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EPA Said To Eye CWA Rule Revisions With Limited Corps, Regional Input

EPA appears to be weighing revisions to the administration's Clean Water Act (CWA) jurisdiction rule with only limited input from the Army Corps of Engineers, which jointly issued the proposal, and the agency's regional offices, sources say, with some raising questions about whether the changes warrant re-proposing the rule in draft form.

During a recent rare joint hearing of House and Senate environmental panels Feb. 4, EPA chief Gina McCarthy outlined several possible revisions being considered for the proposed rule, which the agencies took comment on through Nov. 14. Those included expanding exclusions from the rule to include stormwater infrastructure and other features, and rewriting its definition of a "tributary" subject to the CWA in order to resolve uncertainty on the term.

continued on page 8

IG Targets Budget, 'Access' Hurdles To Ensure Adequate Oversight Of EPA

EPA Inspector General (IG) Arthur Elkins Jr. is seeking a hike in proposed fiscal year 2016 funding for his office and aiming to secure a commitment from the agency for full access to staff and documents during investigations, saying both issues could create potential hurdles to adequate IG oversight of EPA unless they are fully resolved.

In a wide-ranging, exclusive Feb. 23 interview with *Inside EPA* at agency headquarters, Elkins and several top Office of Inspector General (OIG) officials nevertheless touted the program evaluations, audits and investigations that they have been able to do while facing limited resources. And they say recent signals from EPA Administrator Gina McCarthy and others hint at an improved relationship with the OIG after a period of ambiguity.

continued on page 10

Judges' Review Of CSAPR May Set Precedent On EPA Air Trading Policies

Appellate judges reviewing lingering legal challenges to EPA's Cross-State Air Pollution Rule (CSAPR) emissions cap-and-trade program wrestled with a host of issues that could — depending on how they rule — set new precedent for how the agency crafts air trading rules, including which states to regulate and the level of pollution caps.

The pending U.S. Court of Appeals for the District of Columbia Circuit case, *EME Homer City Generation, LP, et al. v. EPA et al.*, addresses a host of suits over technical provisions of the rule and other issues that the appellate court did not resolve in its initial 2-1 ruling in 2012 that vacated CSAPR as exceeding EPA's Clean Air Act authority. The Supreme Court reversed that decision in April, remanding the case back to the court to resolve.

continued on page 13

New Challenge To EPA 'Flow' Limits Revives Debate Over Stormwater

A Vermont city's challenge to an EPA-approved waterbody cleanup plan that limits the rate at which stormwater can flow into a stream is reviving the legal debate over whether the agency can use flow as a surrogate for reducing sediment and other runoff-borne pollution, following a 2013 district court ruling that found such controls violate the Clean Water Act (CWA).

In a complaint filed Feb. 18 in the U.S. District Court for the District of Vermont, the city of Rutland, VT, argues that EPA exceeded its authority by approving a 2009 total maximum daily load (TMDL) cleanup plan for the nearby Moon Brook because it includes flow limits. *The complaint is available on InsideEPA.com. See page 2 for details.*

continued on page 16

Inside

CEQ Extends Comment Deadline On NEPA Greenhouse Gas Guidance

The White House Council on Environmental Quality (CEQ) is extending by 30 days the comment period on its revised draft guidance for how to account for greenhouse gas (GHG) emissions in National Environmental Policy Act (NEPA) reviews, granting a request from major industry groups who signaled early concerns with the plan.

Trade associations representing major manufacturing sectors, mining, rural utilities and the forest and paper industry told CEQ in a Feb. 3 request that they needed an additional 30 days beyond the initial Feb. 23 deadline to respond to the new guide because it presents "complex questions at the intersection of legal, policy and technical issues." *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179105)*

The letter says it is "imperative that interested stakeholders have a full and fair opportunity to carefully review" the revised draft and "provide CEQ with necessary feedback to ensure that potential impacts associated with GHG emissions will be evaluated in a manner that is consistent with NEPA and CEQ's implementing regulations."

CEQ's Associate Director for NEPA Oversight Horst Greczmiel announced at a Feb. 17 National Association of Regulatory Utility Commissioners meeting that the deadline would be extended to sometime in March, and CEQ in a Feb. 23 *Federal Register* notice said the new deadline will be March 25.

CEQ floated the new draft NEPA GHG guide Dec. 18, adding first-time language that requires the analyses to include the impact of climate change on projects. The new draft — which replaces an earlier version issued in 2010 — also includes a host of other changes to NEPA analyses, including requiring sweeping assessments of projects' upstream and downstream impacts, as well as their short- and long-term effects (*Inside EPA*, Dec. 26).

For example, the draft notes that a NEPA analysis for a proposed open pit mine "could include the reasonably foreseeable effects of various components of the mining process, such as clearing land for the extraction, building access roads, transporting the extracted resource, refining or processing the resource, and using the resource." All of these activities should be treated "as the direct and indirect effects of phases of a single proposed action," the draft adds.

The draft has generally drawn praise from environmentalists, though they have acknowledged that without statutory changes, agencies will still be able to approve high-emissions projects.

But critics have already been pushing back, charging that the draft is unlawful. "The Obama administration is attempting to increase federal authority beyond NEPA's original intent and further slow down job-creating projects in this last-ditch effort to appease its far-left environmental base," Sen. David Vitter (R-LA) said in a statement shortly after the document's release.

Also Sen. Deb Fischer (R-NE) floated an amendment to the Keystone pipeline legislation that would have blocked GHG reviews under NEPA. The new draft "goes beyond the scope of NEPA in general," her office said. While the Senate did not debate the amendment, Fischer's office said the senator continues to seek legislative support for the effort.

Background Documents For This Issue

Subscribers to InsideEPA.com have access to hundreds of documents, as well as a searchable archive of back issues of *Inside EPA*. The following are some of the documents available from this issue of *Inside EPA*. For a full list of documents, go to the latest issue of *Inside EPA* on InsideEPA.com. For more information about InsideEPA.com, call 1-800-424-9068.

Documents available from this issue of *Inside EPA*:

- ACC Petitions EPA To Remove EGBE From TRI Reporting Program (179167)
- CEQ Extends Comment Period Deadline For NEPA GHG Guidance (179105)
- Environmentalists, Industry Weigh In On EPA Air Toxics 'Completion' Finding (179116)
- Environmentalists Seek Conductivity TMDL For West Virginia Streams (179081)
- Immigration Order May Boost Bid For Data Act Suits Over EPA Rules (179172)
- Industry Urges EPA To Reconsider Neonicotinoid Efficacy Review (179084)
- McCarthy Urges EPA Employees To Cooperate With Inspector General (179166)
- Utilities Seek Revised Utility MACT Startup, Shutdown Terms (179111)
- Vermont City Challenges EPA-Crafted Stormwater 'Flow' Plan (179169)

Utilities Say EPA Violated Air Law In Revisions To MACT's SSM Provisions

Utilities are claiming that EPA violated the Clean Air Act with its revisions to power plant startup, shutdown and malfunction (SSM) provisions in its maximum achievable control technology (MACT) air toxics rule for the sector, saying the agency failed to follow air law procedures to first allow public comment on the provisions.

In a Feb. 20 statement of issues in litigation over the revisions, as well as a parallel petition for administrative reconsideration of the changes filed with EPA last month, the Utility Air Regulatory Group (UARG) faults the SSM updates that address emissions limit requirements during periods of facility SSMs. But the group notes that EPA has subsequently proposed further updates to the utility MACT that could potentially address some of its concerns. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179111)*

EPA in the Nov. 19 *Federal Register* published its rule taking final action on reconsideration of some startup and shutdown provisions in the MACT. The agency's rule created a second compliance option for utilities who said the original rule was too hard to meet. As a result, EPA established an alternative definition of startup and the conditions for when clean fuel must be combusted and when numeric pollution limits apply under the rule.

Initially, EPA proposed changes to the SSM aspects of the MACT Nov. 30, 2012, and later reopened comment on the plan ahead of the November final rule, but UARG says the policy falls short of air law requirements.

In its statement of issues filed with the U.S. Court of Appeals for the District of Columbia Circuit in its suit over the changes, UARG says the agency did not adequately consult with the public over the revisions. Under section 307(d) of the air law, EPA is obliged to give an opportunity for public comment on substantive changes to its proposal to reconsider certain technical aspects of the MACT rule, but UARG says EPA failed to meet this duty.

The group gives some insight into its arguments in its Jan. 20 petition for administrative reconsideration. EPA in a Dec. 19 proposal announced its intent to reconsider the MACT rule again, in order to make a series of technical corrections and clarifications, several of which address issues raised in earlier comments by UARG.

In its administrative petition, UARG says it welcomes EPA's rulemaking effort to further address alleged shortcomings in the MACT, which will cover two of the three issues raised by the new petition and lawsuit.

"Because two of those issues pertain directly to rule language that is contained in the corrections proposal, we plan to raise the issues in UARG's comments in the proposed rulemaking in order to provide EPA the opportunity to correct those provisions without convening a new rulemaking. We also present them here in the event that the Agency would prefer to address them separately," according to UARG's administrative petition.

"The third issue could not be addressed simply by revising regulatory text and therefore we present it only here," UARG adds in the petition, which was filed with EPA the same day as the lawsuit.

UARG claims that EPA has unreasonably failed to add specific emissions control technologies to a list of exempted control devices that plants need not engage during a certain phase of startup; that the agency's methodology in calculating the MACT "floor," or minimum emissions limit, is flawed and cannot be replicated, in contravention of the air law; and that EPA has mishandled the issue of how and when to cap "diluent" values when measuring emissions of mercury and other hazardous air pollutants. — *Stuart Parker*

Senate Revisions To TSCA Reform Bill Aiming For Preemption Compromise

Senators spearheading efforts to reform the Toxic Substances Control Act (TSCA) are revising a bill released late last year, focusing on crafting "more refined" legislation that is likely to narrow the provisions that would preempt state chemical authority in an effort to gain broader bipartisan support, sources tracking the issue say.

The issue of preempting state chemicals programs has long been a major hurdle to advancing TSCA reform, with previous Republican-led bills drawing opposition from Democrats for blocking state efforts.

Sen. David Vitter (R-LA) is working with Sen. Tom Udall (D-NM) to revise a draft of the S. 1009 bill introduced in 2013 by Vitter and the late Sen. Frank Lautenberg (D-NJ), seen as a landmark compromise to reforming the decades-old chemical safety law.

But the bill drew opposition from then-Environment & Public Works Committee Chairman Sen. Barbara Boxer (D-CA) due to concerns about preempting state chemicals programs, and it failed to advance.

Similarly, divisions in the House over the preemption issue helped to kill the lower chamber's TSCA reform push last year. Rep. John Shimkus (R-IL), chair of the Energy & Commerce Committee's environment panel, says he will start anew on crafting a TSCA reform bill this year in a bid to win more Democratic support.

Some TSCA reform stakeholders have suggested the merits of crafting a TSCA reform bill first and punting a debate over the bill's preemption language until agreement is reached on all other aspects of the bill.

But Vitter says he is continuing to work closely with Udall on revising the legislation and is "optimistic that a revised compromise is on the horizon," according to a statement from Vitter's office. And a congressional source says the resulting changes are focusing on a bill that "will be more refined and attract more support from a broad variety of groups."

The original S. 1009 bill would have barred states from imposing new restrictions on chemicals identified as "high-

priority" by EPA at the time the agency publishes a schedule for assessing safety of the substance and once the agency designates a chemical as "low-priority."

Vitter and Udall worked to revise the bill and added considerations for vulnerable subpopulations, deadlines for EPA to take action on chemicals, and new preemption language that would only block state action on high-priority chemicals once EPA commences a safety assessment.

But gridlock on the bill escalated in September when Vitter criticized Boxer for what he said was a premature release of the revised bill.

Boxer released not only a revised S. 1009 bill but her revisions to the updated measure, which included dropping the provisions that she said would preempt state programs and tightening the bill's safety standard.

Sen. James Inhofe (R-OK), who took over as the panel's chairman for the 114th Congress, has vowed to pursue TSCA reform efforts this year but acknowledged in a brief Feb. 4 interview with *Inside EPA*, the "difference of opinion" with Boxer on preemption.

But a state source tracking the issue says "it sounds like the preemption issues are something they're looking at really closely," and that the planned revisions could be a "big step in that direction" toward narrowing how and when state authority would be preempted that could win a compromise with states.

That source adds that they would oppose any provisions that did not appear to preserve existing state labeling laws, which have a "proven track record" as being effective, and existing state restrictions on specific substances. Future chemical regulations are something that "states can partner with EPA on, but if a state has already taken" action, that action should be preserved, the source says.

Claudia Polsky, deputy attorney general with the California attorney general's office, said during a Jan. 27 Environmental Law Institute event on state preemption and TSCA reform that there are several "nonstarters" for California in the discussions, such as judicial oversight and "regulatory void preemption" that would "kick states out of the regulatory sphere before any final regulation" would take effect, which was a major criticism of early versions of the House and Senate bills.

She also indicated the state would oppose efforts to bar states from enacting parallel laws so they could function as "co-enforcers" of federal regulations, saying it is "unclear why they would want to have one cop on the beat when they can have 51."

