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Environmentalists Plan Air Permit Lawsuits Absent EPA 'Aggregation' Rule

Environmentalists are planning potential lawsuits to force EPA to make final decisions on how to "aggregate," or combine, emissions for oil and gas operations in Clean Air Act permits on case-by-case basis, saying the suits are vital until EPA issues its pending aggregation rule and that the legal threats might accelerate the rulemaking.

EPA's current policy on aggregation, which has faced various legal challenges from industry, is "not at all clear," an environmentalist says. The agency has announced plans to propose in May a rule to define oil and gas emissions sources that could resolve the aggregation issue, but the source is "dismayed we haven't seen more progress" toward broader aggregation decisions in individual permits in lieu of a comprehensive new federal policy.

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UIC Wells May Be Vehicle For Fracking Suits Due To Hurdles For Tort Claims

Legal observers are suggesting that landowners and others opposed to hydraulic fracturing might shift their litigation strategy from tort claims over water pollution and other harms to a new vehicle of suing over permitted underground injection control (UIC) wells for fracking wastewater, due to significant legal hurdles in pursuing tort claims over fracking.

"If folks concentrated on [UIC] wells I think we could create a great deal of responsibility" among operators and regulators, says one attorney who frequently represents landowner plaintiffs in oil and gas cases.

A gas sector lawyer adds that seismic risks associated with oil and gas wastewater disposal may draw increasing

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EPA Regulation Of 'Ultrafine' PM Still Distant Prospect Despite Health Risks

Air quality experts at a recent scientific workshop on "ultrafine" particulate matter (UFP) agreed that tiny particles pose significant health risks compared to larger fine particulate matter (PM2.5) and coarse particulate matter (PM10), but any EPA regulation of UFP appears to be a distant prospect given doubts about how to craft such rules.

UFP penetrates cells in the body more readily than larger particles, experts said, making it potentially more dangerous. While several experts at the workshop agreed on UFP's risks to the public, they thought it unlikely that regulators would be able to set federal or state air standards for the pollutant in the near future.

Questions that remain to be answered prior to regulation of the particles include how to define the components of

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EPA Seeks NAS Study On Whether Toxicity Tests Address Low-Dose Risks

EPA has contracted with the National Academy of Sciences (NAS) to study whether the agency's chemical toxicity testing approach sufficiently addresses potential risk to human and wildlife health from exposures to low doses of endocrine active chemicals.

The new study follows NAS' critical review last spring of a white paper authored by EPA research office scientists regarding related issues. The May 2014 report, known as "Review of the Environmental Protection Agency's State-of-the-Science Evaluation of Nonmonotonic Dose-Response Relationships as They Apply to Endocrine Disruptors," harshly criticized EPA's draft white paper and urged the agency to redo it. The review found the agency could not

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Senate Receives EPA Nominees For Environmental Data, International Offices

The Senate has formally received President Obama's nomination of Ann Dunkin to head EPA's Office of Environmental Information (OEI) and Jane Nishida to be the next top Office of International and Tribal Affairs official, renewing an attempt to win confirmation of their nominations that failed to move in the 113th Congress.

According to the *Congressional Record*, the two nominations were received Feb. 12, shortly after the Senate chamber received formal notification Jan. 27 of the president's decision to nominate acting EPA Deputy Administrator Stan Meiburg to take the position on a permanent basis.

The Senate Environment & Public Works Committee will hold hearings on the nominees that will likely give GOP lawmakers a chance to reiterate their criticisms of a host of EPA policies.

Nominees for other top-level assistant administrator positions currently vacant or held by acting officials, including the heads of the air, water and finance offices, have yet to be formally submitted.

In lieu of permanent appointees at those positions, EPA is relying heavily on career staff to serve as interim officials; the agency now has seven such offices with no Senate-confirmed appointee. They include the deputy administrator; the assistant administrators for air and radiation, water, administration and resource management, research and development, and international and tribal affairs; the chief financial officer (CFO); and the chief information officer.

Currently filling those spots as interim appointees are Meiburg; Janet McCabe as acting air chief; acting CFO David Bloom; and acting research head Lek Kadeli. The information, tribal and water offices have no formally appointed acting leader, though Nishida, now the principal deputy assistant administrator for tribal affairs, Ken Kopocis, the deputy assistant administrator for water who spent three years as the nominee to be assistant administrator, are serving as the departments' *de facto* heads.

Dunkin would serve as the assistant administrator in charge of OEI, which identifies and implements "innovative information technology and information management solutions that strengthen EPA's ability to achieve its goals," according to a description on OEI's website. The office manages the agency's Toxics Release Inventory to which industry reports annual chemical releases, as well as other programs.

Renee Wynn is the current acting chief information officer overseeing OEI, with Ron Borsellino as acting principal deputy, the website says.

Nishida meanwhile would head the Office of International and Tribal Affairs (OITA), which is responsible for implementing "technical and policy options" for dealing with international environmental concerns, according to OITA's website, as well as coordinating the agency's work with Native American tribal governments.

EPA also announced Feb. 13 that Randy Hill will be the permanent deputy assistant administrator at OITA, after serving as one of the four judges on the agency's Environmental Appeals Board.

He has formerly been deputy director in the office of enforcement and the office of wastewater management, and the permanent deputy director of the wastewater office.

EPA Finalizes Long-Awaited Implementation Rule For 2008 Ozone NAAQS

EPA has finalized its rule telling states how to implement the agency's 2008 ozone standard, after a hiatus that has further delayed states' efforts to put the ozone limit into effect after years of litigation had already significantly slowed the process.

The rule signed by EPA Administrator Gina McCarthy Feb. 13, but not yet published in the *Federal Register*, finalizes EPA's June 6, 2013, proposal that sets requirements for state implementation plans (SIPs) that outline states' strategies to meet the 2008 ozone national ambient air quality standard (NAAQS). *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179013)*

EPA set the NAAQS at 75 parts per billion (ppb), tougher than the prior 1997 standard of 80 ppb, which is expressed as 84ppb. However, lengthy legal challenges put implementation of the new standard years behind schedule.

State regulators have been eagerly awaiting the SIP rule, which sets deadlines for submission of various SIP components required under the Clean Air Act, and lays out detailed, substantive requirements for SIPs, such as reasonably available control technology, criteria for states to show "reasonable further progress," and others.

Also, EPA in the 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." EPA is due to issue a final rule that will likely tighten the standard again to a level within a proposed range of 65 ppb to 70 ppb by Oct. 1.

EPA in the implementation rule has abandoned its proposed approach to consolidate various deadlines for SIP elements, which was intended to ease state's compliance by allowing them to submit various documents together instead of separately. The approach would have delayed submission of some SIP components and accelerated submission of others, but EPA in the final rule acknowledges doubts over the legality of this approach raised by some observers in public comments.

The rule further clarifies that states will not profit from several additional months to come into compliance with the NAAQS, which EPA in a 2012 "classifications" rule intended to provide by allowing states until the end of a calendar year to come into compliance. 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.

The change of course 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 (*Inside EPA*, Jan. 30).

"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,•h EPA says in the rule.

Also, the court in rejecting EPA's classifications rule 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. Now, EPA in its new rule revokes the 1997 NAAQS in its entirety, and leaves in place a series of "anti-backsliding" measures to ensure that abolishing the old standard does not result in relaxation of certain controls to limit ozone.

McCarthy Offers 'Big Hint' On Weakening Interim GHG Targets In ESPS

EPA Administrator Gina McCarthy is strongly suggesting that the agency will weaken the controversial interim greenhouse gas (GHG) reduction targets in its pending rule for existing power plants, noting there is "a lot of concern" that overly strict early goals would undermine EPA's oft-heralded pledge of compliance flexibility.

