are maybe on the fence about using these materials."

Both options would also require liners and groundwater monitoring for new landfills. Neither option would apply to coal combustion waste stored in abandoned mines, something the EPA will address in conjunction with the Department of the Interior in a separate rule.

A 90-day period for public comment is expected to commence soon, possibly this week, when the rule is published in the federal register. Citizens can write to the EPA to voice their support for either, and can also suggest components of either proposal be made stronger or weaker. For those who wish to voice their concerns in person, there will be a hearing held in Washington, D.C., but EIP and other groups are requesting that more meetings be held around the country. They're also encouraging citizens who want to attend to contact their offices for assistance.

As to which option TVA supports, spokeswoman Barbara Martocci says TVA plans to offer comments but doesn't yet have a position. She points out that TVA is already moving to convert wet ash ponds at six facilities to dry storage over the next eight to 10 years at a cost of $1.5 to $2 billion. Widawsky applauds this move but also cautions that the utility has made such pronouncements before without following through, and that this illustrates why the enforcement of Subtitle C is necessary.

After the 90 days, the EPA will review comments, which is likely to take six months to a year, and then issue its final rule.

This whole process has been slowed considerably by the White House's Office of Management and Budget, which reviews the potential costs of rules before they're submitted for public comment. The EPA rule was originally submitted in October, and while it typically takes 30 days before being returned, in this case it took more than six months, during which time OMB met with more than 30 industry representatives and at least 12 environmental groups.

What took place at those meetings is not available to the public because the rule had not yet been proposed, but a side-by-side comparison of the proposal that went in and the one that came out shows the rule was watered down. For example, the original proposal called for coal combustion residue to be classified as hazardous waste under RCRA, whereas neither of the two options lists it this way (although according to Adams, a Subtitle C designation is tantamount to a hazardous-waste designation). Lisa Evans, an attorney with Earth Justice, a nonprofit that advocates for environmental causes, says this is a mistake because coal ash easily leaches pollutants. She also notes that even the EPA offers that the difference in cost for companies between Subtitle C and Subtitle D is due to the lack of enforcement in Subtitle D, a fact which she says further demonstrates that option's fecklessness.

For those interested in reading the 563-page document describing the rule, visit epa.gov. The agency has also created a handy chart comparing the two options, as well as a list of frequently asked questions with answers. Comments can be submitted at

regulations.gov, or by e-mail to rcra-docket@epa.gov, with the subject line: Attention Docket ID No. EPA–HQ–RCRA–2009–0640.

On a related note, last week the EPA and TVA announced the Emory River would remain closed until May 29, two weeks later than originally announced, so that dredging operations can be completed and equipment removed.

House Lawmakers Urge EPA To Withdraw Mountaintop Mining Guidelines (*Inside EPA*)

House lawmakers are urging EPA to withdraw its water quality guidance for mountaintop mining operations, citing long-running industry concerns that the guide inappropriately uses "conductivity" as a metric to determine water quality, that the guide could be applied to sectors other than mining, and that it unfairly targets only Appalachia.

Some House lawmakers are also suggesting that EPA -- through the guidance -- is making significant policy changes that under environmental laws require a formal rulemaking process to propose and implement, and that EPA's review of mountaintop mining permits conflicts with the laws' intent for states to be the primary regulator.

The guidance has also attracted attention in the Senate, but rather than asking EPA to withdraw the guidance senators are said to be crafting a letter urging caution in how the agency implements the guide.

Coal state Democratic Reps. Alan Mollohan (WV), Nick Rahall (WV) and Rick Boucher (VA) sent a May 5 letter to EPA Administrator Lisa Jackson outlining their broad concerns with the guidance. That was followed by a May 11 letter to Jackson sent by 20 House Republicans and three Democrats accusing EPA of making "substantive" changes to the Clean Water Act and other laws through the guidance without pursuing a rulemaking process.

The lawmakers' letters could raise new complications for EPA's April 1 guidance, which is designed to address concerns about mountaintop mining's impact on water quality. The guidance set tough new limits on conductivity -- a measure of salinity -- for Clean Water Act permits issued for mountaintop mining projects.

"While we have been urging the agency to provide clarity about the permitting process, we believe that this guidance is premature largely because we do not believe that full consideration has been given to the far-reaching implications of the policies it espouses, especially as it relates to conductivity," says the letter from the three coal state Democrats. *Relevant documents are available on InsideEPA.com.*

The lawmakers all hold influential slots in the House, with Mollohan a senior member of the Appropriations Committee and on the panel that oversees EPA's budget. Rahall is chair of the Natural Resources Committee, and Boucher is a senior Energy & Commerce Committee member supportive of the coal industry.

While the lawmakers have not suggested legislation to address their concerns with the guidance, options could include a rider to EPA's spending bill to prevent the agency from implementing the guide. "I don't know that anyone . . . has put together a strategy to employ one or any" legislative options, a House source says.

Meanwhile, the 23 House lawmakers that sent the May 11 letter accuse EPA of attempting to make "substantive changes" to the Clean Water Act, National Environmental Policy Act and Surface Mining Control & Reclamation Act (SMCRA) through the guidance, which they say contains various requirements that require a formal rulemaking process to implement.

The letter also raises concerns about EPA's decision to begin reviewing water permits, a move that it says threatens to "undermine Congressional intent on primary state regulatory authority under SMCRA and the Clean Water Act." State regulators in Kentucky have criticized EPA's guidance and has proposed since it was released to issue permits that do not meet the criteria it lays out, potentially triggering a showdown with the agency.

The letter was signed by lawmakers from the six states affected by the guidance -- Kentucky, West Virginia, Virginia, Ohio, Tennessee and Pennsylvania -- as well as members from Utah, Illinois, Alabama, Wyoming, Colorado, Michigan, Montana and Alaska. Only Boucher signed both letters to Jackson.

The guidance also has attracted attention in the Senate, where Sens. George Voinovich (R-OH), Jay Rockefeller (D-WV) and others are planning to write to EPA urging caution in implementing the guidance, Voinovich told *Inside EPA* May 11. The letter is expected to be sent the week of May 17, according to an informed source.

Rockefeller said during a brief May 11 interview that he believes EPA's guidance is too restrictive, but he also criticized industry practices. Rockefeller noted that mountaintop mining was used during his term as the state's governor but that at the time companies used the more expensive "haul back" method, rather than depositing waste in valley fills. He said companies "should be spending money to do it the right way."

Meanwhile, Sens. Benjamin Cardin (D-MD) and Lamar Alexander (R-TN) are continuing to consult with EPA over modifications to a bill they have introduced aiming to end mountaintop removal mining.

The senators want to ensure their bill ends the practice in which mountaintops are obliterated and rock is deposited in streams without restricting other types of mining. Cardin told *Inside EPA* in a brief May 11 interview that they are "99 percent there," and

Alexander said in a separate interview that the two were waiting on some final technical information from EPA and may be ready to markup the bill by the end of this month.

EPA's guidance is part of an agency agreement with the Army Corps of Engineers over EPA's review of 79 Corps-issued section 404 Clean Water Act mountaintop mining permits put on hold at the outset of the Obama administration. The guidance's requirements cover all water permits for the mining projects in Appalachia, including section 404 permits and 402 national pollution discharge elimination system (NPDES) permits.

The National Mining Association (NMA), among others, has harshly criticized EPA's use of the conductivity measure. According to an NMA background document on conductivity, such a measure has never been used as a primary screen for water quality -- rather increased conductivity typically triggers requirements for additional testing.

Furthermore, NMA says the thresholds EPA outlines -- proposing to deny permits that would increase conductivity above 500 microsiemens per centimeter (uS/cm) and to require additional scrutiny if conductivity exceeds 300 uS/cm -- are "not defensible or achievable" because background conductivity in waterbodies has been observed beyond those levels and because increased conductivity results from "virtually any" land-disturbing activity, as opposed to just mining.

EPA predicted the new limits would end mine operators' ability to construct most "valley fills," which are used to dispose of waste rock blasted away from mountaintops, burying nearby streams. Industry and state officials have complained that conductivity is an inappropriate standard to measure water quality and has questioned the science on which EPA is basing the guidance; industry sources also worry that the standards could end up applied to an array of other land-disturbing activities, such as home construction or road building (*see related story*).

In their letter to Jackson, Mollohan, Rahall and Boucher echo those concerns, accusing EPA of "seeking to bootstrap conductivity as a section 402 effluent limitation standard through the section 404 process," and questioning their limitation of the new standards only to surface mining in Appalachia, a move they say is unprecedented. The CWA "is a national law and should be applied evenly and equally throughout the country as has been done in the past, and there is simply no justification for departing from that practice," the lawmakers write.

The lawmakers also note that industry has never been required to address conductivity and that more information is needed on how the limits will affect surface or underground coal mining, "as well as any number of essential economic activities, such as road construction," which also is vital to the region's economy. "To wit, we must question why a hardrock mining operation sin California, or a shopping mall construction project in New Jersey, which may impact an intermittent or ephemeral stream, should not be held to the same standard," they write. -- *Nick Juliano*

Early EPA Steps Set High Bar For Environmental Justice, Critics Say (*Inside EPA*)

Early steps by the Obama EPA to incorporate environmental justice into agency decisionmaking set a high bar for when the agency will take actions to limit disproportionate impacts to poor and minority communities, critics say, despite a high-profile commitment to the issue by Administrator Lisa Jackson.

The critics are calling for the agency to develop guidance for how and when to conduct environmental justice analyses, to realistically define a true disparate impact and for top managers to better communicate the agency's equity positions to on-the-ground permit writers.

While Jackson has vowed that the agency will work to ensure its activities do not cause a "disparate impact" on communities, critics say the agency has yet to take a single meaningful action. Rather, in a series of recent moves, the agency appears to be setting an extremely high bar for when and how it must act to address equity, these critics say. EPA officials did not respond to requests for comment by press time.

In one case, the agency is declining to assess the environmental justice impacts of an offshore drilling permit in Alaska saying the proposed drilling action would not result in a violation of air quality standards.

Setting air quality standards as a threshold for addressing environmental justice is "a bunch of poppycock," says one long-time advocate. "A violation of [an ambient air quality standard (NAAQS)] does not indicate an environmental justice problem," the source says, noting, "If that was the case then a huge part of the country would be an environmental justice problem -- every area that violates the NAAQS."

Critics are also assailing the agency methodology for assessing the environmental justice impacts of regulations, charging it downplays the impacts of the rules on poor and minority communities. For example, EPA in its May 4 proposal to issue a first-time Resource Conservation & Recovery Act (RCRA) rule to regulate coal ash and other coal combustion residues (CCR) included an environmental justice analysis that does not recommend any action to address equity concerns despite concluding that the rule may harm some communities.

The rule "may have a disproportionately lower effect on minority populations and may have a disproportionately higher effect on low-income populations" that live near CCR disposal sites, the rule says. The addition of "CCR generation to offsite [existing] commercial hazardous waste landfills [located in 15 states] . . . could have a disproportionate effect on populations surrounding these locations, and in particular, minority and low-income populations surrounding commercial hazardous waste facilities," the rule adds.

The analysis also appears to endorse a solidifying EPA view that the best way to ensure that no population is disproportionately impacted is to seek equal environmental impacts across populations -- a position that one industry source describes as "dilution is the solution to pollution."

The industry source calls this approach "astounding" because it indicates the agency's goal is to balance out [impacts] 50-50 exactly," which could be interpreted as "every community will have to have an ash landfill."

EPA had conducted a similar analysis for its pending rule to redefine when wastes are considered “solid” waste -- and therefore exempted from strict treatment and handling requirements. In the analysis of the so-called definition of solid waste (DSW) rule, EPA suggested the increased recycling of hazardous materials that the rule would allow was beneficial because it would result in less of the material being landfilled or incinerated adjacent to poor or minority communities.

But an alternative analysis conducted by environmentalists found that most of the lesser regulated facilities that would be eligible to handle the wastes are located adjacent to poor and minority communities.

The agency’s analysis prompted “enormous criticism” from environmental justice advocates when it was presented at a January environmental justice conference, and the industry source says the agency may quietly have dropped its plans to revise.

One long-time advocate says EPA has no specific plan for how to conduct equity analysis and these latest decisions show “they are just pulling stuff out of the air.” The source says the agency was warned more than a decade ago that it needed rules outlining how to address equity in rules and permitting. Without such an overarching plan, “We don’t know what all this environmental justice analysis is going to lead to, or if it will lead to anything helpful.”

EPA is also declining to conduct environmental justice analyses for some permit decisions. For example, the agency has declined to conduct an environmental justice analysis as part of its recent decision to grant air permits allowing Shell Oil Co. to conduct exploratory drilling off the coast of Alaska this summer -- a move that is prompting a new legal challenge before its Environmental Appeals Board (EAB), In re: Shell Gulf of Mexico Inc. and Shell Offshore Inc.

EPA said it did not need to conduct the analysis because the emissions from the proposed drilling would not violate a national ambient air quality standard (NAAQS) -- a possible new threshold that environmentalists and others charge is unprotective and unlawful.

But one attorney familiar with the Alaska drilling case says Region X’s refusal to conduct the analysis because the project will not violate a NAAQS does not “jive at all” with Jackson’s environmental justice promises or her top equity adviser Lisa Garcia’s January vow to produce a 100-day plan to lay out how the agency will integrate the issue through its decisions.

“We have yet to see EPA’s promise to make environmental justice a priority play out on the ground in actual decisions. We are still waiting to see those promises turn into reality, and this permit is a perfect example. To pretend there is not disparate impact because the NAAQS are met flies in the face of what we know,” the source says.

The May 3 petition, filed on behalf of native Alaskans, argues that Region X “committed a clear legal error by not performing” the equity analysis, which petitioners had requested. EPA said the analysis was not needed because the permit met air act NAAQS limits. “The level of the NAAQS is set low enough to protect public health, including sensitive individuals, with an adequate margin of safety. . . . Objections to the NAAQS themselves must be addressed during the NAAQS review process,” EPA said in its response to comments.

But the petitioners to EAB argue that no air act permit “will ever trigger the requirements of the executive order on environmental justice, because EPA cannot issue a final

[permit] that fails to ensure compliance with the NAAQS." They add that EPA's sole reliance on NAAQS compliance as a threshold "risks increasing a pre-existing health disparity between Inupiat people on the North Slope and human populations elsewhere in the United States," and add that the Shell permit was issued for an indefinite time period but fails to require it to meet recently finalized stricter NAAQS for several pollutants. Relevant documents are available on InsideEPA.com.

Further, the source notes that EPA's position is completely ignoring the impacts of air toxic emissions, which are not regulated under the NAAQS, and are a bigger concern with oil exploration than NAAQS pollutants.

The industry source says EPA appears to be making the argument that because there is no "adverse impact," because NAAQS are not being exceeded, then whether there is a disproportionate impact does not matter, so an equity analysis is not needed. The source says this echoes earlier agency positions with facilities in Michigan taken by the Bush EPA but the source calls it "odd" that the Obama administration is supporting this view.

EPA won a similar case before EAB late last month, In re: Teck Alaska Inc. Red Dog Mine, after it agreed to revoke contested discharge limits in a water permit for an Alaska mine that advocates had charged were disproportionately harming nearby native populations. EPA revoked some of the more contested limits and then successfully argued to EAB that the advocates' challenge was moot, avoiding their equity claims entirely.

One attorney in the case says EPA agreed to withdraw the limits as a way to avoid losing the EAB appeal and now residents of the village of Kivalina will have to "beg EPA to enforce the old permit." The source accuses EPA of "a long history of allowing the Red Dog mine to do what it wants" despite the complaints of the native villagers that they are suffering disproportionate impacts. "EPA is supposed to have priorities set by the administrator to do something about [mining,] environmental justice and respecting tribal sovereignty and EPA just keeps running over the village of Kivalina to appease the Red Dog mine."

In the case, EAB did not specifically address the equity claims and the source declined to comment on whether an appeal in federal court is likely.

EPA also declined a petition from environmentalists to declare Appalachian communities affected by mountaintop mining operations to be environmental justice communities eligible for special protections. But in a recently issued guidance for mountaintop mining operations, the agency required first-time consideration of subsistence fish consumption -- an issue that could be relevant to poor and minority communities -- as a required factor for EPA review of clean water permits. -- Dawn Reeves

Senate Climate Bill Retains Key EPA Authorities Despite Broad Preemption (*Inside EPA*)

The long-awaited draft Senate climate bill by Sens. John Kerry (D-MA) and Joseph Lieberman (I-CT) unveiled May 12 would preempt EPA from completing a number of

planned regulatory actions to address greenhouse gases (GHGs) under the Clean Air Act and includes a total preemption of existing and future state and regional cap-and-trade programs.

However, the bill retains key EPA authority allowing it to continue with vehicle GHG emission limits in partnership with the Department of Transportation (DOT) and leaves intact key agency authority to establish GHG new source performance standards (NSPS) for existing power plants.

The bill, the "American Power Act," calls on EPA and DOT's National Highway Traffic Safety Administration (NHTSA) to work with California and the auto industry on drafting vehicle GHG and fuel economy standards for model years 2017 and beyond, and also does not explicitly preempt California from pursuing its own future standards.

It says EPA and NHTSA, "in consultation with the state of California and representatives of the automotive industry," should "use current authorities to set motor vehicle standards" for post-2016 models "that reflect the greatest emission reductions and fuel efficiency improvement achievable."

A source with the Alliance for Automobile Manufacturers confirms the bill would allow EPA to continue setting GHG vehicle standards in coordination with NHTSA corporate average fuel economy (CAFE) rules, adding that the industry continues to support the approach and has long advocated for single national GHG/CAFE standards.

California officials are moving toward establishing their next round of GHG vehicle rules, though on a less-speedy timetable than initially envisioned, and EPA Administrator Lisa Jackson recently committed to reaching out to the state to coordinate the next round of standards, similar to the agreement reached for model years 2012-2017 (Inside EPA, April 30).

The bill also directs EPA to establish GHG emission standards for other vehicles, including heavy-duty trucks, non-road vehicles and engines including marine vessels, and aircraft and aircraft engines "to the extent the administrator determines appropriate." Relevant documents are available on InsideEPA.com. See page 2 for detials.

Further, it provides EPA with new authority to establish provisions for "averaging, banking and trading" of GHG credits "within or across classes or categories of" the transportation emission rules.

Additionally, sources say the bill includes an exception from its preemption language that preserves EPA's ability to regulate existing power plants under section 111(d) of the Clean Air Act -- at least preserving the option for EPA to require controls deemed technologically or economically feasible on those facilities.

"That could be a very effective authority to ensure that old coal plants are replaced by cleaner technology," one environmentalist says. This contrasts with House-passed legislation that eliminated the authority, suggesting that the issue will remain the subject of continuing negotiation should the bill move forward. With respect to new sources, the legislation sets out multiple specific standards for new facilities rather than giving EPA discretion to set them.

One utility source says that the issue of performance standard authority for existing plants is a "work in progress."

At a May 12 press conference flanked by environmental, industry and religious groups, Kerry and Lieberman cast the bill as an economic, environmental and national security

imperative. “This isn’t a choice it is a necessity,” in order to transform U.S. energy policy from a weakness into a strength, Kerry said.

Touting what he said was an unprecedented coalition behind the effort, he dismissed the “doubters” who would write off the chances of Senate action, noting that health care reform was once declared dead.

Kerry and Lieberman were accompanied by speakers from nearly a dozen environmental, industry and religious groups, though there were no oil industry CEOs on the podium. Kerry, however, said several oil companies would be issuing statements of support, and named Shell, Conoco Phillips and BP.

Afterward, Environmental Defense Fund’s Fred Krupp told reporters, “We’ve just crossed a huge threshold where there is an actual bill that is being vetted,” and with it, the chance for senators to see that many of their concerns might already have been resolved.

The bill’s preemption provisions for state cap-and-trade programs already are drawing fire for barring “states from implementing or enforcing cap-and-trade programs to control” GHG emissions.

That provision is “unnecessary, inappropriate and unjustified,” the National Association of Clean Air Agencies says.

The legislation also bars EPA from regulating GHGs under a number of Clean Air Act sections, including its criteria pollutant, hazardous pollutant, international air pollutant, new source review or Title V permit program authorities.

However, it does subject new coal-fired power plants to a GHG performance standard that requires a 50 percent cut in emissions compared to a conventional plant. The standard is contingent until 2020 upon the deployment of 10 gigawatts worth of carbon capture and sequestration (CCS) capacity. After 2020, a 65 percent cut is required regardless of CCS deployment.

The bill rejects the economy-wide cap-and-trade approach of past legislative proposals in favor of a sector-by-sector scheme for reducing GHG emissions that eases the compliance burden on industry and provides major new subsidies to the coal and nuclear industries, leading one energy consulting firm to label it as perhaps the first “climate bill that corporate stakeholders might actually want to pass.”

But while Kerry and Lieberman were flanked by a host of supporters, they were without Sen. Lindsey Graham (R-SC), who pulled out of the effort to draft a bipartisan climate plan after citing concerns the Senate would be distracted over a debate on immigration reform.

Some observers say prospects for passage of the bill are greatly diminished in the wake of the ongoing BP oil spill in the Gulf of Mexico, particularly because it backs expanded offshore oil and gas drilling, though, in an apparent response to the disaster, it includes language that could allow coastal states to veto new drilling projects.

“This is a vote for clean energy after a devastating oil spill,” Kerry claimed at the press conference, saying the disaster is among the reasons why “this should be an easy vote.”

Overall, the bill seeks to cut national GHG emissions by 17 percent in 2020 and by more than 80 percent in 2050, and includes a hard carbon price collar, with a floor set at $12 and a ceiling at $25, with inflation adjustments.

Meanwhile at a May 12 background briefing for reporters staff for Kerry and Lieberman sought to allay fears the bill would create a new carbon market ripe for speculation, saying the legislation limits trading to regulated entities.
Staff also highlighted that two-thirds of auction revenues that would purportedly be returned to citizens, though noting most entities would not be required to purchase allowances until 2026 and that proceeds -- similar to provisions in the House-passed bill -- would largely be rebated through electricity local distribution companies.
In a break with the House-passed climate bill, the Senate discussion draft upends a deal brokered by the Edison Electric Institute that would have seen utilities receive free allowances half based on their historic emissions and half based on their retail sales. After complaints from utilities largely dependent on coal who claimed the formula would exacerbate regional disparities, the senators decided to alter it so that allowances are allocated based 75 percent on utilities' GHG emissions.

EPA: Stubborn Environment Refusing To Meet Civilization Halfway (*The Onion*)

May 12, 2010 | ISSUE 46•19

WASHINGTON—The U.S. Environmental Protection Agency called a press conference Monday to publicly denounce the environment for blatantly refusing to pull its weight in mankind's ongoing efforts at ecological conservation.

"For 40 years, we have worked tirelessly to ensure the health and safety of our natural environment," a visibly angered EPA administrator Lisa Jackson told reporters. "But this can only work when it's a give-and-take. If the environment won't even meet us halfway by regenerating a rain forest or two, or pumping out some clean air and water every once in a while, then what's the point of us trying?"

Added Jackson, "I'm as committed to saving the earth as anyone, but for crying out loud, when is the earth going to hold up its end of the bargain?"

According to an EPA report, most of the environment's day-to-day processes can be categorized as rude and inconsiderate, in particular its selfish overreliance on "absolutely, perfectly clean soil" for sustainable growth, and its continual inability to act in good faith and adapt to rising carbon dioxide levels.

Nature's "big thank-you" for mankind attempting to reduce CO2 emissions through cap-and-trade programs.

The EPA also accused the environment of creating more work for the overburdened agency by stubbornly refusing to break down and absorb plastic and other synthetic materials, and producing rare species that can only survive in very specific, excessively fragile ecosystems.

"We're putting in a lot of effort here with recycling and hybrid cars, so a little reciprocity from the environment would be appreciated," Jackson said. "God forbid the oceans replenish their own fish. And would it really be so much trouble for the earth's collective biospheres to pitch in and come up with a clean fuel alternative for use in our homes and vehicles? It's the environment's glaciers we're busting our asses trying to save, after all."

Continued Jackson, "The environment needs to realize that mankind may not always be around to clean up its messes."

Based on recent projections pointing to a high rate of extreme weather and accelerated climate change, EPA scientists have concluded that the least the environment could do is cut back on natural disasters, and perhaps try to grow some crops to help save the 1 billion people who go starving every day.

A nice new waterfall here and there reportedly wouldn't hurt either, officials said.

"I think everybody is getting a little fed-up with the hurricanes, earthquakes, and tsunamis," EPA engineer Thomas Bergman said. "Not to mention UV rays and acid rain. And, not to be petty, but shark attacks? Mankind doesn't have enough on its plate already without having to worry about getting eaten alive by killer sharks? I'm sorry, but that is just unacceptable."

Added Bergman, "The environment may be in peril, but it has no right to treat us like animals."

In an impassioned final warning, Administrator Jackson announced that if the environment did not start helping to stave off global catastrophe soon, it could face "serious repercussions" from humanity in the coming years, including massive Styrofoam-cup usage, oil spills, and exponentially higher emission rates.