Industry, Advocates Spar Over EPA 'Completion' Of Air Toxics Regulations

Industry groups and environmentalists are sparring over EPA's determination that the agency has met its Clean Air Act obligation to regulate air toxics from sources representing 90 percent of emissions of seven hazardous air pollutants (HAPs), with industry backing EPA but advocates warning that the proposed conclusion is unlawful.

The outcome of the fight over the determination could be significant for the future of EPA's air toxics program. If EPA finalizes its conclusion as proposed, environmentalists could sue and seek an appellate order saying the agency has fallen short of the air law requirement. That in turn could trigger a legally binding requirement for EPA to either revise existing air toxics policies or craft new rules in order to satisfy the 90 percent mandate.

Any such additional rulemaking would place additional burdens on EPA's air toxics program, which the agency acknowledges in its fiscal year 2016 budget request has limited resources. EPA has said it is prioritizing various air toxics rulemakings, even as environmentalists seek revisions to a broader set of regulations.

Law firm Earthjustice in early February gave EPA 60 days' notice of its intent to sue the agency to force it to undertake "residual risk" reviews of a slew of air toxics regulations to determine whether there is a need to update them based on threats to public health or new emissions controls becoming available.

In addition to the threat of a lawsuit over the residual risk reviews, environmentalists in their comments on EPA's 90 percent finding are also warning that plan is unlawful and could be the basis for a legal fight.

In a Dec. 16 proposed rule, EPA said its existing air toxics rules are achieving the 90 percent coverage for seven "persistent" and "bioaccumulative" HAPs identified in section 112(c)(6) of the air law (*Inside EPA*, Dec. 19).

Some of the obligation is met through the regulation of "surrogate" pollutants that serve as a proxy for each of the seven pollutants: alkylated lead compounds, polycyclic organic matter, hexachlorobenzene, mercury, polychlorinated biphenyls, 2,3,7,8-tetrachlorodibenzofurans and 2,3,7,8- tetrachlorodibenzo-p-dioxin.

EPA says its air toxics rules satisfy a mandate in section 112(3)(a) of the law that says the agency shall no later than Nov. 15, 1995, "list categories and subcategories of sources assuring that sources accounting for not less than 90 per centum of the aggregate emissions of each such pollutant are subject to standards" under the law's air toxics program, either with "health-based" standards or maximum achievable control technology limits.

Sierra Club has previously sued EPA in U.S. District Court for the District of Columbia over the agency's initial failure to issue the finding on whether it has met the 90 percent mandate.

EPA in 2011 issued a finding that it had satisfied the obligation, without taking public comment on that declaration, prompting Sierra Club to file a new suit in the U.S. Court of Appeals for the District of Columbia Circuit, claiming that

EPA had flouted air law procedural requirements by not seeking public input.

The litigation ultimately resulted in a further order from the district court setting a Dec. 10, 2014, deadline for publication of a formal proposal and a May 25 deadline this year for issuance of a final rule.

In Feb. 17 comments on the Dec. 16 proposal, Sierra Club says the 90 percent finding is unlawful as it relies on surrogates to meet the 90 percent threshold. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179116)*

The group says section 112(3)(a) requires that EPA set emissions standards for each individual pollutant, rather than relying on the use of surrogate emissions reductions.

"For sources EPA lists as contributing to 90 percent the total emissions of one or more of these particularly harmful pollutants, EPA must set a standard for that pollutant ensuring the maximum emissions reduction," the group says. "Congress would hardly have singled out these seven pollutants if it intended for EPA only to set a single limit for the aggregate of emissions of 200 different hazardous air pollutants."

EPA claims in the declaration that for several industry sectors it has met the 90 percent requirement by regulating total HAPs or total organic HAPs, but Sierra Club says this is unlawful.

Also, while EPA can under certain circumstances use surrogates in air regulation, "EPA's surrogacy claims in this rule are unlawful and arbitrary because they lack supporting data or analysis."

Sierra Club says EPA has failed to justify its finding with respect to several industry sectors, including aerospace coatings and other surface coating operations, asphalt roofing manufacturing, chemical manufacturing, internal combustion engines manufacturing, oil refining, lime kilns, kraft pulp furnaces and others.

Major industry groups, however, are backing EPA's finding that it has met the 90 percent mandate, including sectors that could potentially be subject to additional air toxics rules if the finding is deemed not met.

A broad industry coalition in its Feb. 17 comments notes that, "Most of the emission standards promulgated by EPA directly regulate one or more" of the seven listed HAPs in section 112(c)(6). Some, however, rely on surrogates, but this is permissible under the air law, says the coalition, which includes the American Chemistry Council, American Forest & Paper Association, American Iron & Steel Institute, American Wood Council, National Association of Clean Water Agencies, and National Mining Association.

EPA's use of surrogates to meet the 90 percent requirement is "scientifically sound," legally defensible and practical, the industry groups say. "It would be irrational for EPA to propose separate standards and/or emission monitoring for a particular § 112(c)(6) HAP where existing standards control and monitor emissions of that HAP through surrogate pollutants," they argue.

In its Feb. 16 comments, the Council of Industrial Boiler Owners (CIBO) says that "EPA draws reasonable conclusions regarding surrogacy relationships used to establish emission standards for HAP and is therefore within its authority to use surrogates to regulate HAP."

CIBO further supports EPA's legal right to periodically revise the list of source categories that contribute to satisfying the 90 percent requirement. "CIBO supports EPA's analysis and conclusions, which are reasonable and within its authority," on this point. — *Stuart Parker*

Chemical Sector Asks EPA To Remove EGBE From TRI Reporting Program

Chemical manufacturers are asking EPA to take the rare step of removing a chemical from the agency's Toxics Release Inventory (TRI) reporting program, calling for the delisting of the common cleaning agent ethylene glycol butyl ether (EGBE) from the TRI due to what industry says are low health and environmental risks.

The chemical industry association American Chemistry Council (ACC) argues that EGBE does not meet the requirements to be among the nearly 700 other chemicals EPA requires to be reported to the TRI program. These data are available to the public in a Web-accessible database, and the agency also publishes an annual report analyzing trends in the most recent data. ACC submitted the petition to EPA late last month, citing sections 313(d) and (e) of the 1986 Emergency Planning and Community Right-to-Know Act (EPCRA), which authorizes EPA's TRI program.

Jonathon Busch, manager of ACC's Ethylene Glycol Ethers Panel, writes in a Jan. 23 letter to EPA TRI managers that "available scientific data indicate that EGBE poses low potential hazards to human health and the environment, making an assessment of exposure appropriate under EPA's policy for making TRI listing decisions under EPCRA." *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179167)*

Busch goes on to argue that past EPA actions, specifically delisting EGBE from the list of Clean Air Act regulated hazardous air pollutants (HAPs) in 2004, provides a precedent for the TRI delisting and that more recent exposure evidence further supports doing so. ACC petitioned EPA to remove EGBE from the HAPs list in 1997 (*Inside EPA*, Sept. 8, 2005).

"There now is an even stronger basis for making essentially the same statutory findings under EPCRA and removing EGBE from the TRI reporting list," Busch writes. "As shown in this petition, EGBE releases and exposures are now lower than those that formed the basis for EPA's HAPs determinations."

While ACC sources in 2005 suggested the organization might petition for EPA to remove dozens of other glycol

ethers from TRI, an ACC spokeswoman says the industry group has no plans to develop other petitions, in part because it took more than a decade to prepare the petition for EGBE.

There are some 594 individual chemicals and 31 chemical categories on the list of chemical releases that industry must report annually to EPA as part of the TRI program. Congress created the program as part of EPCRA following the accidental releases of toxic gases from chemical plants in Bhopal, India, and West Virginia in 1984 and 1985. The Bhopal release killed thousands of people living near the affected Union Carbide Chemical plant.

Following EPA's 2004 decision to remove EGBE from the list of HAPs, the U.S. Court of Appeals for the District of Columbia Circuit in 2005 ordered a lower court to direct EPA to remove another solvent, methyl ethyl ketone (MEK) from the TRI list. The court rejected EPA's argument that MEK is toxic because it is a volatile organic compound (VOC) and should be listed on TRI because it contributes to tropospheric ozone formation. A month later, EPA delisted MEK, with agency air officials telling *Inside EPA* at the time that the MEK delisting may set a precedent to delist EGBE.

A TRI exemption would provide strong benefits to companies that use EGBE and related chemicals in their products, ACC sources said in 2005. If delisted, EGBE would no longer carry the stigma associated with TRI-listed chemicals and manufacturers and users would no longer have to bear the associated paperwork costs. Such a decision could open the door to delisting the 40 other glycol ethers included in the group on the TRI list because they are weak ozone precursors, an ACC source said in 2005 (*Inside EPA*, July 22, 2005).

But gathering the necessary evidence to petition for the removal of EGBE from the TRI list took 12 years, the ACC spokeswoman says. In particular, ACC waited to gather chemical production information from EPA collected as part of its Chemical Data Reporting rule, the spokeswoman says. EPA collects this information on industrial chemicals every four years under its Toxic Substances Control Act authority, and often uses it as exposure information in its analyses.

ACC describes EGBE in its petition as "a solvent in the manufacture of paints, coatings, metal cleaners, and household cleaners and as a chemical intermediate in the production of other chemicals. It has been used for more than 60 years because of its valuable and unique properties, especially its ability to make water-based, environmentally sound products work effectively."

"Delisting under EPCRA would remove a significant disincentive to the use of EGBE, a solvent that has proven to be highly effective in a variety of important water-based coating formulations with demonstrable [VOC]-reduction benefits," ACC's petition says.

TRI lists chemicals that cause one or more of the following effects: significant adverse acute human health effects; cancer or teratogenic effects, or serious or irreversible reproductive dysfunctions, neurological disorders, heritable genetic mutations, or other chronic health effects; or a significant adverse effect on the environment of sufficient seriousness to warrant reporting of facility releases.

ACC argues that EGBE does not meet any of these criteria. The 491-page petition references, among other sources, EPA's 2010 Integrated Risk Information System (IRIS) assessment of EGBE. These influential documents are often the basis for agency regulations and other decisions, and are used agency wide, as well as cited by other agencies and governments worldwide. ACC argues that the 2010 IRIS assessment "support[s] the conclusions . . . that EGBE is not immunotoxic, genotoxic, or teratogenic, and does not cause adverse reproductive effects. The toxic effects of EGBE are secondary to its irritant and hemolytic [red blood cell] effects, and [EPA] has determined that prevention of hemolytic effects in humans will also protect against all other potential toxic effects."

Further, ACC says, "humans are relatively insensitive to the hemolytic effects of EGBE. Even minor prehemolytic effects are expected to occur in humans, if they occur at all, only at exposure concentrations/doses far in excess of levels that might occur near EGBE-using facilities." The IRIS assessment also concludes that the human cancer potential of EGBE cannot be determined.

The petition argues that because the chemical is of limited toxicity, "EPA's interpretation of EPCRA Section 313(d)(2) calls for the consideration of exposure levels in determining whether to delete EGBE from the TRI reporting list." The petition points to the precedent of the 2004 HAPs delisting decision, where then-Administrator Michael Leavitt relied upon "[a]pplication of conservative exposure models . . . to find that maximum estimated exposures from EGBE-emitting facilities are well below the IRIS reference concentration (RfC) and reference dose (RfD)."

ACC adds that it has "update[ed] the hazard, exposure, and ecological assessments that EPA reviewed and prepared in the HAPs delisting proceeding, consistent with the assumptions and methodologies that EPA found to be 'appropriate,' 'acceptable,' and 'conservative,'" according to the delisting decision.

The petition includes a series of modeling exercises performed by the consulting group Environ International with TRI data regarding EGBE releases in the reporting years 2009-2011 showing total glycol ether releases (estimated to be 52 percent EGBE). The petition also presents screenings of each facility that released EGBE in those three years to determine whether "maximum annual average concentrations of EGBE at or beyond the fenceline [were] greater than the IRIS RfC of 1.6 milligrams per cubic meter (mg/m3)" and "reasonable worst-case assessment of the potential for acute irritation effects from EGBE facility releases using the Margin of Exposure (MOE) methodology EPA has employed in prior TRI listing decisions," among other modeling scenarios.

EPCRA provides EPA 180 days to respond to the petition. — *Maria Hegstad*

EPA Under Pressure To Act On Novel Montana Nutrients Variance Plan

EPA could decide within the next few weeks whether to approve Montana's revised plan to allow general and individual variances to stringent numeric nutrient criteria for up to 20 years, an action that both environmentalist and industry sources say will signal how much flexibility the agency is willing to grant states in addressing nutrient pollution.

Environmentalists have threatened to sue EPA to force a decision since the agency has failed to act by a statutory deadline, but EPA Region 8 has told the Upper Missouri Waterkeeper that it plans "to take action by March," an environmentalist source says.

EPA previously approved a 20-year general variance for Montana's draft criteria in 2012 after an economic analysis indicated in order to comply with the criteria, dischargers statewide would have to treat 100 percent of their effluent through a costly reverse-osmosis treatment system.

But the Montana Department of Environmental Quality (DEQ) submitted a revamped water quality standards package to EPA Region 8 for approval in August 2014 that includes "tweaked" variance provisions to include individual variances that would be determined on a case-by-case basis as well as the general variance, the environmentalist says.

While EPA approved the 2012 variance, the source says the latest rule package is another opportunity for environmentalists to object to the exemptions. "The difference is three years and a much more robust administrative record," the source says. The numeric limits are based on "a very good scientific standard that [DEQ] didn't have in 2011," and EPA will have to consider the protections offered by the numeric limits and whether the state can justify allowing exemptions, the source says.