McCarthy told a Feb. 17 meeting of the National Association of Regulatory Utility Commissioners (NARUC) that the interim goals were of "particular" concern to a range of stakeholders worried about grid reliability and affordability.

Several states, she said, were concerned that the interim goals that begin in 2020 and require significant early reductions in many states "could frustrate EPA's intention [to give] states and utilities the flexibility that they need to make this work for them."

"Flexibility is the key to this proposal," she added. "Flexibility means affordability and it means reliability. . . . I think I gave you a pretty big hint that the dialogue and comments we've received have been enormously useful."

McCarthy's remarks are the most explicit — and highest level — recognition to date from EPA that it is likely to weaken the interim targets. Most recently, acting EPA air chief Janet McCabe told a Senate environment committee hearing that EPA is "looking very, very hard" at the interim goals in response to "anxiety" from stakeholders (*Inside EPA*, Feb. 13).

State utility regulators who have pushed for softer interim goals welcomed McCarthy's remarks. "What I took away from what she said is that she's heard our concerns, they recognize that it's a substantial concern, but that the ultimate goal is 2030," said Missouri Public Service Commission Chairman Robert Kenney. "It seems to me that if states can demonstrate that they're getting there, then the interim goal becomes a little less important."

Kenney added that, "it sounded to me like EPA is persuaded by . . . and recognizes the reasonableness of some of our

comments, and is going to make efforts to incorporate them into the final rule."

Under the proposed existing source performance standards (ESPS), states must not only meet a final 2030 GHG target, but also an interim limit 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.

But environmentalists have pushed back on the notion that the interim limits should be weakened to create a smoother "glide path" toward the 2030 limits, warning that doing so could reduce the cumulative GHG cuts that are required under the rule.

Speaking at a Jan. 29 event in response to a utility industry proposal to eliminate the interim limits and replace them with "milestones" to ensure states have a direct line of emission reductions to their 2030 targets, Natural Resources Defense Council's (NRDC) Derek Murrow said the idea would "significantly weaken the rule." Instead, Murrow urged EPA to strengthen states' targets in the later years of the program, while also addressing what many "early action" states have decried as unequal state goals.

NRDC's David Doniger in a Feb. 14 blog post also downplayed McCabe's recent comments, saying she and McCarthy have been "giving the same answer for months, on this and many other issues. Indeed, it's the proper answer to give when the agency is still reviewing comments and moving towards the final rules."

Asked about McCarthy's NARUC remarks, Doniger says NRDC in its comments recommended "changes to address many of the issues states and others are raising, including the concerns (sometimes founded, sometimes not) that states are expressing about their targets. These concerns can be addressed in a way that achieves greater emission reductions overall" between 2020 and 2030.

McCarthy signaled to the NARUC meeting that the agency is likely to retain some form of the interim limits, arguing that, "We clearly need to make sure that there is trajectory towards a goal that's as far away as 2030, and there is an ability to ensure that states are actively working and going to be on a trajectory to achieve that final goal."

Raymond Gifford, a former Colorado utility regulator who is now an attorney with Wilkinson Barker Knauer, says McCarthy's comments, as well as a recent white paper from the Missouri-based coal utility Ameren Corp. that suggests dropping the interim targets and easing the final targets, are an "opening bid in a negotiation" between EPA and the power sector.

Gifford says the Ameren proposal shows that utilities beyond those like Exelon Corp. — with cleaner generating portfolios — are now willing to engage in a discussion of how to make the proposed rule more palatable to the industry. "What I've taken away from these past few days is that more utilities than just Exelon are willing to talk deal," he says.

But Gifford adds that states still face institutional hurdles to comply with EPA's rule, including that air regulators often lack authority to implement many of the beyond-the-fence reduction strategies that are largely the purview of state utility commissions. As such, most states will need to pass legislation in order to comply, he says.

The administrator also said that "one of the good things" from the nearly 4 million comments on the ESPS is that there were "very few real comments about the final goal. It really is a question of how quickly to get there, and whether or not the flexibility is available to every state equally to get there."

McCarthy twice mentioned EPA's October notice of data ability that offered two methods to ease compliance with the interim targets: phasing in the portion of state goals tied to increased use of existing gas plants instead of assuming it can happen quickly, and also allowing states to use pre-2020 actions for compliance. — *Lee Logan*

Services Say Court's Rulings Mandate Transfer Of Cooling Water BiOp Suit

Federal wildlife and fisheries services are arguing that existing appellate court rulings require a federal district court to either dismiss environmentalists' suit over the services' biological opinion (BiOp) of EPA's Clean Water Act (CWA) cooling water rule or transfer it to a federal appeals court and consolidate it with litigation challenging the rule.

In a Feb. 9 brief filed with the U.S. District Court for the Northern District of California, the Department of Justice (DOJ) on behalf of the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (FWS) — collectively known as the services — say the 9th Circuit's rulings in other cases give the district court no other choices. They oppose advocates' bid to keep the suit over the Endangered Species Act (ESA) BiOp regarding the rule as a stand-alone case. *The brief is available on InsideEPA.com. See page 2 for details. (Doc. ID: 178860)*

The brief backs arguments industry and EPA have made to the 2nd Circuit asking that court to include review of the BiOp in the appellate challenge, *Cooling Water Intake Structure Coalition (CWISC) v. EPA (Inside EPA, Jan. 30)*.

To bolster their case, the services cite Supreme Court precedent that says when a law gives a specific court exclusive jurisdiction over a category of action — in this case, CWA rulemakings, assigned to the appellate courts under section 509 of the water law — "all issues inhering in the controversy" must be reviewed in that court as well.

The services' brief adds that the 9th Circuit, in its 2005 decision *Defenders of Wildlife v. EPA*, specifically held that a

BiOp regarding an EPA rule "inheres in the controversy" of that rule. There, the court was considering the services' opinion on EPA's decision to delegate CWA discharge permitting authority to Arizona regulators, and held that the BiOp on that action could not be reviewed separately from the delegation decision.

"The Ninth Circuit is clear that under exclusive review provisions such as CWA Section 509, the appellate court's jurisdiction is exclusive to all challenges to the specific agency action, regardless of the legal theories advanced," according to the brief.

DOJ is seeking to counter environmentalists' arguments to the 2nd Circuit that oppose consolidating the lawsuits, claiming that the BiOp challenge should be heard separately to the suit over the cooling water policy.

In a Jan. 23 brief in the appellate case they say that even if the 2nd Circuit does have jurisdiction over the BiOp, that jurisdiction is not mandatory; rather, it could be considered in either court, and that since the district court challenge was filed first, the 2nd Circuit is bound to let it proceed.

DOJ counters that the advocates' claims fail to take into account the 9th Circuit's decision in *Defenders of Wildlife*, which it argues explicitly deprives the district court of authority over the BiOp.

While earlier cases have allowed some leeway on the "inhere in the controversy" test, "[A]ny such holding is contradicted by the nearly 20 years of more relevant Ninth Circuit caselaw discussed above, including the binding *Defenders of Wildlife* decision directly on point," DOJ argues.

The Utility Water Act Group, a utility industry coalition that is one of the petitioners in the *CWISC* suit, is intervening in the district case on the services' behalf and has declared that it also intends to ask the court to either dismiss the suit or transfer it to the 2nd Circuit, after the district court granted its request to intervene Feb. 11. — *David LaRoss*

CSB Points To California Process Safety Proposal As Model For EPA

The U.S. Chemical Safety and Hazard Investigation Board (CSB) is pointing to a California plan for strict process safety measures for oil refineries, saying the state's proposed requirements for analysis and use of safer technologies could serve as model for EPA to improve facility safety, though CSB has yet to meet with EPA on the topic.