"It becomes very frustrating when you give, and you give, and you give, and you get *nothing* in return," said Jackson, holding back tears. "And after you've exhausted yourself from all that giving, you leave work and have two measly hours of sunlight before it gets dark or starts pouring down rain on you out of nowhere. It's like the environment doesn't even care. And what's with the leaves everywhere? Every fall, with the goddamn leaves! What are we, your servants? We're supposed to pick up after you? Jesus, if I find one more leaf or fallen branch clogging up my gutters, I swear to God, I'm going to snap."

"Stupid environment," Jackson added. "Sometimes I wish it would just go away."

Industry Groups Seek Exemptions From EPA 'Tailoring' GHG Permit Rule (*Inside EPA*)

Industry groups are meeting with EPA and the White House Office of Management & Budget (OMB) to seek exemptions from EPA's pending "tailoring" rule, which will determine the industrial facilities that must include greenhouse gas (GHG) controls in their air act permits beginning in 2011.

On April 20, OMB began its pre-publication review of the final rule, and the meetings represent a final push by industry to win changes to the rule before it is issued. In the proposed rule, EPA said it planned to ease the Clean Air Act permit threshold from 100 or 250 tons per year (tpy) of emissions to 25,000 tpy for GHGs. Since the proposal, EPA Administrator Lisa Jackson has announced that the agency would phase in the requirements by first requiring limits for facilities that already need permits for non-GHG pollutants and facilities that emit at least 75,000 tpy of GHGs.

However, industry is now pushing the agency to further soften the rule. For example, the American Forest & Paper Association (AF&PA) met April 26 with OMB and EPA to urge them to exempt biomass combustion carbon dioxide (CO2) emissions from GHG permit threshold calculations, regardless of a facility's total emissions. The group also says biofuels should be deemed clean fuels and exempt from best available control technology permit limits for GHGs.

AF&PA argues in a presentation from the meeting that CO2 emissions from biomass combustion are offset by the CO2 that vegetation and plants absorb before becoming fuel, making the emissions carbon neutral.

The group argues that a number of domestic and international climate efforts already recognize the carbon neutrality of biomass, including EPA's renewable fuel standard rule and GHG registry, the Waxman-Markey climate bill, the United Nations Intergovernmental Panel on Climate Change and the European Union Emission Trading System. *Relevant documents are available on InsideEPA.com.*

The American Chemistry Council (ACC) in an April 23 meeting about the rule raised concerns the group outlined in its December comments on the proposed tailoring rule.

The comments, which were also signed by a number of other industry groups, argue that EPA should only require GHG permit limits for facilities that would otherwise need permits for non-GHG pollutants, an approach the groups say could allow the agency to avoid using questionable legal doctrines to raise the permitting threshold.

EPA's justification for raising the permitting threshold is based upon legal doctrines that state permitting workload under the current 100/250 tpy threshold would lead to excessive administrative burden and absurd results. However, the ACC comments argue "EPA can only rely on the administrative necessity rationale so long as it is strictly necessary to avoid absurd consequences that result from 'the literal application of a

statute.' That is not the case here, since the absurd consequences flow, not from a literal interpretation of the Act, but from EPA's flawed interpretation of it."

May 13, 2010

Less Toxic Dispersants Lose Out in BP Oil Spill Cleanup (*New York Times*)

By PAUL QUINLAN of Greenwire

BP PLC continues to stockpile and deploy oil-dispersing chemicals manufactured by a company with which it shares close ties, even though other U.S. EPA-approved alternatives have been shown to be far less toxic and, in some cases, nearly twice as effective.

After the Deepwater Horizon rig exploded and a deepwater well began gushing crude in the Gulf of Mexico three weeks ago, BP quickly marshaled a third of the world's available supply of dispersants, chemicals that break surface oil slicks into microscopic droplets that can sink into the sea.

But the benefits of keeping some oil out of beaches and wetlands carry uncertain costs. Scientists warn that the dispersed oil, as well as the dispersants themselves, might cause long-term harm to marine life.

So far, BP has told federal agencies that it has applied more than 400,000 gallons of a dispersant sold under the trade name Corexit and manufactured by Nalco Co., a company that was once part of Exxon Mobil Corp. and whose current leadership includes executives at both BP and Exxon. And another 805,000 gallons of Corexit are on order, the company said, with the possibility that hundreds of thousands of more gallons may be needed if the well continues spewing oil for weeks or months.

But according to EPA data, Corexit ranks far above dispersants made by competitors in toxicity and far below them in effectiveness in handling southern Louisiana crude.

Of 18 dispersants whose use EPA has approved, 12 were found to be more effective on southern Louisiana crude than Corexit, EPA data show. Two of the 12 were found to be 100 percent effective on Gulf of Mexico crude, while the two Corexit products rated 56 percent and 63 percent effective, respectively. The toxicity of the 12 was shown to be either comparable to the Corexit line or, in some cases, 10 or 20 times less, according to EPA.

EPA has not taken a stance on whether one dispersant should be used over another, leaving that up to BP. All the company is required to do is to choose an EPA-approved chemical, EPA Administrator Lisa Jackson told reporters yesterday during a conference

call aimed at addressing questions about dispersants being used in efforts to contain the Gulf spill.

"Our regular responsibilities say, if it's on the list and they want to use it, then they are preauthorized to do so," Jackson said.

One explanation for BP's reliance on Nalco's Corexit, which its competitors say dominates the niche market for dispersants because of its industry ties, was its availability in large quantities at the time of the Gulf spill.

"Obviously, logistics and stockpiles and the ability for the responsible party to pull the materials together," Jackson said. "I'm sure that has a lot to do with the ones that they choose."

Nonetheless, experts question BP's sustained commitment to Corexit, given apparently superior alternatives.

"Why wouldn't you go for the lesser toxic formulation?" said Carys Mitchelmore, an assistant professor of environmental chemistry and toxicology at the University of Maryland's Center for Environmental Science. Mitchelmore testified on Capitol Hill this week about dispersants and co-authored a 2005 National Academy of Sciences report on the chemicals.

BP spokesman Jon Pack defended the use of Corexit, which he said was decided in consultation with EPA. He called Corexit "pretty effective" and said the product had been "rigorously tested."

"I'm not sure about the others," Pack said. "This has been used by a number of major companies as an effective, low-toxicity dispersant."

BP is not considering or testing other dispersants because the company's attention is focused on plugging the leak and otherwise containing the spill, Pack said.

"That has to be our primary focus right now," he said.

Nalco spokesman Charlie Pajor said the decision on what to use was out of his company's hands. He also declined to comment on EPA comparison tests, saying only that lab conditions cannot necessarily replicate those in the field. "The decision about what's used is made by others -- not by us," he said.

Nalco's connections

Critics say Nalco, a joint partnership with Exxon Chemical that was spun off in the 1990s, boasts oil-industry insiders on its board of directors and among its executives, including an 11-year board member at BP and a top Exxon executive who spent 43 years with the oil giant.

"It's a chemical that the oil industry makes to sell to itself, basically," said Richard Charter, a senior policy adviser for Defenders of Wildlife.

The older of the two Corexit products that BP has used in the Gulf spill, Corexit 9527, was also sprayed in 1989 on the 11-million-gallon slick created by the *Exxon Valdez* grounding in Alaska's Prince William Sound.

Cleanup workers suffered health problems afterward, including blood in their urine and assorted kidney and liver disorders. Some health problems were blamed on the chemical 2-butoxyethanol, an ingredient discontinued in the latest version of Corexit, Corexit 9500, whose production Nalco officials say has been ramped up in response to the Gulf of Mexico disaster.

Among Corexit's competitors, a product called Dispersit far outpaced Corexit 9500, EPA test results show, rating nearly twice as effective and between half and a third as toxic, based on two tests performed on fish and shrimp.

Bruce Gebhardt, president of the company that manufactures Dispersit, U.S. Polychemical Corp., said BP asked for samples of his company's product two weeks ago. Later, he said, BP officials told him that EPA had wanted to ensure they had "crossed all their T's and dotted all their I's" before moving forward.

Gebhardt says he could make 60,000 gallons a day of Dispersit to meet the needs of spill-containment efforts. Dispersit was formulated to outperform Corexit and got EPA approval 10 years ago, he said, but the dispersant has failed to grab market share from its larger rival.

"When we came out with a safer product, we thought people would jump on board," he said. "That's not the case. We were never able to move anyone of any size off the Corexit product."

He added, "We're just up against a giant."

May 13, 2010

EPA Cleanup Tactic to Face GE Challenge in D.C. Circuit (*New York Times*)

By GABRIEL NELSON of Greenwire
Attorneys for General Electric Co. and U.S. EPA will debate the constitutionality in federal appeals court next week of a legal weapon often used by the agency to force the cleanup of the nation's most contaminated sites.

The case, *General Electric Co. v. Jackson*, focuses on "unilateral administrative orders," a privilege given to EPA by the Comprehensive Environmental Response, Compensation and Liability Act, more commonly known as Superfund.

Experts say EPA's ability to issue unilateral orders is the Superfund statute's heavy artillery, a deterrent allowing officials to reach settlements with companies that might otherwise resist moving forward with cleanup. If a company balks at the order, the agency can levy penalties or treble damages -- in which case the agency remediates the toxic site itself and bills the company for three times the cost.

Companies such as GE feel that the agency has used the authority as a negotiating tool, threatening to issue orders even when their sites do not pose an imminent threat to public health or the environment, said Barry Hartman, a former Justice Department attorney now working as an environmental litigator at K&L Gates in Washington, D.C.

"Their original purpose was that if there's a dangerous situation, you want to be able to clean it up and fight about the money later," Hartman said. "It's devolved into EPA using them in a way where you could argue if this is what Congress really intended."

Justice Department attorneys are representing EPA Administrator Lisa Jackson, the defendant in the case.

More than 1,700 unilateral orders have been issued since the Superfund statute became law in 1980, according to court documents, and GE -- which is responsible for about 75 Superfund sites -- has been a frequent target. The company filed suit to challenge the orders in 2000, claiming that they violate the constitutional right to due process by forcing companies to incur expenses without being able to make their case in court.

U.S. District Judge John Bates ruled in favor of the agency last year, rejecting what he described as a "broad constitutional attack on a significant federal environmental program" and saying that "courts approach due process claims with scalpels, not cleavers."

The company appealed. Oral arguments in the case are scheduled to take place Tuesday before a three-judge panel of the U.S. Court of Appeals for the District of Columbia, the nation's second-highest federal court.

Superfund cleanups could "slow to a crawl" if EPA could no longer rely on the administrative orders, said Rena Steinzor, an environmental law professor at the University of Maryland and the president of the Center for Progressive Reform. Because the Superfund tax on polluters has not been renewed by Congress and the program's namesake fund ran dry in 2003, the agency has lacked the money to take a "shovels first, lawyers later" approach, she said.

"If this case gets lost, it would be much harder for EPA to persuade companies to voluntarily come in and do the cleanup," Steinzor said.

Hitting companies in the wallet

It costs $4.4 million on average to comply with a unilateral order, according to a study commissioned by GE. Between 1982 and 2006, the orders resulted in a total of $5.5 billion in costs for companies held responsible for Superfund sites.

If companies refuse to comply and are found to have lacked "sufficient cause," they can face fines of up to $32,500 per day -- a level of punishment that effectively eliminates the choice to fight the orders, GE has argued.

In his 2009 **ruling** (pdf), Bates said companies hit with the orders were not being coerced because they could still refuse to comply and face the risk of harsher penalties. Though a unilateral order could damage stock value, brand value or a company's ability to obtain financing, Bates concluded that these possibilities did not provide the underpinning for a due process claim.

"Although GE has presented evidence of isolated errors by EPA, such infrequent errors ... do not warrant the sweeping changes GE requests," Bates wrote. "To the extent that GE continues to believe that EPA generally overuses or abuses [the orders], thereby overstepping its mandate, any broader remedy should be sought from Congress, not the courts."

Attorneys for EPA have contended that companies have opportunities to contest the orders and that requiring evidentiary hearings before every order would be costly and time-consuming for the agency.

"If EPA wants to compel the cleanup the order calls for, it has to file a civil action in federal court to enforce the order," the agency argued, so a company cannot be deprived of property "without getting a chance to defend itself in court."

Environmental groups including Riverkeeper and the Natural Resources Defense Council filed briefs on behalf of the agency, describing GE's ongoing cleanup of polychlorinated biphenyls from the Hudson River as a "concrete illustration of the interests at stake."

Martha Judy, a Superfund expert at Vermont Law School, said a ruling in favor of GE probably would not slow down cleanups as much as claimed by some environmental groups. The agency could instead take its orders to court as civil actions, though that would create new bureaucratic hurdles and add to agency enforcement costs.

"They require less process, so EPA generally prefers to use them," Judy said of the administrative orders. If the court were to rule against the agency, she said, "I'm not sure they would lose much more than the convenience."

The U.S. Chamber of Commerce and National Association of Manufacturers filed briefs supporting GE's position, arguing that expediency is no reason to violate companies' constitutional rights.

"The value of a pre-deprivation hearing before a neutral decisionmaker is not something that must be factually proven in a due process case. Instead, the judgment concerning the value of such hearings was made long ago by the Framers who enshrined the due process guarantee of notice ... into the Fifth Amendment," the chamber argues in its brief. "The very fact that the district court expected GE to justify the value of a pre-deprivation hearing as a factual matter confirms that the court lost sight of basic due process principles."

May 13, 2010

EPA Issues Final 'Tailoring' Rule for Greenhouse Gas Emissions (*New York Times*)

By ROBIN BRAVENDER of Greenwire

U.S. EPA today issued its final "tailoring" rule for greenhouse gas emissions, a contentious policy aimed at shielding small polluters from rigid Clean Air Act permitting requirements.

EPA's rule "tailors" permitting programs to limit the number of facilities that would be required to obtain New Source Review and Title V operating permits based on their greenhouse gas emissions. EPA said the threshold would cover power plants, refineries and other large industrial plants while exempting smaller sources like farms, restaurants, schools and other facilities.

Beginning next January, facilities that must already obtain New Source Review permits for other pollutants will be required to include greenhouse gases in their permits if they increase their emissions of the gases by at least 75,000 tons of carbon dioxide equivalent per year.

On July 1, 2011, EPA will extend the requirements to new construction projects that emit at least 100,000 tons of greenhouse gases and existing facilities that increase their emissions by at least 75,000 tons per year, even if they do not exceed thresholds for other pollutants. Sources that emit at least 100,000 tons of greenhouse gases per year will also be required to account for greenhouse gas emissions in their Title V operating permits starting next July.

Between July 1, 2011, and June 30, 2013, EPA estimates about 550 sources will need to obtain operating permits for the first time due to their greenhouse gas emissions.

Most of those sources will likely be solid waste landfills and industrial manufacturers, according to EPA. About 900 new facilities and modifications per year will trigger New Source Review permitting requirements based on greenhouse gas emissions.

New and upgraded facilities that are subject to the requirements will be required to install the "best available control technology" to control their greenhouse gas emissions. EPA is preparing to issue guidance for industries about how it will define that standard.

The Clean Air Act's current thresholds for regulating "conventional pollutants" like lead, sulfur dioxide and nitrogen dioxide are 100 or 250 tons a year. But while those thresholds are appropriate for those pollutants, EPA says, they are not feasible for greenhouse gases, which are emitted in much larger quantities.

Without the tailoring rule, EPA air chief Gina McCarthy said today, about 6 million facilities could need permits when EPA's greenhouse gas standards for automobiles kick in next January, making greenhouse gases officially "subject to regulation" under the Clean Air Act. "We did not want that fact lingering out there for long," she said.

EPA will complete another rulemaking by July 1, 2012, taking comment on phasing in additional sources and whether certain small sources can be permanently excluded from permitting requirements. Such a rulemaking would not require permitting for sources that emit less than 50,000 tons of greenhouse gases annually, EPA said.

No sources that emit less than 50,000 tons per year will be subject to permitting requirements until at least April 30, 2016, according to the rule.

"After extensive study, debate and hundreds of thousands of public comments, EPA has set common-sense thresholds for greenhouse gases that will spark clean technology innovation and protect small businesses and farms," EPA Administrator Lisa Jackson said in a statement.

"There is no denying our responsibility to protect the planet for our children and grandchildren. It's long past time we unleashed our American ingenuity and started building the efficient, prosperous clean energy economy of the future."

EPA said the rule will encompass facilities that are responsible for 70 percent of the greenhouse gases from stationary sources.

Thresholds raised from proposal

EPA's initial thresholds have been increased substantially from the limits laid out in the agency's **proposal** **(pdf)** last September, which sought to require permits from facilities that release more than 25,000 tons of carbon dioxide equivalent annually (*E&ENews PM*, Sept. 30, 2009).

Under the proposal, EPA estimated that 14,000 large industrial sources would need to obtain greenhouse gas permits, and about 3,000 of those sources would be newly subject to Clean Air Act operating permit requirements.

Jackson signaled earlier this year that EPA was planning to "substantially" raise the thresholds from its proposed rule to exempt more facilities from permitting requirements, in part because state regulators had argued that the rule would impose significant administrative burdens and could create regulatory backlogs (*E&ENews PM*, March 3).

McCarthy said today agency officials realized the 25,000-ton limit was going to reach sources it did not intend to cover, including large apartment buildings and other commercial sources "that clearly were not appropriate at this point to even consider regulating."

Environmentalists today were quick to offer support for the tailoring rule.

"It's clear that EPA is trying to fine-tune it and make sure that the permit requirements are truly limited to the biggest sources," said Clean Air Watch President Frank O'Donnell. "I think the EPA is trying to act very responsibly, and they're trying to say to the Congress and the public, 'We're not the green monsters you think we are.'"

But despite EPA's decision to raise the thresholds from the proposal, industry representatives maintained their position that the Clean Air Act is an inappropriate vehicle for regulating greenhouse gas emissions and that the rule is based on shaky legal ground.

"The Clean Air Act is not designed to regulate greenhouse gas emissions, and this tailoring rule doesn't fix the problems with the Clean Air Act doing it," said Howard Feldman, director of regulatory and scientific affairs at the American Petroleum Institute.

Feldman and others fear that EPA's rule could be overturned in court because it seeks to alter limits that were laid out plainly by Congress.

McCarthy said today that while she expects challenges to all of EPA's rulemakings, "We think that this phased approach is not only legally correct but it's the best way that we can achieve the intent of Congress when they passed the Clean Air Act."

EPA finalizing emissions rule that would lessen impact on small businesses (*Washington Post*)

May 14, 2010 Friday
Suburban Edition
SECTION: A-SECTION; Pg. A05
DISTRIBUTION: Maryland

EPA finalizing emissions rule that would lessen impact on small businesses
By: Juliet Eilperin
The Environmental Protection Agency announced Thursday that it is finalizing a rule aimed at curbing greenhouse gas emissions from the largest emitters in the United States, a proposal that would soften the regulation's impact on small businesses but is sure to face a court challenge.

The decision is significant because it shows the Obama administration's determination to move ahead with regulating carbon dioxide under the Clean Air Act, even as the prospects of enacting climate legislation this year appear uncertain.

The new rule would cover 67 percent of the greenhouse gas emissions from stationary sources such as power plants and oil refineries, the EPA estimates, and in its first year would translate into 900 permits for both new sources and modifications to existing sources of global warming pollution. Those emitters would have to prove they are using the best technology to minimize their greenhouse gas output.

Under the Clean Air Act, facilities emitting 100 to 250 tons of a pollutant each year must apply for a federal permit. But since that would encompass emitters as small as a restaurant or a large apartment building, the new rules would initially raise the threshold to 100,000 tons of carbon dioxide equivalent for any new facility. Facilities undergoing modification that would increase emissions by 75,000 tons would also need a permit.

"After extensive study, debate and hundreds of thousands of public comments, EPA has set common-sense thresholds for greenhouse gases that will spark clean technology innovation and protect small businesses and farms," said EPA Administrator Lisa P. Jackson.

In addition to carbon dioxide, emissions of methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons and sulfur hexafluoride would count toward a facility's greenhouse gas emissions.

Frank O'Donnell of the advocacy group Clean Air Watch said the announcement's timing "does raise one eyebrow: Surely this isn't designed to nudge some EPA-hating senators to embrace the Senate legislation?"

Sens. John F. Kerry (D-Mass.) and Joseph I. Lieberman (I-Conn.) unveiled their compromise climate and energy bill Wednesday, saying colleagues should consider backing legislation rather than allowing the EPA to regulate emissions.

EDITORIAL / OP-ED / COMMENTARY / LETTERS
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While the Senate Fiddles (*New York Times*)

May 14, 2010 Friday
Late Edition - Final
Section A; Column 0; Editorial Desk; EDITORIAL; Pg. 26
You don't have to look far for proof that this country must cut its dependence on fossil fuels and develop cleaner sources of energy.

It can be found in the oil-slicked Gulf of Mexico. It can be found in China's aggressive efforts to win the global competition for green technologies and green jobs. And, most urgently, it can be found in the inexorable math of accumulating greenhouse gas emissions.

And where is the Senate? After a year of talking, utterly nowhere. Paralyzed by partisanship, hobbled by indifferent leadership, it is unable to muster a majority (much less a filibuster-proof 60 votes) for even a modest energy and climate bill.

Senators John Kerry and Joseph Lieberman presented a good but far from perfect bill on Wednesday that would at least point the country in the right direction. For the first time, it would set a price on carbon emissions that are now dumped without penalty into the atmosphere. A price signal is an essential prerequisite for reducing emissions and for shifting American industry to cleaner, less polluting sources of energy.

The measure would also invest widely in low-carbon technologies, renewable fuels, more efficient vehicles and mass transit.

The two senators (originally three, until Lindsey Graham jumped ship) have worked hard to fashion a worthy companion to a similar measure passed by the House in June of last year. They deserve thanks. Yet the bill has no chance unless President Obama steps up.

Mr. Obama pledged to "engage" with the Senate to pass a comprehensive energy and climate bill "this year." This was one of those ticket-punching statements that isn't going to change any minds. What he should have said is that he is going to hammer on the Senate until it does what this country needs.

Mr. Kerry and Mr. Lieberman doled out all sorts of rewards to various industries to bring them aboard, and the bill has been endorsed by several big power producers, including Duke Energy. But Republicans remain unanimously opposed and Democrats from industrial states are not enthusiastic.

Getting the Senate to act is not just a matter of leadership for Mr. Obama. It is also a matter of honor and sound science. At the Copenhagen climate conference in December, the president -- who did much to rescue that meeting from failure -- committed this country to a 17 percent reduction in greenhouse gas emissions by 2020.

That is the target in the Senate bill and the bare minimum that scientists believe is necessary to get the United States on track toward reducing its emissions by 80 percent by midcentury -- which it must do to help the world avoid the worst impacts of a warming planet.

Despite industry pressure, the bill preserves much of the Environmental Protection Agency's regulatory authority to reduce emissions from power plants. And on Thursday, the agency issued a rule saying that it planned to address only the biggest emitters. But while the E.P.A.'s authority is important, Congress must still act. A broad market-based scheme would be much more effective than a patchwork of regulations.

The United States is the world's second-largest emitter of greenhouse gases after China. Until America moves seriously to control emissions, the big developing countries will not do so. As Mr. Obama knows well, all senators like to imagine themselves as world leaders. Well, here's his chance, and their chance, to lead.

Our View: Unified effort may save bay (Salisbury Daily Times)

EPA strategy may succeed where the states have failed
May 13, 2010
The federal Environmental Protection Agency released its latest strategy to restore the health of
the Chesapeake Bay and watershed on Wednesday. On Tuesday the Chesapeake Bay Foundation
announced it had settled its lawsuit with the EPA. EPA Director Lisa Jackson acknowledged the impact of waterways on the communities and economies that rely on them and said the new strategy would hold everyone to higher levels of accountability.

The piece that has been missing in previous strategies has been the effects of urban and
suburban development on waterways; such plans in the past have heavily focused on agriculture and on fisheries management. While farming, poultry, and both commercial and recreational fishing will still be regulated, better control of such factors as wastewater and sewage management, lawn chemicals, fertilizers and other runoff from residential and commercial development is needed.

It has been well-established that the primary causes of the bay's problems are nitrogen and phosphorus that support algae blooms that cause oxygen-starved "dead zones" in the bay and sediment that kills underwater grasses. A healthy bay requires restoration of underwater habitat to support healthy fisheries; it requires a decrease in nutrient pollution and less sediment and runoff from impervious surfaces.

The good news is that the federal government will be in charge, placing efforts by seven states in the Chesapeake Bay watershed under a single umbrella. Since previous uncoordinated efforts have not been effective, but placing a single entity in charge may

have a better chance of success.

Perhaps these efforts failed because the connections are not obvious: If you live along the shores of the bay itself, it's easy to see how your activities might affect it, but it's less compelling elsewhere. Nonetheless, within the watershed area, whatever goes into the ground (rainwater, chemicals, septic

Posted on Thu, May. 13, 2010
Commentary

Gulf catastrophe should push us beyond petroleum (*Philadelphia Inquirer*)

By Daphne Wysham

A golden opportunity is bubbling up beneath that undersea volcano of oil spewing thousands of gallons per day into the Gulf of Mexico. We have a chance to truly move our country, as BP says in its ad campaigns, "beyond petroleum."