"I am cautiously optimistic that EPA will step up to the plate," the environmentalist says. But "if EPA decides to rubberstamp any approval, we will have to take a look at that approval."

A source with the National Association of Clean Water Agencies (NACWA), which represents publicly owned treatment works, says if EPA approved the state's standards it would show the agency "is serious about providing the flexibility that utilities and states need once those numbers are in place."

Conversely, if EPA disapproves the Montana variance, the NACWA source says "that would have negative consequences on what other states are using" to develop standards and implementation schedules "whether they're using the Montana model or not." States may "have to slow down" developing strict numeric limits for nutrients "because 'we don't want numbers on the books that are unachievable,'" the NACWA source says.

But even if EPA approves Montana's variance, the NACWA source says the state's model may not be adopted by other states in the future.

"It's probably not the best model because at the end of the day if the variance provision is challenged and thrown out . . . utilities are left with water quality criteria that are extremely low and unachievable. There's some risk there," the NACWA source says.

Under the general variance approved in 2012, dischargers of more than 1 million gallons per day would have to meet an effluent standard of 1 milligram per liter (mg/L) for total phosphorus and 10 mg/L for total nitrogen; dischargers of less than 1 million gallons would be held to a standard of 2 mg/L total phosphorus and 15 mg/L total nitrogen. Every three years the dischargers will have to assess whether the technological or economic factors are in place to ratchet those standards down, ultimately reducing discharge limits to between 0.006 and 0.124 mg/L for phosphorus and between 0.130 and 1.358 mg/L for nitrogen. The variance is set to be phased out in 20 years.

Although DEQ's original economic analysis determined that dischargers would have to install expensive reverse-osmosis equipment in order to filter out enough nutrients from their effluent in order to meet the limits, environmentalists say new information demonstrates at least some dischargers would meet the strict limits without the costly technology.

"For instance, a recent EPA report shows that treatment of phosphorus at a state of the science facilities in the Puget Sounds region have routinely achieved total phosphorus concentrations of 0.02 mg/L, and total nitrogen concentrations of 2 to 3 mg/L.12 While perhaps not applicable to all dischargers nor by itself capable of all necessary reductions, this recent science shows that technology — aside from reverse osmosis — is capable of approaching reductions contemplated under the Rule Package," April 1 comments from Upper Missouri Waterkeeper say.

Upper Missouri Waterkeeper filed a Dec. 16 notice of intent to sue EPA after the 90-day Clean Water Act deadline to approve or disapprove the new water quality standards passed.

"Upper Missouri Waterkeeper is concerned about the harm caused by the EPA's failure to take action on Montana's numeric nutrient water quality standards and implementing criteria, in particular impacts to waterways now subject to Montana's new standards and that receive nutrient discharges, many of which are already impaired. It is essential that EPA take action on Montana's new standards and in so doing provide regulatory clarity moving forward, particularly as Montana begins to incorporate these new standards in permitting decisions that affect local water quality," the notice says.

The environmentalist source notes that the 60-day notice period has now lapsed, and the group may file a suit any day if EPA stalls or makes a decision that environmentalists feel would negatively impact water quality.

The Waterkeeper group has already filed a lawsuit in state court Jan. 21challenging the permit of a Talc mine that was granted the exemptions to the numeric limits for nutrients, saying the permit should be remanded because EPA has not yet approved the nutrient package.

Meanwhile, Wisconsin is preparing to submit a nutrients variance proposal to EPA this summer, a source with the

state's Department of Natural Resources (DNR) says.

"We have had several discussions with EPA, and we are working collaboratively towards that submittal," the DNR source says.

The Wisconsin variance requires point source dischargers that qualify for the waiver to pay fees to finance local county conservation programs aimed at reducing nutrient loads from nonpoint sources.

But the variance program is drawing strong criticism from environmentalists, who say the program's cap on penalties will encourage dischargers to seek a variance and that the program has overly broad and vague eligibility criteria that will exempt dischargers from their current "adaptive management" responsibilities overseeing nonpoint sources.

So far, EPA has said little on how it is likely to rule on the Wisconsin program, though the agency has long indicated that it is willing to approve state variances if they help ensure enactment of numeric water quality standards, which few states have adopted.

EPA Said To Eye CWA Rule Revisions . . . begins on page one

But one industry source says that some of the changes may be significant enough to warrant a re-proposal — which agencies must do under the Administrative Procedure Act (APA) when major changes are made to a draft rule. But the source says EPA does not appear to be planning to issue a re-proposal "almost to the point of violating the APA."

Moreover, the industry source says the Corps does not does appear to have seen a draft of any revised changes since November, and a second industry source similarly says that Corps staff have "expressed frustration" that they've had limited involvement in the rulemaking.

A state source says that while the Corps since the fall has been purportedly told to "stand down" on the rulemaking process, some have also suggested that Corps staff felt that both agencies conducting outreach was not necessary, adding that it is "unclear" what the current situation is.

A Corps spokesman says the agencies are "currently reviewing the million comments that were received during the public comment period in order to inform the final rule language" and "have been discussing many options for addressing the stakeholder input received during the public outreach sessions and in the robust public comments."

The spokesman says, "At this time, there is no agreed upon joint agency rule text or preamble language."

An EPA spokesman says the rulemaking "involves extensive coordination between the agencies," and that the agencies are both reviewing public comments and will make "appropriate changes" to the final rule scheduled for release in spring 2015.

Some sources have also suggested that EPA regional offices have provided data to agency headquarters on potential impacts associated with the rulemaking, but that headquarters has not kept them abreast of the process of revising the proposed rule. For example, the state source says that calls conducting outreach with state and local agencies have since the proposed rule was issued in April of last year "primarily been run by [headquarters] staff."

However, the second industry source says that while the Corps, as the joint lead agency on the rulemaking, should be heavily involved in revising the rulemaking, the degree to which regional staff must have input is "kind of a gray area" given that headquarters is crafting the rule.

The agencies are currently reviewing more than 800,000 comments received on the proposed version of the rule, which aims to resolve uncertainty about the water law's reach following competing tests for jurisdiction established in a 2006 Supreme Court decision, *Rapanos v. United States*, that had separate but partially concurring opinions by Justices Anthony Kennedy and Antonin Scalia.

Supporters of the rule argue that it will help to resolve regulatory and legal uncertainty about the CWA's scope, but GOP lawmakers, industry and others say it would broaden the law beyond Congress' intent.

"We're going to make changes in a variety of areas," EPA Administrator Gina McCarthy told lawmakers during the Feb. 4 bicameral hearing on state and local impacts associated with the proposed waters rule, held by the Senate Environment & Public Works Committee and the House Transportation & Infrastructure Committee (*Inside EPA*, Feb. 6).

For example, McCarthy said she understands concerns raised by stakeholders that the proposed rule's language defining "tributaries" and subjecting all waters meeting that definition to default CWA protection creates fears about certain agricultural erosional features, which are waterbodies created from erosion.

"We're going to tackle that confusion head on," McCarthy told Rep. Bill Shuster (R-PA) about erosional features' treatment in the rule.

Jo-Ellen Darcy, assistant secretary of the Army for civil works, said during her testimony at the hearing that the final rule would seek to address a "lack of clarity about what's in and out," and whether there might be a way to streamline the permitting process under section 404 of the law.

But while the first industry source suggests that the changes might be substantial enough to require re-proposal through a supplemental notice, the second industry source notes that EPA has a fair amount of leeway, citing a 1987 U.S. Court of Appeals for the District of Columbia Circuit ruling in *Natural Resources Defense Council v. EPA*.

"As long as EPA can explain that revisions are a 'logical outgrowth'" from the proposal and public comments

received on the proposal, the source says, naming the legal test under the APA for final legislative rules, "they're in the clear."

And the state source says it is difficult to evaluate whether a supplemental rulemaking is necessary without having a chance to evaluate the revised language, noting that some of the changes McCarthy mentioned during the Feb. 4 hearing "sounded significant" but also as though the agency is interested in providing additional clarity, which states have repeatedly urged.

Backing State Bee Protection Plans, Growers Oppose EPA Pesticide Limits

Cotton growers are urging EPA not to limit pesticide use in states that are crafting plans to protect pollinators, raising concerns that a forthcoming federal strategy for implementing President Obama's memo on pollinator protection could curb state efforts to protect bees through better communication between growers and beekeepers.

EPA and the U.S. Department of Agriculture (USDA) are leading a federal Pollinator Health Task Force that is expected to release in the coming weeks a strategy for implementing President Obama's June 20 memo on stemming pollinator declines by improving their habitat; assessing how pesticides and other stressors contribute to their declines; and acting where appropriate.

Observers say the strategy will likely include strict default pesticide label requirements under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) for products that are toxic to bees, but that those federal restrictions will defer to state pollinator protection plans, which generally seek to mitigate risks to bees through improved cooperation between beekeepers and pesticide applicators.

A half dozen states currently have pollinator protection plans, though sources say roughly 25 to 30 other states have begun the process of developing one. Exactly how the pesticide labels will reference or defer to state plans has been a subject of concern for industry and state regulators in recent weeks.

During the National Cotton Council's annual meeting in Memphis, TN, Feb. 6, growers told EPA toxics chief Jim Jones that federal officials should hold off on imposing new regulatory requirements on pesticide applicators in states that are currently crafting plans to protect bees, according to an industry source.

The source says growers noted that developing a state plan is a lengthy process and that the federal strategy could potentially preempt those efforts.

"States are working on these plans, but whenever you bring multiple stakeholder groups together," agreeing on an approach can be a time-consuming process, the source says, describing the concern growers addressed to Jones during his remarks at the conference.

The industry source says Jones did not detail how federal officials might accommodate the growers' concern, but said Jones reiterated past statements from other EPA officials that the agency is backing the state pollinator protection efforts as a means of mitigating pesticides' risks to bees while accounting for the different needs of agriculture around the country.

EPA declined a request to provide *Inside EPA* with Jones' comments to the National Cotton Council, saying he did not speak from prepared remarks.

EPA and USDA are leading a federal task force in working to stem declines in bee populations, and the agencies have named pesticides, namely neonicotinoids, as one of several factors in the decline, with others including decreasing habitat as well as pests and pathogens like the varroa mite.

While federal officials are expected to soon announce plans for implementing Obama's memo, EPA is also weighing the risks and benefits of neonicotinoids as part of its registration review process, which is ongoing and expected to last several more years.

Industry officials have recently met with EPA pesticide officials, urging them to reconsider the agency's Oct. 15 analysis, conducted as part of registration review of several neonicotinoids, which concluded seeds treated with the pesticides bring negligible benefit to soybean yields over no pesticide use at all.

The growers' request during the Feb. 6 conference for EPA to withhold pesticide labeling restrictions in states where pollinator protection plans are in the works backs similar concerns that industry officials and regulators from some Midwestern states have raised about the implementation of the forthcoming federal strategy.

During the National Association of State Departments of Agriculture's winter policy conference in Washington, DC, Feb. 3, the North Dakota Commissioner of Agriculture said the federal strategy should back state efforts to improve collaboration between beekeepers and growers and not restrict pesticides, adding that risks from pesticides to bees have been overstated.

Industry sources tell *Inside EPA* that the state plans are better able to accommodate various farming and pesticide application processes around the country than any federal policy.

"For EPA to try to write a management plan that covers all crops in all regions" would be almost impossible, a second industry source says. The source added that EPA, in implementing the president's memo, is expected to establish a framework for state plans, which states may implement in a way that is suitable for local agriculture.

EPA signaled it was moving in that direction with an August letter to the State FIFRA Issues Research and Evaluation

Group (SFIREG). In the letter, agency pesticide officials called state pollinator protection plans a first step in mitigating acute risks from neonicotinoids and other pesticides to bees, and said the plans are consistent with the agency's pollinator protection efforts.

In December, SFIREG circulated draft guidance aimed at helping states craft pollinator protection plans, and took comment from its members through Feb. 1. The draft guide says growers and beekeepers can mitigate unreasonable risks to bees through communication and collaboration prior to pesticide applications on topics including choosing a pesticide product and application time, as well as by allowing beekeepers time to move or cover their hives.

The document also calls for states to accept stakeholder input before crafting a plan and to establish mechanisms to facilitate communication between beekeepers and growers. SFIREG is currently reviewing comments from its members, an official with the group says, adding that the group hopes to soon finalize the guidance.

Environmentalists have opposed relying on the state plans to protect bees, arguing the strategy shows EPA shifting responsibility for pesticide risks to bees to state regulators, creating a patchwork of approaches that are inadequate to address the risks that systemic pesticides, which are taken up into plants' pollen and nectar, pose to bees.

"Honey bees are going to be affected everywhere in the same way from these chemicals so the best way to address this pollinator crisis is with action at the federal level," a source with the Center for Food Safety says.

Industry officials, meanwhile, are continuing their pushback against an EPA Oct. 15 analysis that found neonicotinoids provide negligible benefits for soybean yields over no pesticide use at all, a boon for environmentalists who argue neonicotinoids pose unreasonable environmental risks while bringing little, if any, benefit.

EPA sought comment on the efficacy study through Jan. 23 and has indicated it will consider those comments as part of its registration review of the neonicotinoids clothianidin, imidacloprid, and thiamethoxam.