Since last year, CSB, in accident investigation reports and comments to EPA, has repeatedly urged the agency to strengthen requirements for facility safety, including by requiring use of controversial safety measures, though CSB officials say their recommendations, so far, have received greater reception at the state level than with EPA.

In a Feb. 12 interview with *Inside EPA,* CSB Chairman Rafael Moure-Eraso said EPA should follow California's lead and propose similar process safety requirements for all facilities covered under EPA's Risk Management Plan (RMP) accident prevention program. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 178891)*

"Where we're having the most impact on this issue is at the state level, in California," Moure-Eraso said, noting the California Department of Industrial Relations last fall proposed new requirements to prevent accidents and has also increased resources for inspections.

"If the state law gets more sophisticated and more preventative, I think that is something that we look forward to that could be done nationwide," Moure-Eraso said. While acknowledging additional inspectors would be needed to check for violations of new rules, he said, "I believe if California can do it, and California sees this as a priority, I don't know why EPA couldn't do the same at the national level."

Moure-Eraso and other CSB officials during the interview said board staff are seeking meetings with EPA on the CSB's call in recent comments for EPA to use authority under the Clean Air Act to require facilities to use inherently safer technologies (IST), usually less-toxic chemicals or process changes that may reduce the likelihood or consequences of an accident or attack, though CSB has not yet been granted that meeting.

Meanwhile, environmental, labor and other advocates who are also urging EPA to require facilities to use IST, met Feb. 12 with officials with EPA's Office of Solid Waste and Emergency Response and raised the possibility of EPA following the California proposal, according to a source familiar with the meeting. EPA officials did not say whether the agency would follow California's approach, the source says.

"It's a major step forward in the direction that we're looking for the EPA to take," the source says of California's proposal, adding that while the state's proposal is limited to refineries, EPA should consider similar measures for all facilities that store large quantities of hazardous chemicals.

The advocates' and CSB's call for EPA to follow California in tightening standards for industrial facility safety comes as EPA, the Department of Homeland Security and the Occupational Safety and Health Administration are weighing how to strengthen regulations in response to President Obama's Executive Order 13650 on improving the safety and security of industrial plants.

Obama issued the order in August 2013, in the wake of an ammonium nitrate explosion, in April of that year, at a fertilizer facility in West, TX, that killed 15 people and wounded 200 others. The president's order seeks to improve the safety and security of industrial plants through improved communication and information sharing, as well as modernized

policies, rules and standards.

But environmental and labor groups, who in 2012 petitioned EPA to require IST, as well as some Democratic lawmakers, have said EPA is not moving fast enough to strengthen facility safety. Last year, Sen. Barbara Boxer (D-CA), then chairman of the Senate Environment and Public Works Committee, noted EPA has not addressed her call for the agency to act on the CSB's 2002 recommendation to add ammonium nitrate to the RMP program, nor answered advocates' calls to require IST.

In a report issued in June, EPA outlined a multi-year process for encouraging use of IST, by issuing an alert and guidance on safer processes, and then considering whether to require analysis or use of IST, though the agency has said it would not select the specific processes companies would use.

EPA took comment through October on a request for information (RFI) on strengthening the RMP, which currently requires facilities to report holdings of threshold levels of certain chemicals and to reduce the risk of their accidental release.

In the RFI, EPA suggests potentially sweeping changes to the RMP rule, ranging from covering new chemicals and requiring new process safety analysis and review of past near-accidents, to scrapping the RMP program in favor of a different approach.

CSB officials tell *Inside EPA* they are backing California's proposed revisions to its Occupational Safety and Health Administration's Process Safety Management Standard, announced in September, that would require oil refineries to assess the hazards of their processes and implement safer processes where feasible.

As part of the process hazard analysis, California refineries would have to consider past accidents within the industry as well as inherently safer processes, and inspect for damaged equipment, according to an Oct. 31 red-lined version of the state proposal.

Refineries would have to promptly change to safer technologies or processes where feasible and document any deferred implementation of those changes, giving a time frame for when the change will be implemented.

The proposal also would require companies to include employees in process hazard evaluations, notify employees of hazards, and develop worker safety mechanisms that allow for anonymous reporting of hazards and authority to stop work or shut down processes based on safety or health concerns.

While the proposal is to improve a process safety management standard for refineries, CSB officials said EPA could implement similar rules for facilities covered under the agency's RMP program. A significant difference between the California proposal and current federal regulation, CSB officials said during the interview, is a requirement that refineries meet a risk-based standard "to reduce the risks associated with a process to the greatest extent feasible."

CSB Managing Director Daniel Horowitz said numerous CSB investigations have found that process safety improvements, which companies were familiar with but did not employ, would have prevented serious accidents that caused injuries, deaths and millions of dollars in damages.

"There needs to be some sort of driver for industry to take a look at those things and make the safest choices where they're available and that driver doesn't exist right now" in federal regulations, Horowitz said.

Industry and some Republican legislators have opposed calls for a federal IST requirement, saying that companies already consider safer processes where feasible, and that EPA should formally consult with the U.S. Small Business Administration to ensure potential changes to the RMP program do not unnecessarily burden small companies.

In requesting comments on the July RFI for strengthening RMP, EPA asked that comments consider the costs of any recommended changes, as well as the benefits in risk reduction.

Moure-Eraso and Horowitz said many changes that reduce risk of accidents are not expensive, and that increased inspections, which would be needed if safety requirements are strengthened are worth the cost.

"There are so many cost-effective design changes that the companies could have used to prevent these accidents," Horowitz said, adding that different piping material could have prevented a fire a 2012 fire at Chevron oil refinery in Richmond, CA, and sprinkler systems might have prevented or mitigated the fire and explosion at the West fertilizer facility. "These accidents cost a fortune, not just money but in lives and preventing them often costs a pittance," Horowitz said.

CSB first called for EPA to require IST in May 2014 report on the fatal April 2010 explosion and fire at the Tesoro oil refinery in Anacortes, WA, that killed seven workers. CSB reiterated the call in Oct. 29 comments on EPA's RFI for strengthening the RMP, and also sought a dialogue with EPA on that issue as well as on a recommendation to improve transparency of facility safety information to improve local emergency planning and response.

CSB officials told *Inside EPA* they have yet to meet with EPA on their October comments on the RMP RFI, and emphasized that states are moving forward with changes such as stricter safety requirements at some facilities or stronger inspections, based on CSB recommendations that have also been made at the federal level. — *Dave Reynolds*

EPA, Refiners Fault Ethanol Sector's Attack On Agency's Fuel Testing Policy

EPA and major refining groups are faulting the ethanol sector's attack on the agency's policy on test fuels used to certify vehicles as complying with federal regulations, rejecting the industry's claim that the policy — modified by EPA's recent "Tier 3" fuel and vehicle air rule — effectively blocks higher ethanol blends entering the market.

"To the extent Petitioners believe they face hurdles in gaining market acceptance of new vehicle technologies, those hurdles were not created by EPA and are not appropriately addressed through the test fuel regulations," the Department of Justice (DOJ) says on the agency's behalf in a Feb. 11 brief in litigation over the test policy. They say the ethanol sector is trying to drive market changes to boost ethanol, which is unrelated to fuels testing. *Relevant documents are available on InsideEPA,com. See page 2 for details. (Doc. ID: 178830)*

In a Feb. 12 intervenor brief backing EPA, the American Fuel and Petrochemical Manufacturers (AFPM) and American Petroleum Institute (API) say existing agency approval of some ethanol blends shows the alleged hurdles do not exist. The "proliferation" of 10-percent ethanol (E10) "into the market alone demonstrates the falsity of Petitioners' claim that it is 'economically infeasible' to introduce a new fuel into commerce before EPA approves it as a test fuel. E10 became the predominant fuel in the marketplace without being a certification test fuel," they say.