Despite the spill's devastation, President Obama continues to claim that we must push forward with more offshore drilling - albeit with stronger safeguards - if we want to increase our energy security. I disagree.

We wouldn't ever be secure, even if we drilled every well off our nation's coasts. It's clear that offshore drilling will never replace what we get from overseas. We must use less oil, regardless of its source.

Let's use the Deepwater Horizon disaster as an impetus to really shoot for a target of being oil-free by 2030. And, while we're at it, we might as well go coal-free, if we want to avoid the deadly coal mining disasters, ash slurry breaches, and destroyed ecosystems we're seeing in Appalachia.

Impossible? Not by a long shot.

Consider this: Consumers will soon be able to buy affordable electric cars. The vehicles will cost about $30,000, according to General Motors, maker of the Chevrolet Volt. For these cars to be truly clean, their electricity must be clean, too.

Energy efficiency is the best first step to take toward clean energy. And first in line to ramp up our energy efficiency is a smart grid. Energy Secretary Steven Chu claims that it will cost more than $100 billion to modernize and "smarten" the grid.

Prohibitive? Only if you consider the costs of not doing so soon.

A comprehensive report for the British government, known as the Stern Review, produced a price tag. It determined that 1 percent of gross domestic product per year - which would amount to $140 billion for the United States - must be invested in a transition to clean energy to avoid the worst effects of climate change. Failing to make this investment could risk costing us up to 20 percent of our global economy - a potential $2.8 trillion loss.

Building a smart grid and making other energy-efficiency investments could be a down payment on a global shift. According to a United Nations report, this could make renewable energy affordable for everyone on the planet in only 10 years.

The United Nations estimates that an investment of $100 billion per year by all of the world's countries over the course of a decade - about as much as we've spent on the wars in Iraq and Afghanistan since 2001 - would drive down the price of renewable energy alternatives. That would make them affordable for everyone.

On the state and local levels, renewable energy could create local jobs. The Institute for Local Self-Reliance has shown that 31 states could meet their energy needs with homegrown renewable resources. And the Institute for Energy and Environmental Research has mapped out a strategy for a carbon-free, nuclear-free United States by 2050.

What would the average American driver save if the whole nation were to shift gears and switch to electric vehicles powered by renewable energy distributed on a smart grid? Not a huge amount - about $2,000 or so per year at current oil prices. But it adds up: With 200 million drivers in the United States, we would save $400 billion per year. That's $400 billion that could help us end our reliance on fossil fuels, foreign and domestic.

In addition to the financial return, we'd see no more spills in the Gulf of Mexico; no more oil-laden turtles washing up on our shores; pristine beaches from Alaska to Florida for our children and grandchildren to sink their toes into; fewer cancer-causing toxins poisoning our environment; less asthma; no more wars over oil; a future of greater climate stability.

And maybe, just maybe, an energy company that really is moving "beyond petroleum." Now there's energy security I could wrap my head, my heart, and my wallet around.

Daphne Wysham is a fellow at the Institute for Policy Studies and the host of Earthbeat Radio. For more information, see www.ips-dc.org.

AIR

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EPA working to limit emissions (*Los Angeles Times*)

May 14, 2010 Friday
Home Edition
SECTION: MAIN NEWS; National Desk; Part A; Pg. 16
NATIONAL BRIEFING;
WASHINGTON, D.C.;
EPA working to limit emissions
By: Times Wire Reports
The Environmental Protection Agency is moving to control the U.S. power plant, factory and oil refinery emissions blamed for **global warming.**

The EPA said it would require large polluters to reduce six greenhouse gases by installing better technology and improving energy efficiency.

The step would have to be taken when a facility is built or significantly modified. The rule, to take effect in July 2011, applies to any industrial plant that emits at least 75,000 tons of greenhouse gases a year.

The **EPA** said the rule would cover sources that are responsible for 70% of such emissions in the U.S.

May 13, 2010

The E.P.A. Announces a New Rule on Polluters (*New York Times*)

By SINDYA N. BHANOO
The Environmental Protection Agency unveiled a final rule on Thursday for regulating major emitters of greenhouse gases, like coal-fired power plants, under the Clean Air Act.

Starting in July 2011, new sources of at least 100,000 tons of greenhouse gases a year and any existing plants that increase emissions by 75,000 tons will have to seek permits, the agency said.

In the first two years, the E.P.A. expects the rule to affect about 15,550 sources, including coal-fired plants, refineries, cement manufacturers, solid waste landfills and other large polluters, said Gina McCarthy, the agency's assistant administrator.

She said the rule would apply to sites accounting for about 70 percent of the nation's greenhouse gas emissions. "We think this is smart rule-making, and we think it's good government," she said.

Last fall the E.P.A. had indicated that the bar would be set at 25,000 tons a year, which would have imposed the permit requirement on smaller entities like family farms and large apartment buildings. “What we realized at the 25,000 level was that we were going to be actually reaching sources that we did not intend to reach,” Ms. McCarthy said.

The announcement came a day after a climate and energy bill was introduced in the Senate, one that would effectively shift regulatory power over greenhouse gases to Congress from the E.P.A.

Last year the agency issued a finding that carbon dioxide and other climate-altering gases posed a threat to human health and welfare. Under the Clean Air Act, that gave it the authority to issue regulatory measures like the one announced Thursday.

The Obama administration made clear last year that the finding was intended to goad Congress into superseding the agency and adopting emissions limits of its own. The E.P.A.’s regulatory move faces stiff opposition from industry groups.

Senator John Kerry, a Massachusetts Democrat and one of the two sponsors of the climate bill, seized on Thursday’s announcement to argue for the urgency of passing it. “Today we went from ‘wake-up call’ to ‘last call,’ ” he warned in a statement.

In another move, Senator Lisa Murkowski, Republican of Alaska, introduced a resolution in January that would strip the E.P.A. of its power to regulate greenhouse gas emissions.

She argued that allowing the agency to regulate emissions could devastate the American economy. A spokesman for Ms. Murkowski, Robert Dillon, said on Thursday: “The E.P.A. has made very clear that while they might start at the 75,000, they plan to ratchet that down in ensuing years to catch even the smallest emitters. It doesn’t matter how fast you boil a lobster — it’s still cooked.”

But environmental groups praised the new rule as a smart move that conveys to Congress that the agency’s goal is to regulate large emitters rather than serve as a vengeful force that financially burdens small businesses.

“It’s clear evidence that the E.P.A. is saying, ‘We are no rogue agency,’ ” said Frank O’Donnell, president of the advocacy group Clean Air Watch. “They are saying, ‘We’re only going to be looking at the very biggest polluters.’ ”

Next year the E.P.A. is to begin another rule-making process to phase in more permits and determine whether some smaller sources of emissions can permanently be excluded from the process.

May 13, 2010

Senate Climate Bill Would Create 'Task Force' to Assess Power Plant Rules (*New York Times*)

By ROBIN BRAVENDER of ClimateWire
A little-noticed provision within the Senate climate bill unveiled yesterday would create a "task force" to explore how federal and state environmental programs would affect the ability of coal-fired power plants to lower their greenhouse gas emissions.
The details of the task force -- laid out in the 987-page climate bill (pdf) unveiled yesterday by Sens. John Kerry (D-Mass.) and Joe Lieberman (I-Conn.) -- caused alarm among some environmental and public health advocates, who warned that the language could lead to exemptions from federal air pollution programs. Kerry and industry representatives, meanwhile, said the panel would merely bring attention to overlapping power plant rules.

The task force would be composed of representatives from U.S. EPA, the Energy Department, the Treasury Department, state public utility commissions and other relevant agencies, as well as the electricity-generating sector and nongovernmental organizations.

The coalition would conduct a study of how existing federal and state environmental laws will affect the transition of the coal-fired power fleet to lower-emitting plants or on the retirement of existing plants. The panel would also assess how federal rules under development would affect power plant emissions and the transition of coal-fired plants to cleaner generation, among other things.

Within a year of the enactment of the bill, the task force would be required to submit the results of its study to Congress. After that, agency chiefs would be required to publish a response, including any proposed changes to regulations or guidance to implement the recommendations.

Environmental and public health advocates yesterday argued that the task force would allow the electric power industry to lobby for a wish list of changes to federal rules that they can argue impede their ability to switch to cleaner fuels.

"It would trade off more pollution today for the idea that some point in the future these plants would go away," said Clean Air Watch President Frank O'Donnell. This provision, he added, "is clearly right from the word processors of the electric power industry."

Paul Billings, vice president of national policy and advocacy at the American Lung Association, said he reads the provision as "a multi-pronged attack on the cleanup of power plants so controls like [New Source Review, Maximum Achievable Control Technology], even the Clean Air Interstate Rule, which EPA is working on, could be waived or repealed through this process."

But Kerry said yesterday that the bill would not block Clean Air Act requirements outside of limitations on regulating greenhouse gases under certain provisions of the act.

"It really was just an effort to kind of make sure we're looking at this," Kerry said. "But there's nothing that allows anybody to get out of it. There's nothing that allows anybody to sidestep that."

Kerry said that the details of the task force are still being worked out. "That was a little something that got worked out between a couple of the environmental groups and the utilities," he said. "That's one of the things we've still got to kind of shape up a little bit."

Industry representatives, meanwhile, welcomed the prospect of studying overlapping regulations for greenhouse gases and conventional air pollutants.

"These provisions taken together will have some impact on the decisions that utilities make as they move forward with new plans to build or retrofit," said a source from the utility industry.

Jeff Holmstead, an attorney who represents electric utilities, said the task force "doesn't do anything except to maybe highlight an issue and make sure it gets attention."

"It doesn't do anything to give EPA authority that it doesn't already have to improve existing programs," added Holmstead, who served as EPA air chief during the George W. Bush administration.

MAY 13, 2010, 9:41 A.M. ET

EPA To Unveil Greenhouse Gas Regulations, Top-Emitters List (*Wall Street Journal*)

By Siobhan Hughes Of DOW JONES NEWSWIRES
WASHINGTON (Dow Jones)--The U.S. Environmental Protection Agency is set to unveil on Thursday greenhouse-gas regulations, a step that is expected to reveal which companies qualify as the large emitters first subject to the rules.

The EPA said in a statement it will hold a press briefing at 12 p.m. EDT on the regulations.

The agency says rising concentrations of carbon-dioxide and other gases in the atmosphere are changing the climate in ways that will lead to more extreme weather events, such as flood and drought.

-Siobhan Hughes, Dow Jones Newswires, 202-862-6654, siobhan.hughes@dowjones.com

UPDATE 1-US EPA issues rules on big carbon polluters (*Reuters*)

* EPA to regulate power plants, landfills, factories
* EPA action could push polluters to support climate bill
* Climate bill would prevent EPA from regulating (Adds details, background)

By Timothy Gardner and Ayesha Rascoe

WASHINGTON, May 13 (Reuters) - The U.S. Environmental Protection Agency ruled on Thursday that factories and power plants would be subject to greenhouse gas regulations, a major step that could push polluters and lawmakers to support the climate bill unveiled this week in the Senate.

The Obama administration has long said it would prefer that Congress pass a bill to cut U.S. greenhouse gas emissions but has used the threat of EPA regulation to push lawmakers in states heavily dependent on fossil fuels to support the climate bill.

Many power utilities and other companies have also wanted Congress to act, believing they would have a better bargaining position in the legislative process than in top down regulation by the EPA.

The climate bill unveiled by Senators John Kerry, a Democrat, and Joseph Lieberman, an independent, on Wednesday would stop automatic EPA regulations under existing clean air laws.

But the bill faces an uncertain future in the Senate because of a lack of a Republican sponsor. The legislation also worries coastal state Democrats eyeing the massive and unchecked oil spill in the Gulf of Mexico because it includes incentives for offshore drilling.

The EPA action could spark concern from industry and unions worried about jobs as the big companies would have to prove they are using the best green technology when undergoing major plant work.

"It's long past time we unleashed our American ingenuity and started building the efficient prosperous clean energy economy of the future," EPA Administrator Lisa Jackson said in a statement on Thursday.

Under this ruling, the EPA is effectively trimming the Clean Air Act, or "tailoring" it, so it only applies to the biggest emitters of gases blamed for warming the planet. Without the tailoring, small emitters like hospitals and schools would be regulated, which would load down the agency with paperwork.

The rules would subject power plants, factories and oil refineries that emit 75,000 tonnes of carbon dioxide equivalent to regulations beginning in January 2011. Regulated polluters would include big coal-fired power plants and heavy energy users such as cement, glass and steel makers.

Waste landfills and factories that are not already covered by the Clean Air Act that emit at least 100,000 tonnes of greenhouse gases a year would get a six month extension and would not be regulated until July 2011.

Under the rules polluters would at the least have to get permits showing they are using the best available technology to cut emissions when building new plants or modifying existing ones. They could also face a host of other emissions rules in coming years if the climate bill fails to pass.

The rules could hit big operators of coal-fired power plants. Companies such as Calpine Corp (CPN.N), Southern (SO.N), and Dynegy Inc (DYN.N) may benefit because because they have "peaker" plants that only run in times of high demand. (Additional reporting by Tom Doggett; Editing by Doina Chiacu)

EPA Pulls Fire Emissions Policy Over Interagency Agriculture Concerns (*Inside EPA*)

EPA has withdrawn its long-pending plan to strengthen a policy on protecting public health and air quality visibility during prescribed fires due to interagency concerns about how the policy addresses agricultural burning.

The draft policy revisions under review were to update the agency's 1998 interim policy designed to help states reduce emissions during planned forest fires, and seeks to add agricultural fires for the first time. It is unclear how the revisions addressed agricultural burning, though some states had pressed for strict guidelines.

The guidelines were also to address which types of fires qualify under EPA's "exceptional events" rule which allows states to discard pollution data based on certain uncontrollable natural events from counting toward compliance with EPA ambient air standards. Concerns from other agencies about the approach EPA took were sufficient to prompt the agency to withdraw the plan from White House review May 4.

EPA submitted the plan for review in early February, but an agency spokeswoman says it was withdrawn "to address concerns raised during the interagency review process," and says the delay will provide "an opportunity for EPA to have further, detailed discussions with federal, state, tribal and other stakeholders, as appropriate."

The spokeswoman declined to identify the agencies that had concerns or whether the concerns focused on agricultural burning, but sources outside the agency confirm that was the crux of the issue.

A member of the U.S. Department of Agriculture's (USDA's) Agricultural Air Quality Task Force says the group issued formal recommendations to EPA that agricultural burning be given broad exemptions in EPA's exceptional events rule. But it is unclear if those recommendations were forwarded by USDA to EPA, the source notes, and USDA could not be reached for comment.

EPA Weighs Regional, Sector-Specific Frameworks To Cut Black Carbon (*Inside EPA*)

EPA is weighing several possible regulatory frameworks for reducing short-lived climate "forcers" such as black carbon, ozone and methane, including pursuing emission cuts on a regional basis, or developing sector-specific plans that could set new rules to target sources of the climate forcers such as diesel engines and biomass burning.

EPA is seeking expert advice on approaches to reducing climate forcers -- greenhouse gases (GHGs) that stay in the atmosphere for only days or weeks but have significant impacts on global warming -- and that input could influence EPA's eventual regulatory options, which could include traditional Clean Air Act standards and emission limits.

An agency spokeswoman says many existing air programs targeting pollutants for non-climate reasons can also help reduce climate forcers, but says it is "premature" to speculate on new rules EPA could develop for the short-term GHGs.

Short-lived climate forcers have been the focus of several recent meetings, including an EPA-sponsored workshop in North Carolina March 3-4 and a Yale University meeting April 9-10 that EPA staff attended. Sen. Jeff Bingaman (D-NM), the chairman of the energy committee, also hosted an April 29 briefing on black carbon.

EPA is gathering information on the issue in preparation for a report to Congress on black carbon that is due April 2011. The report will assess the major sources of black carbon, the impact of black carbon on climate, potential metrics for quantifying the climate impacts of black carbon, the most cost-effective approaches to reduce black carbon, as well as the climatic, environmental and health benefit of those reductions, the EPA spokeswoman says.

Congress is already weighing language directing EPA to cut black carbon. Sens. John Kerry (D-MA) and Joe Lieberman (I-CT) introduced their highly anticipated climate bill May 12. Among other climate measures, the bill directs EPA to further study black carbon, use its authority to further reduce black carbon, and establish a voluntary grant program to reduce black carbon through diesel particulate filters. The bill also directs

the Secretary of Agriculture and other agency heads to provide grants for research and development of the use of biochar, which is a charcoal produced from combustion of biomass and which can be used to fertilize soil and sequester carbon.

Many of the agency's current air programs already have reduced ozone and black carbon, the spokeswoman says. For example, as part of its national ambient air quality standards program EPA has and will continue to qualitatively assess the climate impact of pollutants such as ozone, carbon monoxide and particulate matter, the spokeswoman says.

However, the spokeswoman notes, "It is premature to speculate about future agency actions that might follow after completion of this report [to Congress]."

Experts at both the EPA and Yale meetings made the case that policy-makers should approach short-lived climate forcers differently than long-lived GHGs, suggesting potential regional and sector-specific approaches rather than the agency's planned approach for long-term GHGs. For example, the agency is planning to start requiring in 2011 that major stationary sources of long-lived GHGs include limits on those emissions in their facility air permits.

And while EPA says it is premature to speculate on possible climate forcer regulations, presentations EPA staff gave at the meetings appear to show the agency is weighing the novel approaches outlined at the events.

Terry Keating of EPA's Office of Air & Radiation in a March 4 presentation at the North Carolina meeting summarized the debate about whether to pursue new metrics to tackle carbon forcers. "We don't have a single metric (objective) for dealing with air pollution, water pollution or even risks of toxic chemicals. Why should we for climate change?" the presentation says.

Location-specific impacts are an important consideration for black carbon, which has a greater impact in the arctic than in other regions because the dark particles land on snow and ice and accelerate melting. For example, Benjamin DeAngelo of the EPA's climate change division, in a presentation given at the Yale meeting, raised the idea of using "arctic warming potential" as one possible metric for cutting black carbon.

According to a presentation Ellen Baum, a senior scientist at the Clean Air Task Force, gave at the March 3 EPA meeting, emissions from ships in the arctic are particularly concerning. In January, the United States, Norway and Sweden requested that the United Nations marine environment protection committee examine measures to "significantly" reduce black carbon emissions from ships in the arctic, the presentation says.

Agricultural burning and controlled forest fires also have a regional impact, especially when it occurs at northern latitudes or near mountains with snow pack, according to a summary of the biomass issues discussed at the EPA meeting. Current fire policies aim

to reduce health and visibility impacts from fires, so more information is needed before determining the best methods for mitigating climate impacts from fires, the presentation says.

But policies that encourage other uses of agricultural biomass, like biofuels, and policies that manage the timing and location of burns could help cut relevant black carbon emissions, the summary says.

EPA and experts are also studying the source-specific nature of black carbon, because different sectors emit different amounts of climate-warming black carbon in relation to climate cooling pollutants like sulfates.

According to Keating's presentation, "mitigation measures change the mix of emissions of multiple pollutants simultaneously, with synergistic impacts on [short lived climate forcers]." In light of this fact, these emissions should be approached according to their total effect, rather than on a pollutant-by-pollutant basis, the presentation says.

Some sectors that emit climate forcers are diesel engines and woodstoves, which emit black carbon, and agricultural operations and oil and gas operations, which emit methane, according to presentations from the EPA meeting.

Experts at the black carbon briefing hosted by Bingaman said that diesel engines account for a large portion of U.S. black carbon emissions. According to a presentation given there by Tami Bond, a professor at the University of Illinois at Urbana-Champaign, on-road and off-road transportation accounts for at least 67 percent of U.S. black carbon emissions.

Although EPA has issued rules to cut down on particulate matter and other pollutants from new diesel engines, old diesel engines have a long life and can emit significant amounts of black carbon. The EPA spokeswoman says the agency has authority to require retrofits for on-highway engines when they are rebuilt, but notes that EPA does not currently have plans to issue such a mandate.

Another difference that EPA should consider in cutting short-lived climate forcers is the amount of time short-lived forcers stay in the atmosphere, experts say. For example, the 100-year timeframe that is commonly used for other GHGs may not be appropriate for short-lived forcers that stay in the atmosphere for days or years.

As a result, EPA is floating the idea of looking at different time metrics for different GHGs. For example, DeAngelo's Yale presentation raises the idea of looking at global warming potential over both short- and long-term time horizons, or measuring climate change by the rate of change or the long-term magnitude of the change.

In addition to EPA's report to Congress, there are also a slew of ongoing efforts on short-lived climate forcers that could influence the agency's approach to the pollutants. The Arctic Council Task Force on Short Lived Climate Forcers is also slated to issue a

report on black carbon in April, 2011. The United Nations Environment Program has a black carbon and ozone assessment due in February, 2011.

International research groups are also conducting a so-called bounding study that will assess what is known about the impact of black carbon, which is due out in June. The United Nations Convention on Long Range Transboundary Air Pollution task force on Hemispheric Transport of Air Pollution is meeting in June and the convention's black carbon expert group held its first meeting April 20-21. -- *Kate Winston*

Stationary Source Groups Sue EPA Over Final Vehicle Tailpipe GHG Rules (*Inside EPA*)

Several groups representing large stationary sources, including mining companies and other industries, have filed a petition for review in a key appellate court challenging EPA's just-issued final mobile source greenhouse gas (GHG) emission standards, which were published May 7 in the *Federal Register*.

The petition for review was filed May 7 in the U.S. Court of Appeals for the District of Columbia Circuit by attorneys for Holland & Hart LLP on behalf of the six petitioning groups, which include organizations that have already filed litigation challenging pending EPA GHG permitting requirements for industrial facilities.

The vehicle rule petitioners include the Coalition for Responsible Regulation, Inc.; Industrial Minerals Association-North America; National Cattlemen's Beef Association; Great Northern Project Development, L.P.; Rosebud Mining Co.; and Alpha Natural Resources, Inc. The Coalition for Responsible Regulation is already a plaintiff in a lawsuit filed earlier this year challenging EPA's endangerment finding for GHGs.

The groups all represent stationary sources of emissions such as factories and mining facilities, and do not represent vehicle manufacturers or other mobile source groups subject to the rule.

The lawsuit comes after automakers on April 6 asked several federal courts to dismiss their legal challenges to California's vehicle GHG rules as part of a deal they had worked out with the Obama administration to apply the state rules across the nation.

In the vehicle rule lawsuit, the industry groups are challenging EPA's "Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards" based on the expectation that the vehicle rules will trigger a slew of new EPA regulations to reduce GHGs from stationary sources.

EPA on April 1 finalized its joint rulemaking with the Department of Transportation governing vehicles produced in model years 2012-2016. The new rules establish by

2016 a national fuel economy standard of 35.5 miles per gallon, or 250 grams per mile of carbon dioxide. EPA says the rule will reduce GHGs between 2.2 and 6.2 percent.

Another coalition of stationary source groups filed a petition April 2 asking the D.C. Circuit Court to review EPA's recent plan to require regulators to set GHG limits for new facilities but to delay the permit requirements until Jan 2, 2011, the date that EPA's vehicle GHG rules go into effect.

Environmentalist Lawsuit Challenges EPA Decision To Delay CO2 Controls (*Inside EPA*)

Environmentalists are using an Environmental Appeals Board (EAB) suit over EPA-approved offshore drilling air permits to make an "applied challenge" to the Obama EPA's recent decision upholding a Bush-era policy memo that finds carbon dioxide (CO2) is not currently a regulated pollutant under the Clean Air Act.

The Center for Biological Diversity's (CBD) claims in the EAB suit, *In re: Shell Gulf of Mexico, Inc. and Shell Offshore Inc.*, that EPA must regulate CO2 under the air act and that agency Administrator Lisa Jackson erred by upholding the memo -- written by Bush EPA Administrator Stephen Johnson -- that rejected environmentalists' arguments that CO2 is "subject to regulation" and that air permits must include CO2 limits.

CBD argues that EPA has improperly given itself "a staggering degree of discretion" that the air act does not allow, a claim that could preview the group's arguments should it sue over Jackson's recent decision to uphold the Johnson memo. Industry groups have already filed a suit, *Coalition For Responsible Regulation, Inc., et al v. EPA*., in the U.S. Court of Appeals for the District of Columbia Circuit, over Jackson's policy, which says CO2 will be regulated at stationary sources as of Jan. 2, 2011.

A CBD source declined to comment on whether it plans a lawsuit over the memo reinterpretation, though other environmental groups are intervening on EPA's behalf to support Jackson's decision.

But in the EAB petition -- in which CBD challenges air permits issued for Shell drilling operations off the Alaskan coast -- the group outlines its strong opposition to Jackson's approach on CO2 regulation, saying EPA should have required Shell to install best available control technology (BACT) to reduce CO2 emissions.