According to documents posted to a federal website Feb. 10, EPA staff has met twice in recent months with industry officials who offered research showing neonicotinoid seed treatments provide a host of benefits for agriculture and the economy, including increased crop yields and quality, as well as lower food prices.

During a Jan. 22 meeting, industry contractor AgInfomatics told EPA staff that neonicotinoids add billions to the North American economy, including between 4 billion and 4.3 billion annually to U.S. agriculture, primarily through corn farming, and between $150 million and $275 million for agriculture in Canada, primarily for canola, according to a presentation from the industry contractor. *The presentation is available on InsideEPA.com. See page 2 for details. (Doc. ID: 179084)*

AgInfomatics also reiterated arguments that without neonicotinoids farmers would revert to fewer but more toxic pesticides leading to increased pesticide spraying and increased resistance in target pests.

More than 15 EPA officials and two USDA officials attended the Jan. 22 meeting with industry officials from AgInfomatics, as well as Bayer CropScience, Syngenta and Valent U.S.A. Corporation, according to public documents. A smaller group of EPA staff met Dec. 2 with Dupont/Pioneer where industry presented results from a decade of research showing the efficacy of neonicotinoid-treated seeds in soybean and corn production, according to documents recently posted online.

Environmentalists have said they met with EPA staff Dec. 12, and that agency officials said they intended to analyze the efficacy of neonicotinoid-treated seeds in corn production, and that the review would follow a similar approach as the agency's analysis of the efficacy of treated seeds in soybean production.

One of the sources says industry officials are urging EPA to reconsider its conclusion in the Oct. 15 efficacy analysis during its ongoing registration review of neonicotinoids. The source also says EPA has not requested efficacy data to support an analysis of the efficacy of treated seeds in the production of other crops besides soybeans. — *Dave Reynolds*

IG Aims To Ensure Adequate EPA Oversight . . . begins on page one

Elkins — who has served as the IG since 2010 — heads the office that is an independent entity within EPA, consisting of auditors, program analysts, investigators and others that review agency programs, grants, contracts, and other issues with the overall goal of detecting fraud, waste and abuse. The IG each year crafts a plan for its upcoming reviews, but also responds to hotline complaints and requests from Congress for investigations.

The IG's reviews can include investigating claims of pay fraud, such as former EPA air official John Beale, who was paid for time taken while claiming fraudulently to be working at the CIA. Other work includes reviewing agency rules and programs to determine whether proper procedures were met, financial reviews, and more.

Elkins told *Inside EPA* that the entirety of the office's work already faces difficulties in a tight budget environment, and that the proposed FY16 budget for OIG could exacerbate the strains on its workforce.

EPA's budget request would fund the IG office at $50.09 million in FY16, which would be a $8.61 million increase over the $41.49 million currently enacted funding level and also higher than the $41.45 million in funding it received in FY14. Obama is also proposing to scale back funding for the IG's hazardous substance Superfund account by $1.48 million, taking that account down to $8.46 million in FY16 compared to the existing $9.93 million funding.

When combined, the total budget authority for OIG in FY16 under the proposal would be $58.56 million — a $7.13 million increase over the combined $51.43 million budget authority it received in FY15. Total work years for the office

would drop slightly by 3.4 work years, from 321.5 in FY15 down to 318.1 in FY16 (*Inside EPA*, Feb. 6).

But the proposal includes a $276,000 payroll cut, and EPA in its FY16 documents notes that total payroll years for the OIG's audits, investigations and evaluations would fall from 321.5 in FY15 to 318.1.

Elkins noted that EPA overall faces an ongoing tough budget, and added, "When you start to cut the budget of an agency, in essence what could happen — because people are trying to do more with less — it creates an environment where people start to take short cuts. And in taking short cuts they could find themselves doing things that are either illegal or working against the agency. And that's why you have an OIG in place, we step in to make sure that those areas are addressed so that the agency can be more efficient and stay focused on its tasks."

He noted that OIGs are labor intensive and almost 90 percent of the EPA IG's budget is for personnel. Although the office has not had to lay off staff, it has in place a hiring freeze and has been unable to back-fill when people leave. OIG currently has 307 employees, though Congress authorized it to have 362 employees.

"So that affects the number of reports that we get out, the number of investigations that we do, and quite frankly affects the workload of each and every individual. There's a certain amount of stress that goes along with that," Elkins said, and adverse impacts include potentially lengthy delays for a host of OIG work.

He also said the tight budget complicates succession planning. "We can't hire new people because of the budget, but we do have a work force with institutional knowledge that is aging. To do all the work takes people, it takes resources and money. So that is a risk that's out there in terms of our ability to operate," he said.

The IG's Chief of Staff Aracely Nuñez-Mattocks said that EPA appears to have passed on some of its FY16 budget cuts to the OIG, which it should not do as the office has a separate appropriation to the agency's budget. And she said Congress could ultimately reject even the proposed $7.13 million increase, potentially funding OIG at the same or lower levels than its current budget. "That's why we have to fight for every penny that we can get."

Elkins has in testimony to Congress and a recent letter to the White House Office of Management & Budget urged increased funding his office, a call that he reiterated during the interview.

"Investing in the OIG is like investing in an insurance policy, it's something you need to make sure people are working in various areas that are helpful, that the agency is being more efficient, and the taxpayer is getting a better return on investment. If you cut us, you have fewer people looking at the agency at the most likely time for fraud, waste and abuse to occur. There's a disconnect there and it doesn't make sense," he said.

Another hurdle to the OIG being able to fully conduct its work is an ongoing dispute with EPA's Office of Homeland Security (OHS) — part of McCarthy's office — on access to agency staff and documents.

OHS staff have long claimed that they are exempt from oversight and review by the IG, due to the sensitive security nature of their work. The IG disagrees, and the fight gained publicity as a result of the IG's investigation into the pay fraud scheme of former EPA air official Beale, who earned pay for extensive time he took off in periods when he lied about working for the CIA. The agency's IG for investigations has cited the Beale incident as one case where the OHS impeded the IG's work by withholding information essential to the investigators' research.

The dispute includes a memorandum of understanding (MOU) between the Federal Bureau of Investigations (FBI) and OHS, crafted, without the IG's input, which says OHS has sole power to investigate national security issues at EPA.

The MOU "calls for mutual assistance to each other and states that the OHS will be the FBI's single point of contact in EPA for any matter related to intelligence, counter-intelligence, counter-terrorism and national security involving employees, contractors, records, assets. The reason why that's problematic is it doesn't acknowledge the role of the IG to investigate misconduct," said Assistant IG for Investigations Patrick Sullivan during the interview.

"We're not limited by national security, we still have jurisdiction as well as the FBI," Sullivan said. "Nobody is suggesting we're usurping the authority of the FBI. Quite the contrary. But the MOU is problematic for us because our equities were never mentioned. It just made OHS the point of contact and purports to give OHS investigate authority — clearly they do not have that because they are an entity created by the administrator's office."

"If you don't have an independent source to review misconduct and leave to agency to do its own work, that creates a potential problem. Cutting the IG out takes away the only objective tool you have for oversight," Elkins added.

Congress has held several hearings on barriers to IG's access at various agencies, including EPA. At a Feb. 3 House Oversight & Government Reform Committee hearing, Elkins said there is now an agreement in principle with the agency that "there is no category of activity at the EPA to which OIG does not have unfettered access" (*Inside EPA*, Feb. 6).

During the Feb. 23 interview, Elkins said, "I think the rhetoric is getting better from the standpoint of the agency making more affirmative statements that they do want to work with us and try to find some ways to move forward. We are still working on the mechanics of that," though the MOU remains a "bone of contention."

Alan Larsen, assistant IG for congressional and public affairs and counsel to the IG, said in the interview that "our home run is to rescind that thing" as the FBI has told EPA that the IG should have the access it seeks. He said a meeting is pending between the OIG, FBI and OHS on the issue and he hopes for scrapping of the MOU.

Lawmakers at the recent House oversight hearing suggested that a bill amending the IG Act of 1978, which provides the offices with their authority, might be necessary to enforce compliance with existing mandates that agencies provide IGs with "all" material relevant to their investigations. During the interview, Larson said that the OIG does not believe

there is any doubt that the office should have access to all necessarily material.

Nevertheless, he said there are ongoing discussions among federal IGs about whether there is a need to potentially revise the IG Act to create some enforcement mechanisms to achieve that access.

"The IG Act gives emphatic access to all documents and information. The problem is what happens when an agency doesn't do what it's required to do? The IG act doesn't have any self-enforcing mechanisms to deal with that," Larson noted, adding that the question of how to revise the law is "still up for discussion."

Elkins concluded by saying that he has seen an improvement in the relationship between the OIG and EPA in recent months, citing for example a Jan. 2 memo McCarthy sent to all agency employees on working with the OIG.

In the memo, the administrator wrote that the IG's "important work" on targeting fraud, waste and abuse "enables us all to be more effective in achieving the agency's mission." She urged agency staff to report fraud, waste and abuse to the OIG if they see it, and vowed to protect the "valuable role" of EPA employees in helping with the OIG's oversight of the agency. *The memo is available on InsideEPA.com. See page 2 for details. (Doc. ID: 179166)*

Elkins said of the memo that "[w]e haven't had that in the last few years, and the lack of such a message created some ambiguity and issues with access, with employees refusing to cooperate. Now we have a clear message from the administrator on expectations and how to move forward in the future." — *Anthony Lacey*

EPA IG Officials Detail Wide-Ranging Plan For Reviews Under Tight Budget

Top officials in EPA's Office of Inspector General (OIG) say they will push ahead with a wide-ranging agenda of agency program evaluations, criminal investigations, and various other work at a time of tight funding, though EPA Inspector General (IG) Arthur Elkins Jr. warns that further funding limits could restrict OIG's work.

"I don't think you'd be surprised that for the federal government as a whole, the budget is having an impact. We are experiencing that just like everybody else. But I think the impact of the budget on an operation like the OIG has an effect that sometimes you can' t really see," Elkins said in an exclusive Feb. 23 interview with *Inside EPA*. He cautioned that any funding cuts to the office could force it to delay some key reviews until next year, or even later.

EPA's budget request would fund the IG office at $50.09 million in FY16, which would be a $8.61 million increase over the $41.49 million currently enacted funding level and also higher than the $41.45 million in funding it received in FY14. Obama is also proposing to scale back funding for the IG's hazardous substance Superfund account by $1.48 million, taking that account down to $8.46 million in FY16 compared to the existing $9.93 million funding.

When combined, the total budget authority for OIG in FY16 under the proposal would be $58.56 million — a $7.13 million increase over the combined $51.43 million budget authority it received in FY15. Total work years for the office would drop slightly by 3.4 work years, from 321.5 in FY15 down to 318.1 in FY16. But Elkins said the IG needs a higher budget, and that he will continue to call on Congress to provide a higher funding increase.

Lawmakers are holding hearings on EPA's budget that will inform the upcoming appropriations process, but in the meantime the OIG is pushing ahead with its various efforts to target fraud, waste, and abuse.

For example, Assistant IG for Program Evaluation Carolyn Copper said the major projects include a pending review of how EPA conducted its assessment of the Bristol Bay watershed in Alaska that informed the agency's novel preemptive veto of the contested Pebble Mine — an issue that the mine's developers are litigating.

"Another 'hot topic' is hydraulic fracturing. We're looking at how EPA, as well as the states, can use their authorities to address potential impacts to water resources," she said, with a report coming later this year.

Copper also said that the OIG at the request of EPA Region 2 Administrator Judith Enck has investigated "pretty serious financial management issues" with the U.S. Virgin Island's implementation of environmental programs, and that the OIG is preparing to make "some pretty sweeping recommendations for improvements."

Assistant IG for Audit Kevin Christensen said his division will work on important issues such as financial reviews, and said he is seeing a greater willingness by EPA staff to cooperate on those projects.

OIG is also pursuing a host of criminal and other investigations, said Assistant IG for Investigations Patrick Sullivan. His division at the end of January had 207 pending cases: 71 were allegations of employee misconduct, 35 are contract fraud, 34 are grants fraud, 17 are program fraud, 5 are computer crimes, 11 are laboratory fraud, 8 are cases of threats against the agency, and 26 pending cases fall in a general category of "other."

"EPA's criminal investigation division is limited by statute to environmental crimes only. We investigate all the other crimes that take place in EPA," Sullivan said. Still, he cautioned that the 207 pending investigations that his division continues to process are only allegations and nothing has been proven.

Meanwhile, Deputy IG Charles Sheehan touted what he sees as an improving relationship between OIG and the agency. He said, "A really strong indicator for how well the relationship is working is that the vast majority of our recommendations are accepted by the agency. We don't have a lot of push-back or fuss," he said, adding that often EPA has implemented recommendations in an OIG report by the time of its release. — *Anthony Lacey*

Judges Weigh Disputes Over EPA's CSAPR . . . begins on page one

Observers have suggested that the lingering challenges are unlikely to pose the risk of another total remand of CSAPR, though it was unclear from the Feb. 25 arguments how the court might resolve some of the major issues.

Judge Brett Kavanaugh — who authored the majority opinion scrapping CSAPR — was one of the judges who heard arguments, along with Judge Judith Rogers who wrote the dissent in the initial ruling. At arguments, they again appeared to be on competing sides, with Kavanaugh appearing more sympathetic to critics of the trading rule. The third judge, Thomas Griffith, followed the proceedings remotely due to sickness and did not ask any questions.