But the ethanol producers in their Feb. 12 final brief filed with the U.S. Court of Appeals for the District of Columbia Circuit in *Energy Future Coalition, et al. v. EPA* reiterate their claim of flaws in the fuels testing policy, which they say makes it impossible to bring new fuels such as ethanol blends above E10 to market.

They say that the Tier 3 rule made changes to the testing policy that require that fuels be "readily available nationwide" before they can be approved as alternative test fuels, yet fuel marketers are not allowed to sell new fuels under a 1977 law unless they are "substantially similar" to existing test fuels.

The producers have said in previous filings that this creating a "catch-22" situation, compared to prior policy when fuels needed to be "commercially available" to be approved as test fuels.

The litigation, slated for oral arguments March 20, appears to be the only lawsuit filed over EPA's controversial Tier 3 rule, which set new requirements to limit the amount of sulfur in fuel in order to cut air pollution. Although groups such as AFPM and API raised multiple concerns about the proposed version of the rule and its potential to cause gas price increases, they did not sue EPA over the merits of the rule.

Instead, the Energy Future Coalition — representing ethanol producers and proponents — filed a suit that does not fault the overall Tier 3 rule, but does contest changes to the years-old fuel testing policy EPA made in the rule. As a result, they seek to scrap the policy but not the entire final Tier 3 regulation.

EPA first issued the fuels testing policy in 2002 and modified it several times since. EPA included the policy in its April Tier 3 rule setting fuel standards and vehicle emissions limits, and the ethanol groups say language in the rule's preamble effectively strengthens the policy to make it more difficult still for new test fuels to be developed.

DOJ in its Feb. 11 brief on EPA's behalf says that the ethanol producers are driven by a desire to force open the market for mid-range ethanol blends, such as E30, which the producers claim would allow development of a new generation of vehicles that could use higher-octane fuels, and achieve greater fuel-efficiency.

Fundamentally, EPA has no duty to do this, DOJ says. The ethanol producers cannot show standing to sue because the policy in question pertains to vehicle manufacturers, not fuel producers, DOJ adds. Also, the issue is not "ripe" for decision by a court, because EPA has yet to apply the policy to any request for approval of a new test fuel.

"Petitioners are ethanol producers and a pro-ethanol public policy group, not vehicle manufacturers, and thus are not directly regulated by the challenged provision. Petitioners have suffered no concrete or particularized injury-in-fact that is actual or imminent, their alleged injuries are not fairly traceable to EPA's alternative test fuel provision, and they offer only speculation that their situation is likely to be redressed by a favorable court decision," DOJ writes.

Nor does the ethanol groups' claim fall within the "sphere of interests" that could otherwise establish legal standing for a party not directly regulated by an EPA rule, DOJ says, arguing that ethanol producers' inherent interest in selling more ethanol does not qualify as giving them authority to sue over the Tier 3 rule.

Should the court reach the merits of the case, DOJ argues, it should reject the ethanol producers' case and defer to EPA's policy judgment on what the appropriate conditions are for approval of new test fuels.

Test fuels in general "should correlate to in-use fuels" so that vehicles developed for use with a new fuel do not in fact end up being used with another fuel — negating regulatory assumptions about the vehicles' emissions. Such a situation might occur if the new fuel is not widely available, DOJ says.

DOJ in its brief acknowledges that the "substantially similar" 1977 statute is a limiting factor, and maintains that EPA is within its rights to evaluate the commercial availability of new fuels when considering whether to approve them. The agency considered making 15-percent ethanol (E15) the new benchmark test fuel, but reasonably declined to do so because of marketplace conditions — E15 is not widely available — DOJ notes.

Further, DOJ says that the ethanol groups have ignored EPA's discretion to interpret and apply its own criteria for approval of test fuels on a case-by-case basis. Commercial availability is only one criterion the agency will consider, others being that "engines will use only the designated fuel in service," and that using the existing approved test fuel

would result in test results that are "substantially unrepresentative" of real-world emissions.

Ethanol groups also wrongly give regulatory force to Tier 3's preamble language that merely paraphrases the existing test fuels rule, DOJ says. "There is nothing in the preamble suggesting that EPA essentially intended to substitute the term 'readily available nationwide' for 'commercially available' in the regulatory text," DOJ says. "Instead, EPA described a process for requesting approval of alternative test fuels, providing a general description in the preamble without committing to any particular outcome if a vehicle manufacturer actually were to make such a request."

AFPM and API in their Feb. 12 brief intervening on EPA's behalf offer support for the administration against the ethanol groups' claims. They say that the producers' claim that it is "infeasible and illegal" to market a new fuel without first getting it approved as a test fuel is "demonstrably false."

"E10's proliferation into the market alone demonstrates the falsity of Petitioners' claim that it is 'economically infeasible' to introduce a new fuel into commerce before EPA approves it as a test fuel. E10 became the predominant fuel in the marketplace without being a certification test fuel," AFPM and API say.

The oil sector groups seek to prevent the ethanol groups from forcing open a larger market for their product — and note that there is an existing legal avenue for them to increase ethanol sales.

"Petitioners clearly have an available market for their fuel additive because flexible fuel vehicles can utilize intermediate or 'mid-level' gasoline ethanol blends as well as E85 (an alternative fuel that can vary in ethanol content from 51 to 83 percent). What Petitioners really complain about is that the [Clean Air Act] and the EPA do not mandate the specific market — [E30] — that they want to serve," AFPA and API say.

The oil sector groups echo EPA's arguments that the ethanol groups are not subject to the test fuel rule and do not therefore have standing to sue. They also say that the "available nationwide" language in the Tier 3 rule's preamble does not have regulatory force and EPA therefore has not revised its policy, which serves to ensure that vehicles use substantially similar fuels in practice to those they are emissions-tested on.

In their Feb. 12 final brief, the ethanol groups reject all of these assertions, and largely reiterate their criticisms of the fuels testing policy. The groups defend their standing to sue, which they say is grounded in the fact that this dilemma stunts an ethanol market that would otherwise develop to their advantage.

Further, the groups insist that the test fuel rule at issue has in fact never been used to approve alternative test fuels. EPA in its response to public comments in the Tier 3 rule asserted that natural gas had been approved under the test fuel rule, but the petitioners say this is false. "The alternative test fuel rule and its 'commercially available' standard did not even exist when natural gas was approved as a test fuel," they say.

"The same is true of every other new test fuel that EPA has approved. All of them preceded the alternative test fuel rule, and none of them (with the exception of gasoline and diesel) was widely available in the market when it was adopted as a test fuel," the petitioners say. — *Stuart Parker*

Groups Plan Lawsuits Over Aggregated Air Sources . . . begins on page one

As a result, environmental groups are aiming to use the threat of litigation to force the agency into making decisions on air permits that they believe would require aggregation of pollution sources. Potentially, advocates could also sue over whatever aggregation decision EPA makes in such permits as a final agency action. Aggregating sources could push their combined emissions over the "major" source threshold for stricter Clean Air Act permits.

The source says a U.S. Court of Appeals for the 6th Circuit 2-1 ruling from August 2012 in *Summit Petroleum Corp. v. EPA* that scrapped the agency's "functional interrelatedness" test used in aggregation decision has "really clouded the air" on EPA's policy for making case-by-case permit decision on aggregation. They are seeking clarity on the agency's approach to aggregation, and hoping the suits will spur faster EPA action on the rule.

The environmental group WildEarth Guardians is now eying a possible lawsuit against EPA Region 8 to force the agency to make an aggregation permit decision on several pending permits in that region, which includes Colorado, Montana, North Dakota, South Dakota, Utah and Wyoming. The group recently filed a notice of intent to sue (NOI) EPA over its alleged failure to act on permit applications for oil and gas operations in Utah.