EPA granted the permits for Shell to conduct oil exploration in the Chukchi Sea March 31 and the Beaufort permit April 9. EPA finalized the Johnson memo decision in between the issuance of the two permits April 2.

"EPA bases its decision not to require BACT for Shell's CO2 emissions on its current interpretation of the phrase 'subject to regulation'. . . . EPA's current interpretation of

this phrase was developed in the course of [the Johnson memo reconsideration]. Yet the reconsideration is just the latest in a series of changing positions EPA has taken on what 'subject to regulation' means. However, because that phrase is unambiguous and requires BACT to be applied to this pollutant, EPA has no discretion to give it different interpretations, choose among them, and delay regulation," the April 30 petition says.

It adds, "EPA has constructed a thicket of arbitrary preconditions to its obligation to require stationary source CO2 emissions that are nowhere to be found in the statutory language. . . . In *Massachusetts v. EPA*, the Supreme Court condemned EPA's reliance on policy preferences that were not grounded in the statutory text to construct reasons why it need not regulate [CO2] emissions under the [air act.] EPA has repeated this fundamental error here."

A CBD source criticizes EPA's "waffling" on when CO2 limits will apply. "Every time a date comes near to when they previously announced [CO2 regulation would take effect], they change their minds again. It shows pretty clearly we have long ago left behind what the statute says and are going on what is politically being required."

CBD is splitting from other environmental groups that are backing EPA in court in industry's challenge of the memo, though industry's challenge is expected to question the agency's authority to regulate CO2 at all, rather than when those regulations should take effect. Groups signing onto a recent motion to intervene on the agency's behalf include Environmental Defense Fund, Natural Resources Defense Council (NRDC), the Sierra Club, and state groups from Michigan, Ohio and Indiana. The deadline to file a petition in the case is June 2.

CBD also split with most other environmental groups in petitioning EPA last December to establish a national ambient air quality standard for CO2, claiming the agency has both the authority and a "clear legal duty" to "take such action as is necessary to set the United States on a course toward reducing atmospheric carbon dioxide concentrations below dangerous levels." EPA has not yet responded to that petition.

One NRDC source says it is unclear whether EAB will accept CBD's challenge of the Johnson memo reinterpretation because the board has already weighed in on EPA's interpretation of when a pollutant is "subject to regulation" in a 2008 decision in *In Re: Desert Rock*. In that case -- an activist challenge to a power plant air permit that lacked CO2 limits -- EAB remanded the issue back to EPA, prompting the original Johnson memo.

"It would at least be a new posture for EAB to entertain an appeal where the agency has spoken to the broader national question through a rule or guidance," the source explains. -- *Dawn Reeves*

EPA Advances Final Revised SO2 Standard To White House For Approval (*Inside EPA*)

EPA has sent for White House approval its final rule that could scrap the agency's existing 24-hour and annual primary, health-based national ambient air quality standards (NAAQS) for sulfur dioxide (SO2) and replace it with a stricter 1-hour standard that EPA says will better protect public health.

The final rule sent to the White House Office of Management & Budget May 5 is the result of litigation filed in 1996 by the American Lung Association (ALA) in the U.S. Court of Appeals for the District of Columbia Circuit, in which the group argued the Clinton EPA was unjustified in its decision earlier that year not to set a 1-hour SO2 standard. The court in a 1998 decision ordered EPA to issue a new SO2 NAAQS by June 2 this year.

EPA in November proposed to scrap the existing 24-hour and annual SO2 standards and replace them with a first-time 1-hour standard in the range of 50 to 100 parts per billion (ppb), while taking comment on alternative levels of up to 150 ppb. EPA justified the proposal by citing data that show greater health risks from shorter-term spikes of SO2 pollution than the current standards for 24-hour and annual exposure can address.

The proposal prompted a mixed response from states, industry and others. State and local air officials largely support dropping the annual standard, while industry officials say that data do not warrant establishing a 1-hour standard. Environmentalists want to subject ambient SO2 levels to all three standards: 1-hour, 24-hour and annual limits.

EPA Rejects Texas Defense Against Penalties For 'Upset' Emission Events (*Inside EPA*)

EPA is proposing to reject Texas' plan to allow industry to make an affirmative defense against civil penalties for violating permitted emission limits if the violations are due to planned startup, shutdown or malfunction (SSM) events, saying that EPA's long-standing policy requires compliance with emission limits during planned SSM events.

In a notice slated for publication in the May 13 *Federal Register*, EPA proposes to deny the portion of a Texas' state implementation plan (SIP) revision that includes the affirmative defense. The move is the latest in an ongoing dispute between EPA and Texas over the adequacy of various provisions in the state's SIP, which is an air quality blueprint for how the state intends to come into attainment with the agency's national ambient air quality standards (NAAQS).

Texas in January 2006 submitted for EPA approval a revision to its SIP providing industry with an affirmative defense against civil penalties for excess emissions during planned SSM events.

EPA Region VI, which includes Texas, signed a May 5 proposal to disapprove the portion of the SIP that includes the defense, though the agency is proposing to approve other elements of the submission that deal with reporting and record-keeping requirements, operational requirements, and various other provisions. And EPA approved a separate affirmative defense against civil penalties if the SSM events are unplanned and meet certain criteria.

In rejecting the affirmative defense for planned SSM events, EPA says in the notice, "Because these events are planned, we believe that sources should be able to comply with applicable emission limits during these periods of time." EPA will take comment on the proposal for 30 days following its publication.

The proposal says the defense is inconsistent with EPA policy, last clarified in 2001 and repeatedly expressed in agency rulemakings, that says a defense against civil penalties for emission violations should only be available for non-planned malfunctions. EPA says the policy defines malfunctions as "sudden, unavoidable or beyond the control of the owner or operator," not planned events. *The notice is available on InsideEPA.com.*

EPA says its policy that the Clean Air Act prohibits "automatic exemptions" from SIP emission limits during SSM events is long-held, citing its guidance and a 2000 court ruling upholding EPA's position in *Michigan Department of Environmental Quality v. Browner* in the United States Court of Appeals for the Sixth Circuit.

EPA in the notice says that SIPs can include some affirmative defenses for SSM, but they must meet several criteria beyond the bar for planned events, including that the defense be limited to upset or malfunctions; that it apply only to civil penalties and not for injunctive relief; that it not bar EPA or a citizen suit enforcement action; and that it not be available when the violation causes or contributes to a NAAQS violation.

In a related development, EPA is tightening is policy on SSM events in the federal air toxics program, which until 2008 contained a broad exemption for such events from counting toward compliance with air toxics rules. But the U.S. Court of Appeals for the District of Columbia Circuit in a 2008 ruling vacated the exemption, and EPA is now conducting a sector-by-sector effort to address SSM events in air toxics rules (*Inside EPA*, March 12).

EPA says it warned the Texas Commission on Environmental Quality (TCEQ) in 2005 against adopting the affirmative defense but that TCEQ did not respond to the federal agency's concerns.

A TCEQ spokesman says of the agency's pending *Federal Register* notice, "We have the proposal, [but] have not made a decision on response."

EPA's proposed rejection of the Texas affirmative defense for planned SSM events is among a growing number of disputes between Texas and the federal agency over air quality policy.

For example, EPA in an April 14 *Federal Register* notice finalized its disapproval of the state's "qualified facilities" program, under which companies modifying facilities can receive exemptions from new source review (NSR), a federal program that can require the installation of expensive pollution controls.

EPA is also widely expected to finalize its disapproval in June of the state's "flexible permit" program -- which allows facilities to adopt plant-wide pollution caps and then make modifications without triggering NSR requirements, as long as the modifications will not result in emissions that exceed the plant-wide cap.

Meanwhile, Texas is one of several parties suing EPA in the D.C. Circuit over the agency's greenhouse gas (GHG) endangerment finding, due in part to Texas Gov. Rick Perry's (R) concern about the cost of GHG regulations that the scientific finding will trigger.

Texas officials at a Feb. 25 state legislative hearing hinted at another suit over EPA's proposed tightening of the ozone NAAQS, which are slated for finalization in August (*Inside EPA*, March 19). -- *Molly Davis*

Funding Fight Threatens Landmark Ozone Treaty Climate Plan For HFCs (*Inside EPA*)

The United States, Mexico and Canada are touting a landmark proposal to use the Montreal Protocol ozone treaty to cut hydrofluorocarbons (HFCs) -- a refrigerant chemical and potent greenhouse gas (GHG) -- but the plan is under threat from an ongoing fight over how much money developing countries should receive under the treaty, sources say.

Advocates are urging parties to the treaty to reach agreement on the long-running funding dispute and approve the HFC plan in November, saying it would cut 10 to 20 times more carbon dioxide equivalent (CO2e) emissions than the Kyoto Protocol, which requires cuts in six GHGs, including HFCs. The plan could buy roughly five years for countries to develop a new global treaty to cut the five other GHGs governed by Kyoto Protocol, sources say.

The total costs of the proposed HFC cuts -- around $4 billion -- would also be relatively inexpensive compared to other climate efforts, sources say. But countries may be unwilling to vote on the plan until they resolve a separate dispute over how much money developed countries should give to developing countries to help them phase out hydrochlorofluorocarbons (HCFCs), which are refrigerant chemicals that are also GHGs.

“Whatever the impasse is in funding, it’s some of the cheapest climate benefits that could be bought,” according to a source with the advocacy group Environmental Investigation Agency (EIA).

A State Department spokesperson did not return calls, and EPA did not respond on the issue of the dispute.

Backers of the HFC proposal are hopeful that the funding disagreement can be resolved at a “non-decisional” meeting of the parties in Geneva in June so that the parties can vote on the proposal at their meeting in Uganda in November. The three countries proposed their plan April 29, after a similar proposal failed to move forward last year.

The Montreal Protocol requires party countries to phase out production and consumption of a range of ozone-depleting substances in order to reduce emissions of the substances. As a result of the treaty, HFCs have been used to replace other substances that have a greater impact on destroying the ozone layer.

But countries are now pushing to reduce HFCs because they can have up to 14,000 times the global warming impact of CO2. According to EPA estimates, the new proposal could cut 3.1 billion tons of CO2e by 2020 and 88 billion tons of CO2e by 2050. Relevant documents are available on InsideEPA.com.

The proposal also lays out a plan to cut HFC-23, a GHG that has been especially difficult to cut under other treaties. HFC-23, which is created during production of the refrigerant HCFC-22, has14,000 times the climate impact of CO2.

Parties to the Kyoto protocol have paid for developing countries to destroy HFC-23 to offset emissions in developed countries, a second EIA source says. However, the offsets became so valuable that developing countries continued using inefficient processes just so that they could destroy the HFC-23, leading to little actual GHG reductions despite the large amount of money that has been invested in it, the source says. The North American plan would help solve this problem by reducing production, not emission, of the substance, the source says.

The North American countries submitted their proposal last year, but had to re-propose in it order for the plan to qualify for consideration by Montreal Protocol parties in 2010. The ozone secretariat is now circulating the proposal among the parties. An EPA spokesman says, “By starting significantly earlier in 2010 and building on last year’s important progress, the U.S. and its North American partners anticipate significant progress prior to the November Meeting of the Parties.”

But if the funding fight continues, the prospects of passing the HFC proposal are “very dim” because developing countries are unlikely to agree to more cuts if developed countries will not pay for the last round of cuts they agreed to, the first EIA source says.

Backers of the proposal were optimistic that the parties could move forward on the HFC plan this year because the protocol parties recently took steps to resolve a long-standing funding disagreement among developed and developing countries, sources say. However, key funding disputes remain that could threaten the the changes of passing the HFC proposal, the source says.

At issue is an agreement among the parties to phase out HCFCs. Developed countries have already begun phasing out HCFCs and developing countries have agreed to freeze production in 2013 and begin phasing out the substances in 2015. However, the parties to the treaty disagree about how much developed countries should pay to help developing countries make the cuts.

At an April meeting in Montreal, the parties to the treaty agreed to guidelines to pay for the HCFC cuts under the treaty's funding mechanism, a multilateral fund that developed countries pay for and that developing countries can access to help pay for the incremental costs of phasing down substances controlled by the treaty. The funds help developing countries pay for costs such as new refrigerant chemicals or retrofits for manufacturing facilities. Observers hoped the agreement would clear the way for the parties to consider other cuts, such as the HFC proposal, the first EIA source says.
But a key disagreement remains regarding how much money developed countries will contribute to developing countries' efforts. Developing countries believe developed countries should pay for all HCFC cuts, compared to a 2013 baseline when production will peak, but developed countries want to pay for cuts compared to a 2009-2010 baseline, the first EIA source says. The HCFC disagreement is significant because it could impose large costs on quickly growing countries like India and Brazil, the source says. For example, if developed countries pay for cuts only compared to the 2009-2010 baseline, the funds will pay for only 150 ozone-depleting potential (ODP) tons, but if the developed countries pay for cuts compared to a 2013 baseline as developing countries are seeking, the funds will pay to cut 400 ODP tons.
One international environmental law expert acknowledges that the dispute could derail reaching an HFC agreement, but says the parties are moving closer to a deal and could pass the proposal if President Obama and Secretary of State Hillary Clinton make clear that the political benefits of the agreement are more important than technical disagreements. "I don't think we are going backwards. The way to resolve these technical questions is to step out of the technical frame of reference into the political frame of reference and make sure we know what is at stake," the source says.
Reaching agreement on both the HCFC funding and HFC plan is essential because of the massive climate benefits that could be achieved by the plans, sources say. The HCFC phase out, which would result in cuts of 22 billion tons of CO2e, combined with the 88 billion tons of CO2e expected to be cut by the HFC proposal would total 100 billion tons of CO2e cuts, the first EIA source says. In comparison, the Kyoto protocol will result in cuts of 8 billion tons of CO2e.
The climate benefits of the Montreal Protocol plans also come at a much lower cost than other climate efforts the second EIA source says. "If your allegiance is climate mitigation, there is not a prospect for climate mitigation that is in even remote proximity in terms of yield per investment."
One chemical industry scientist says the HFC proposal is significant because it acts to cut the powerful GHGs while still acknowledging that HFCs are a product and not a waste gas. The HFC proposal has broad support among environmentalists and industry, according to the source, who voiced optimism about passing the proposal but had no knowledge of the funding dispute.
The international environmental law expert says there also may be more momentum to pass the HFC plan this year because of the status of climate negotiations. Last year, some parties saw an HFC amendment as a possible threat to success at Copenhagen meeting of the United Nations Framework Convention on Climate Change, the source says. But since the Copenhagen meeting did not result in a legally binding agreement, nations are more inclined to look a broader mix of climate strategies, including approaches under the Montreal Protocol, the source says. -- Kate Winston

Credit Ratings, Canada Telcom, Cuomo Subpoenas: Compliance (*Bloomberg Businessweek*)

Story also appeared: *San Francisco Chronicle*

May 14, 2010, 12:30 AM EDT
By Carla Main
May 14 (Bloomberg) -- The U.S. Senate approved a proposal to let regulators decide who rates asset-backed securities after investors, including public pensions, said Standard & Poor's and Moody's Investors Service assigned inflated assessments to mortgage bonds because the companies were paid by Wall Street firms selling the debt.

The Senate in a 64-35 vote yesterday approved an amendment to the financial overhaul legislation that would create a ratings board overseen by the Securities and Exchange Commission. The panel would assign a credit-rating company to rank an offering.

Senator Al Franken, a Minnesota Democrat who introduced the amendment, said the credit-rating industry is affected by "a staggering conflict of interest," and issuers of securities "shop around" for the credit ratings.

Lawmakers and regulators have been debating for three years how to reduce conflicts at the companies. Under Franken's amendment, the SEC would determine the size of the board. The majority of members would be investors, at least one member would be from a credit-rating company and at least one member would be from an investment bank.

For more, click here.

Compliance Policy

Clement Says Canada Can Open Telecommunications Alone

Canadian Industry Minister Tony Clement yesterday said his country can open its telecommunications industry to foreign investment while leaving its broadcasting industry protected, contradicting the country's regulator and other groups.

Clement told a Parliamentary committee studying the loosening of Canada's foreign ownership restrictions that distinctions can be drawn between telecommunications "as a field of endeavor, and activity and broadcasting."

Clement's assertion puts him at odds with the country's telecommunications regulator, which said last month Canada needs to limit foreign ownership of companies such as Telus Corp. and BCE Inc. to no more than 49 percent to have effective content policies.

Prime Minister Stephen Harper said in March that opening Canada's C$40 billion ($39.3 billion) telephone industry is a priority for him, which could herald the biggest changes to ownership rules since caps were imposed in the 1980s.

EPA Says Emission Rule Will Shield Small Businesses

The U.S. Environmental Protection Agency said final rules for greenhouse-gas emissions will shield small companies from permitting requirements aimed at power plants and oil refineries. Initially, the EPA will regulate greenhouse gases from existing power plants and oil refineries that increase emissions by more than 75,000 tons per year, and from new plants that emit more than 100,000 tons per year, under rules announced yesterday. Legislation introduced in the U.S. Senate May 12 would halt EPA's proposed rules under the Clean Air Act and substitute legal restrictions on greenhouse gases, Steve Schleimer, a New York-based director of energy and environmental regulation for Barclays Capital, said yesterday on a conference call with reporters. Republicans and some Democrats in Congress are trying to block EPA's efforts to regulate carbon dioxide and other gases blamed for global warming.

For more, click here.

FCC Chairman Says Policies to Help U.S. Catch Up in Broadband

Federal Communications Commission Chairman Julius Genachowski said his push for more stringent regulations on Internet providers is designed to help the U.S. catch up to the leading countries in broadband services.

The FCC's priorities are to extend broadband access and adoption, while keeping the Internet open and fair, he said at a conference in Los Angeles yesterday. Those priorities were threatened after a U.S. court ruled April 6 the FCC lacked authority to regulate Comcast Corp.'s Web practices, he said.

Genachowski said his proposal last week to extend a suite of regulations for telephone services to Internet-access providers is an effort to reclaim the FCC's "legal foundation." Cable and phone companies such as AT&T Inc. and Comcast say the new regulations will make it harder for them to justify network investments because the FCC may require them to share their pipes with rivals in the future, limiting returns.

Nigeria Limits Banks' Non-Performing Loans to 10% of Portfolio

Nigeria's central bank said commercial lenders must limit non-performing loans to 10 percent of their portfolios, according to guidelines published on the bank's website yesterday. If toxic debt exceeds the limit, banks will have to provide an action plan within six months.

Banks will only pay a dividend if they have made “adequate” provisions for actual and contingent losses, and all preliminary expenses have been written off, the central bank said.

Compliance Action

Banks, Rating Agencies Said to Be Subpoenaed by Cuomo

Goldman Sachs Group Inc., Morgan Stanley, UBS AG and five other banks were subpoenaed by New York Attorney General Andrew Cuomo over whether they misled rating companies about mortgage- backed securities, according to a person familiar with the investigation.

Cuomo is probing the relationships between the banks and the major companies, which also were subpoenaed, said the person, who declined to be identified because the investigation is continuing.

The subpoenas were sent yesterday, the person said.

State and federal regulators since at least 2008 have been looking into why Moody’s Investors Service, Standard & Poor’s and Fitch Ratings gave top grades to subprime-mortgage backed securities and collateralized debt obligations that later plummeted in value.

Subpoenas also went to Credit Suisse Group AG, Deutsche Bank AG, Citigroup Inc., Credit Agricole SA and Merrill Lynch & Co., which was acquired by Bank of America Corp., the person said.

UBS received a subpoena from the New York attorney general and will comply, said Doug Morris, a spokesman.

Michael Duvally, a Goldman Sachs spokesman, and Morgan Stanley’s Mark Lake declined to comment.

For more, click here.

Lawyer Fined $591,000 for Helping Boiler Room Scam, FSA Says

The founding partner of a London law firm will be fined 400,000 pounds ($591,000) for aiding a multimillion-pound illegal share scam, Britain’s Financial Services Authority said yesterday in a statement.

Andrew Greystock, a former investment banker at NM Rothschild & Sons Ltd. and senior partner of Atlantic Law LLP, will also be banned by the FSA from working in financial services for signing off on advertising from four Spanish firms that were boiler

rooms, the FSA said. Around 130 British consumers lost a total of 3 million pounds in the scam, according to the regulator.

The U.K. has been trying to crack down on boiler rooms, which defraud Britons out of at least 200 million pounds a year, according to FSA data.

Shale-Gas Producers Apply Tougher Pennsylvania Water Standards

Shale-gas producers told Pennsylvania regulators most of them are already complying with new regulations for protecting aquifers that aren't scheduled to be adopted until October.

Thirty-five shale-gas producers, members of the Marcellus Shale Coalition, also agreed yesterday to work with the state to develop better tests, record-keeping and drilling procedures to prevent methane gas from contaminating groundwater.

The state Department of Environmental Protection called energy companies to Harrisburg yesterday to make sure they understand proposed rules for cementing metal casings around their wells. The state last month ordered Houston-based Cabot Oil & Gas Corp. to cap three wells with defective casings in the northeastern corner of Pennsylvania.

Cabot has made "significant" progress in complying with the order, Chief Executive Officer Dan Dinges said in an April 27 statement. The company said it accepted the order without agreeing that it caused the gas migration into wellwater.

For more, click here.

Coventree Followed Law in Commercial Paper Sale, Lawyer Says

Coventree Inc., once the biggest seller of non-bank asset- backed commercial paper in Canada, complied with Ontario regulatory law, the company's lawyer said at an agency hearing, denying allegations the bank misled investors.

The Ontario Securities Commission "sought to attribute to Coventree knowledge that it did not have," Kent Thomson, Coventree's lawyer, said yesterday at the OSC hearing in Toronto. "One can't disclose what one does not know."

OSC lawyer Jane Waechter May 12 said Coventree misled investors about the risks of its commercial paper investments and failed to disclose that institutional buyers, including Caisse de depot et Placement du Quebec, were pulling out of the market on concern that the notes had ties to U.S. subprime mortgages. The market for the notes froze in August 2007.

The collapse resulted in the biggest insolvency in Canadian history.

For more, click here.

Courts

Ex-J&J Unit Executive Wins Appeal of London Jail Time

Robert John Dougall, 44, a former employee at Johnson & Johnson's U.K. unit who admitted to joining a scheme to pay bribes to Greek doctors, had his prison sentence overturned. The ruling may limit the U.K. Serious Fraud Office's ability to offer plea bargains.

The ruling yesterday by the Court of Appeal in London overturns a 12-month prison term given to Dougall, who agreed with Britain's SFO to admit his role in the plot and help with the probe in exchange for avoiding jail.

Judges David Clarke and Lloyd Jones said Dougall should have his prison sentence suspended because he cooperated with authorities and didn't profit from the scheme. They also said the SFO shouldn't offer such deals to whistleblowers.

A plea agreement in which a sentence is agreed upon between the prosecution and the defense to which the court is expected to assent "is contrary to principle," the judges wrote in a 19-page decision.

The ruling is the second to challenge the SFO's ability to offer plea bargains. David Corker, a criminal defense lawyer at Corker Binning in London, said the ruling is a rebuke to the agency.

For more, click here.

Transocean Asks to Cap Rig Liability at $26.7 Million

Transocean Ltd., the owner and operator of the oil rig leased to BP Plc that exploded last month and killed 11 workers, asked a U.S. judge to limit its liability to $26.7 million.

The request, filed yesterday in Houston federal court under a 150-year-old law originally designed for the shipping industry, applies to all litigation the company faces over the explosion and subsequent oil spill.

"I think there are more than 100 cases now," Guy Cantwell, Transocean's spokesman, said in a telephone interview.

The Deepwater Horizon drilling rig off the coast of Louisiana exploded on April 20 and sank two days later. Transocean and co-owners of the Deepwater Horizon, which now lies wrecked a mile deep in the Gulf of Mexico, say the state- of-the-art rig has a present value of zero and had accrued almost $27 million in unpaid rental fees before it exploded.

The company also asked that all litigation against the rig owners be consolidated before one federal judge in Houston, where Transocean's U.S. operations are based. Vernier, Switzerland-based Transocean said it would create a court- administered fund, equal to the unpaid fees, from which all claims against the company could be paid on a pro-rata basis.

The case is In Re The complaint and petition of Triton Asset Leasing GmbH, 4:10-cv-01721, U.S. District Court, Southern District of Texas (Houston).

Interviews

SEC's New York Head Canellos Discusses His Focus, Goals

George Canellos, the head of the Securities and Exchange Commission's Manhattan office, spoke with Bloomberg's Suzanne O'Halloran about his staff's focus on sales to institutional investors, as well as the outlook for a regulatory overhaul, future investigations and the challenge of overseeing a more sophisticated financial investment market.

For the video, click here.

Hintz Says It's Unclear If Banks Broke Rules With CDOs

Brad Hintz, an analyst at Sanford C. Bernstein, talked with Bloomberg's Lori Rothman about the Securities and Exchange Commission's civil lawsuit against Goldman Sachs Group Inc. and the prospects for litigation pertaining to collateralized debt obligations.

Hintz also discussed the outlook for the CDO market and bank stocks.