Power sector groups and some upwind states want the court to vacate CSAPR entirely or scrap certain requirements for states to reduce emissions. Several downwind states and environmentalists are backing EPA's defense of the rule, saying that its pollution cuts will be vital to help states attain stricter federal air standards.

CSAPR regulates nitrogen oxides and sulfur dioxide emissions in 28 states, seeking to satisfy an air law "good neighbor" duty for states to curb interstate pollution that contributes to downwind areas' problems attaining the national ambient air quality standards (NAAQS) of ozone and fine particulate matter (PM2.5).

The Bush EPA first tried to establish a cap-and-trade program with its Clean Air Interstate Rule (CAIR), but the D.C. Circuit found fault with the rule and remanded it to EPA. The Obama EPA then developed CSAPR, imposing federal implementation plans (FIPs) on states to implement the rule. Several states objected, saying the rule was too strict and that they should have been allowed to first write state implementation plans (SIPs) to implement it.

The D.C. Circuit's split ruling in 2012 said EPA should have devised an allocation of states' emissions allowances, or "budgets," using a strictly proportional approach based on how much each state contributes to its neighbors' air quality problems. Kavanaugh said at the time that EPA was wrong to directly impose FIPs, and wrong to allow any degree of "overcontrol" — emissions cuts beyond those required to ensure downwind areas attain the NAAQS.

The high court, however, rejected this position in its 6-2 ruling that revived CSAPR, although the justices explicitly allowed "as-applied" legal challenges to be brought by states where they consider EPA's mandates on them to be in error. The high court approved of EPA's use of a uniform cost-effectiveness threshold for emissions controls when determining states' obligations, and allowed for some degree of overcontrol. But the high court also said that overcontrol is not permissible in situations where a downwind area is forced to reduce emissions more than is required to attain or maintain the NAAQS in every downwind location "to which it is linked."

They also note that the high court did not address a key question of whether EPA had the right to disapprove SIPs crafted to comply with CAIR that aimed to satisfy the air law's good neighbor requirement. The agency eliminated these using an air law SIP "correction" mechanism, clearing the path to impose the FIPs.

Attorney Bill Davis, Texas and other states seeking to vacate CSAPR, at the oral arguments in *EME Homer City* attacked EPA's decision to invalidate SIPs and FIPs that were based on CAIR. The plans were valid when approved by EPA, Davis said, and EPA cannot arbitrarily scrap them because they are based on a rule — CAIR — that was remanded by the D.C. Circuit in its 2008 ruling in *North Carolina v. EPA*.

Rogers noted that EPA's assertion was that the court only left CAIR in place with respect to the trading program using its "equitable powers" to temporarily sustain a rule it had found unlawful, to which Davis responded that the "court left CAIR in effect for all purposes."

Rogers pressed Davis on what to do where a "statute leaves a gap" on how to proceed in such circumstances.

"We don't believe there is any gap," Davis replied.

Kavanaugh told Davis that "you are hanging everything on the fact that it [CAIR] wasn't vacated," to which Davis replied that the manner of EPA's action invalidating SIPs was also unlawful.

EPA used its SIP "error correction" authority to do this, but Davis said this is reserved for errors that are "routine, insignificant and inconsequential," but "here that is clearly not the case."

"In our view this error should result in vacatur of the entire rule," Davis said, because so many SIPs and FIPs supporting CSAPR would fall as a result of the court correcting EPA's mistake that the rule's trading programs could no longer continue to function. Nor did EPA give states the chance to correct any deficiency in their SIPs through a "SIP Call" that would have involved public notice and comment.

Davis also said that EPA failed to give independent meaning to the good neighbor provision's requirement that states reduce their "significant contribution" to pollution that not only results in NAAQS nonattainment, but "interferes with maintenance" of NAAQS in areas that are close to violating the standards.

Department of Justice (DOJ) attorney Norman Rave, representing EPA, said Davis' position was "clearly inconsistent with what this court actually did in *North Carolina*."

He rebuffed Rogers' suggestion that EPA considered CAIR to have been kept alive only to preserve the trading program, saying, "it was not the trading program *per se*," rather, "it was the health benefits" that the court sought to preserve. "Because CAIR was invalid, the CAIR SIPs were invalid," he said.

Rave said EPA only invoked the "error correction" mechanism "out of an abundance of caution," but did not need to rely on it, given the *North Carolina* ruling. With respect to a SIP Call and notice-and-comment, Rave said, "nothing the

states could have said would have changed" the fact that CAIR was invalid.

Rave noted EPA gave independent meaning to the "interfere with maintenance" part of the good neighbor provision, identifying those areas at a high risk of nonattainment, and also significant contributors to their "high risk" status.

Attorney Andrew Frank, representing states and local authorities supporting CSAPR, said EPA's use of the error correction mechanism was "fair, reasonable and lawful," and that a "SIP Call would have introduced an unnecessary and unreasonable delay" in replacing CSAPR.

Attorney Peter Keisler, representing industry groups seeking a remand of CSAPR, claimed EPA's air modeling for 2014 used in the proposed rule had been ignored, to the detriment of many states that would otherwise not have to participate in the trading program. These groups are seeking the total exclusion of 14 states from the trading program.

While projections used in the final CSAPR rule required these states to participate based on projections of their significant contribution in 2012, the 2014 analysis — not ultimately used by EPA for regulatory purposes — showed no significant contribution to NAAQS nonattainment or maintenance problems in 2014. Indeed, the modeling showed that pollution levels in downwind states would actually increase as emissions upwind were cut under CSAPR. "That should have been a stop-the-presses moment" showing serious problems with the rule, Keisler said.

Keisler further said that Texas should be allowed to increase its emissions budget to allow more pollution because EPA's own modeling showed that the state could eliminate its significant contribution to downwind states' problems at a cost-effectiveness threshold of 100 dollars per ton of SO2 — far less than the 500 dollars per ton used by EPA as a uniform threshold for states including Texas.

EPA in CSAPR used two groupings of states with two different cost-effectiveness thresholds for SO2, limiting the states to trading within, but not between, each bloc. Some states with air pollution problems pressed for higher thresholds, given that they already accept higher costs to reduce pollution, but upwind states argued for lower thresholds.

Keisler said that should a state successfully bring an "as-applied" challenge, including using a lower cost-effectiveness standard, that would be "at war" with EPA's insistence on uniform cost-effectiveness thresholds.

Kavanaugh appeared to accept this argument, but pressed Keisler on the solution, to which Keisler replied that a remand with respect to an individual state would suffice. EPA's mistakes with regard to the 14 states, however, were so egregious that only vacatur of their obligations would do, Keisler said.

DOJ attorney Jessica O'Donnell countered that EPA was within its rights not to implement CSAPR based on the 2014 modeling, and not to entertain different cost-effectiveness thresholds for different states. The Supreme Court supported EPA's "reasonable" approach to cost effectiveness, she said. "I don't think anything in the Supreme Court's ruling requires that EPA set an individualized cost-effectiveness threshold for each state," she added.

O'Donnell further clashed with Kavanaugh over EPA's interpretation of overcontrol, after Keisler had said EPA simply refused to accept the Supreme Court's view that excessive overcontrol is possible and must be avoided. "I think petitioners are putting too much emphasis on that language," she said.

Attorney Graham McCahan, representing environmentalists, said during arguments that downwind areas must formally be designated attainment before they can be excluded from calculations of NAAQS "maintenance" under CSAPR, and that emissions reductions made to achieve this — including those upwind — must be "permanent and enforceable," requiring upwind areas to remain in the program.

Some downwind areas that were projected by 2014 to meet the 1997 ozone NAAQS, expressed as 84 parts per billion (ppb), without CSAPR are now in fact violating the tougher 2008 standard of 75 ppb, now being implemented by EPA and states, McCahan said. Therefore taking the upwind contributor states to these areas out of CSAPR would contradict EPA's purpose of improving public health, he argued. — *Stuart Parker*

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Environmentalists Seek Novel Conductivity TMDL In Appalachian Waters

Environmentalists are suing to force EPA to craft or compel the West Virginia Department of Environmental Protection (DEP) to craft total maximum daily loads (TMDL) for watersheds in the state that include novel limits for conductivity — a measure of ionic pollution — though industry lawyers say it is not clear how such a limit would be established.

The groups in *Ohio Valley Environmental Coalition, et al. v. Gina McCarthy, et al.*, filed earlier this year in the U.S. District Court for the Southern District of West Virginia, are challenging EPA approval of TMDLs that DEP set for six watersheds in the state.

"The nondiscretionary duties of which Plaintiffs seek to compel performance are Defendants' duties pursuant to disapprove of WVDEP's actual and/or constructive submission of no TMDLs for waters in West Virginia biologically impaired by ionic stress and to develop such TMDLs for those waters," the suit says. *The suit is available on InsideEPA.com. See page 2 for details. (Doc. ID: 179081)*

The six watersheds are Upper Ohio South, Dunkard Creek, Lower Kanawha River, Elk River, Monongahela River and the West Fork River. The suit alleges DEP failed to develop TMDLs with "loads" that address conductivity, even though the watersheds contained streams that are biologically impaired for ionic stress. The state said "there is insufficient information available regarding the causative pollutants and their associated impairment thresholds for biological TMDL development for ionic toxicity at this time," according to the suit.

The groups ask the federal district court to find that EPA's approval of the six TMDLs was arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with the Clean Water Act (CWA), challenging DEP's decision to suspend further development of a TMDL for more than 500 streams.

According to a Jan. 27 blog post by Robert McLusky of the firm Jackson Kelly, the list of streams for which the groups are seeking relief includes those in the Coal, Gauley, Guyandotte and Tog Fork watersheds in addition to the six watershed specifically mentioned in the suit.

"The goal of this suit largely is to force the imposition of effluent limits for "conductivity" on discharges from coal mines throughout the State, a result that would add an enormous financial burden to an already stressed industry," McLusky writes.

Section 303(d) of the CWA requires states to submit to EPA for approval every two years a list of all waters in which pollutant controls are not sufficient to attain or maintain water quality standards, and establish priorities for crafting TMDLs according to the severity of the impairment and the designated use of the waterbody.

But industry is likely to argue that conductivity is an indicator of other pollutants in a waterbody, not a specific pollutant itself, and therefore it is unclear how EPA would set TMDLs for the ionic pollution measure, though environmentalists could pursue in the litigation use of EPA's controversial conductivity benchmark.

"Is there an obligation to impose TMDLs for conductivity at all?" McLusky writes, noting that DEP declined to impose "loads" on conductivity "because it is not the actual cause of any biological impairment. Rather, it believes that any causal link exists only for one or more of the dissolved ions making up the measured conductivity, but it does not know which ones or in what concentrations they might be having adverse effects."

Moreover, the suit raises questions over whether EPA's actions in approving the TMDLs that did not have specific conductivity loads are judicially reviewable, because the state did not submit a TMDL for approval that concerned the ionic toxicity.

Conductivity, or a measure of how much electricity the water can conduct due to ionic levels, has been a contentious issue in recent years, in particular given EPA's controversial CWA permitting guidance for mining in Appalachia, issued early in the Obama administration.

The guidance, which was challenged in court by industry and states but upheld last year by the U.S. Court of Appeals for the District of Columbia Circuit, included a numeric conductivity limit of 300 microsiemens per centimeter (uS/cm) as the level at which operators would be required to adopt best management practices to protect aquatic life and 500 uS/cm as a threshold at which the agency can deny permits.

A three-judge panel for the D.C. Circuit last July upheld the guidance in *National Mining Association (NMA), et al. v. Gina McCarthy, et al.*, but limited its application, saying state permit writers are "free to ignore" the guide's advice when crafting state discharge permits. The court also said the agency may not use the guide as a basis for enforcement for alleged violations of CWA permitting requirements.

Following the ruling, advocates have in recent months pursued various case-by-case CWA permit challenges aiming to force use of the benchmark, and have scored wins in suits challenging permits for discharges violating the benchmark.

EPA recently said it is crafting a field-based conductivity methodology for states to use in developing criteria for adoption into water quality standards, amid months of pressure from advocates for a formal rulemaking to set water quality criteria for conductivity in the wake of the court ruling, but falling short of their push for a rule to codify the conductivity benchmark into water permits (*Inside EPA*, Feb. 13).

EPA plans on releasing a draft for public comment in 2015. — *Bridget DiCosmo*

Vermont City Challenges EPA 'Flow' Limits . . . begins on page one

(Doc. ID: 179169)

"At the time of this filing, there is no statute, regulation, or guidance granting EPA the authority to issue or approve flow TMDLs. . . . Rutland hereby challenges EPA's effort to unilaterally expand its regulatory power from its CWA-authorized role of establishing TMDLs that limit 'pollutant' discharges in order to meet water quality standards, to control the quantity, or flow of a non-pollutant: water itself," the complaint says.

Rutland is asking the district court to vacate the TMDL on the basis of both its flow restrictions and what the city claims are scientific errors in the plan.

An industry attorney who deals with stormwater says the case appears to be headed for a ruling on the merits as long as EPA does not seek to settle with the city — creating the opportunity for a new decision that would either reinforce an earlier case that said the agency lacks authority to regulate flow, or create a conflicting precedent.

"I think the government's going to come back and seek dismissal, but if they survive that, I think it's Accotink all over again," the attorney says.