Under the Clean Air Act, EPA or state permitting authorities must issue or deny Title V permits for major air pollution sources within 18 months of receiving an application. "The EPA's delay in issuing or denying Title V Permits within 18 months after receiving complete applications means that the agency has failed and is continuing to fail to ensure that the these facilities are meeting all applicable requirements under the Clean Air Act," according to the NOI. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179006)*

"Further, the public is being denied information necessary to understand which Clean Air Act requirement apply to the aforementioned facilities and what monitoring is being undertaken to ensure compliance," the NOI says.

The NOI says EPA proposed draft Title V permits in early 2011 for the Chipeta Processing Natural Buttes Compressor Station and the Anadarko Ouray Compressor Station, but never finalized them.

Both the compressor stations are located in the Uinta Basin of northeastern Utah, an area with heavy volumes of oil and gas development that has struggled with attaining EPA's national ambient air quality standards for ozone, partially

seen as a result of rapidly expanding oil and gas drilling activities that emit ozone-forming pollutants.

WildEarth Guardians is seeking for EPA to apply its three-prong aggregation test, outlined in a Bush-era memo signed by then-air chief William Wehrum and subsequently expanded in a controversial 2009 Gina McCarthy memo, to the two compressor stations. That would require EPA to consider whether they should be aggregated, or combined, with surrounding oil and gas wells and other sources, which could trigger stricter emissions controls.

In the 2011 comments on the Natural Buttes and Ouray facilities, WildEarth Guardians urged EPA to consider the "interrelatedness" of ancillary sources such as wells in making aggregation decisions, saying they "appear to be components of an interdependent natural gas production, gathering, and processing system."

The comments cited the 2009 McCarthy memo and other applicable requirements, "EPA is therefore obligated to assess to what extent all or portions of these oil and gas wells and related facilities belong to the same industrial grouping, are contiguous or adjacent, and under common control or ownership."

"In particular, we are concerned that EPA has not assessed to what extent the oil and gas wells and other facilities (including upstream compressor stations, gathering lines and/or other ancillary facilities) that may be connected to or adjacent to the compressor stations should be aggregated together with the Natural Buttes and Ouray compressor stations," the comments said. They also faulted EPA for not making "an accurate source determination" for the facilities under aggregation and the air law's Title V and prevention of significant deterioration programs.

Due to the lack of analysis that WildEarth Guardians said EPA must conduct, the agency "has not demonstrated that both Title V Permits will assure compliance with all applicable requirements," the comments said.

The three aggregation criteria outlined in the Wehrum memo for deciding when to combine sources in permits are whether units are adjacent, whether they are under common control, and whether they are part of the same industrial grouping, but McCarthy later revised the adjacency definition to include "functional interrelatedness" as a significant factor, along with physical proximity, potentially leading to more decisions to aggregate.

An energy company, Summit Petroleum, subsequently sued over the McCarthy memo in the 6th Circuit, saying EPA should revert to the Bush administration's focus on physical proximity as the main adjacency factor, as specified in the Wehrum memo.

The court in its split ruling agreed with industry, vacating the agency's 2008 decision that the energy company's gas sweetening plant and wells located in Michigan constituted a single source requiring a major source permit. The court ordered EPA to revisit its decision using physical proximity as the basis for whether the plant and wells were adjacent.

Following the ruling, EPA issued a December 2012 memo that sought to limit the ruling to those states covered by the 6th Circuit: Michigan, Ohio, Tennessee and Kentucky, which cover parts of EPA Regions 4 and 5. The memo said that in all other EPA regions and states the stricter adjacency test would remain in place.

But industry challenged the 2012 memo in the D.C. Circuit, saying it unlawfully created competing permitting regimes and gave the 6th Circuit states a competitive advantage by allowing use of the weaker aggregation definitions.

The D.C. Circuit in *National Environmental Development Association's Clean Air Project (NEDA/CAP) v. EPA*, sided with industry, finding in its May 30 ruling that the memo violated EPA's regional consistency regulations, but suggested steps for how EPA might otherwise address its concerns with the 6th Circuit ruling — including rewriting its "regulatory consistency" policy to include an exemption for court rulings, which the agency is doing.

In response to the *NEDA/ CAP* ruling, EPA launched its rulemaking to better define source definitions, and separately also plans to issue a notice of proposed rulemaking this year to "revise the Regional Consistency regulations to allow an exception for judicial decisions."

But despite the planned rulemakings, the environmentalist says that uncertainty remains over EPA's policy, prompting the threat of permit-specific suits. — *Bridget DiCosmo & Lea Radick*

attention in litigation, potentially through lawsuits claiming inadequate protection for underground sources of drinking water due to increased seismicity.

EPA's Safe Drinking Water Act UIC "Class II" permitting program has come under increased scrutiny alongside the shale gas boom, given that in much of the United States, the use of the wells is industry's and the agency's preferred method for disposing of the wastewater associated with oil and gas production such as fracking. The UIC program is used to govern underground injections, such as wastewater disposed of in deep reservoirs.

But the landowner attorney notes that overuse of such wells has led to concerns about potentially inadequate EPA and state oversight, and a high profile set of instances where earthquakes have been linked to Class II UIC wells used for oil and gas wastewater. "They're overused and there are way too many of them," the source says.

Environmentalists have pushed for the agency to regulate the sector's wastes as hazardous under federal law, a designation that would automatically require more stringent Class I rules for disposal wells.

The UIC program may be an "Achilles heel" for the oil and gas industry, the landowner attorney says, creating a new avenue to fight fracking and other operations after setbacks to tort claims against industry.

Environmentalists and others have long viewed damages litigation as a vital tool to pressure industry to agree to new or more stringent regulations on oil and gas operations — especially in cases such as fracking where they view industry practices as unregulated or insufficiently regulated by states or the federal government.

Recent technological advances in fracking have opened up large shale reserves across the country to rapid development of oil and gas plays, bringing the industry much closer than in previous decades to residential areas and creating concerns that government oversight was inadequate to prevent contamination.

Complicating the issue is that a number of environmental laws giving EPA permit, emergency and other authorities contain exemptions for aspects of oil and gas drilling. For example, the 2005 energy law barred EPA from directly regulating fracking injections — except where diesel fuel is used — under the UIC program.

Tort claims have faced steep legal hurdles in the courts in recent years. At the outset of the shale gas boom, some saw the industry as being subject to a wave of litigation similar to that over methyl teriary butyl ether (MTBE) water contamination, but several industry sources say those predictions have not played out.

Unlike fracking injections, which occur well below the drinking water supply, MTBE contamination is more likely to occur because it was a component of gasoline stored in underground tanks above groundwater strata, the industry source says. And plaintiffs have faced losses in their efforts to pursue fracking tort claims.

In a recent decision, Judge John Jones III of the U.S. District Court for the Middle District of Pennsylvania in *Nolen Scott Ely, et al v. Cabot Oil & Gas Corporation and Gassearch Drilling Services Corporation* opted to dismiss a number of claims against the drillers, narrowing the massive suit to only a single claim each of negligence and private nuisance. *The order is available on InsideEPA.com. See page 2 for details. (Doc. ID:179005)*

In a Jan. 12 order, Jones granted the companies' motion for summary judgment on claims for fraudulent inducement, medical monitoring, personal injury, negligence *per se*, but denied the motion with respect to the remaining two claims — which have a lower threshold for the amount of evidence the plaintiffs must submit to prove the claim.

"I look at the Cabot case as representative of the run of the mill fracking claims" which account for the "vast majority" of cases up to this point, a second industry source says, noting the majority of claims with high evidentiery bars tend to be quickly dismissed, leaving easier to prove claims such as negligence.

"A lot of claims boil down to nuisance and negligence at the end of the day," the source says, giving that those legal claims are usually based on property value and simpler to establish.