Fisher Calls Overseeing Community Banks a 'Vital' Role of Fed

U.S. Senate approval of an amendment to the financial- overhaul bill to let the Federal Reserve retain oversight of smaller banks was "a miracle," Dallas Fed President Richard Fisher said. He made the remarks yesterday at a speech in Odessa, Texas, adding that having the responsibility to oversee and regulate community banks "is a vital part of our franchise."

--With assistance from Laurel Brubaker Calkins in Houston; Joe Schneider in Toronto; Karen Freifeld, Jim Efstathiou Jr. and Caroline Salas in New York; Erik Larson and Caroline Binham in London; Kelly Riddell, Jesse Westbrook, Alison Vekshin and Joshua Zumbrun in Washington; John Lippert in Harrisburg, Pennsylvania; Vincent Nwanma in Lagos; and Alexandre Deslongchamps in Ottawa. Editor: Steve Farr

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CLIMATE CHANGE / GLOBAL WARMING

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Global warming blamed for keeping females in hiding, away from food (*Washington Post*)

May 14, 2010 Friday
Suburban Edition
A-SECTION; Pg. A03
Maryland
Heat has deadly effect on lizards' breeding;
Global warming blamed for keeping females in hiding, away from food
By: David Brown
When it comes to the hazards of global warming, it may turn out that lizards in burrows are the canaries in the coal mine.

In a study to be published Friday in the journal Science, an international team of biologists reports that in more than one-tenth of the places in Mexico where lizards flourished in 1975, the reptiles now cannot be found. The researchers predict that by 2080, about 40 percent of local lizard populations worldwide will have died off and 20 percent of lizard species will be extinct.

The reason for the huge die-off appears to be rising temperatures. But it isn't heat that is killing the lizards directly.

Instead, global warming appears to be lengthening the period of the day when lizards must seek shelter or risk fatal overheating. In the breeding season, that sheltering period is now so long that females of many species are unable to eat enough food to produce eggs and offspring.

Springs that start earlier and are warmer than they once were have been noted in many regions of the world in the past three decades. The new study suggests that the phenomenon may be far more important for the survival of some animals than peak summer temperatures, said Barry Sinervo, an evolutionary biologist at the University of California at Santa Cruz who headed the 26-person research team.

"It is as if something has really happened in world climate and the lizards are telling us that," he said.

The lizard findings also suggest that early stages of global warming may be more than a warning: They may have permanent consequences.

"Many of us have been worried about extinctions in the future," said Raymond B. Huey, a lizard physiologist at the University of Washington in Seattle, who wrote a commentary accompanying the study. "This paper shows that extinctions are already here. I think that will really be surprising to most biologists."

Lizards are cold-blooded. They depend on the environment for the heat necessary to run their bodies -- functions from muscle contraction to digestion and hearing. Some get heat by basking in the sun ("heliotherms"), others by waiting for the air to warm them up ("thermoconformers"). Different species have different optimal temperatures as well as different maximal temperatures they can tolerate.

Several years ago, the research team visited 200 places in Mexico where in 1975 biologists had recorded the presence of basking lizards of the Sceloporus genus, 48 species in all. At 12 percent of the sites, the researchers found no lizards.

The places with none tended to be at southern latitudes and low elevations and in regions where four decades of weather data showed a marked increase in springtime temperatures. Species with lower optimal temperatures -- 90 to 95 degrees, on average -- were also more likely to have gone "locally extinct" than more heat-tolerant ones.

Sinervo hypothesized that springtimes were getting too hot for lizards. He fashioned artificial reptiles out of painted PVC pipe and electronic temperature gauges and put them out in the sun at two places in the Yucatan where the species Sceloporus serrifer survived and two places where it was extinct.

Where the lizards had died out, the average April day had 9.25 hours with temperatures so high that lizards of that species would have had to seek refuge in a cool spot to survive. Where they survived, there were far fewer "hours of restriction."

An analysis of more sites led the scientists to conclude that when Mexican Sceloporus lizards spent more than four daylight hours in burrows out of the sun, extinction was very likely. Females simply wouldn't have enough time to eat.

"The summer maximum [temperature] doesn't matter to them," Sinervo said. "Lizards are fully capable of crawling under a rock and not doing anything for a couple of months. The problem arises for females in the spring who are maximally cranking away for reproduction."

The researchers created a mathematical model linking a lizard's optimal temperature, the maximum outdoor temperature and the hours of restriction to a species' risk of extinction. It correctly "predicted" recent extinctions in South America, Europe, Australia and Africa.

Predictions for 2050 -- local extinction of 16 percent of the world's lizard populations and global extinction of 6 percent of lizard species -- appear unavoidable, the researchers wrote. The more dramatic 2080 die-offs might be avoided if global warming is slowed.

Climate change imperils lizards (*Los Angeles Times*)

May 14, 2010 Friday
Home Edition
LATEXTRA; bad desk code; Science Desk; Part AA; Pg. 5
Climate change imperils lizards
By Thomas H. Maugh II
Twelve percent of Mexico's spiny lizard population has been driven to extinction over the last quarter-century by increasing local temperatures, a phenomenon that is linked to global warming, researchers said Thursday.

The results suggest that, if warming continues, nearly 40% of all lizard populations globally and 20% of all lizard species could become extinct by 2080, the authors said.

Lizards may not be cute and cuddly animals, but they are a valuable link in the global food chain, consuming large amounts of insects and serving as food for larger species. If they disappeared, the viability of other species could be threatened, the team reported in the journal Science.

The researchers "deliver a disturbing message," biologist Raymond B. Huey of the University of Washington and his colleagues wrote in an editorial accompanying the report. "Climate-forced extinctions are not only in the future, but are happening now."

Because lizards are cold-blooded animals, it might seem at first blush that higher temperatures would be beneficial. But that's not the case, said evolutionary biologist Barry Sinervo of UC Santa Cruz, the lead author of the report. "These lizards need to bask in the sun to warm up, but if it gets too hot they have to retreat into the shade and then they can't hunt for food," he said at a news conference.

The team found that, at the sites where extinctions were occurring, the number of hours per day the animals could spend in the sun had dropped sharply. "They would barely have been able to emerge to bask before having to retreat," Sinervo said.

The effects were most pronounced during the spring breeding season, when it is most important for the animals to eat lots of food to be able to produce offspring. If they can't produce the normal number, the population collapses.

Lizards that bear their young alive are at greater risk -- perhaps twice the risk -- than those that lay eggs because they have evolved lower body temperatures, Sinervo said. "We are literally watching these species go extinct before our eyes," he said.

Sinervo did not set out to study extinctions. Instead, he was planning to use a Eurasian lizard to determine the role of skin color in evolution. But when he revisited sites where the lizards had been earlier, there were far fewer of them.

He then became aware of a similar problem with Sceloporus lizards in Mexico. Ecologist Jack W. Sites Jr. of Brigham Young University, while he was a graduate student during the late 1970s and early 1980s, had documented the spiny lizard populations at more than 200 sites in Mexico from the Rio Grande Valley south to Mexico City.

But when researchers returned to the sites, "the habitat was still there, but the lizards were hard to find or gone," Sites said. "If it's sunny, the lizards aren't hard to find. When you go back and don't see lizards, the alarm bells go off."

Sinervo then mobilized a larger team that studied other sites around the world with similar results. He also developed a mathematical model which correlated lizard populations with temperatures and, thus, the number of hours that the animals could spend in the sun each day. The model identified five other sites where the team found that extinctions had occurred.

Although most lizards evolve too slowly to adapt to the changes, some are able to survive by moving to higher altitudes where it is cooler. But the team found that this displaces other lizard species that normally live at those altitudes, leading to their loss.

thomas.maugh@latimes.com

World's lizards face extinction amid warming (*San Francisco Chronicle*)

(California)
May 14, 2010 Friday
FINAL Edition
Main News; Pg. A4
World's lizards face extinction amid warming;
Science
By: David Perlman, Chronicle Science Editor
Lizard populations on five continents are becoming extinct because of rising global temperatures, and if climate change continues unabated, 6 percent of the world's lizard species will disappear in the next 40 years and up to 20 percent in the next 70 years, an international team of biologists report.

So far, 4 percent of lizard populations have vanished in the past 35 years, said the biologists in a report published today in the journal Science. The findings by 25 biologists and led by ecologist Barry Sinervo of UC Santa Cruz were the result of the first worldwide survey of lizard extinction.

In a commentary in the same journal, three independent scientists, including Craig Moritz of UC Berkeley, call the work "disturbing" and "should be taken seriously." But "some aspects of the study warrant further investigation," they say. The title of their commentary: "Are Lizards Toast?"

The disappearance of lizards can cause crucial changes to the global food chain "top to bottom," said Sinervo, an evolutionary biologist, a herpetologist and ecologist. They are an important food source for birds and snakes and other animals, he said, so where lizards become extinct, bird and snake populations diminish, too.

Because lizards prey on insects as their major food source, insect populations would "explode" with the disappearance of lizards, he said.

Sinervo and his team surveyed 48 species of spiny lizards at 200 sites on the Yucatan peninsula in Mexico that had been studied in detail from 1975 to 1995 and found that 12 percent of that population had already become extinct by 2009.

The lizards lived in well-protected areas like national parks, so it wasn't habitat destruction that caused the population decline, Sinervo said. Instead, it was a tale of rising temperatures disrupting lizard lives, he said Thursday in a phone interview from Madrid, where he and two colleagues are preparing for a new lizard survey in the Pyrenees.

Predatory lizard species on the Yucatan peninsula, Sinervo explained, prefer to bask in temperatures around 88 degrees Fahrenheit, which is when they are best at hunting insects for their food. When it gets any hotter, the lizards retreat to the shade.

The March temperature in the Yucatan in the 1970s was about 86 degrees, but it has since risen to 91 degrees, and because of that increase, the lizards have lost four hours of daily hunting time, Sinervo said. As a result, they cannot get enough food to stay healthy and are no longer able to reproduce. The consequence is extinction if things don't change, he said.

From the results of that Yucatan study, Sinervo developed a mathematical model to predict what could be happening to lizard populations everywhere in the world. He then tested his model by linking it to specific reports on lizard extinction from colleagues in three countries in Europe and four in South America, as well as in Australia and South Africa. They all matched completely, which added significantly to the accuracy of the team's predictions, he said.

Using Google as a research tool, Sinervo said he was able to gather data from many parts of the world. "We used Google Scholar to find all the data on 1,216 lizard body temperatures for 34 families of lizards distributed across the globe," he said.

The survey of lizards comes at a time when many amphibian species have been

reported facing extinction as well; when many tropical marine organisms have been reported moving northward; and when many land animals are reported seeking cooler habitats at higher mountain elevations - all recent indications that **climate change** could be altering the ecology in many parts of the world.

"6 percent of the world's lizard species will disappear in the next 40 years and up to 20 percent in the next 70 years."

EPA working to limit emissions (*Los Angeles Times*)

May 14, 2010 Friday
Home Edition
SECTION: MAIN NEWS; National Desk; Part A; Pg. 16
NATIONAL BRIEFING;
WASHINGTON, D.C.;
By Times Wire Reports
The Environmental Protection Agency is moving to control the U.S. power plant, factory and oil refinery emissions blamed for global warming.

The EPA said it would require large polluters to reduce six greenhouse gases by installing better technology and improving energy efficiency.

The step would have to be taken when a facility is built or significantly modified. The rule, to take effect in July 2011, applies to any industrial plant that emits at least 75,000 tons of greenhouse gases a year.

The **EPA** said the rule would cover sources that are responsible for 70% of such emissions in the U.S.

Scientists say: It's really real (*San Francisco Chronicle*)

(California)
May 14, 2010 Friday
FINAL Edition
Datebook; JON CARROLL; Pg. F10
By Jon Carroll
The most disturbing thing to me about the recent climate change and evolution debates is how ignorance has been elevated to knowledge, and how scientists have been assaulted for holding generally accepted theories.

These issues have been demagogued to death, and the credulous or stupid people who believe the rhetoric have, in some places, turned into the majority. Science is inherently

undemocratic - you don't get to vote on whether two plus two equals four, but some politicians, school boards and political parties have adopted the "wishing makes it so" protocols, and we as a nation are poorer for it.

Recently a panel of 250 scientists wrote a letter to the magazine Science expressing these same ideas. They said it better than I could, so here's a portion of it, edited for space:

"We are deeply disturbed by the recent escalation of political assaults on scientists in general and on climate scientists in particular. All citizens should understand some basic scientific facts. There is always some uncertainty associated with scientific conclusions; science never absolutely proves anything. When someone says that society should wait until scientists are absolutely certain before taking any action, it is the same as saying society should never take action. For a problem as potentially catastrophic as **climate change,** taking no action poses a dangerous risk for our planet.

"Scientific conclusions derive from an understanding of basic laws supported by laboratory experiments, observations of nature, and mathematical and computer modeling. Like all human beings, scientists make mistakes, but the scientific process is designed to find and correct them. This process is inherently adversarial - scientists build reputations and gain recognition not only for supporting conventional wisdom, but even more so for demonstrating that the scientific consensus is wrong and that there is a better explanation. That's what Galileo, Pasteur, Darwin, and Einstein did. But when some conclusions have been thoroughly and deeply tested, questioned, and examined, they gain the status of 'well-established theories' and are often spoken of as 'facts.'

"For instance, there is compelling scientific evidence that our planet is about 4.5 billion years old the theory of the origin of Earth, that our universe was born from a single event about 14 billion years ago the Big Bang theory, and that today's organisms evolved from ones living in the past the theory of evolution. Even as these are overwhelmingly accepted by the scientific community, fame still awaits anyone who could show these theories to be wrong. **Climate change** now falls into this category: There is compelling, comprehensive, and consistent objective evidence that humans are changing the climate in ways that threaten our societies and the ecosystems on which we depend.

"Many recent assaults on climate science and, more disturbingly, on climate scientists by **climate change** deniers are typically driven by special interests or dogma, not by an honest effort to provide an alternative theory that credibly satisfies the evidence. The Intergovernmental Panel on **Climate Change** IPCC and other scientific assessments of **climate change,** which involve thousands of scientists producing massive and comprehensive reports, have, quite expectedly and normally, made some mistakes. When errors are pointed out, they are corrected. But there is nothing remotely identified in the recent events that changes the fundamental conclusions about **climate change.**
...

"We ... call for an end to McCarthy-like threats of criminal prosecution against our colleagues based on innuendo and guilt by association, the harassment of scientists by politicians seeking distractions to avoid taking action, and the outright lies being spread about them. Society has two choices: We can ignore the science and hide our heads in the sand and hope we are lucky, or we can act in the public interest to reduce the threat of global **climate change** quickly and substantively. The good news is that smart and effective actions are possible. But delay must not be an option."

- Let's do nothing, and watch the coastal areas get drowned. We'll all learn how to swim!

ENERGY

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GOP Warns Energy Star Problems Could Affect Other Climate Programs (*Inside EPA*)

Key Republicans are warning EPA that its failure to ensure the integrity of its Energy Star efficient products program calls into question the agency's ability to protect more complex agency greenhouse gas (GHG) mitigation programs from fraud and abuse.

Sen. John Barrasso (R-WY) and Rep. Darrell Issa (R-CA) sent EPA Administrator Lisa Jackson an April 29 letter asking her to "account for outrageous failings of the Energy Star program" detailed in a recent scathing Government Accountability Office (GAO) report. *The letter is available on InsideEPA.com.*

GAO found the program -- which awards energy efficiency products a promotional label -- is vulnerable to "fraud and abuse," after GAO investigators were able to win certification for fake products, including a gasoline-powered alarm clock and an "air cleaner" made from a feather duster taped to a space heater.

Barrasso and Issa in their letter ask Jackson to provide detailed information by May 14 on what actions EPA took in response to the earlier OIG warnings; on how EPA determines the accuracy of the energy savings estimates it credits to Energy Star; and on what actions the agency is taking to study vulnerabilities of international carbon offset markets.

The lawmakers warn that EPA's flaws in overseeing Energy Star calls into question the agency's ability to ensure the integrity of other GHG mitigation programs, such as administering international carbon offset programs.

FUEL

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MAY 14, 2010

In a First, Truck From India to Sell in U.S.(*Wall Street Journal*)

By MATTHEW DOLAN

Mahindra & Mahindra would become the first company to sell an Indian-made vehicle in the U.S. with its plans to offer a compact diesel pickup truck in the country by the end of the year, a top company executive said Thursday.

Pawan Goenka, president of Mahindra's auto and farm-equipment operations, said in an interview that the new truck model has been road-tested according to U.S. government requirements and that the company expects to gain certification from the U.S. Environmental Protection Agency no later than July. Production would begin in India in early fall and the truck would arrive in U.S. showrooms by December, Mr. Goenka said.

European Pressphoto Agency

A Mahindra &Mahindra plant in Chakan, India, in March. A pickup built by the firm is likely to be the first Indian-made vehicle sold in the U.S.

The truck doesn't yet have a name, but is likely to be called TR20 and TR40, depending on the model. "Since we're new, we want to emphasize that the truck is just Mahindra," Mr. Goenka said. The company has built 175 prototypes in India and tested 30 in the U.S.

Originally, the pickup was supposed to arrive in the U.S. by mid-2009. Executives pushed back the rollout twice, due to the historic fall-off in the auto market and changes made to the truck to conform to U.S. regulations and meet American tastes.

The truck is currently sold in markets including Europe, Africa and South America.

When it arrives in the U.S., the 2.2-liter, four-cylinder vehicle is expected to be the first compact diesel truck in the U.S. It will be promoted as a "no-nonsense" truck for work and play, according to Mr. Goenka. Traditionally, only larger trucks have been sold with diesel engines in the U.S.

Initially, the truck will be assembled in India and imported into the U.S., a strategy likely to trigger a 25% U.S. tax on foreign-made pickups. So Mahindra plans to start U.S. production by the end of next year with a yet-unnamed partner.

The hurdles for Mahindra in the U.S. are high. The company is new to the already-crowded American vehicle market and must rely on an informal network of 300-plus dealerships, which sell other brands.

Mahindra also has yet to settle on a financing company to help customers fund their purchases, an essential piece of a successful launch, according to Mr. Goenka.

Mahindra has hired the advertising company Strawberry Frog to introduce U.S. buyers first to the Indian conglomerate and then to the truck.

The auto maker plans in its marketing to emphasize the truck's fuel economy, which could reach 30 miles per gallon without giving up the payload and towing capacity offered by competitors, according to Mr. Goenka. In the U.S., Mahindra considers Toyota Motor Corp.'s Tacoma, Ford Motor Co.'s Ranger and Nissan Motor Co.'s Frontier to be direct competitors, though none are offered with a diesel engine.

For the first four months of this year, U.S. sales of small pickups have been about flat, according to Autodata Corp. But Mahindra sees growth in the compact-truck segment, rising from 240,000 sold last year to at least 300,000 by 2011. Mr. Goenka said Mahindra expects to capture 5% to 7% of the market in its first year of full production.

The truck's introduction will be followed by a sport-utility version of Mahindra's current Scorpio model in December 2011 and a new SUV with a gas-electric hybrid option by 2013, Mr. Goenka said.

Mahindra's fiscal year ending March 2010 saw its auto sales outpace the Indian market, up 30% compared with a rise of 20% overall. Its share of the truck market in Indian grew from 57% to 64% in the last fiscal year, according to Mr. Goenka. The company expects double-digit growth in sales of its SUVs—where it captured 80% of the Indian market last year—and trucks again this year, officials said.

Write to Matthew Dolan at matthew.dolan@wsj.com

GENERAL

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EPA establishes website on Gulf of Mexico oil spill (*The Town Talk*)

May 14, 2010
Louisiana
The Environmental Protection Agency has created a website to inform the public about health and environmental impacts of the Gulf of Mexico oil spill.

The website is http://www.epa.gov/bpspill.

The site contains data from EPA's ongoing air monitoring along with other information about the

agency's activities in the region related to the oil
spill.

Information on the broader response from the U.S.
Coast Guard
and other responding agencies is available at http:
//www.deepwaterhorizonresponse.com>

GRANTS

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Davis to speak on EPA grant award Friday in Montgomery (*Montgomery Advertiser*)

May 13, 2010

U.S. Rep. Artur Davis will be a featured speaker Friday in Montgomery for the awarding of a
$200,000 grant from the U.S. Environmental Protection Agency, according to a news release from Davis' office.

The grant will be awarded to the Alabama Department of Environmental Management and will
be used to conduct assessments at petroleum Brownfields sites where the presence of underground storage tanks might have caused environmental contamination, making the sites
unsuitable for redevelopment, the release states. The study area is along U.S. 80 between
Montgomery and Uniontown and includes the entire Selma to Montgomery National Historic Trail, according to Davis' office.

Davis will be joined by several elected and city officials, including Selma Mayor George Evans,
Montgomery Deputy Mayor Jeff Downes, ADEM Director Lance LeFleur and Montgomery County Commissioner Jiles Williams, the release states. The grant award ceremony will take place at 10 a.m. Friday at 515 Mildred St.

HAZARDOUS WASTE

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Kettleman Hills chemical cleanup finished (*Fresno Bee*)

Posted at 02:26 PM on Thursday, May. 13, 2010
By Lewis Griswold / The Fresno Bee
The company that owns the Kettleman Hills hazardous waste landfill said Thursday that cancer-causing chemicals have been cleaned up at the building where they arrive for disposal.

Waste Management Inc. operates the landfill outside Kettleman City in Kings County, where a rash of facial birth defects such as cleft palate has devastated several families.

PCBs -- polychlorinated biphenyls -- have been linked to reproductive problems, but Waste Management has denied that the landfill is the cause of birth defects.

Meanwhile, the state Department of Public Health and the California Environmental Protection Agency are investigating to learn the birth defects' cause.

The mothers of children born with birth defects felt "angry and hurt" by Thursday's announcement, said Ana Martinez, a community organizer for Greenaction for Environmental Health and Justice.

"They're fast to move on a site where they find PCBs, but the investigation of the cause of the birth defects keeps dragging on," Martinez said.

The cleanup of the company's PCB storage and flushing building was ordered last month by the federal Environmental Protection Agency after an inspection.

The EPA found PCBs both inside the building and in soil next to it. The soil was dug out, the building cleaned and the floor recoated with epoxy.

The cleanup exceeded EPA standards, the company said.

The landfill will now test soil more often and has put new procedures in place, according to Bob Henry, Waste Management's senior district manager.

Spokeswoman Nahal Mogharabi of the regional EPA office in San Francisco said the case is still open, and the EPA would have no comment.

EPA To Use Mules In Hunt For Radiation (*WPTX.com*)

Nuclear Reactor Partially Melted Down At LA Search Site
POSTED: 11:05 am EDT May 13, 2010
UPDATED: 6:40 am EDT May 14, 2010
The Environmental Protection Agency has a new weapon in the fight against radioactive contamination at a Los Angeles-area lab: Mules.
The EPA will use four mules to carry high-tech scanning equipment to detect radiation on steep and rocky terrain at the Santa Susana Field Laboratory.
The EPA is conducting a survey of soil and water contamination at the lab near Simi Valley, where rocket engines were tested for years and a partial meltdown of a nuclear reactor took place in 1959.
About 500 acres of the lab will be scanned for gamma radiation.
Results will be turned over to the state, which is overseeing a cleanup.

Industry Faces Uncertain Prospects On Bid For Key Waste Rule Exemption (*Inside EPA*)

Federal appellate court judges at recent oral arguments suggested industry could win its bid to reuse certain materials without complying with strict hazardous waste rules if the court looks only at the rules' non-binding preamble text, but said industry's prospects are more uncertain in context of the the rules' more detailed binding regulatory text.

The U.S. Court of Appeals for the District of Columbia Circuit heard May 7 arguments in *Howmet Corporation v. EPA*, which addresses what constitutes a "spent material" subject to strict EPA Resource Conservation & Recovery Act (RCRA) regulation. Howmet argues that a chemical it used as a solvent and then sold to another company for use in fertilizer did not qualify as "spent" material subject to RCRA because the substance had multiple uses.

The suit has gained national attention, with the Alliance of Automobile Manufacturers (AAM) arguing in an *amicus* brief that an EPA Environmental Appeals Board (EAB) definition of spent material that Howmet is challenging ignores changes to RCRA rules aimed at accommodating substances with more than one useful purpose.

At issue is a 2007 EAB ruling that found Howmet had wrongfully sold an already used chemical to another company without following RCRA requirements for transporting hazardous waste. Howmet had argued that the chemical has multiple uses and is not "spent" just because it is no longer useful as an industrial solvent.

Howmet first challenged that ruling in the U.S. District Court for the District of Columbia. That court ruled for EPA in September last year, prompting industry to appeal the decision to the appellate court.

In a March 23 brief to the court, Howmet argued that the preamble to the RCRA regulations at issue in the case says "the 'continued use' of a used (but not spent) material for 'the purpose for which it was produced' is properly beyond the reach of

RCRA regulation because it is analogous to using/reusing a secondary material as an effective substitute for commercial products." Howmet said its sale of used liquid potassium hydroxide (KOH) to another company for use as a fertilizer qualified as continued use even though Howmet had used KOH as a solvent.