A substantive ruling for EPA could revive the agency's power to establish overt controls on stormwater flow in permits — which has been seen as defunct since a 2013 ruling by the U.S. District Court for the Northern District of Virginia in *Virginia Department of Transportation (VDOT) v. EPA. In that decision,* the court held that the agency could not regulate stormwater flow in the Accotink River through a TMDL, because the CWA only allows regulation of "pollutants."

While no other court has ruled on the issue, EPA declined to appeal the case and has been seen moving away from direct limits on flow rate. Most recently, the agency in November amended a controversial 2010 memorandum on stormwater to remove references to flow regulation, focusing instead on management practices including stormwater retention, and crafting numeric standards for sediment and other contaminants discharged from stormwater systems (*Inside EPA*, Dec. 11).

But the industry attorney says that even though EPA appears to have stepped back from flow controls, given an opportunity to win a new district court ruling the agency could still seek to defend the Rutland TMDL and other similar plans.

"There are indicators that EPA still wants to regulate flow — in this carefully-crafted, 'never use the word flow' way. It's a little bit of a linguistic game that they're playing, and it's never been tested anywhere but this one district court," the attorney says.

The 2010 memo originally included guidance for regulators to use surrogates for pollutant parameters, such as flow or impervious cover, when establishing TMDL loading capacity targets. The revisions remove the "surrogate" language entirely but still encourage restrictions on impervious cover as a way to mitigate stormwater runoff.

According to the attorney, industry and municipalities subject to federal stormwater standards see the agency's recent push to require stormwater retention and the use of green infrastructure such as permeable pavement and rain gardens as an alternative route to regulating stormwater flow.

"In the memo, they removed every mention of 'flow,' but they used some smoke and mirrors. They talk about retention-based performance standards, which sounds an awful lot like flow to me. And they talk about limits on pollutant discharges . . . through on-site retention," the attorney says.

For instance, the memo touts as a model for stormwater control the landmark municipal separate storm sewer system (MS4) permit for Washington, DC, which imposed a stormwater retention standard throughout the district and has been seen as a major shift toward an agency policy of encouraging or requiring green infrastructure in permits and consent decrees.

Industry and environmentalist sources have said EPA is expected to move forward with similar mandates in other jurisdictions as part of a "permit-by-permit" approach to retention standards after the agency abandoned its planned post-construction rule for stormwater runoff — which was expected to set retention standards for all new construction and redevelopment — in favor of providing guidance and technical assistance to local governments. — *David LaRoss*

Immigration Order Could Boost EPA Critics' Data Quality Suits Over Rules

A Texas federal judge's order allowing states to advance with their suit aiming to block President Obama's immigration policy could also boost EPA critics' plans to sue the agency over alleged Information Quality Act (IQA) violations in rules, because the order reinforces states' litigation rights that are similar to those in the planned IQA suits.

The immigration order, by U.S. District Court for the Southern District of Texas Judge Andrew S. Hanan, embraces the "*parens patriae*" legal theory, under which states can sue the federal government to defend their citizens' rights as long as those rights have been guaranteed by a federal law even if they are generally barred from challenging federal policies in court outside of an explicit statutory right of action — the same legal theory underpinning the potential IQA suits. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179172)*

"I would advise those of you interested in [IQA challenges] to follow" the immigration suit because of its adoption of the *parens patriae* theory, said Lawrence A. Kogan, a trade lawyer and free-market advocate, during a Feb. 20 roundtable in Washington, D.C., to discuss a February white paper for the Washington Legal Foundation (WLF) that encouraged private parties and states to pursue new IQA suits over key EPA climate policies.

"States are not barred outright from suing the federal government based on a *parens patriae* theory; rather, provided

that the states are seeking to *enforce* — rather than prevent the enforcement of — a federal statute, a *parens patriae* suit between these parties may be maintained," says Hanan's Feb. 16 order in *State of Texas, et al., v. USA, et al.*

The case deals with President Obama's "deferred action" program announced in November to provide what Hanan calls "legal presence" to more than 4 million individuals currently in the United States illegally, and to enable them to secure various state and federal benefits. Texas and its allies have argued that the program "will injure the economic interests of their residents" by crowding the job market and sending benefits such as unemployment to a population that until the president's action did not qualify for them, among other issues.

Hanan's logic in the order mirrors an argument that Kogan raised in his February white paper, in which he encouraged both private parties and states to claim standing to sue EPA over alleged IQA violations in EPA's determination that greenhouse gases (GHGs) endanger human health and welfare — the basis for many climate regulations — as a test case for further data act suits (*Inside EPA*, Feb. 20).

"The key point here is to consider that states can be players in an action against EPA or other agencies who have been involved in the development or peer review of science assessments underlying proposed rulemakings," he said.

The IQA sets out criteria for the use and peer-review of scientific data in rulemaking actions. Federal courts have long held that private plaintiffs lack standing to challenge agency actions for failing to meet those criteria, finding that the law lacks an explicit right of action. Even though the IQA allows for citizen petitions to address claimed violations, judges have also denied attempts to challenge petition responses under the Administrative Procedure Act on the grounds that the challenged agency actions are not "final."

But Kogan argues in the paper that the IQA can be read to create a "negative right" to be free from regulations founded on flawed science that contravenes the law's intent, and that both states and individuals could sue over new EPA rulemakings and binding actions in order to enforce that right.

While Kogan's paper focuses mainly on the potential for individuals and private groups to challenge EPA rules, he also addresses state challenges and says they could get a boost from broader adoption of the *parens patriae* theory, which he argues would not only allow states to bring IQA suits but allow them to meet a less onerous standard to show that they have been injured by the contested regulations.

"States bringing suit in their quasi-sovereign capacity on behalf of their citizens will arguably be subject to a less rigorous test for standing that requires injury-in-fact to collective, rather than individual, state, and citizen interests. To this end, States should be able to utilize collective statistical and other data, including computer projections of current and future economic harm, to prove injury-in-fact, along with a lesser standard of general causation," the paper says.

The "quasi-sovereign capacity" under the *parens patriae* doctrine has varied over time, Kogan writes, but generally involves a state's defense of the well-being, "both physical and economic," of its populace, and aiming to protect a state's "rightful place within the federal system," which can extend to situations where a state's residents are denied benefits guaranteed by a federal law — in this case the IQA's "negative right" against regulations that are alleged to be mis-crafted because they are based on what critics say is flawed data.

If a test case over the climate endangerment finding is successful, Kogan says it would pave the way for further challenges to EPA actions including its pending Clean Water Act jurisdiction rule; the social cost of carbon, which underlies many GHG standards; the proposed national ambient air quality standard for ozone; EPA's study on the human-health and environmental impacts of hydraulic fracturing; review of the Keystone XL pipeline's environmental impacts; joint EPA and National Oceanic and Atmospheric Administration disapproval of states' coastal nonpoint source pollution control programs; and the Fish and Wildlife Service's endangered species designations. — *David LaRoss*

EPA Eyes Staff Cuts At Many Program Offices In FY16 Budget Request

EPA is planning staff cuts in many program offices even as it asks Congress for a funding boost in fiscal year 2016, according to the agency's congressional justification for the FY16 budget request, signaling that agency employees could see another round of buyouts or other staff reduction measures in the coming year even if appropriators in Congress do not cut EPA's total budget.

While the agency is seeking an overall increase for FY16 of 38 full-time equivalents (FTEs), the budget justification, released Feb. 2 alongside EPA's overall FY16 funding request, says program areas including the waste, toxics and water offices would be targeted for reductions under EPA's plan, despite many of the same offices being slated for larger budgets.

The FY16 budget request includes 15,373.3 FTEs, which would be up from the current enacted level of 15,335. But that increase is due almost entirely to a proposed increase of 105 FTEs in the air and radiation program, which the agency says is needed to implement the Obama administration's climate change agenda and to move forward on an array of air actions such as rulemakings that are subject to court-ordered or statutory deadlines.

Meanwhile, the budget proposal says the agency's cleanup programs are set to cut 51 FTEs, from the current level of 3,871.4 down to 3,820.4; the water program plans to cut four FTEs, from 3,160 to 3,156; and the chemicals program 21, from 2,410 down to 2,389.

The cuts could be implemented through simple attrition, by choosing not to replace staff who voluntarily leave EPA;

by transferring employees from one program area to another; or through a new round of buyouts mirroring offers made to many career staff in 2014 and 2013 in order to achieve payroll reduction goals in those years.

It is uncertain how new buyouts would be received by the EPA workforce, however, after staff unions threatened to file a labor complaint against the agency over its handling of "impact and implementation" procedures for reassigning duties after staff who accept buyouts depart.

The proposed staff reductions at the affected offices are being spread out across a variety of individual program areas. For instance, the Resource Conservation & Recovery Act (RCRA) program would lose five FTEs from its corrective action office, and 9.3 from the waste management area, while gaining 4.2 in the waste minimization and recycling program.

EPA acknowledges in the justification that the staff moves could lead to lower performance in the affected offices. In the waste management section of the request, it says the proposed reduction "may delay activities such as conducting additional analysis to support non-hazardous secondary materials categorical rulemakings and responding to regulatory backlog petitions."

Meanwhile, addressing the boost to staffing in the air office, the request says that "[a]t a national level, the agency is requesting additional FTE to provide support in targeted areas" including rulemakings and regulatory reviews subject to statutory deadlines, guidance on federal planning and permitting requirements and implementation of motor vehicle engine standards.

Enforcement is the only other major program area slated for an increase in staff, from 3,390.7 to 3,401.9 FTEs. However, the agency says in the justification that it will continue with its "next generation compliance" strategy — EPA's plan to cut enforcement costs through innovative measures that will rely more on data than inspections for enforcement. The strategy has prompted outcry from environmentalists and others who warn it will reduce EPA's ability to identify and prosecute violators of environmental laws.

"The FY 2016 [enforcement] request maintains FTE at a reduction from pre-FY 2010 levels, but includes funding that allows EPA to support those staff so they can identify and address noncompliance, through investments in data analysis and systems, lab support, equipment for front line enforcement personnel, inspector training, and case support such as expert witnesses and document management service," the request says.

EPA's Inspector General (IG) Arthur Elkins Jr has already urged Congress to reject a proposed cut to the Office of Inspector General (OIG) payroll, warning that existing funding is hindering investigations of fraud, waste and abuse.

"The budget levels made available to me are impeding our ability to do our work. . . . When the OIG is not able to carry out its responsibilities because of inadequate funding, it is a net loss to the federal government and American taxpayers," Elkins said in testimony to a Feb. 3 House Oversight & Government Reform Committee hearing on agency IGs' access to documents, which also included testimony from IGs at two other agencies (*Inside EPA*, Feb. 6).

The agency's proposed staffing hike is part of a general funding increase sought in President Obama's proposed FY16 budget for EPA, which would increase appropriations for the agency by $452 million — up to $8.591 billion from its current $8.139 billion funding.

But lawmakers are expected to largely ignore the president's budget proposal when they craft FY16 spending bills later this year, and Republicans are likely to use the appropriations process for EPA's FY16 budget to push significant cuts in EPA's overall budget and its Environmental Programs & Management account in particular, which funds most agency rulemaking and regulatory efforts and is currently set at $2.613 billion.

While the Senate has in recent years blocked House proposals for sharp EPA funding cuts, this year the interior panel that oversees the agency's budget and other environmental spending includes many prominent EPA critics, including Majority Leader Mitch McConnell (R-KY) and Roy Blunt (R-MO). — *David LaRoss*

Judges Weigh Settlement's Language In Florida Nutrient Standards Appeal

Federal appellate judges seemed skeptical of all sides' claims during oral arguments in the long-running litigation over Clean Water Act (CWA) criteria for nutrients in Florida, focusing on the question of EPA's discretion under a 2009 consent decree that mandated stricter water quality standards in the state — but giving little hint of how they will ultimately rule.

A three-judge panel of the U.S. Court of Appeals for the 11th Circuit pressed attorneys for the state, EPA and environmentalist groups for their interpretations of the 2009 settlement agreement between advocates and the agency, with an emphasis on the meaning of the text, according to a recording of the Jan. 29 arguments in *Florida Wildlife Federation (FWF), et al. v. EPA, et al.*, provided to *Inside EPA* by the court.

"If you want to promote settlements, settlement agreements have to mean something. And the easier you make it for one party to back out, the less incentive I'm going to have in the future to give up things and reach a median position between the two parties," one judge on the panel said to Department of Justice (DOJ) attorney Brian Toth, who represented EPA.

However, another judge said to FWF attorney David Guest, "You've got some strong arguments, but just to be accurate about it, the consent decree doesn't say 'you can't back out.'"

Members of the panel that will decide the case include Chief Circuit Judge Edward Earl Carnes, Senior Judge Emmett Ripley Cox and district court Judge C. Ashley Royal, sitting on the 11th Circuit by designation, but the recording

did not identify speakers by name.

Under appeal in the case is a Jan. 7 order by Judge Robert Hinkle, of the U.S. District Court for the Northern District of Florida, where he granted EPA's request to modify the consent decree between EPA and environmentalists that required the agency to promulgate strict numeric nutrient regulations for Florida, in order to allow for less-stringent narrative standards at some of the state's waters.

The modification brought the terms of the consent decree in line with the state-crafted criteria EPA supported in 2013, but which environmentalists attacked as too lax to satisfy EPA's 2009 determination that numeric nutrient limits were necessary to protect water quality in Florida.