For example, the first industry attorney says personal injury cases are difficult as they are subject to *Daubert v. Merell Dow Pharmaceuticals*, the Supreme Court case that set the standard for admissibility of scientific evidence. The ruling requires a trial judge to scrutinize medical expert testimony to determine reliability before allowing it to proceed to a jury.

In contrast, nuisance claims often only require a showing that water quality has changed in color, indicating a loss in water quality, after drilling began near a property and that "arguably can be enough to get to a jury," the source says.

"I think courts are still struggling with causation in these kinds of claims," the first industry source says, noting that the Colorado Supreme Court in 2014 agreed to review a state appellate court finding in *William G. Strudley v. Antero Resources Corporation,* disallowing use of a causation order to require landowner plaintiffs to establish some evidence linking the plaintiffs' injuries to Antero's operations.

Causation, which refers to an evidence-based link between a defendant's conduct and a resulting adverse effect suffered by the plaintiff, is a key element underlying most tort claims, but can be one of the most difficult to show in environmental suits.

The *Antero* ruling represented one of the first in a toxic tort claim involving fracking, given that a majority of these types of cases have resulted in settlements. The appellate ruling reversed a district court dismissing a lawsuit by the plaintiffs, who live near the company's Silt, CO, drilling operations.

The tort suit sought damages for negligence, trespass, nuisance, strict liability and other claims for alleged contami-

nation, but the District Court for the City and County of Denver held that plaintiffs were unable to meet the order's requirement for a *prima facie* showing that exposure to air and water contaminated with chemical releases linked to fracking caused adverse health effects.

However, the issues in *Strudley* are also significant because the court based its dismissal on the plaintiffs' failure to comply with a modified case management order, also called a Lone Pine order, which industry asked the court to enter.

The orders are named after a 1986 New Jersey ruling, *Lore v. Lone Pine Corp.*, and require plaintiffs to produce credible expert evidence at the start of the case to establish that they can support at least some elements of causation before the case moves into the more costly pre-trial discovery phase.

In suits that involve fracking operations, the orders were seen as especially useful to industry defendants because of difficulties in showing a causal link between human health effects and environmental releases from fracking — a necessary bar for winning a tort claim but one that is difficult to meet given that the exposure pathways are notoriously unclear.

A Colorado high court ruling upholding use of the order would be "encouraging" to plaintiffs even and industry defendants in other states have increasingly been relying on such orders in similar cases involving drilling, the first industry source says.

In another high profile torts claim involving drilling, *Parr v. Aruba Petroleum,* a Dallas County jury in Texas last year awarded a $2.9 million verdict to plaintiffs — an amount far greater than the $275,000 property value award.

The jury attributed the majority of the award to compensation for pain and suffering and mental anguish in spite of the fact that the court dismissed personal injury, assault, intentional infliction of emotional distress and other costly damage claims, leaving the jury to deliberate only nuisance and trespass claims. The decision marks "one of the first cases where a nuisance claim resulted in a large verdict," the first industry source says. — *Bridget DiCosmo*

Climate ESPS Supporters Reject Reliability Fears Ahead Of FERC Meeting

Supporters of EPA's proposed greenhouse gas (GHG) rule for existing power plants are pushing back on warnings from a federal reliability watchdog that the rule will undermine electricity reliability, previewing the potential debate at an upcoming Federal Energy Regulatory Commission (FERC) meeting to discuss the rule's reliability impacts.

The Advanced Energy Economy Institute (AEEI), the educational affiliate of a group whose members include General Electric, Microsoft, Enernoc, Johnson Controls, Verizon and other companies, issued a Feb. 12 report refuting findings issued late last year from the North American Electric Reliability Corporation (NERC) that warned that EPA's rule will undermine grid reliability. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 178880)*

The AEEI report charged that NERC's fears are "largely overstated" and do not account for a host of solutions to mitigate the concerns. "Following a review of the reliability concerns raised and the options for mitigating them, we find that compliance with the [EPA Clean Power Plan (CPP)] is unlikely to materially affect reliability," says the report, which was prepared for AEEI by the Brattle Group.

NERC did not respond to a request for comment on the study's findings but noted that it planned to release another reliability study in April.

AEEI's findings generally support EPA's characterization that the proposed existing source performance standards (ESPS) will not threaten grid reliability due to its extended compliance window and potential changes to the rule's interim compliance targets.

The report contradicts NERC's "initial reliability review," which warned that compliance with the rule as proposed could pose major threats to a reliable electric system. The review said EPA's unrealistic assumptions in setting targets under the ESPS could have major grid reliability impacts, bolstering the case for changes that could weaken the rule.

NERC's report has already been cited by a host of agency critics to seek concessions. For example, congressional Republicans cited the report to successfully push the FERC to host a series of technical meetings — the first of which is slated for Feb. 19 — to discuss the rule's potential reliability impacts and other issues.

But supporters of the rule, including EPA officials, have downplayed NERC's conclusions, charging that the reliability watchdog failed to account for new generating capacity that is either planned or under construction.

Both the NERC report and the new AEEI study could be a major focus of discussion during the Feb. 19 technical conference, which is slated to discuss reliability concerns as well as the need for new infrastructure and potential changes to FERC-regulated markets.

The NERC report has already been at the heart of competing advocacy that FERC commissioners have faced from industry and environmental groups, who have been urging commissioners to take different approaches in how they assess the grid impacts of the ESPS.

Industry officials said they were pressing FERC to assess the impact of the ESPS, together with a series of other EPA rules governing the power sector. Environmentalists, meanwhile, have urged commissioners to address what the group sees as major flaws in earlier reliability assessments by NERC and the grid operator Southwest Power Pool (SPP).

In response, FERC Chairman Cheryl LaFleur has emphasized that the commission plans to be an "honest broker" for

the competing claims.

In advance of the FERC meeting, supporters of EPA's rule are stepping up calls for commissioners to downplay NERC's findings. The American Wind Energy Association (AWEA) is urging FERC to ensure that NERC and other reliability groups provide independent assessments that do not favor the interests of users, owners and operators of the bulk-power system.

"Some analyses being done are truly 'garbage-in/garbage-out' exercises using outdated assumptions about clean energy. Such analyses with built-in biases should not be viewed as credible," AWEA said in its Feb. 6 comments to FERC.

"In short, FERC needs to make sure, through audits or other oversight tools, that NERC's and the regional authorities' studies do not unduly represent the interests of a particular segment of the electric power industry and their assessments of reliability issues can relied upon for their objectivity and thoroughness," the wind group adds.

Administration officials have also been making the case. "Keeping reliability very much in mind, as the president directed us to . . . we looked at a way to design the proposed plan in a way that reliability would not be put at risk and would in fact be enhanced," acting EPA air chief Janet McCabe told a Feb. 11 Senate environment committee hearing on the rule.

During the Senate hearing, McCabe acknowledged that NERC and various grid operators have released reviews of the proposed rule, but added that "until the states decide what it is that they intend to do by way of compliance, it's really not very possible to do a real reliability study."

Even so, she welcomed the reviews for weighing several factors that could affect grid reliability, including EPA's rule, anticipated weather events and shifts in the use of fuels. "They're doing exactly what you just described their job to be, which is thinking ahead, looking ahead, planning, thinking about contingencies, thinking about how things might roll out," McCabe said. "Those kinds of conversations are exactly what should be happening and what is happening."

In response to a question from Sen. Ed Markey (D-MA) about whether climate-related extreme weather would impact electric infrastructure, McCabe said, "We agree that the worst thing to do for reliability is to do nothing."

The administration is also seeking $63 million in new grant funding in its fiscal year 2016 budget request for the Department of Energy's (DOE) Office of Electricity, with the money to be used by state energy offices to do reliability and energy assurance assessments that could assist their efforts to comply with EPA's requirements.