Howmett says the word "purpose" implies a fundamental purpose, and therefore KOH already used as a solvent is not "spent" if it is then used as a fertilizer because both uses are consistent with KOH's fundamental purpose as a concentrated source of hydroxide ions and potassium -- useful in both the solvent and fertilizer context.

EPA, however, in its brief argued that a product's purpose as defined in the rule is related to its original use, in this case its use as a solvent. A product first used as a solvent is "spent" when it becomes too contaminated to be used for that specific "purpose," the agency argued, and therefore is subject to hazardous waste regulations.

During oral arguments, two members of the three judge panel told industry lawyers that they would likely prevail in the case if the panel looked only at the preamble language. "I think you win under the preamble," Judge Brett Kavanaugh told Howmet attorney Bryan Moore. But "it's a little tricky under [the regulatory] operating language," Kavanaugh said. Chief Judge David Sentelle agreed, noting that the preamble is "non-binding."

The used KOH Howmet sold to the fertilizer company was "still for use," as opposed to disposal, Kavanaugh told Department of Justice attorney Justin Pidot, who represented EPA. "If you look at the preamble you lose," Kavanaugh told Pidot. Still, examples of the rule's implementation that EPA has cited in its defense could bolster the agency's arguments, Kavanaugh suggested.

Pidot argued that had Howmet's used KOH not been subject to EPA's hazardous waste regulations, the agency would never even have known whether it contained harmful concentrations of hazardous chemicals and heavy metals such as chromium. EPA only learned this because the company disposed some of the KOH it was unable to sell, and under the agency's hazardous waste disposal regulations the company had to conduct an analysis of the used material's contents, Pidot said.

If Howmet is able to sell the same used material to a fertilizer company without complying with the hazardous waste regulations, it would not have to conduct such an analysis and harmful concentrations of contaminants could inadvertently wind up being applied to land as fertilizer, Pidot argued.

AAM as an *amicus* party in the case supported Howmet's arguments by in part maintaining that the word "purpose" in EPA's hazardous waste regulation "must be interpreted to not only refer to a limited 'singular' purpose, but instead to include multiple purposes."

Moore noted, however, that Howmet did raise this particular argument itself, a decision Chief Judge Sentelle said "may have been wise." Sentelle said AAM's argument was

“silly” because it suggests “you can never read [the word ‘purpose’] as a singular in regulations.”

Unedited EPA Coal Ash Proposal Sought Only Hazardous Waste Rules (*Inside EPA*)

EPA has released the original text of its coal ash waste regulatory proposal sent to the White House last year, which shows EPA had been advocating for strict hazardous waste rules in contrast to the final proposal it issued this month seeking comment on several options, including solid waste rules.

The agency’s original proposal sent to the White House Office of Management & Budget (OMB) in October would have listed coal combustion waste as hazardous under subtitle C of the Resource Conservation & Recovery Act (RCRA). EPA released the original version May 6 in its regulatory docket for the coal ash regulatory proposal that includes red-line edits by OMB. *Relevant documents are available on InsideEPA.com.*

The original proposal would also have required coal ash to be disposed in “dry” landfills rather than “wet” ponds, or impoundments, and required monitoring to prevent leaching of the waste unless it was beneficially reused in products. It also would have imposed additional regulatory requirements mandating the closure of all existing wet storage impoundments.

However, industry lobbied OMB heavily against a hazardous waste approach, warning that it would impose major costs and “decimate” the beneficial reuse industry, and environmentalists claim that OMB effectively forced the agency to water down its strict regulatory plan.

EPA’s proposal issued May 4 is vastly different to the original version sent to OMB and takes comment on several regulatory options, including hazardous waste rules, solid waste rules under RCRA subtitle D and other options. Still, observers say that the neutral approach still appears to reflect EPA’s preference for hazardous waste rules.

The red-line version shows OMB struck key language from the agency’s original plan. For example, OMB deleted language noting that “the effect of this listing would be to prohibit [coal combustion residues (CCRs)] from land disposal unless and until CCRs meet the proposed treatment standards. In addition, CCRs destined for disposal would be subject to the cradle-to-grave management standards under the rules implementing subtitle C of RCRA.”

OMB also added language that says, “Given the inherently discretionary nature of the decision, the complexities of the scientific analyses, and the controversy of the issue, EPA wants to ensure that the ultimate decision is based on the best available data, and is taken with the fullest possible extent of public input. . . . EPA has not yet reached a

conclusion as to how to strike the appropriate balance . . . and so is presenting two proposals for federal regulation of CCRs."

The Center for Progressive Reform (CPR) in a May 7 blog post says, "[B]y the time the OMB economists had chewed over the proposal, EPA was no longer presenting a clear and unambiguous policy to the public for comment. Instead, EPA has been reduced to proposing three inconsistent alternatives."

The alternatives include what CPR calls "a somewhat weaker version" of EPA's original approach that would not declare coal waste as hazardous under RCRA subtitle C but instead as a "special waste," and other options under RCRA subtitle D which apply to solid waste, according to a chart the group put together summarizing the key differences.

CPR says OMB's revisions include about 140 pages of deletions and style edits, along with dozens of added pages to alter the proposal. However, the group commends EPA for releasing it, and notes that this rule is Jackson's first "notable reversal" by "an unnamed squad of number-crunching economists" who "decided to second-guess Jackson's judgment."

MINING

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Pending EPA Ruling On Michigan Mine Could Expand Reach Of UIC Permits (*Inside EPA*)

EPA is nearing a decision on whether discharges from a proposed Michigan mine must be permitted under the federal underground injection control (UIC) program, a decision that industry sources say could set a precedent requiring non-hazardous discharges from scores of other facilities -- including wastewater, energy, mining and others that use above-ground discharges -- to seek first-time permits.

"It would be such a massive expansion of the UIC program to things that it has never been applied to before," one industry source says of the possibility that EPA may require a permit.

EPA Region V officials and leaders of the Keweenaw Bay Indian Community are scheduled to meet May 14 to discuss EPA's pending decision, after regional and headquarters officials have spent months reviewing Kennecott Eagle Mineral Co.'s claims that a redesign of its proposed treated water infiltration system (TWIS) eliminates the need for a UIC permit.

Environmentalists say the modified design should not free the company from a permit requirement because the treated water is still meant to be added to groundwater and

could affect drinking water supplies -- protection of which is the primary aim of the UIC program. “That’s the triggering factor,” says an environmental attorney familiar with the case.

Sources say EPA still has not decided whether the company is correct in claiming it does not need a UIC permit and plans to brief the tribe on issues the agency is considering; a formal decision could come as soon as the meeting concludes but likely would not be announced for at least another week or so, sources say. Region V staff has consulted with headquarters officials because of the potential scope of their decision and to ensure it is consistent with EPA permitting practices in the rest of the country, sources say.

Kennecott plans to operate a nickel and copper sulfide mine on Michigan’s Upper Peninsula, but the project has been delayed over uncertainty regarding the company’s permit requirements and various challenges by local activists and the Native American tribe, which claims the mine site has religious significance.

Earlier this year, the company withdrew its application for a UIC permit after modifying the design of its TWIS to rely on Styrofoam-insulated pipes, rather than pipes that would be buried within mounds of dirt and gravel for insulation. The company did not believe it required a UIC permit even for the originally designed system, a source says, because the water itself is to be released above ground and filtered through gravel back into groundwater supplies.

At issue is the definition of a “subsurface fluid injection system” -- one of four categories of wells that trigger UIC permits, EPA sources say. Federal regulations define such a system as “an assemblage of perforated pipes, drain tiles, or other similar mechanisms intended to distribute fluids below the surface of the ground.”

Kennecott’s TWIS design initially called for a grid of lateral distribution polyvinyl chloride pipes to be constructed over a 1,020 foot by 150 foot area at grade over six inches of gravel and covered with more than five feet of sand and topsoil. Under the new design, the TWIS area remains the same, but the pipes would be made of high-density polyethylene (HDPE) at grade over at least eight inches of washed stone; the pipes would be insulated with Styrofoam and the entire system would be covered by an HDPE geomembrane, according to a summary of the changes Kennecott shared with EPA. *Relevant documents are available on InsideEPA.com.*

While environmentalists say the modified design should still require a permit because the water is meant to be added to groundwater, industry says permit requirements should only be triggered based on whether the water is physically “injected” underground. If EPA were to require Kennecott to obtain a UIC permit in this instance, it could affect an array of other industries, including the agriculture sector, that have not previously faced such requirements.

For example, an industry source says, nutrient-rich wastewater, such as would be generated at a produce-processing plant, is sometimes applied to land to irrigate crops. Such applications -- of which the industry source says there are “literally hundreds” in Michigan -- are regulated under a state groundwater discharge permitting program, rather than through federal UIC requirements. The industry source says an EPA decision against Kennecott could open the door to myriad new claims that agriculture and other sectors would need UIC permits as well.

The environmentalist calls that argument a “red herring,” noting that Kennecott’s intent of disposing of wastewater into groundwater does not have any additional application for other sectors.

A second industry source, who is not directly involved in the case, says it is “counterintuitive” for the pipe design to make a difference in whether the TWIS requires a UIC permit and backs Kennecott’s argument that even its initial design would not require a permit. The source says EPA seems to be relying on a broad reading of the subsurface fluid injection system definition, and would likely base a requirement for a UIC permit on an argument that the company’s “intent” is to discharge the treated water back to groundwater that would affect an underground source of drinking water.

The source says a potentially broad reading of UIC requirements from EPA would not be surprising, given other aggressive moves by the agency during the Obama administration, and worries that the decision in this case could have broad implications. “You could draw this [out] *ad infinitum*. . . . It does open up a range of potential processes and industries that could” face new requirements, the source says.

Meanwhile, local environmentalists and tribal officials are pursuing environmental justice (EJ) claims in an attempt to block the mine. Tribe members say Kennecott’s plans would prevent them from accessing Eagle Rock, an outcropping near the mine site that the tribe says is necessary for religious ceremonies and cultural activities.

Activists filed a petition with Michigan Gov. Jennifer Granholm (D) asking for an EJ review in line with a 2007 executive directive the governor signed. State officials are still in the process of creating an EJ plan for the state, releasing a draft plan in December. The petition is expected to be dismissed because the EJ plan has not yet been finalized, an activist says. The petition also was sent to EPA’s Office of Civil Rights, but it does not explicitly mention federal EJ initiatives, such as the Clinton-era executive order on EJ.

EPA also has been consulting with tribal and company officials to determine whether Eagle Rock should be classified as a “traditional cultural property” under the National Historic Preservation Act -- a classification that would trigger additional considerations in federal permitting. However, that consultation is only required if the operation is required to get a UIC permit, which has heightened activists’ focus on EPA’s ongoing deliberations. While activists want EPA to require the permit, an agency decision

backing the company's position would allow environmentalists to challenge that decision in court.

SUPERFUND
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EPA finalizes RODs but promises future flexibility (*Western News*)

Stacey Fuqua/The Western News The EPA declared a public health emergency in Libby on Wednesday.
Posted: Thursday, May 13, 2010 11:02 am | Updated: 11:07 am, Thu May 13, 2010.
By Canda Harbaugh, The Western News | 0 comments
The Environmental Protection Agency on Monday issued the Libby Area Superfund Site's first-ever Records of Decision, characterizing the remedies as "flexible" and promising that they could be modified as more information about Libby amphibole asbestos becomes available.
Outlining cleanup remedies for Operable Unit 1 – city-owned property at the former export plant – and Operable Unit 2 – private land at the former screening plant – the RODs were similar to the EPA's proposed plans, which were open for public comment last winter. The remedies included a combination of soil removal and capping.

Lincoln County commissioners met with EPA officials Wednesday and voiced their disappointment that the agency did not take the city/county health board's suggestion to issue an interim ROD and hold off on a permanent ROD until a thorough risk assessment could be completed.

Also in attendance were Libby city councilmembers Peggy Williams and Bill Bischoff, who agreed with commissioners.

Rebecca Thomas, EPA's project manager for OU1 and OU2, said that EPA put several measures in place to address those concerns.

"A lot of (groups and individuals) focused on concerns about moving forward on the remedy even in advance of having all the final science done on the Libby amphibole type of asbestos," Thomas said, "so we've got several evaluations of the remedy built into the selected remedy."

Thomas explained:

• Once remedies are implemented, the EPA will perform another risk assessment using activity-based sampling at both sites to guarantee that the remedies are protective.

• Once EPA gains toxicity factors for Libby amphibole, which is expected by next year, the remedies and risk assessments will be reevaluated.

• After the EPA completes its site-wide cumulative risk assessment for OU4 – residential areas in Libby – OU1 and 2 will be evaluated again.

• The EPA is required by law to re-evaluate the remedies at least every five years.

Commissioner John Konzen asked, “With that flexibility, why does the EPA even have an interim ROD, if you can do it all with a permanent ROD?”

Thomas said that interim RODs were used for smaller-scale projects, such as providing bottled water to a neighborhood until a more permanent measure could be put in place.

“The interim ROD is designed not to look at a comprehensive remedy or an operable unit even,” Thomas said. “It’s generally very media-specific and might be a very short-term fix.”

TOXICS

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Lead rule adds cost to projects (*Omaha World Herald*)

By Bob Glissmann
WORLD-HERALD STAFF WRITER
Concerns about lead and the damage it can do to children's brains means renovations in older homes will cost more.
Under rules that went into effect late last month, contractors doing major work on a house, school or day care built before 1978 now must take precautions to avoid the spread of dust from lead-based paint.

Contractors who do such work must take eight hours of training to become certified and, at the job site, set up plastic containment barriers, post warning signs, avoid spreading dust to other areas of the house, properly dispose of waste and adhere to many other “lead-safe” practices.

If they don't, they could face fines of $37,500 per incident, per day.

Do-it-yourselfers aren't required to follow the same U.S. Environmental Protection Agency guidelines, but the EPA's website could guilt them into it: “You have the ultimate responsibility for the safety of your family or children in your care,” one section reads.

Renovation firms had previously been allowed to opt out of the training and work-practice requirements if they got owners of pre-'78 houses to certify that no children under age 6 or pregnant women lived in the house. But after environmental and children's health advocacy groups challenged the opt-out provision, the EPA decided to eliminate it. The opt-out option expires on July 5.

The extra steps that contractors must take to meet the requirements come with a price.

“Unfortunately, it's going to add costs to remodeling jobs,” said Jeff Brau, president of the Metropolitan Omaha Builders Association. “The EPA will tell you, ‘It's protecting kids, so what's that worth?’”

The EPA estimates that the cost of containment, cleaning and cleaning verification will range from $8 to $167, with the exception of some exterior jobs.

Brau himself went through the training, which cost $175, even though his construction firm, Brau Builders, works mostly on new construction.

Mike McLaughlin, the millwork manager for Omaha Door & Window, said 18 people in his company went through the training. He also said the rule will increase costs, noting that he expected window installers to charge extra for each window.

Companies could avoid the extra prep and cleanup work and simply not bid on projects involving older homes, McLaughlin said, but his company will continue to serve that market.

“We've decided an awful lot of people have homes older than 1978,” he said. “It wouldn't make sense for us to close off our business to all of those homes.”

After taking the training, contractors pay $300 to the EPA for a five-year certification.

In Nebraska, the EPA is enforcing the rule. In Iowa, the State Department of Public Health is in charge.

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Company: Cleanup complete at Calif. toxic dump (*Associated Press*)

(AP)
KETTLEMAN CITY, Calif. — The company that runs the Central California landfill where nearby residents complain that toxins have caused a number of birth defects in their town said Thursday it has cleaned up contaminated areas cited by federal investigators.

Chemical Waste Management Inc. said a thorough cleanup of a storage building and an adjacent soil area at its Kettleman Hills Facility exceeded federal requirements, the building's floor has been re-coated, and clean soil has been brought in.

The company also has "implemented new processes and procedures, including more frequent soil testing, to ensure continued compliance with all regulations," said Bob Henry, senior district manager for the facility.

Last month the U.S. Environmental Protection Agency said the facility had violated the Toxic Substances Control Act by improperly disposing of PCBs, or polychlorinated biphenyls — chemicals linked to cancer and other health effects.

It also faulted the dump — the largest hazardous waste facility in the West — with failing to decontaminate structures prior to continued use.

The EPA had tested the site between Feb. 8-12 as part of its compliance investigation.

Nahal Mogharabi, a spokeswoman for the EPA in San Francisco, said she could not comment because of the ongoing investigation.

The facility has been at the center of a fight with residents who blame it for a seemingly high number of birth defects in nearby Kettleman City.

A survey done by Greenaction, an environmental justice group, found that of 20 children born in the area from September 2007 to November 2008, five had defects, including clefts in their palates or lips.

State health officials said in February they found nothing unusual about the rate of infant birth defects in the impoverished farm town, but they emphasized the findings were preliminary.

Federal environmental officials announced earlier this year they would investigate the situation, including whether the EPA had dropped the ball on past complaints.

EPA ‘lead paint’ mandate adding to cost of renovations (*Tulsa Beacon*)

Environmental extremists in the Obama Administration have enacted new mandates that will cost every American thousands of dollars in home repairs.

On April 22 (Earth Day), the EPA began enforcing that “renovation, repair and painting rule” for professional remodelers in homes with lead-based paint.

Heat and air contractors, carpet installers, plumbers, painters and any contractor that does work in a home built before 1978 must now test for lead paint or assume that the house is infested with lead.

“This won’t save one life,” said Bob Enoch, general manager of Wortman Central Air Conditioning. “This is a massive waste.”

Enoch just completed a mandatory eight-hour course on how to comply with the new EPA rules. Only two companies in Oklahoma offer the training and one of those is only in-house. Enoch was trained by a Texas company that traveled to Tulsa just for EPA compliance.

“The Oklahoma Builders Association is going nuts over this,” Enoch said. “This will take twice as long to do most of the work we do.”

Enoch said one job that would normally cost $12,000 for new heat and air units and venting would jump to $16,000 because of the testing for lead paint.

“This will add thousands of dollars to the costs to our customers,” Enoch said. “I have to do it, even if I am not touching the paint.”

If a contractor does not test for lead paint, he can be fined up to $37,500 by the EPA for one job.

Enoch said he knew nothing about the EPA regulation before it took effect and none of his trade groups were aware of it.

Oklahoma Senators Jim Inhofe and Tom Coburn are trying to delay implementation of the new rules. U.S. Rep. John Sullivan has taken no action.

The mandate applies for any job covering more than six square feet of “contaminated painted surfaces” in homes built prior to 1978 that house pregnant women or children under age 6.

The bureaucratic rule mandates a cleaning inspection when the work is done. It prohibits open-torch burning and using high-heat guns and high-speed equipment such as grinders and sanders unless equipped with a HEPA filter.

The rule requires posting warning signs for occupants and visitors; using disposable plastic drop cloths; cleaning the work area with HEPA vacuuming and wet washing; and individual certification through a training course.

A 2006 study by the National Association of Home Builders on lead-safe work practices showed that a home was better off after a remodel than before, as long as the work was performed by trained remodelers who clean the work area with HEPA-equipped vacuums, wet washing and disposable drop cloths.

The newest EPA rule mandates the following:

• Anyone working in pre-1978 homes will need to be certified. Firms must apply for certification and pay a fee of $300 to the EPA. Along with the firm certification, an employee will also need to be certified as a certified renovator. This includes an eight-hour class by an EPA-approved training providers.

• Once work starts on a pre-1978 renovation, the Certified Renovator will post warning signs outside the work area and supervise setting up containment to prevent spreading dust.

Once the work is completed, the regulation specifies cleaning and waste disposal rules. Clean up procedures must be supervised by a certified renovator.

• After clean up is complete, the certified renovator must verify the cleaning by matching a cleaning cloth with an EPA verification card. If the cloth appears dirtier or darker than the card the cleaning must be repeated.

• Beginning in July, remodelers are required by EPA to share a copy of records developed under rule requirements with the customer within 30 days of completing the remodeling work.

Here are some exemptions to the rule:

• A home built after 1978.

• Minor repairs (less than six square feet).

• A homeowner may opt out by signing a waiver if there are no children under age six frequently visiting the property, no one in the home is pregnant, or the property is not a child-occupied facility.

The EPA has released an amendment to the rule that revokes the opt-out waiver. This change is expected to take effect in early July.

This new law applies to Renovation contractors, maintenance workers in multi-family housing, painters and other specialty trades.

The EPA has the authority to authorize states, tribes and territories to administer their own RRP program that would operate in lieu of the EPA regulations. The following states have been authorized by EPA: Wisconsin, Iowa, North Carolina, Mississippi, Kansas, Rhode Island and Utah.

According to the EPA website, “If you are a homeowner performing renovation, repair or painting work in your own home, EPA’s RRP rule does not cover your project. However, you have the ultimate responsibility for the safety of your family or children in your care.”

This entry was posted on Thursday, May 13th, 2010 and is filed under Front Page Stories.

EPA: BP makes Gulf oil spill worse by using more toxic, less effective chemical dispersants (*Political Spin Examiner*)

May 13, 9:50 PM · Maryann Tobin - Political Spin Examiner
EPA: BP makes Gulf oil spill worse by using more toxic, less effective dispersant

While millions of people and an entire ecosystem, await punishment from the oil and chemicals being pumped into the Gulf of Mexico, BP has decided against using a dispersant that the EPA says would be 100% effective, and less toxic to the environment.

BP has been using a chemical dispersant called Corexit to break up the oil that has been pouring into the Gulf of Mexico since the Deepwater Horizon exploded on April 22,2010.

However, Corexit is more toxic and less effective than 12 other EPA approved chemicals that BP could be using. Additionally, two of the dispersants on the list "were found to be 100 percent effective on Gulf of Mexico crude, while the two Corexit products rated 56 percent and 63 percent effective."

So why would BP choose a product that only works on about half of the spilled oil, when they could use one that works on all of it?

It might have something to do with BP's relationship with Nalco, the corporation that manufactures Corexit.

"Nalco was once part of Exxon Mobil, whose current leadership includes executives at both BP and Exxon," according to the New York Times.

BP has told federal officials that so far, they have use 400,000 gallons of Corexit to battle the Deepwater Horizon spill. An additional 805,000 gallons have been ordered.

The longer the oil keeps spilling, the more Corexit British Petroleum will buy - and the less chance anything in the Gulf of Mexico will have to survive.

EPA Tests Dispersant Use For Gulf Oil Spill Prior To Possible Expansion (*Inside EPA*)

EPA and other federal agencies are testing the use of chemical dispersants near the seafloor in response to the ongoing oil spill in the Gulf of Mexico to examine whether it would be effective to expand to the current cleanup effort and future spills use of the chemicals, about which researchers warn little is known of their effects on aquatic organisms.

More than 372,000 gallons of the dispersants have been used so far to prevent leaking oil from the BP offshore oil well and subsequent spill from reaching the shore. The chemicals act like dish soap to break up oil slicks and distribute oil particles throughout the water column. Researchers say the use of the dispersants in the Gulf is unprecedented and that should spur new efforts to research the chemicals' effects on aquatic life.

BP, which owns the well, conducted three tests deploying dispersants near the site of the leak. EPA Administrator Lisa Jackson said during a May 12 conference call that the first two tests were inconclusive and that the agency is waiting for the results of the third test before determining whether to authorize additional subsurface dispersant use.

EPA wants to ensure that using dispersants underwater would be at least as effective at breaking up the spilled oil as surface application and would not cause additional human or environmental health impacts, Jackson said. More than 28,000 gallons of dispersants were used in the subsurface tests, Jackson said.

Jackson acknowledged that the dispersants create a risk trade-off, because they expose aquatic organisms that live in the water column and near the sea floor to dispersed oil in an effort to keep that oil from reaching coastal ecosytems that are home to a diverse array of wildlife. Dispersants are "not a silver bullet," Jackson said, but rather an attempt to find the least adverse method for responding to the massive oil spill.

EPA and the National Oceanic and Atmospheric Administration (NOAA) used several methods in testing the dispersant use, including visually observing the amount of oil reaching the surface, measuring changes in oil particle sizes within the water column, calculating the concentration of dissolved oxygen, testing for the presence of chemicals within the water and performing biological tests, according to Jackson and NOAA Administrator Jane Lubchenco.

"There's always been a desire to test subsea dispersant use," Jackson said, noting that it could become a more flexible tool to fight oil spills because it can be done regardless of the time of day or weather patterns, unlike other strategies like skimming oil from the surface, burning oil or applying dispersants to oil slicks from the air.

Researchers have warned that there are many unknowns when it comes to dispersant use, especially in applying them underwater. A 2005 National Research Council report, “Oil Spill Dispersants: Efficacy and Effects,” is among the most detailed reports to date on the chemicals, but even that report acknowledges significant shortcomings in the availability of existing data and recommended EPA and other agencies establish an “integrated research plan” to further examine dispersant use. An author of that report says little follow-up research has been done since it was released.