Before asking the court to modify the consent decree, EPA amended the 2009 determination to allow for less-strict criteria, and then successfully argued to the court that the consent decree only had to be strict enough to enforce the terms of the determination, even if those terms were changed unilaterally.

Environmentalists are now arguing that Hinkle lacked discretion to accept the modified settlement without a fact-finding hearing to determine if the state-crafted criteria are sufficiently protective, regardless of the changes to EPA's underlying determination. They have said, in briefs and at the Jan. 29 arguments, that the consent decree sets out a requirement for EPA to craft or approve strict nutrient standards, rather than merely mandating compliance with the determination as the agency has claimed, and that obligation can only be avoided through narrow enumerated exceptions.

"What those folks want to do is add a third provision, which is 'if we change our minds.' That's not in the consent decree," Guest said during arguments.

If the court rules for environmentalists, it could force EPA to craft a new set of federal criteria for the state — likely leading to another round of litigation over the stringency of those rules.

If the agency wins, FWF and its allies would only be able to block the state-crafted rules through a new suit claiming that the standards are "arbitrary and capricious" under the Administrative Procedure Act — which one environmentalist attorney close to the case has said would be a high bar to clear.

Questions at oral argument implied that the 11th Circuit's decision could turn on the judges' interpretation of the specific language of the consent decree, but no judge offered a definitive statement on his own reading of the consent decree's language, instead asking Guest and Toth to respond to each other's claims.

"What about the argument . . . that really what the consent decree provided is deadlines, and once the EPA takes action, and Florida [Department of Environmental Protection] has arguably taken action, the deadlines part of the decree no longer has a function? Now, the action may be wrong, but the consent decree is about deadlines, not about the validity or exactitude of the actions that they take," one judge said to Guest.

And they asked Jonathan Glogau, who represented Florida's state and municipal governments, whether regulators' decision not to craft numeric limits for some of the state's waters satisfies the settlement's mandate for new or revised CWA standards for the state, since those waterbodies are operating under rules substantively similar to those that existed before the 2009 determination.

"You're assuming that the 2009 determinations are valid and operate to waive the requirements to require modification of the consent decree. But I understood the previous argument to mean that EPA had not approved new water quality standards as to all the waters," one of the judges said.

Under the water law, states draft and EPA approves water quality criteria — risk-based limits that regulators use, along with waterbodies' designated uses and antidegradation policy — to set enforceable water quality standards and permit limits. But most states have opted for "narrative standards" for nutrients, which allow discharges of nitrogen and phosphorous to continue so long as there is no discernible effect on the waterbody, rather than setting a stricter and measurable numeric limit.

Environmentalists have long charged that states' use of narrative nutrient criteria makes it difficult to comply with the CWA's requirement that states determine whether a discharger has a "reasonable potential to cause, or contribute to an excursion beyond applicable water quality criteria." In a bid to advance the issue, environmentalists in 2009 successfully sued EPA to force the agency to set numeric criteria for Florida waters, but litigation over how strict the rules must be, and how they should be implemented, has continued ever since.

FERC Meeting Addresses Concerns Over ESPS' Citizen Suits, Safety Valve

EPA's acting air chief Janet McCabe is acknowledging concerns from state and federal officials that states could face citizen suits seeking to enforce provisions of their plans to comply with the agency's greenhouse gas (GHG) standards for existing power plants and is vowing to address the concerns and preserve states' flexibility.

Speaking Feb. 19 at the Federal Energy Regulatory Commission's (FERC) first-ever technical conference on the implications of EPA's existing source performance standards (ESPS), McCabe said said she sees a "potential" for states to be sued by third parties for their attempts to comply with the ESPS, where the states' use of compliance flexibilities under the rule could become subject to litigation.

"As a former state regulator, . . . I am extremely sensitive to this kind of issue and we tried to be extremely sensitive to this kind of issue, and we tried to be extremely sensitive to that in the proposal [by] recognizing a potential tension

there," McCabe said.

She added: "There are some things we can think about in the final rule to provide space for states to design plans that wouldn't necessarily bring every last bit into federal enforceability. We want to work very hard to find a way to be responsive to those concerns."

McCabe's commitment was one of several areas where regulators and other participants in the conference appeared to suggest ways to address concerns over the rule. For example, representatives of environmental, electricity and grid groups agreed on the need for a relatively narrow reliability "safety valve" to address adverse grid reliability impacts, though they differed on how such a mechanism should be structured.

Under the ESPS, EPA sets rate-based GHG emission targets for each state and then requires states to submit compliance plans detailing how they plan to attain the targets. Once approved by EPA, those compliance plans are enforceable by third-party suits authorized by litigation rights contained in the Clean Air Act.

Given the enforcement option, critics of EPA's rule fear that the ESPS will prompt a host of citizen suits that will give environmentalists tremendous power to dictate energy supply policy for states. As a result, they fear the suits will undermine the flexibility that EPA has vowed to provide states as they seek to comply with their GHG targets.

"I think states are going to be reluctant to bring things into their plan that currently are sort of voluntary partnerships with businesses. They want that to be discretionary," Alexandra Dunn, executive director of the Environmental Council of the States, a group that represents state environmental commissioners, told the FERC conference.

"If [the concept of federal enforceability] is interpreted too rigidly, we will see inflexible approaches to state plans. If putting it in the plan makes it federally enforceable, that's going to be a deterrent," she said.

Dunn also cautioned that fossil fuel-fired power plants, which are most clearly subject to regulation under section 111(d) of the air act, could be forced to bear the brunt of emission reduction requirements in state compliance plans if other "building block" strategies, such as increased use of natural gas and greater use of renewable energy and energy efficiency, do not withstand legal scrutiny or do not deliver reductions.

"Do those plants end up at the end of the day having to sort of bear the shortfalls of the other building blocks not delivering as projected? There is some risk there," she said.

FERC Commissioner Tony Clark, one of the two Republicans on the commission, echoed Dunn's concerns, warning that many states believe if they include measures in compliance plans later be subject to suit, they are "effectively walking into a buzz saw where their entire state plan can become subject to judicial fiat," he said.

Clark said such suits are "the bane" of state government, adding that many utility regulators raised during the winter meeting of the National Association of Regulatory Utility Commissioners (NARUC) in Washington, DC, held earlier this week. State commissioners "feel there is a big target on their chest[s]" in being subject to "judicial fiat" if someone, or some group, does not believe a state's compliance strategy is adequate or underplays a particular resource, he said.

For example, Kenneth Anderson, Jr, of Texas Public Utility Commission, speaking at the NARUC meeting, said regulators are "very concerned with federal enforceability of state implementation plans, and particularly by third-party plaintiffs that could bring suit in federal court."

"We simply aren't going to turn the keys to [the Texas grid] over to the Sierra Club in [a] federal lawsuit," he said, noting that environmentalists tend to be the largest litigants in cases regarding the Clean Air Act. "It just won't happen."

Anderson said Texas "won't do a plan if that's the risk. We won't turn our energy efficiency program over to the Sierra Club or other environmental groups that really don't have a clue about how energy markets work." He explained that the state may not write a compliance plan and let EPA implement a federal plan unless there is federal enforcement litigation relief, while also questioning whether such relief is possible.

Given such concerns, Clark said EPA "has an interest in getting as many states willing to play ball as possible in terms of setting up [state implementation plan (SIP)] or regional plans because there are a lot of things that states can voluntarily put into a SIP that EPA can't mandate as part of a federal implementation plan."

Clark asked McCabe if there is "a way for EPA to address that concern through the rule itself to limit some of the exposure states have that might encourage them to play ball? Or is this just embedded in the [air] act itself" where Congress would have to provide the answer?

McCabe did not address the need for Congress to act, but reiterated that EPA is aware of the concerns and will work with states to help resolve the potential tension between state plans, EPA enforceability if they fulfill their obligations and the potential of state plans being subject to lawsuits leveled by third parties.

"We want states to have as much flexibility as possible, but we also recognize the very real impulse to not put into a federally enforceability world things . . . that traditionally have not been" included, she said. — *John Siciliano*

Legal Concerns Prompt EPA To Scale Back Flexibilities In Ozone SIP Rule

EPA's final rule detailing requirements for state implementation plans (SIPs) for meeting the agency's 2008 ozone air standard scales back regulatory flexibilities the agency floated in the proposed version of the rule, due to EPA's fears that the provisions could have been vulnerable to lawsuits claiming that they violated the Clean Air Act.

For example, the final ozone national ambient air quality standards (NAAQS) implementation rule abandons the proposed version's approach to consolidating various SIP deadlines together (*Inside EPA*, Feb. 20). The suggested approach was designed to reduce states' burdens by allowing them to submit all elements of an ozone compliance SIP at once, but EPA in the final rule drops that plan and notes that commenters warned that the approach might not be lawful.

EPA has also clarified in the rule that states will not be able to have several additional months to attain the ozone standard. The agency in a 2012 "classifications" rule intended to provide the extra time by allowing states until the end of a calendar year to come into compliance with a NAAQS. Previously, states were given a prescribed number of years to meet the NAAQS after designation of areas as either "attainment" or "nonattainment" for a NAAQS, with deadlines not corresponding to the end of calendar years — but an appellate court scrapped that approach.

The change of course on SIP deadlines follows a Dec. 23 ruling by the U.S. Court of Appeals for the District of Columbia Circuit that found EPA's initial approach to attainment deadlines illegal. The ruling cast further doubt on whether EPA could alter SIP submission deadlines from those prescribed under the air law.

"The EPA believes that the recent ruling by the D.C. Circuit Court on the Classifications Rule impacts the level of flexibility EPA is able to provide regarding SIP due dates," the agency says in the new rule.

EPA's decision to retreat from various flexibilities it planned to offer states in the implementation rule will likely be a disappointment for states, who have long complained about burdens in writing SIPs. Under the NAAQS process, EPA sets a limit on criteria air pollutants to protect public health. The agency then writes implementation rules detailing how states should write SIPs detailing the pollution controls they will impose to meet the NAAQS.

The implementation rule for the 2008 ozone standard of 75 parts per billion (ppb) outlines a host of important provisions including deadlines for the plans; allowable emissions control strategies; and various other elements including criteria for states to show "reasonable further progress" (RFP) in reducing ozone-forming emissions.

The agency also regards the rule as an example that it may follow for the implementation rule for its pending update to its ozone NAAQS that it is due to issue by Oct. 1 under a legally binding deadline. EPA has proposed tightening the standard to within a 65-70 ppb range. EPA in the new final rule says that if it chooses to tighten the ozone NAAQS again, it "expects that this rule will help facilitate implementation of any new standards."

In the final implementation rule, EPA says that it is not finalizing various measures it floated for states in the proposed version of the rule to ease compliance. For instance, EPA had proposed to in certain circumstances allow states to cut emissions of nitrogen oxides (NOx), an ozone precursor, in lieu to mandated cuts of volatile organic compounds (VOCs) — chemicals that also lead to ozone formation. But the agency will not now allow this in the final rule.

Under the NAAQS program, states are required to submit rate of progress plans showing they are meeting requisite targets to reduce ozone precursors. EPA had proposed that a mandatory 15 percent cut in VOCs could be met instead with NOx reductions in areas where states believe that to be more effective at reducing ozone, given different mixtures of sources and differing atmospheric chemistry.

States include in their SIPs plans for reasonably available control technology (RACT) — a standard of emissions control required in areas classified nonattainment for the ozone NAAQS. Some stakeholders had pushed for EPA to allow for the right not to make mandatory VOC cuts in "NOx-limited areas" where reducing VOCs, such as those emissions from oil and gas drilling, has little beneficial effect on ozone. EPA, however, says legal support for modifying its existing guidance on RACT needs to be "further explored" before such a change can be made.

EPA also proposed "alternative" approaches for states to meet the RFP requirement, such as allowing states to win credit toward RFP for reductions in different chemical types, or "species," of VOCs based on their ozone-forming potential. Another option was for states to use an approach to RFP based on percentage reductions in ambient pollutant concentrations, as opposed to more specific, fixed annual reductions in VOCs and NOx.

But in the final version of the implementation rule, the agency says it "is not taking final action now" on these aspects of the proposal, citing uncertainties over the approaches. "The EPA believes that more time is needed to better understand the scientific and legal issues involved in allowing and implementing these approaches. In the meantime, use of these approaches may be considered on a case-by-case basis," EPA says in the rule.

Meanwhile, the final rule revokes for all purposes the 1997 ozone NAAQS, expressed at 84 ppb and subsequently tightened in 2008 to the current 75 ppb limit. This action follows the D.C. Circuit's Dec. 23 ruling, in which the court also found illegal EPA's partial revocation of the 1997 ozone NAAQS for the purposes of "transportation conformity," a requirement that state transportation projects do not result in ozone violations.

The court held that EPA cannot partially revoke a NAAQS, but can fully revoke one subject to certain restrictions imposed by the Clean Air Act to prevent "backsliding." Some states with problems attaining ozone NAAQS, such as Delaware, have opposed any relaxation of transportation conformity requirements.

In order to comply with earlier appeals court rulings, EPA is adding to the list of "anti-backsliding" measures that

must remain in place for areas that have violated the 1997 standard. Such measures aim to ensure that abolishing the old standard does not result in relaxation of certain controls to limit ozone.