Asked by reporters Feb. 4 whether the funding was aimed at addressing EPA's GHG rule, Energy Secretary Ernest Moniz said the grants are for "reliability planning . . . , [and] to the extent to which that's connected to the power plant rules then the answer is yes."

Moniz also addressed the reliability grants during a Feb. 11 House Energy & Commerce Committee hearing on the FY16 budget, saying the grants would help states "plan for reliability," which could lead states to discover the need for additional resources that DOE could consider funding at some later date.

Echoing EPA claims, the AEEI study charges that NERC's review "fails to adequately account for the extent to which the potential reliability issues it raises are already being addressed or can be addressed through planning and operations processes as well as through technical advancements."

The new report says NERC's earlier review has multiple shortcomings, and did not consider that retirement of the least-efficient coal plants would improve emissions and that gas pipeline constraints are "generally short-term and seasonal."

The report also finds that grid operators "already have many operational tools and market rules available to them to manage a complex and changing power grid while maintaining reliability," and that states have the option to comply with the rule beyond using the four "building blocks" EPA used to set state targets.

Under the ESPS, the agency used four building blocks, or emission reduction strategies, to set targets: greater efficiency at coal plants, increased use of existing gas plants and higher levels of renewable energy (RE) and energy efficiency (EE).

The ESPS also includes an interim compliance target that must be met on an average basis from 2020 to 2029, in addition to a final target in 2030.

Regarding NERC's concerns about maintaining a sufficient level of generation resources following coal plant retirements, the AEEI report says that coal units needed for peak demand can operate at lower capacity levels, and that there is "excess capacity in many regions." Further, the report says NERC did not consider how demand response, EE, new baseload gas plants and energy storage could mitigate the concerns.

"Regions with capacity markets have shown that many types of capacity resources can be added to the system in response to significant coal plant retirements due to environmental regulations [such as EPA's power plant mercury rule], including resources that can be constructed and commissioned in less than two years," the report says.

Further, the study adds that under the ESPS, "no specific plant needs to retire at any given time. In that case, plant retirements can be delayed if necessary for months or years while alternative means of meeting the CPP requirements through additional fuel switching, EE, RE, or regional cooperation are pursued in the interim."

NERC and others have also raised concerns that pipeline and other midstream infrastructure shortages could constrain gas supplies needed for power generation to comply with the ESPS.

But AEEI notes that market rules are in place to ensure sufficient supplies, and that gas storage and demand response

could manage gas demand during constrained periods.

The study notes that the CPP does not "require coal to natural gas switching during" periods of high demand, so "traditional resources as well as other options (such as gas storage, localized gas and electric energy efficiency measures, gas and electric demand response) can continue to provide the services necessary to ensure reliability."

Further, the report says "significant efforts are underway" to address gas shortage concerns, making it "likely that short-term gas supply bottlenecks will be at least partially overcome in the next few years."

AEEI also downplays NERC's concern about integrating the level of variable energy resources (VER) assumed in the ESPS, noting that many regions exceed penetration levels of resources such as wind and solar assumed by EPA "without negatively impacting operational reliability."

The report notes that NERC did not consider non-variable renewable generation, "improved scheduling of energy and ancillary services markets," improved forecasting of VER, better cooperation on transmission, and other strategies.

EPA expects renewables to have a 7 percent market share nationally under a business-as-usual scenario, with the rule increasing that to 8 percent by 2020. Under the formula used to set state targets, that would increase to 13.5 percent by 2029. Those levels, the report says, "would not lead to any reliability concerns. Many states and countries are operating at much higher levels of renewable energy today without any negative impact on reliability."

Noting the experience of integrating renewables in California and Germany, the report says, "It is likely that over the coming decade the availability of various options to manage intermittency will increase while their cost will decrease."

The report adds that states have additional flexibility of complying with their targets by employing strategies not used to set the targets, including building new gas plants, co-firing coal with biomass, demand response, combined heat and power and non-utility energy efficiency programs.

Further, AEEI's report notes that "there is some historic evidence that the EPA allows for flexibility in compliance so that reliability can be maintained, as long as states provide contingency plans in their [compliance plans] for just such cases and implement those contingency measures to ensure that overall regulatory goals are attained or nearly so over time." — *Lee Logan*

Ultrafine PM Regulation Remains Uncertain . . . begins on page one

UFP, what size of UFP to regulate, and how to measure concentrations of UFP emissions.

Without more scientific evidence on UFP to answer those questions, it "would be premature" for EPA to pursue a first-time national ambient air quality standard (NAAQS) for UFP separate from its existing NAAQS for PM2.5 and PM10, said Alberto Ayala, deputy executive officer with the California Resources Board (CARB), at the recent conference. EPA hosted the UFP workshop from Feb. 11-13 in Research Triangle Park, NC.

Ayala said "we don't have an ambient air standard, and we are probably not going to have one in the near term" for UFP, and also noted that CARB is unlikely to pursue UFP rules in the near-term.

The Clean Air Act gives California authority to set air regulations for mobile sources — one of several sources of PM pollution — stricter than the federal government. But Ayala said that without more data on UFP, it would be hard to craft the right state or federal rules to reduce those risks. Nevertheless, he said there is sufficient proof of UFP's harm to humans that the state will still seek to mitigate emissions without rules in place.

EPA and state air regulators have for some years been studying the adverse health effects of ultrafine particles, which are much smaller even than PM2.5, which is blamed for a variety of ailments including cardiovascular disease and pulmonary effects such as asthma. The agency is currently pursuing a review of its PM2.5 NAAQS of 12 micrograms per cubic meter last updated in 2012, and could potentially alter that standard.

However, the agency is not expected to include direct or distinct regulation of UFP in the upcoming revision to its PM2.5 NAAQS given the various scientific doubts about how to define and control it.

UFP is conventionally defined as particles 100 nanometers (nm) or less in diameter, but not all experts agree that this is necessarily the most useful threshold for the purposes of regulation.

Some experts at the workshop suggested that more than one size category smaller than PM2.5 may be required — for example, a "very fine particles" category smaller than PM2.5 but larger than 100 nm.

In its last review of PM NAAQS standards, EPA found the available scientific evidence was "suggestive" of a causal relationship between UFP and short-term health effects, such as cardiovascular effects and mortality, said Scott Jenkins, of EPA's Office of Air Quality Planning and Standards, during the workshop. The agency, however, found the evidence inadequate to suggest a causal relationship for other health effects.

The agency also noted the ongoing difficulty in measuring the ambient concentration of UFP, due to a lack of air quality monitoring networks aimed specifically at the class of tiny particles.

In a 2013 survey of scientific studies on UFP, the Health Effects Institute (HEI) found that "Several factors — the unique physical properties of UFPs, their interactions with tissues and cells, their potential for translocation beyond the lung — have led scientists to expect that UFPs may have specific or enhanced toxicity relative to other particle size fractions and may contribute to effects beyond the respiratory system. However, the considerable body of research that

has been conducted has not provided a definitive answer to this question."

HEI concluded that, "The current evidence does not support a conclusion that exposures to UFPs alone can account in substantial ways for the adverse effects that have been associated with other ambient pollutants such as PM2.5," but cautioned that more research is required and that unique health effects caused by UFP cannot be ruled out.

HEI, a research organization funded half by EPA and half by the auto and other industries, found a striking absence of long-term studies from which to draw conclusions about possible long-term health effects.

During EPA's workshop and a related event, experts' comments highlighted there is no consensus about the size of particles that EPA should regulate if it chooses to eventually set a NAAQS for UFP.