Two dispersants have been used so far in response to the Gulf spill, Corexit 9500 and Corexit EC9527A, both manufactured by Nalco Energy Services LP. Material Safety Data Sheets for the chemicals that EPA posted online say the chemicals pose “low” risk to humans and the environment but note that no toxicity studies have been conducted.

Both chemicals are on a list of dispersants that have been pre-approved by EPA for surface use in oil spills more than three miles offshore and in water deeper than 10 meters. Subsurface use has not been authorized beyond the three tests that were conducted.

Congress also is examining the use of dispersants in the wake of the spill. The chemicals were discussed at a May 11 joint hearing of two Senate Environment & Public Works subcommittees. Carys Mitchelmore, a professor at the University of Maryland who has studied dispersants, said it would be “impossible to predict” the consequences of their use in response to the BP spill. She noted in her testimony that little is known about aquatic life that would not have been exposed to oil if not for the dispersant use, and that limited toxicological information exists to fully assess risks to such organisms. She noted that some species are more vulnerable to dispersant exposure.

Sen. Benjamin Cardin (D-MD), who chairs the water and wildlife subcommittee, during the hearing pressed EPA officials to step up their research into the chemicals and share their findings with the public.

Industry Seeks To Dismiss EPA Defense In Discharge Permit Toxics Suit (*Inside EPA*)

On the eve of oral arguments in a key Clean Water Act (CWA) permit dispute over what types of toxicity limits are required in permits, industry players are asking that a recent EPA brief defending the agency’s push for the limits be thrown out on a violation of court rules.

EPA’s Environmental Appeals Board (EAB) is scheduled to hear oral arguments June 10 in the case *In the Matter of: San Jacinto River Authority (SJRA)*, in which the water agency charges that EPA is requiring the use of whole effluent toxicity (WET) test limits in permits without scientific justification. WET limits are meant to protect aquatic

organisms from the aggregate effects of multiple pollutants in a single waterway, even if individually the toxins in a waterbody are below water quality standards.

EPA has been pushing for more stringent WET test requirements in permits across the country, to the frustration of industry, who think the test requirements do not show enough of a link to actual harm to aquatic organisms to justify their costs. In the Texas case, EPA has vigorously defended its use of WET requirements, rejecting in an April 14 brief industry arguments that EPA has changed its position on the validity of Texas' WET permitting procedures.

But the National Association of Clean Water Agencies (NACWA), which represents municipal wastewater treatment plants and is an *amicus* party in the permit dispute, is asking EAB to strike EPA Region VI's response to NACWA on the grounds that EPA filed the brief without following EAB rules. NACWA, additionally, is seeking to participate in the oral arguments.

Region VI's April 14 response to NACWA should be stricken from the record because EPA failed to file a request from the board before it submitted the brief, NACWA says in a May 5 filing to EAB. "The Board's rules do not contemplate that a party can file a response to an amicus curiae brief," the May 5 NACWA brief says.

NACWA also asks the court for permission to participate in May 10 oral arguments, using EPA's brief as justification. "As should be evident from EPA's actions in filing a response to NACWA's *amicus* brief (a response that was longer than the NACWA brief itself), there are substantial issues being raised here as to EPA's authority in reviewing and issuing state [CWA] permits." *Relevant documents are available on InsideEPA.com.*

EPA maintains that it has not changed position on Texas' WET procedures, and that its 2002 approval of the state's WET implementation procedures was an approval of a state guidance document not an approval of water quality standards.

The final control over "what permit conditions are necessary is what is required by state water quality standards," the April 14 EPA brief says. And where it is necessary to meet those water quality standards, WET limits must be included in permits, the brief argues. EPA Region VI "did not and, indeed, cannot relax these requirements based on a state guidance document."

But NACWA, in its latest filing, takes issue with EPA's arguments. "In contending that it did not shift its position on the state's WET procedures, EPA appears to rest its argument primarily on a contention that the Texas procedures that were approved by EPA are meaningless, so any position that EPA took as to them was irrelevant," NACWA says in the brief.

However, the agency's approval of Texas WET procedures is important, NACWA says, "not some kind of trivial EPA opinion concerning state planning details: it was EPA's

explicit approval of the method that the state would use to interpret and implement its water quality standards when it issues permits, including those concerning WET."

EPA Advances Next Two Chemical 'Action' Plans For White House Review (*Inside EPA*)

EPA has sent the latest two of its ongoing chemical "action" plans to the White House Office of Management & Budget (OMB) for review, including a plan for the laundry detergent chemical nonylphenol that industry has sought to phase out voluntarily.

OMB received a plan for nonylphenol and its ethoxylates and a separate plan for hexabromocyclododecane on May 10, according to the office's Web site. The nonylphenol action plan could require industry to test for possible harmful effects ahead of a possible phase-out that some in industry say is an alternative to EPA proposing a test rule.

Nonylphenol is used in laundry detergents, personal care products, industrial soaps, textile processing, leather processing, veterinary medicines, pulp and paper manufacturing, paints and as dispersing agents in pesticides and herbicides. Last year, the Textile Rental Services Association of America, a group that represents industrial launders, proposed a voluntary phaseout of the chemical by 2016 as an alternative to an EPA rule.

Industry says the voluntary move could even be codified under the Toxic Substances Control Act through a significant new use rule. "We've been meeting with EPA" regarding the proposal "and are hoping to agree to something in the very near future," an industry source said in March.

EPA has already issued action plans for bisphenol A; multiple phthalates; certain perfluorinated chemicals; penta, octa, and decabromodiphenyl ethers; and short-chain chlorinated paraffins.

EPA Poised To Rank Formaldehyde Among Highest-Risk Chemicals (*Inside EPA*)

EPA is preparing to issue its long-delayed draft risk assessment of formaldehyde that is expected to set one of the agency's strictest cancer inhalation safety limits for a chemical, stricter even than the safety limits EPA has set for benzene and vinyl chloride -- which industry acknowledges are known carcinogens.
The move is likely to drive stringent new regulations for air emissions and other environmental releases of the substance, including rules governing natural gas turbines, ethanol plants, plywood manufacturers and other pollution sources, prompting significant fears among industry representatives.

“The implications for air limits -- nobody knows,” one industry source says. “Everybody’s in a cold sweat.”
The new draft Integrated Risk Information System (IRIS) assessment is expected to be released publicly June 2, an industry source says, just days before a National Academy of Sciences panel -- demanded by the substance’s manufacturers and Sen. David Vitter (R-LA) -- is expected to begin its review.
The agency is moving to complete the draft IRIS assessment after other federal agencies submitted their comments to EPA on the draft assessment in recent weeks. EPA last published a formaldehyde assessment in 1991, labeling the chemical a “probable human carcinogen.”
But the agency’s effort to revise the assessment was delayed several years in 2004 at the urging of then-Senate Environment & Public Works Committee Chairman James Inhofe (R-OK), who asked EPA to wait until the National Cancer Institute collected additional data on the deaths of workers who were exposed to formaldehyde on the job. The agency, however, restarted its assessment after receiving a briefing from NCI on the new data about a year ago.
While EPA was awaiting the new NCI data, Bush administration officials relied on industry-funded modeling data as the basis for its regulation of formaldehyde emissions from plywood facilities in 2004. The agency declined to regulate natural gas turbines, which also emit formaldehyde, until staff finished an update of the IRIS assessment.
But sources say the upcoming EPA assessment is anticipated to be more stringent than existing risk-based standards for formaldehyde, given new data -- from NCI and a controversial Chinese worker study -- suggesting that exposure to formaldehyde could be linked with leukemia.
These studies are hotly disputed by industry, which argues that there is no known biological way in which formaldehyde can enter the bloodstream to cause cancer. Shifting EPA’s cancer risk numbers from nasal cancers -- widely agreed can be caused by formaldehyde exposure -- would lead to more stringent risk numbers in part because leukemia is far more prevalent than nasal cancers.
“The implication that it causes leukemia, so much biology is seemingly ignored to come to that conclusion,” an industry source says. “The whole idea of setting a number so much lower than what we exhale -- we’re emitting 1 to 2 parts per billion with our breath -- I don’t know if we’ve ever seen anything like this. Formaldehyde is . . . present in every living cell, and if you didn’t have it, you’d die.”
Federal government sources indicate that the inhalation cancer risk number in the draft document -- also known as the inhalation unit risk (IUR) -- are “likely to be 10 times more potent,” or health protective than those listed for vinyl chloride and benzene, both chemicals that are known human carcinogens.
EPA presents a range of IURs for both benzene and vinyl chloride on its website, all measured in terms of 10-6 micrograms per cubic meter of air (ug/m3). The 2000 benzene assessment provides an IUR range of 2.2x10-6 -- 7.8x10-6 ug/m3. Vinyl chloride’s IUR range, also published in 2000, is 4.4x10-6 -- 8.8x10-6 ug/m3. EPA’s existing IRIS assessment, also published on its website and dating from 1991, provides an IUR of 1.3x10-5 ug/m3.
Whatever the exact number, it would be thousands of times more stringent than the industry-funded modeling data EPA used to craft its plywood maximum achievable

control technology emissions standard. That number is some 10,000 times less stringent than EPA's existing IRIS number -- and the revised draft is expected to be more stringent in turn.

WATER

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5/14/2010

With Utility MACT Looming, EPA Seeks New State Steps To Limit Mercury (*Inside EPA*)

With the Obama EPA poised to issue a strict rule regulating mercury and other air toxics emissions from power plants nationwide, the agency is now urging regulators from upwind and downwind states to use a landmark Clean Water Act (CWA) meeting next month to develop additional "collaborative" approaches to limit depositions of the neurotoxin.

While the agency has agreed to a request from Northeast states to hold the first-time water act meeting to discuss ways to control pollution from sources outside their borders, the agency stopped short of making a formal determination that any of the 11 downwind states is contributing "significant" levels of mercury pollution that is harming Northeast waters -- a determination that could result in an uncertain regulatory regime. Instead, EPA determined that the aggregate contribution from the downind states "in whole or in part is contributing to impairments" in the Northeast, according to EPA's response to the state's request.

One state source says the upcoming meeting could provide an important opportunity to coordinate multi-media approaches to control air emissions that travel among states and inhibit water quality. "I think historically there's been a lot of problems getting water and air programs in sync when they intersect," the source notes, adding that the Northeast states' petition to seek the first-time meeting "is an attempt to get that kind of traction."

EPA and state officials are quietly preparing for the first-of-its kind meeting next month at which New England regulators will press EPA and upwind states -- especially Pennsylvania -- to implement new controls on mercury emissions and take other actions to reduce mercury releases that New England states say are needed to meet water quality standards in the Northeast.

The meeting, triggered under a never-before-used provision of the CWA, stems from Northeast states' completion of a landmark regional total maximum daily load (TMDL) for mercury in 2007, in which the region's states observed that they could not limit mercury sufficiently to meet fish consumption and water quality standards unless upwind states cut their mercury emissions by up to 90 percent.

But the Bush administration declined to craft a rule that would require such stringent emissions limits, prompting the Northeast states to subsequently petition EPA in 2008 --

during the final months of the Bush administration -- to convene the conference under CWA section 319(g) to determine how best to reduce mercury pollution coming from nonpoint sources. Section 319(g) says that if states are not meeting their water quality standards “as a result, in whole or in part, of pollution from nonpoint sources in another state,” EPA shall convene a conference “to develop an agreement among such states” to reduce pollution to improve water quality.

Scheduled for June 22-23 in Philadelphia, the closed-door conference will bring together regulators from the seven states that compiled the Northeast TMDL -- Connecticut, Maine, New Hampshire, New York, Rhode Island, Vermont and Massachusetts -- and 11 states that are contributing mercury pollution to the region -- Pennsylvania, New Jersey, Ohio, West Virginia, Maryland, Michigan, Virginia, Indiana, Kentucky, North Carolina and Illinois.

Atmospheric deposition is responsible for nearly 98 percent of the total mercury load in the Northeast, but regulators have struggled to implement regulations on the primary sources of atmospheric mercury because the pollutant can travel from other states or countries and the power plants and industrial facilities that emit it are regulated as stationary source emissions under the Clean Air Act, rather than the CWA, which considers atmospheric deposition a nonpoint source.

But the Obama EPA has already announced that it will develop a power plant MACT, an issue that EPA will discuss at the upcoming conference while shifting the focus to state efforts to control mercury. “This information sharing [among states] would provide an understanding of mercury reduction efforts in other states and could form the basis for collaborative efforts as well as an opportunity for participants to benefit from others’ experiences in reducing mercury sources,” Denise Keehner, director of EPA’s Office of Wetlands, Oceans & Watersheds, told EPA and state regulators in an April 26 memo on the upcoming meeting.

EPA is merely the “convener” of the conference and will provide a “facilitator” for the discussions, but “the nature and content of any agreement and/or followup actions emerging from the conference will be determined collectively by the state participants,” Keehner writes. Relevant documents are available on InsideEPA.com.

The memo notes that although states are the focus of the conference, EPA will provide an update on the agency’s MACT rulemaking for coal-fired utilities and other actions to reduce mercury but that the agency is seeking stakeholder input on the air toxics rule “apart from this conference.”

While EPA has declined to make a formal determination that any state is contributing significant amounts of harmful mercury emissions, the agency and states have nevertheless identified Pennsylvania as a significant contributor. Of the atmospheric mercury that is impairing waters in the Northeast, 30 percent comes from within the United States, and nearly half of that load comes from states outside the region. Pennsylvania is the largest single out-of-region contributor, responsible for about 22 percent of the domestic mercury impairing the northeast; the other 10 out-of-region states contribute between about 1 percent and 5.5 percent each, according to EPA.

While EPA is not singling out individual states for action, the issue of out-of-state contributions to Northeast water quality impairment is up for discussion at the conference. A draft schedule Keehner distributed includes presentations from the Northeast states on their TMDL, from EPA on its findings on the out-of-region

contributions and from all participating states on their ongoing mercury reduction program experiences.
Northeast state sources say they still plan to stress to EPA their support for a stringent power plant mercury MACT, but that they hope to explore other sectors where mercury reductions can be achieved from states within and outside the region, such as sewage sludge incinerators, municipal waste combustors and dental amalgam.
It is not clear what will come out of the conference, but one Northeast source says the primary question participants will be grappling with is, “How do you get mercury out of the product cycle?” The source says this conference should allow states and EPA to “get way beyond the discharge pipe and smokestack” in looking for ways to control mercury sources. “We don’t want these conversations to be bound by one particular statute or one particular regulation,” the source says.
For example, the source says participants would push EPA for national rules on amalgam separators, which activists have said should be required in dentists offices to separate mercury from fillings. Activists have estimated that eight to 10 tons of mercury from dental amalgam is flushed into waterways every year.
The Northeast source says participants in the conference also may develop model legislation that could be implemented at the state or federal level to give regulators more tools to control mercury pollution. “I think there’s a lot of ideas out there. We don’t need to create the solutions, we’re really at the, ‘How are we going to do this?’” the source says. “We know the sources [of mercury]. How are we going to get at them?”
An industry source says EPA seems to be taking a hands-off approach to the conference, judging by the identification of states as “primary participants” and EPA simply as the “convenor” in Keehner’s memo. The source also criticizes EPA’s decision to hold the conference behind closed doors. An EPA spokeswoman says in an e-mail that the agency plans to publicly release a “summary of the proceedings” but is not inviting public participation because the conference is aimed merely at “facilitating a dialogue” among the involved states and “is not a decision forum in which actions affecting stakeholders will be enacted. Any state actions that do emerge out of the conference would be enacted through state processes which have their own public involvement components.”
Sources say the conference could serve as a model for future proceedings to address similar issues such as nutrient pollution, although it is not clear at this point that other states are looking to the 319(g) petition process in other areas.
Meanwhile, EPA is continuing to explore how it could use controls on air emissions to control water pollution in other areas, such as reducing nutrients in the Chesapeake Bay. In a series of draft strategy reports released in September -- and finalized this month -- EPA proposed a series of steps to limit nitrogen oxide (NOx) emissions from power plants to limit nitrogen deposition in the Bay, including enforcing new source review, new source performance standards and state implementation plan requirements for NOx and by “obtaining either judgments or enforceable settlement agreements to install pollution control technology and incorporate best management practices to achieve NOx emissions reductions.”
Sources in states in the Chesapeake Bay airshed, which stretches from North Carolina to the Canadian border and as far west as Indiana, say little formal work has been done to implement new NOx controls specifically targeted at water quality, but they suspect

some discussion of water quality needs will be included in EPA's forthcoming replacement to the Clean Air Interstate Rule, which a federal court remanded to the agency in 2008. -- Nick Juliano

States Urge EPA Not To Implement Florida Nutrient Process Nationally (*Inside EPA*)

States are questioning the validity of EPA's ability to accurately connect nutrient limits in Clean Water Act (CWA) permits and with improved aquatic ecosystem health through the methods EPA plans to use to set numeric nutrient water quality criteria in Florida and are urging the agency to avoid using the methods as a model nationally.

While environmentalists have strongly backed EPA's approach, the agency has seen strong criticism from states, industry and Florida politicians over its plans to implement numeric nutrient criteria in the state. Many observers believe EPA is likely to use the same approach in other states that are continuing to rely on less precise narrative nutrient criteria, and the proposed criteria for Florida have drawn more than 2,300 comments by the April 28 deadline.

Activists are increasingly looking to EPA to pressure states into implementing numeric water quality criteria for a range of pollutants in order to bypass a perceived reticence by state regulators, using EPA's issuance of numeric criteria for nutrients in Florida as a model for action.

In comments from the Association of State & Interstate Water Pollution Control Administrators (ASIWPCA), state regulators urge EPA not to use nationally the methods created in Florida because the approach illustrates the difficulty of linking the health of aquatic ecosystems with nutrient discharges.

"Water quality standards provide an effective foundation for water quality management and addressing impairments caused by many pollutants. However, as natural and necessary components of healthy ecosystems, nitrogen and phosphorus present unique challenges to following an approach that was mainly devised and designed to address threshold pollutants, especially those which are toxic in the environment," the April 28 comments say.

"Arguably," ASIWPCA says, what is natural and healthy for a waterbody in terms of nutrient enrichment exists along a broad scale, and states are struggling, "even after a 10-year investment of state and federal resources, to develop viable and broadly applicable effects-based numerical water quality standards for nutrients." Consequently, ASIWPCA urges EPA not to look at its proposed standards for Florida "as a 'blueprint' for states to follow."

Nutrients, unlike toxics, states say, cannot always be proven to cause downstream damage. Nevertheless, EPA "has typically urged application of standards based on concentration data, which are often poorly correlated to or independent of what the biology might be indicating."

The states note that nutrient concentrations and adverse impacts on aquatic life change from waterbody to waterbody, and this "basic limitation was not acknowledged" in EPA's approach to developing the Florida criteria.

In other states, EPA should only apply numeric nutrient standards "when there is biological confirmation of an impact related to nutrient loads from human sources that exceeds stressor identification and nutrient susceptibility determinations for the waterbody and that there is confidence that nutrient control is key to use attainment," ASIWPCA says.

Alternately, they say, EPA should focus on best available technology and practices to reduce nutrient pollution from point and nonpoint sources with even accountability. "The water quality based approach, i.e., relying on water quality based effluent limits and TMDLs, is a hard, slow road that leads to expensive controls for point sources, or to use attainability analyses where unnecessary."

Senate Climate Bill Would Mandate Disclosure Of 'Fracking' Chemicals (*Inside EPA*)

The just-introduced draft Senate climate bill would require companies that conduct the controversial natural gas extraction process of hydraulic fracturing, or fracking, to disclose all chemicals used in the process, a key goal for lawmakers seeking disclosure to determine whether the chemicals are entering drinking water and threatening public health.

A discussion draft of the bill would amend the Emergency Planning & Community Right-to-Know Act to require any hydraulic fracturing service company to disclose on the Internet "all chemical constituents" used in fracking operations, in order to provide "adequate information" for the public and state and local authorities.

The bill does not appear to impose any new regulations or requirements other than the disclosure requirement, but if it became law it could provide a boost to proponents of increased regulation of fracking. While discharges of fracking fluids to surface water are subject to regulation under the Clean Water Act, the 2005 energy law exempted the practice from regulation under the Safe Drinking Water Act (SDWA).

Sen. Robert Casey (D-PA) has introduced a bill, S. 1215, to require disclosure of the chemicals used in fracturing fluid and give EPA authority to regulate the practice under SDWA. Rep. Diana DeGette (D-CO) also has introduced a companion bill in the House,

H.R. 2766. The lawmakers introduced the bills in part due to concerns that the largely unregulated practice is causing drinking water contamination.

After a January House hearing related to oil drilling, industry sources said the fact that DeGette and other lawmakers focused their questions on disclosure seemed to indicate emerging support for moving only the disclosure portion of the bill. “To the extent that she intends to push more the disclosure portion of the bill, that is something that Congress as a whole would be more amenable to,” one industry attorney said (*Inside EPA*, Jan. 29).

Casey is also urging EPA to use its current authority under several environmental laws to “investigate and respond to” reports of drinking water contamination in Pennsylvania allegedly caused by fracking, echoing long-standing calls from activists for EPA to take action now even while they call for more authority for the agency.

But an industry source has said EPA has no reason to step in to regulate fracking in the state because Pennsylvania is already taking strong steps to address the issue. EPA also has authority to address drilling under several existing statutes, including emergency provisions under SDWA, the Clean Water Act and the Comprehensive Environmental Response, Compensation & Liability Act, known as Superfund law, the source said (*Inside EPA*, April 30).

House Energy & Commerce Committee Chairman Henry Waxman (D-CA) earlier this year launched a broad inquiry into the risks posed by fracking, bolstering calls to restore EPA authority to regulate the practice under the drinking water law, as well as increased regulation of the practice under existing EPA authorities.

Democrats Include Broader Endocrine Test Rules In Drinking Water Bill (*Inside EPA*)

House Democrats have included language in a key drinking water funding bill to expand the scope of EPA’s endocrine disruptor screening program (EDSP) to cover industrial chemicals in addition to the pesticides that the agency is already reviewing, prompting praise from activists but industry doubts about the need for the additional authority.

The endocrine disruptor provisions were first introduced May 5 as a stand-alone bill, H.R. 5210, introduced by Reps. Ed Markey (D-MA) chair of the Energy & Commerce Committee’s environment panel, and James Moran (D-VA), chair of the Appropriations Committee’s interior panel.

They were later included in a broader draft bill unveiled May 10 by Markey and House Energy & Commerce Committee Chairman Henry Waxman (D-CA) to reauthorize funding for EPA’s drinking water state revolving loan fund (SRF), which EPA uses to

help finance water infrastructure projects. *Relevant documents are available on InsideEPA.com.*

Democrats argue the bill is a priority that is needed to help close a massive funding gap between infrastructure needs and available funds. But the drinking water bill's fate is uncertain as the Senate companion to the House bill -- S. 1005 -- is being blocked by Republicans who are concerned by what they say is EPA's overly broad application of Davis-Bacon prevailing wage requirements to wastewater and drinking water infrastructure projects (*see related story*).

Waxman and Markey announced that they plan to hold a hearing on the drinking water funding bill May 13.

In addition to the endocrine provisions, Waxman and Markey's bill's also includes new EPA requirements to help local communities afford treatment technologies needed to meet tougher drinking water standards, such as requiring states to prioritize SRF funding for disadvantaged communities -- an issue that is a top priority for many Republicans, who have sought to provide local communities with a waiver from EPA standards.

The bills' endocrine provisions would amend the Safe Drinking Water Act to include language requiring EPA to begin screening and testing drinking water contaminants for potential endocrine-disrupting effects as part of the EDSP. The program, launched by EPA in 2009, was mandated by the Food Quality Protection Act in 1996, which required the agency to assess pesticide chemicals and environmental chemicals for their adverse endocrine effects.

It codifies non-binding report language that Moran inserted in EPA's fiscal year 2010 appropriations law mandating that EPA release by next fall a list of at least 100 drinking water contaminants and to issue testing orders for those chemicals under the EDSP within four years. The new bill solidifies those requirements but also adds a slew of new mandates for how EPA should approach the addition of the new chemicals to the EDSP.

EPA issued test orders last fall for the first group of 67 pesticide ingredients to undergo tier one testing. Agency officials have said they are "scurrying" to meet the appropriations language deadline for developing the list of drinking water chemicals, and will take public comment on the list in the coming months.

For example, under the legislative language, EPA would be required to engage in a public comment period during the development and evaluation of tests, can accelerate testing for suspected disruptors, establishes a 6-month time line for EPA to determine what action to take after the screening is completed, and asks the agency to prioritize the list based on vulnerable subpopulations.

The language also requires EPA to report to the House and Senate environment committees every three years with information on the progress made testing and regulating the chemicals; changes in testing methods; actions taken to communicate results to the public and other agencies; and an explanation of any deviations from the testing schedule.

“This bill will mandate the screening of chemicals found in our drinking water, and update the testing requirements to create a more transparent program that relies on the most up-to-date science,” Markey said May 5.

Moran said the bill “gives us the tools to catch up and employ the latest science to ensure our water is safe, laying the groundwork for removing potentially harmful endocrine disrupting chemicals from our drinking water.”