For example, EPA is adding to the list "contingency measures" that states must take in case they miss regulatory emissions reduction targets, and "section 185 fees" levied on industry in the event that NAAQS are not attained. A lengthy list of other anti-backsliding measures, such as vehicle inspection and maintenance measures and clean fuels programs, are also required as they were under previous EPA policy.

However, EPA in the final rule has not scaled back all flexible compliance options offered to states in the proposal. The agency is finalizing an option for states to use a baseline year other than 2011 from which to measure RFP. States must select a baseline year between 2008 and 2012, and justify it as appropriate. In the event that a pre-2011 baseline year is selected, states must make additional annual 3 percent emission reductions after the initial 6-year period for which RFP must be demonstrated, which EPA says ensures that sufficient progress is made.

EPA is also finalizing a "re-designation substitute" that would serve to end anti-backsliding measures in areas that have violated the 1997 NAAQS. This would take the place of a formal re-designation to attainment status for the old standard. Environmentalists were critical of the measure, but EPA insists that the end result is the same and the concept is legal.

Critics argued that the idea runs counter to the D.C. Circuit's 2011 ruling in *Natural Resources Defense Council (NRDC) v. EPA* that found EPA cannot lift anti-backsliding measures on the introduction of a new NAAQS standard.

"The court ruled in *NRDC v. EPA* that it would be improper for the EPA to relieve an area that has not attained a standard from requirements imposed for failure to attain that standard. The EPA's 'redesignation substitute' proposal does not do that," EPA says in the final rule.

The approach "relieves areas that demonstrate that they are in fact attaining a standard from obligations arising from failure to attain that standard as well as all anti-backsliding requirements applicable for any prior revoked standard without the need for a formal redesignation. Nothing in the 2011 *NRDC v. EPA* decision forecloses that approach," EPA adds. — *Stuart Parker*

Republicans Ready Bills To Ease, Not Scuttle, EPA's Power Plant GHG Rules

Top House and Senate Republicans are jointly crafting a pair of bills aimed at easing EPA's proposed rules to regulate greenhouse gases (GHGs) at new and existing power plants, though they are stopping short of scuttling the rules and challenging EPA's authority to address carbon dioxide (CO2) and other GHG emissions.

Rep. Ed Whitfield (R-KY), chairman of the House Energy & Commerce Committee's energy and power subcommittee, said Feb. 24 that the GOP has decided to "acquiesce" to EPA's authority to regulate CO2 but will push forward separate bills aimed at easing the agency's proposed new source performance standards (NSPS) and the existing source performance standards (ESPS).

Whitfield told an energy symposium hosted by consulting firm Faegre Baker Daniels that the bills would seek to retain coal-fired generation as part of the nation's energy resource mix under the NSPS by allowing plants without carbon capture and sequestration (CCS) — such as highly efficient "supercritical" plants — to comply. The bill addressing the ESPS would push back controversial interim compliance deadlines under the ESPS.

"We are going to be moving on this relatively soon," Whitfield said, noting that the bills will serve as a marker for the GOP's stance on federal carbon regulations going into the 2016 presidential elections. "We will be passing legislation in the House again. We hope we can get it passed in the Senate. And we want to deliver it right to the president again in preparation for the 2016 elections."

Although he said that the House will be seeking to reverse the regulations, he explained to reporters after his speech that the bills will be "a reversal in a sense" but will not seek to upend EPA's authority to regulate carbon or eliminate the power plant rules in their entirety.

Ryan Jackson, GOP staff director for the Senate Environment & Public Works Committee, told *InsideEPA/climate* that the committee will be working in conjunction with the House on legislation that addresses the ESPS and NSPS. He said that although the Senate has not developed its legislation, the upper chamber would not seek to develop a measure or measures that are too different from the House bills that Whitfield referenced.

The GOP strategy appears to mirror an approach touted by many industry officials in the wake of the 2014 elections, when Republicans gained control of the Senate and a larger majority in the House, though not enough to override presidential vetoes. As a result, some suggested that lawmakers should consider "tailored" fixes to modify key deadlines and other rule provisions, saying the approach is more likely to win broader bipartisan support.

In addition, they urged Republicans to step up their oversight of EPA's GHG rules in an effort to bolster pending legal challenges and win concessions as the agency softened the proposal.

Their assessment has since been borne out as President Obama Feb. 24 vetoed legislation approving the Keystone pipeline — an early test of congressional strength on climate issues — though the bills passed without the votes needed to override the veto.

The upcoming legislation is aimed at the suite of rules EPA is slated to promulgate this summer to limit GHGs from power plants. The NSPS, proposed in January 2014, sets a standard of 1,100 pounds of CO2 per megawatt hour for

new coal plants that would require new coal-fired power plants to install partial CCS. But critics like Whitfield say the proposal is unlawful because the technology is not "adequately demonstrated" as the Clean Air Act requires.

Under the ESPS, EPA has proposed rate-based GHG emissions targets for each state, though the issue that has garnered the greatest concern is EPA's proposed interim targets, which require states to demonstrate compliance on an average basis between 2020 and 2029. Critics have charged that the interim goals create a compliance "cliff" in many states by requiring substantial cuts early in the compliance period, and have urged EPA to drop the interim targets and allow states to simply meet final targets in 2030.

EPA Administrator Gina McCarthy suggested last week that the agency plans to weaken the interim targets, despite environmentalists' concerns that such a move would reduce the cumulative GHG cuts that are required under the rule.

Whitfield said Republicans plan to redouble their efforts to ease the rules. "We're going to do everything we can possibly do to reverse the new coal standards, or new performance standards and also the new proposed rule on existing coal," he said.

He was especially interested in ensuring coal plants without CCS could be approved under the NSPS. He said he visited the only new "supercritical" coal plant that is being built in Arkansas by a subsidiary of American Electric Power. But under the climate rules these plants will no longer be allowed to be built even though they are highly efficient and cleaner than conventional power plants, he said.

"That plant is now operating, its supercritical technology, very clean and yet we cannot build a plant like that in America today. And once this regulation passes we won't be able to do it later either," he said.

Whitfield explained the same coal plants are being built in China, India and Europe, but "America not being able to do it is not the right policy, particularly when you consider our CO2 emissions are at the lowest they have been in 20 years."

While Republicans appear to have given up on scuttling the rules through legislative means, state and other critics are optimistic their pending litigation will result in a quick court decision blocking the ESPS.

West Virginia's Attorney General Patrick Morrisey told the same symposium that he expects ongoing litigation he is leading with a group of states will succeed in blocking the rule before a final version can be promulgated.

The suit, *West Virginia, et al v. EPA*, charges that the Clean Air Act bars EPA from regulating power plants' GHG emissions under section 111 when the agency is already regulating the plants' air toxics, as the agency did in its mercury standards.

But the issue is complicated because the House and Senate passed two different versions of the section that were both signed into law in 1990. The Senate amendment would explicitly allow EPA's rule, while the House version could be read as prohibiting EPA's proposal because its prohibition centers on source categories and not pollutants.

West Virginia and other states filed a Feb. 24 reply brief where they largely reiterated their arguments that the statute bars EPA from regulating power plants' GHG emissions.

The litigation is slated for oral arguments April 16 and West Virginia's Morrisey said the timing of oral arguments would facilitate a speedy review by the court, given that EPA's release of the final rule is slated for this summer. Once the rule is issued, it will face a D.C. Circuit "that is fully briefed" on the ESPS, which should make for "quick review" and a timely ruling, he said. — *John Siciliano*

GOP Concedes On EPA Climate Rules . . . begins on page 24

amount of time."

Regarding bills to block the power plant rules entirely, Whitfield said: "We know there will be Democratic support for it. The question will be, is there enough?" He added that attracting Democratic support for bills to undermine EPA rules "always depends on the way these bills are written."

Regarding the early suits over the ESPS, Griffith also cited "prior court cases where EPA conceded the point that EPA cannot move forward" with regulations of power plants under section 111 of the air act if the plants' mercury emissions are already regulated under section 112.

If McCarthy is confident about EPA's legal strategy on the issue, he said, "your confidence is misplaced and your lawyers are not telling you the truth."

The issue in the suits is complicated because the House and Senate passed two different versions of section 111(d) that were both signed into law in 1990. The Senate amendment would explicitly allow EPA's rule, while the House version could be read as prohibiting EPA's proposal because its prohibition centers on source categories and not pollutants.

In response to Griffith's characterization of EPA's past positions on the issue, McCarthy said "I don't agree with that interpretation."

She later added that the legal issue over the ESPS differs from past litigation over the Bush-era Clean Air Mercury Rule. "That was about the same source category and the same pollutant being regulated under two different sections. We do not have that conflict [in this rule.] We do not believe that issue is really going to affect the legal viability of our Clean Power Plan," she said.

West Virginia Attorney General Patrick Morrisey (R), who is leading the coalition of states suing over the proposal, recently sounded optimistic that pending April 16 oral arguments over the suits would allow for a "quick review" of the issue after the rule is finalized this summer. — *Lee Logan & David LaRoss*

GOP Concedes On EPA Climate Rules But Seeks To Aid Pending Lawsuits

A Republican House member is conceding that his party likely lacks the votes to block EPA's high-profile climate regulations for power plants, but other lawmakers at a recent hearing attempted to build a record to help pending legal challenges targeting rules for both new and existing plants.

During a Feb. 25 joint hearing of two House Energy & Commerce subcommittees on EPA's fiscal year 2016 budget request, Rep. David McKinley (R-WV) told EPA Administrator Gina McCarthy that the agency "has the ultimate power to issue any regulation" authorized by statute, and that "Congress doesn't . . . have the votes here to be able to overturn them."

He added that "just because you can doesn't mean you should," and that he is concerned "that maybe EPA has gotten a little more aggressive than they should be."

Although McKinley did not specifically cite EPA's existing source performance standards (ESPS), which covers emissions from existing power plants, or the companion new source performance standards (NSPS) for new plants, his statement tracks with recent remarks from Rep. Ed Whitfield (R-KY) that the GOP has decided to "acquiesce" to EPA's authority to regulate greenhouse gases (GHGs) and will instead push targeted legislation aimed at easing the rules.

Whitfield, chairman of the energy and power subcommittee, told *Inside EPA* after the hearing that bills to ease the rules could attract Democratic support and that lawmakers hope to act even though EPA has signaled it could address some of critics' concerns.

The comments from the two coal-state lawmakers appear to foreclose on legislative attempts to block the rules entirely, but several lawmakers at the recent hearing questioned McCarthy in an attempt to build a record for already filed or future suits over the rules.

For example, Rep. Morgan Griffith (R-VA) targeted a procedural issue affecting novel suits brought by the coal mining firm Murray Energy and a group of states that target EPA's underlying authority in the Clean Air Act to issue the ESPS. Critics say the suits can move forward in part because the legal question will be applicable no matter how EPA finalizes the rule, and that the administration is fully committed to finishing the regulation.

To bolster that claim, Griffith asked McCarthy if there is any chance the administration would not complete the rulemaking. "Has there ever been a time that EPA has considered not finalizing this rule?" he asked. McCarthy replied that there has not been such a time.

Griffith said that means the agency's lawyers "did not tell the whole truth" in briefs in the litigation, because they argued the suits were premature in part because EPA could decide not to the finish the proposal at all.

McCarthy later added that, "many things can happen. You asked about my confidence level, and I'm confident we can get this done."

Other lawmakers also raised legal concerns over the NSPS, particularly whether carbon capture and sequestration (CCS) technology — which formed the basis for standards for new coal plants — is "adequately demonstrated" as the Clean Air Act requires.

Rep. Tim Murphy (R-PA) mentioned several CCS projects that EPA relied on for that finding in the proposed rule, charging that the projects "haven't been completed. Some haven't been started. One's been discontinued. One isn't even in this country, and none of them are large scale."

"You've said you want to stay true to the rule and the courts. I'm not sure that EPA is actually following the law on this," he said.

McCarthy replied that "the record EPA produced in the proposed rule went well beyond the facilities you referenced. We feel confident this technology is available. The use of CCS technology, at the levels we're proposing, will be a viable option for coal."

She also defended the agency's cost estimate for CCS technology, saying "I believe we included our best judgment" and that EPA's technical staffers "align very well" with staff from other federal agencies.

In addition to efforts to support legal challenges to the climate rules, Republicans are also moving forward with targeted legislation aimed at easing the rules' requirements, despite signals from McCarthy and other officials that EPA is likely to soften the ESPS' interim targets that critics have decried as creating a compliance "cliff" in many states.

Rep. John Shimkus (R-IL) urged McCarthy to "really look at" the interim limits to ensure "the end goals can be reached without upsetting the apple cart."

McCarthy responded that, "we've put out some ideas on this, and we have some great comments in that will allow us to address this effectively."

The administrator earlier offered a "big hint" that EPA would soften the interim goals, noting some have argued that the stringency of the interim limits "could frustrate" the flexibility EPA sought to offer states.

Despite those public assurances, Whitfield told *Inside EPA* after the hearing that Republicans will quickly move forward with a bill to address the interim goals in the ESPS, as well as other issues with the NSPS.

"We plan to introduce this legislation very soon," he said. "It's been our experience that EPA, they say a lot of things and we never know precisely what limits they're going to have on anything. So we'll be proceeding with our legislation, which we think is reasonable, relating to new plants and existing plants. We'll be introducing it in a relatively short

continued on page 23