Both lawmakers have repeatedly said they want to force EPA to more strictly regulate endocrine-disrupting chemicals. Moran in December introduced a bill, H.R. 4190, that would mandate new endocrine research at either the National Institute of Environmental Health Sciences (NIEHS) or EPA’s research office.

Most recently, Moran said on an April 20 teleconference that he wants to use pending House legislation to reform the Toxic Substances Control Act (TSCA) as a vehicle for moving new EDSP requirements. For example, he said he hopes to win inclusion in a final TSCA reform bill of language to force chemical companies to perform more tests on chemicals before they can enter the marketplace.

Environmentalists welcome the new bill language for mandating an expansion of the EDSP to include industrial chemicals and their impacts on wildlife, though industry sources say the agency already has such authority.

EPA Pact Sets Enforceable Timetable For Chesapeake Bay Cleanup (*Inside EPA*)

EPA has agreed to a proposed settlement with environmentalists that, if entered by the court, will provide a mechanism by which activists can force the agency to implement a number of stringent nutrient pollution control rules for the Chesapeake Bay, creating a new hurdle for industry groups that may seek to challenge the requirements.

The now-enforceable requirements are nationally significant because the agency has publicly vowed to expand all successful Bay cleanup measures nationwide. Environmentalists and EPA announced the proposed settlement May 11, one day before the agency unveiled its final interagency plan for cleaning up the Bay. “Many of the commitments in the settlement agreement will be reflected in the strategy,” EPA said in a May 11 statement.

Some industry groups have suggested they may challenge the agency's regulatory cleanup plan for the Bay -- known as a total maximum daily load (TMDL). Conversely, environmentalists say they would still like to see the requirements codified, but pending legislation to do that is currently stalled.

Among other things, the settlement outlines EPA's mandates for states to implement the agency's upcoming pollution limits for the Bay and also requires EPA to review all new general permits drafted by Bay states for the construction sector to ensure they meet federal requirements.

In early 2009, the Chesapeake Bay Foundation (CBF) sued EPA in federal district court over its stalled plans to clean up the Bay, seeking to force the then-incoming Obama administration to confront a long-time failure to deal with nutrient pollution in the six-state watershed.

In part, the suit aimed to force the agency to set a watershed-wide aggregate pollution load limit, or TMDL, by 2010, one year sooner than a court-ordered mandate to create the TMDL by 2011.

But soon after the suit was filed, President Obama signed an executive order (EO) aimed at cleaning up Chesapeake Bay pollution, agreeing to set a TMDL by the 2010 deadline, along with other key milestones.

EPA May 12 rolled out its final plan for cleaning up the Bay, issuing a document required by Obama's executive order that details a host of EPA and other federal actions. The final strategy outlines specific end-points for cleaning up the Bay, extending its two-year milestone plans to all federal agencies and throwing the agency's weight behind plans to create a multi-state environmental credit market.

The cleanup endpoints include pledges to restore "30,000 acres of tidal and non-tidal wetlands and enhance the function of an additional 150,000 acres of degraded wetlands by 2025;" to "restore naturally reproducing brook trout populations in headwater streams by improving 58 sub-watersheds from 'reduced' classification (10--50 percent of habitat lost) to 'healthy' (less than 10 percent of habitat lost) by 2025; and to protect "an additional two million acres of lands throughout the watershed currently identified as high conservation priorities at the federal, state or local level by 2025, including 695,000 acres of forest land of highest value for maintaining water quality," the strategy says. *Relevant documents are available onInsideEPA.com.*

The agency in the final plan also cites stormwater management permits and plans in the District of Columbia as "a model for the Chesapeake watershed" that will follow the footprint of stringent federal requirements.

And EPA touts plans to propose new regulations for concentrated animal feeding operations by Dec. 30, 2010, and to review states' technical standards for nutrient management by Dec. 15, 2012, to make sure they meet *Concentrated Animal Feeding*

Operation (*CAFO*) regulations. EPA is also considering an expanded definition of what is a CAFO, broadening what is considered to be a regulated CAFO and proposing more stringent permitting requirements.

The new plan provides very specific strategies for enforcement, noting where the agency plans to target investigations and inspections, including CAFOs in the Delmarva peninsula, south-central Pennsylvania and the Shenandoah Valley; at significant wastewater treatment plans; and in the Elizabeth, Anacostia and Patapsco rivers for toxic contaminants, the report says.

The recently announced settlement is important because, together with the previous court-ordered deadlines, it gives the administration additional legal cover to take the steps detailed in the Chesapeake Bay strategy, even as some industry groups are reiterating previously thwarted arguments challenging EPA's statutory authority to develop a TMDL for the Bay and its tributaries before states have developed such plans.

The Federal Water Quality Coalition -- a coalition of municipalities and industry groups -- and a separate coalition of poultry producers argued in comments to EPA earlier this year that the agency's emphasis in a draft version of its action plan on taking a leading federal role cleaning up the Bay belies the Clean Water Act's (CWA) plain emphasis on the leading role of states in enforcing and developing pollution reduction plans. The industry groups take aim specifically at the agency's intention to develop a TMDL for nitrogen and phosphorous pollution in the Chesapeake Bay, and then require states to develop watershed implementation plans (WIPs) to show their methods for meeting those reductions.

The groups' arguments echo those that municipal and industrial dischargers made in litigation during the 1990s when they challenged EPA plans to set a TMDL before the state had acted. But the dischargers' arguments were never addressed on the merits.

While CBF welcomed the proposed settlement with EPA, they acknowledged that it is only a "first step," albeit an "historic" one, though they reiterated their long-standing call for Congress to pass legislation known as the Chesapeake Clean Water Act, which would codify EPA's authority to set a TMDL and implement it. "We commend EPA and the Obama Administration for their commitment to clean water," CBF President William Baker said in a statement. "But the job is not done," he said, calling for Congress to pass a bill that would "legally reinforce the pollution budget that is part of the settlement agreement, making it much more difficult for polluters to challenge the TMDL requirements."

However, the bill is currently stalled in Congress, where it faces significant opposition from agriculture and construction groups concerned about the new authority it would provide EPA and states to clamp down on runoff and other pollution.

The settlement with CBF outlines what “reasonable assurances” EPA will require of the states to support the TMDL. Among other things, states will be required to develop WIPs -- an approach that mirrors controversial requirements of an abandoned Clinton-era rule -- explaining how they will meet the limits for all sources in each area of their state. The settlement also outlines consequences that EPA will impose on states that do not produce WIPs in good time, such as refusing to issue permits for new pollution sources, including for new developments or wastewater treatment plants.

Significant requirements could revolve around stormwater requirements: review all new construction general permits in the Bay states to make sure they meet federal standards, develop a guidance for major municipal stormwater permits by July 31, and finalize new industrial and municipal stormwater regulations by Nov. 19, 2012.

And the settlement stipulates that EPA will require offsets for any new pollution sources, make tracking of all pollution loads and increases publicly available, and allocate a budget for air pollution of nitrogen in the Bay.

Many of the requirements are consistent with environmentalists’ calls for how EPA should implement Obama’s executive order. In a May 6 letter to EPA Administrator Lisa Jackson, activists from the Choose Clean Water coalition pushed for strong consequences for states not following through on WIPs; a focus on two-year pollution reduction milestones; strict new regulations, including for large farms; and completion of the TMDL by EPA’s stated 2010 deadline -- now an enforceable time limit. -- *Erica Martinson*

EPA Pushing Strict Water Toxics Test Method Despite Lack Of Guidance (*Inside EPA*)

EPA is increasingly requiring the use of controversial toxicity tests in Clean Water Act (CWA) permits as a way to develop national consistency on the issue, despite never finalizing a 2004 draft implementation guidance and industry concerns that the tests fail to measure actual environmental harm.

The agency could face an early legal test on its requirement when the Environmental Appeals Board meets June 10 to consider a protracted fight in Texas over EPA efforts to require use of the so-called whole effluent toxicity test (WET) to set discharge limits (*see related story*).

The pending case, *In re: San Jacinto River Authority*, has already prompted Texas to hold off on approving dozens of other permits where EPA is requiring the test be used until the legal issues in the pending EAB case are settled.

The WET test is meant to protect aquatic organisms from the aggregate effects of multiple pollutants in a single waterway, which can often lead to a variety of chronic and

acute harms to organisms. If, for example, a waterbody's levels of individual toxins is below the federal threshold, but the combination of several toxins together is harmful to fish or other aquatic life, EPA may impose WET limits to ensure that the effluent takes the combined effect of those multiple pollutants into consideration.

EPA has created separate test methods to assess chronic and acute harms, with the chronic tests seeking to correlate toxicity in water and sub-lethal activities in fish -- for instance, when a toxic hinders growth or reproduction of a fish.

Many states have been hesitant to require use of the tests because of the difficulty in proving that industrial discharges are causing chronic sublethal effects, such as hindering growth or reproduction of a fish, an industry attorney says.

And industry wants EPA to allow states great flexibility in deciding when to require WET testing because industry believes "the tests aren't really precise enough in detecting [sublethal] impacts or correlating those," the source says. "It's one thing if fish die," the source says, "but when fish just don't grow as much as you like, or just don't reproduce enough . . . that's really hard to figure out, correlating an impact in the lab to an impact in real life. Sublethal toxicity is where a lot of the scientific problems lie."

But EPA is pushing for the use of WET tests in CWA permit programs in Texas, Colorado, California and other states, the industry attorney and other sources say. Colorado regulators are working to develop a policy to document how sublethal WET limitations will be incorporated into discharge permits as part of the state's Performance Partnership Agreement with EPA that outlines regulatory goals and priorities.

And EPA's recently released guidelines for mountaintop mining operations in six Appalachian states -- Virginia, West Virginia, Kentucky, Ohio, Pennsylvania and Tennessee -- also requires states to use the WET test, along with best management practices, in setting permits if regulators are unable to set numeric water quality-based effluent limits.

EPA Region VIII said in a presentation last year that the agency's push to require adoption of the test is aimed at ensuring "national consistency."

Sandra Stavnes, chief of EPA Region VIII's wastewater unit, told state regulators and industry representatives in September that it is EPA's position that WET tests should be required in permits and that EPA is preparing to review Region VIII states' WET policies within the next year to ensure "full implementation of WET" requirements in discharge permits. *Relevant document are available on InsideEPA.com.*

Specifically, Region VIII is recommending that "Colorado consider identifying all chronic (growth, reproduction and survival) WET failures, and encourage facilities to implement [toxicity identification evaluations/toxicity reduction evaluations] prior to next permit renewal," Stavnes' presentation says. Region VIII recommends Colorado establish a

“timeline for expiring Colorado permits and proactively prepare for inclusion of chronic WET full implementation by 2010,” the presentation says.

Despite Stavnes’ call for “national consistency,” an EPA spokeswoman says the agency has no plans to finalize draft WET implementation guidance that the agency issued in 2004. The guidance generally said that permits that did not contain discharge limits based on WET and/or “chemical-specific numeric interpretation of the narrative criteria” would not likely win EPA approval.

“Although EPA’s review of each permit is case-specific, EPA expects that a permit that fails to include provisions implementing the narrative water quality standards and fails to explain why such omission is appropriate under the regulations will not be consistent with the requirements of the CWA,” the draft states.

The draft document received a slew of critical comments. Industry groups, for example, criticized the limited flexibility EPA provided states when requiring chronic WET tests.

And industry said mandatory WET testing would lead to unncessary permit limits, unwarranted permit violations, state program changes, permit backlogs and more impaired waters, meaning states would need to create more waterbody-wide load limits, according to 2005 comments submitted by law firm Hunton & Williams for The WET Coalition.

Environmentalists, however, found the guidance to be too lenient. “The approach being suggested by USEPA in the [guidance] is to have dischargers take a minimal amount of data (for example the 4 minimum WET tests required by federal regulations for [publicly owned treatment works]) and, if that data indicates a reasonable potential for toxicity in the effluent, to require more data to be collected, rather than to institute WET effluent limits as required” by the Clean Water Act, the Environmental Law & Policy Center said in 2005 comments. -- *Erica Martinson*

EPA Moves Closer To Launching Long-Awaited Urban Waters Strategy (*Inside EPA*)

EPA is moving closer to launching a long-awaited strategy aimed at protecting urban waters, launching a new competitive grant program aimed at promoting stormwater mitigation and addressing other issues related to urban revitalization after a year of planning and talks with other agencies on how to implement its Urban Water Initiative.

“The Urban Waters initiative is an effort to reconnect communities with urban waterways and restore critical resources by making programs more relevant to urban and under-served communities,” EPA explains in a statement on the grants program launched April 29.

EPA and other federal agencies, including the Agriculture and Interior departments, also met April 6 to discuss the imitative. “At the meeting, the federal agencies shared ideas and agreed to establish and implement a partnership that will restore, improve and protect urban waterways and engage local communities in this effort,” EPA says.

The grant program is aimed at helping disadvantaged communities “access, restore and benefit from their waters and the surrounding land,” according to EPA. The grants -- running up to $600,000 -- are aimed at promoting community stewardship, better decision-making, and improved restoration efforts as a part of long-range development plans, EPA says. The agency is accepting grant proposals until May 19.

Inside EPA reported last year that agency staff were discussing an urban rivers initiative as part of the agency’s stormwater program. The agency has been focused on limiting urban stormwater runoff, including a new focus on previously unregulated urban streams. Activists have long pushed for a focus on urban stormwater runoff, and some in the agriculture industry see stormwater from impervious urban surfaces as a greater problem than agricultural runoff.

Washington Beef Reaches Agreement with EPA on Water Discharges (*Western Farmer-Stockman*)

Washington Beef of Toppenish, Wash., has reached an agreement with the U.S. Environmental Protection Agency regarding alleged violations of its permit for discharges of treated water.

These permit issues were reported to the EPA when the occurred.

"The water was processed through the treatment facility and had no detrimental water quality impacts on either Wanity Slough or the irrigation system," says WB Executive Vice President Rick Stott. "The water was for the beneficial use of the local farmers."

Historically, this water was managed through an innovative constructed wetlands system in cooperation with the Yakama Nation and Wapato Irrigation District. During the last decade, WB's waste water permit was administratively extended and the company actively petitioned EPA to establish new permit standards and incorporate the existing cooperative agreement.

Since the 2003 purchase of WB, the company has actively pursued the discharge permit renewal, which would allow the firm to significantly upgrade the water treatment system. Upon the issuance of the renewed permit in February this year, WB immediately began construction of the advanced waste water treatment system

"Now that EPA has issued a permit renewal and this enforcement action has been settled, Washington Beef has moved forward with investments in the state-of-the-art water treatment system we envisioned several years ago," adds Stott.

"These investments are part of Washington Beef's environmental initiatives as the company continues to be on the forefront of green technology."

Buyer beware: Bottled water not necessarily safer (*Water World*)

By Jennifer Hall, St. Joseph News-Press, Mo.
May 14--A magazine, a pack of gum and a bottle of water. It's a daily routine for Kris Meeks.
The St. Joseph woman turned to bottled water years ago, believing it was a healthier alternative to her tap water. But according to the Environmental Protection Agency, bottled water is not necessarily safer than that coming out of your faucet.

More than 90 percent of water systems meet the EPA's standards for tap water quality. The EPA oversees public water systems, while the U.S. Food and Drug Administration governs the bottled water industry, which sees nearly $50 to $100 billion each year in sales.

Both agencies said some bottled water is treated more than tap water, while some is treated less or not treated at all. That's a scary reality for loyal bottled-water drinkers like Ms. Meeks.

"I've never thought to look at the back of the bottle," she said. "I would be very upset if all I was drinking was tap water in a fancy container."

Choosing to drink bottled water should be an informed one, said Nathan Fuson, a registered nurse. He said the answers are in plain sight -- on the bottle itself. From micro brewed and reverse osmosis, bottled-water manufacturers tell their customers where their water comes from, a public water source. While many companies use a filtration process, not all do.

"A lot of people drink bottled water out of convenience," said Michael Woods, operations manager for Missouri American Water. "But I think people are starting to realize ways to make that tap water more convenient by taking a water jug or cooler."

The answer appears obvious, but bottled water costs much more than tap water on a per-gallon basis as well.

Mr. Woods said if a consumer drinks eight glasses of water a day from the tap, he or she could pay about 49 cents a year. Purchasing the same amount of water could cost more than $1,000 annually.

And as far as health and safety, Mr. Fuson said tap water could be a more reliable source than a loosely regulated bottled water manufacturer.

According to its website, the FDA only regulates bottled water sold through interstate commerce. "There's certain things we have to do as a public water supply system that those manufacturers don't have to," Mr. Woods said.

Mr. Woods said Missouri American Water, similar to other public water systems, is required to pull more than 90 samples on a monthly basis to run through EPA labs. "The bottled industries are not required to do those tests, but on a very limited basis," he added.

But Ms. Meeks and other dedicated bottled-water consumers will continue their habits. "Something about it just makes me feel better," she said.

According to a report by the Earth Policy Institute, global consumption of bottled water doubled between 1999 and 2004, reaching 41 billion gallons annually. The International Bottled Water Association said the product provides a convenient, healthy alternative to calorie-laden portable drinks or those containing caffeine and artificial additives.

Mr. Fuson agrees that if bottled water is compared on a nutritional level to a soda or sugary fruit drink, that version of the water would win, hands down.

"I don't think it's about what is healthier in the corner store," he said. "I think it's about the myth that you can't drink the water at your own house. This isn't Mexico."

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White Lake group opposes EPA cleanup plan, suggests multipronged habitat restoration approach (*Muskegon Chronicle*)

By John S. Hausman | Muskegon Chronicle
May 14, 2010, 5:59AM
FileChemical cleanup? Pictured is Hooker Chemical dump site near the Montague Township plant in October, 1979. The U.S. Environmental Protection Agency has proposed a plan it says will clean up ground water to safe levels within 18 years in the

southern portion of the former Hooker Chemical site in Montague Township.WHITE LAKE AREA -- The White Lake Public Advisory Council, supported by the Whitehall City Council and a variety of other groups and officials, has come out against a proposed federal plan to clean up a portion of the groundwater poisoned by the former Hooker/Occidental Chemical Co. in Montague.

Instead, the council proposes a multipronged approach focused on restoring White Lake's shoreline habitat, studying the health of former Hooker employees and setting up an endowment fund to pay for environmental programs in the White Lake area.

The White Lake PAC, a group of residents who study the condition of White Lake and lobby to protect it, this week issued its position paper on the U.S. Environmental Protection Agency's proposal.

The EPA's public comment period on its proposal ends Saturday. After that, the agency will review and publish a report on the comments it has received, then eventually reach a decision on how to proceed.

Endorsing the White Lake PAC's position as of Thursday afternoon were the Whitehall City Council, Montague Mayor Henry Roesler, state Rep. Mary Valentine, Muskegon County Board Chairman Ken Mahoney and three Fruitland Township elected officials: Supervisor Sam St. Amour, Clerk Karolyn Rillema and Trustee Jan Deur. Also signing on were the White Lake Association and the White Lake Area Sportfishing Association.

The governing board of Occidental's host community, Montague Township, also voted to oppose the EPA proposal, but declined to endorse all of the White Lake PAC's suggestions. The township board also stated that Occidental's remediation and restoration work at the site "is appreciated by the community and is held in high regard."

The plan

The EPA says its plan would clean up groundwater to safe levels within 18 years in the southern portion of the former Hooker Chemical site in Montague Township.

In its first major new cleanup initiative for the Hooker site in nearly a decade, the EPA proposes to install six new extraction wells to speed the cleanup of the area south of Old Channel Trail and north of White Lake. An existing system of eight wells closer to the lake has removed and treated billions of gallons of groundwater since 1979, preventing their flow into the lake.

The EPA's proposal would do nothing to clean up the northern portion of the property, the source of the contamination. No workable technology has yet been found to clean it, the EPA concluded. The agency proposes to designate the property north of Old Channel Trail a "Technical Impracticability Zone" that cannot meet Michigan groundwater cleanup standards. If nothing more is done, the site could remain polluted for another 10,000 years, the EPA concluded.

After several discussion meetings, members of the White Lake PAC decided to oppose the recommendation.

"Cleanup of groundwater under the lakeshore portion of the site provides negligible benefits for a relatively large cost -- $24 million," PAC Chairman Norm Ullman said in a statement. "There is little ecological benefit to the site to be realized from the additional remediation strategy, beyond a limited cleanup of a small amount of groundwater contamination, which is already being captured effectively by the existing groundwater cleanup system."

The opposition

Instead, the council proposes these initiatives:

Permanent protection, through a conservation easement, for the company's lakeshore property, preventing future development to preserve fish and wildlife habitat.

Doing a health study of Hooker/Occidental employees who worked at the plant before it shut down in 1983.

Establishing an endowment fund to institutionalize "long-term environmental stewardship programs" in the White Lake Area of Concern.

White Lake was declared a Great Lakes Area of Concern in 1987 because of a history of pollution from several industries. The lake has a variety of "beneficial use impairments," including restrictions on fish and wildlife consumption.

Either proposed approach would be funded by Occidental.

The EPA has estimated that its proposal for new extraction wells -- which the company opposes -- would cost $1.9 million per year, which the government could require Occidental to pay for.

White Lake PAC has no cost estimate for its proposals, which the council acknowledges the EPA could not compel the company to fund.

Recommendations

In addition to the three basic proposals, which are intended as an alternative to the EPA's purge-well plan, the White Lake PAC also made five broader recommendations for the EPA to consider for the entire Hooker site:

Requiring Occidental to contribute more research money toward finding technology capable of cleaning up the source of the contaminated groundwater, and to report to the community every two years about its efforts.

Keeping the site a high priority for EPA oversight, with updates to the community at least every two years.

Making sure that monitoring of private drinking-water wells near the site is regularly reviewed and reported to the community.

Requiring the capping of all unused private drinking wells near the contaminated plume.

Ensuring that any cleanup activities won't move the contamination into unpolluted groundwater areas, and that the potential effects of climate change on the plume are taken into consideration.

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DEP: More TCE-polluted wells found in Limerick township (*The Mercury*)

Friday, May 14, 2010
By Evan Brandt, ebrandt@pottsmerc.com
LIMERICK — More chemical contamination has been discovered in residential wells in the township, state officials confirmed Thursday.

Lynda Rebarchak, a spokeswoman for the southeast office of the Pennsylvania Department of Environmental Protection, confirmed that well tests discovered unsafe levels of the chemical trichloroethylene, or TCE.

The initial tests were conducted by the Montgomery County Health Department, which notified the DEP on April 13.

Rebarchak confirmed that unsafe TCE levels were found in eight wells near the intersections of Country Club Road in Ridge Pike and Township Line Road and Graterford Road.

"It's a brand new site," said Rebarchak. The DEP is calling it the Landis Creek site.

Currently, the state is taking its own samples and conducting tests on those samples to confirm the health department's findings, Rebarchak said.

"We will be getting bottled water to those folks as soon as we complete our sample results," she said.

TCE is part of a chemical family known as volatile organic compounds and was used widely in past decades as an industrial de-greaser, as well as by dry cleaners.

It is recognized by the state of California as a carcinogen and is a suspected carcinogen

according to numerous federal agencies.

The U.S. Environmental Protection Agency has set a safe drinking water standard for TCE at five parts per billion.

Rebarchak said the health department results were in excess of that level, but she did not have specifics Thursday on the health department's findings.

Rebarchak said it is too soon to speculate about the source of the underground contamination.

"Our first goal is to make sure people have a clean drinking water supply," she said.

Once, and if, bottled water is provided, the DEP will look into whether the contamination is severe enough and widespread enough to require providing a permanent public water supply to the homes affected, she said.

"Hopefully, we won't have to have people on bottled water permanently," said Rebarchak.

At the same time, the DEP will begin an investigation to identify potential sources of the contamination, an investigation which will begin with conversations with the local residents.

"As you know, sometimes the source of contamination can be decades old and long gone, but we've found that when we talk the locals, we can often get a sense of what might have been there," she said.

The discovery comes on the heels of a March 30 Mercury report on twin underground plumes of chemical contamination which have contaminated the wells of 47 homes on the other side of the township.

Those homes are on South Limerick Road, Linfield-Trappe Road, North Lewis Road, South Limerick Road. The DEP has named that project after a nearby stream, calling it the Turtle Creek Hazardous Site Clean-up Act site.

The Turtle Creek contamination was referred to the DEP in 2001 by the Montgomery County Health Department, Rebarchak said, and the agency tested wells quarterly from early 2003 until spring, 2009.

The chemicals found in the well water samples are TCE; tetrachloroethylene, or PCE; 1,1-dichloroethylene, or DCE; 1,2 dichloroethene or Cis; as well as 1,4-dioxane.

The highest level of contamination detected was for DCE, which has a safety standard of seven parts per billion but was found in one well at a level of 366 parts per billion,

The likely sources of that contamination have been identified as the Teleflex Medical building on South Limerick Road and the former Stanley Tool Works on Lewis Road.

Both companies have funded a project to extend water lines from the Pennsylvania American Water Co. to provide public water to the homes.

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