For example, Professor Michael Kleeman, a clean air expert with the University of California, Davis, said in a Feb. 11 presentation at an earlier "kick-off" conference hosted by EPA in Research Triangle Park to inform the current PM2.5 NAAQS review, that it is "not clear" that the 100 nm threshold is the correct one.

Participants at the Feb. 13 UFP event also discussed the arbitrary nature of the 100 nm cutoff, and discussed whether EPA should perhaps consider other thresholds and maybe more than one additional size class of particles, such as PM0.5 or PM1. Particles smaller than PM2.5 but larger than 100 nm could quite plausibly be responsible for specific health effects, participants noted.

Another ongoing debate is how to measure UFP concentrations. Because of its small size, UFP typically makes up a very small portion by mass of larger PM classes of which it is a constituent, but accounts for a large number of particles in any given air sample. However, counting the number of ultrafine particles may not be the best way of determining the health risk of UFP, participants agreed, as the number of particles does not necessary equate to their toxicity.

CARB's Ayala noted that California recently considered determining compliance with its Low-Emission Vehicle III standards using particulate-count, but reverted to a mass-based system when faced with public criticism over the approach's drawbacks.

Participants in the Feb. 13 meeting broadly agreed with the findings of HEI's 2013 study, however, that a variety of existing regulations aimed at reducing PM2.5 will also curb UFP. Ultrafine particles from vehicles, in particular, should be relatively easy to mitigate using existing technology, meeting participants said.

Diesel particulate filters are already in widespread use and are very efficient at reducing UFP if correctly maintained, participants said, while similar filters could be introduced for gasoline-powered vehicles. Should filters for gasoline vehicles prove too costly, improving the efficiency of combustion systems offers similar benefits, various speakers said. — *Stuart Parker*

Experts Outline Key Scientific Issues For EPA's Particulate NAAQS Review

EPA officials, university researchers and others say that key scientific and policy issues for the agency's latest review of its particulate matter (PM) national ambient air quality standards (NAAQS) include how to respond to new science on shorter-term exposures to the pollutant and better information on identifying the sources of PM.

Whatever the agency decides in response to those issues could be central to its eventual decision on whether to revise or retain the existing fine particulate matter (PM2.5) NAAQS of 12 micrograms per cubic meter (ug/m3) set in 2012, which is stricter than the previous 15 ug/m3 standard issued in 1997. EPA in its 2012 rulemaking retained its prior separate NAAQS for larger coarse PM (PM10) of 150 ug/m3 over a 24-hour period.

The Clean Air Act mandates that EPA review its various NAAQS every five years, and the agency Feb. 9-11 held a workshop in Research Triangle Park, NC, to help inform its review of the PM standard. Immediately after that event, the agency also held a Feb. 11-13 workshop to discuss the science on smaller "ultrafine" particles (UFP).

EPA staff announced during the PM NAAQS workshop that it expects a draft integrated review plan outlining how the agency will conduct the review will be ready by fall or winter of 2015. The agency will then craft an integrated science assessment (ISA) outlining the most policy-relevant science on PM pollution and its impacts on public health and the environment, and plans to have a first draft review by its air advisors in late 2016.

Scott Jenkins of EPA's Office of Air Quality Planning & Standards said in a Feb. 9 presentation to the workshop that some key considerations in the current review include the extent to which new scientific evidence reinforces, extends or calls into question the data EPA assessed in previous PM NAAQS reviews; and the extent to which uncertainties in data from the last review of the standard have been reduced and/or whether new uncertainties have emerged. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 179004)*

These uncertainties include EPA's understanding of PM-attributable health effects, particularly at low ambient concentrations, and at-risk populations; uncertainties in the agency's characterization of PM emissions, ambient concentrations and exposures (i.e., monitoring and modeling); and uncertainties in the public welfare implications of visibility and non-visibility effects, and uncertainties in monitoring for welfare effects.

During a recap of a session on broad scientific issues of atmospheric science, modeling and monitoring of PM, panelist Mike Kleeman with the University of California, Davis, said there is an extensive amount of new data on PM from modeling and monitoring, but a question is how the "power of data can be harnessed."

Kleeman also said that studies that identify PM sources that are harmful to human health and ecosystems exist but

their results are "unsatisfactory," and that the panel "articulated a wish to continue studying that."

Regulators have long debated speciation, or the ability to define the individual components of PM and their sources. Speciation could potentially allow for more-targeted regulation of PM than setting an overall NAAQS, because it might allow officials to regulate those sources of PM that contribute the most harmful or largest components of particles. PM is emitted from a host of mobile and stationary sources, including cars and power plants.

One panelist said during a Feb. 9 discussion that since the last NAAQS review there have been a number of field studies done on the characterization of secondary aerosol emissions, and "a lot of new instrumentation" used, such as maps and the online measure of organic PM, to better characterize the pollutant.

Panelists also talked about the emergence of new findings related to local-scale efforts of near-road monitoring and being able to get more "complex" gradations of PM size distribution and particle composition, and learning what sources are large contributors of PM — which could potentially help speciation efforts.

Near-road monitoring is crucial given mobile source emissions of PM, and the need to better understand their impacts on human health. EPA's Gayle Hagler said that the upcoming ISA will need to include a "significant" new volume of literature on near-road trends using a "wide variety" of measurement techniques.

Discussing key messages from a workshop session on linkages from atmospheric science, exposure characterization and interpretation of results from health studies, EPA's Tom Long summarized panelists' comments on a need to start thinking about PM exposures, efforts to characterize exposures in health studies, and options for improving ways to model exposure. The "gap for personal exposures" is "huge and complex," he said.

Exposure plays an important role in the NAAQS review process, because EPA sets the standards for PM, ozone, carbon monoxide, and other criteria pollutants based on the level it believes is necessary to provide an adequate level of protection to public health based on the level of exposure humans face from a pollutant. Long said that there is better data available now that can help to refine exposure and clarify the interpretation of study results.

Some uncertainties from the 2009 ISA that informed the last PM standard review included spatial and temporal variability of UFP, PM components and PM sized between PM2.5 and PM10, and how exposure measurement error changes across PM size and composition influence health effect estimates; and characterization of how ambient exposure is influenced by climate, season, housing stock, and proximity to roads or other sources.

Scientific advances could help to address some of those questions in the upcoming NAAQS review, panelists suggested, for example increasing use of satellite data that provides better information on PM.

Within the last five years, the use of satellite information has been "finding its way into a wide range of health applications" and its use is "ready to be thought about in the ISA." Satellites have enabled the "ability to characterize exposures to many more people and a wider exposure range," Long said, which is "useful."

Panelists suggested that EPA in the review should increase its research on assessing PM emissions and exposures in different areas, for example better comparisons of rural and urban or eastern and western locations.

This approach "may provide insights specifically to coarse particles" that are regulated under the PM10 NAAQS and different compositions of coarse particles, another panelist said. Monitoring low-density populations in agricultural areas "may provide additional insights" on particle size differences, the panelist suggested.

Research studies on PM in the United States have advanced to assessing "lower and lower concentrations" of PM, which is helping to provide "more and more precision" in ambient concentrations and estimates at lower concentrations, putting "pressure" on thinking about health effects at even lower concentrations of PM, said another panelist, which could be important in EPA's decision on whether to tighten the NAAQS.

During a wrap-up discussion of all of the key messages from the various sessions, some panelists emphasized a need for EPA in the upcoming NAAQS review to focus on predicting how PM exposures will change over time — by the year 2030, for example — while others emphasized focusing on current PM exposures.

One panelist pointed out that while "big changes are hard to predict," small changes are occurring with respect to vehicle technology and gas mileage, which could impact mobile sources' contribution to PM formation. — *Lea Radick*

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EPA Endocrine Program Misses FY14 Target For Determining Further Tests

EPA's Endocrine Disruptor Screening Program (EDSP) failed to meet its fiscal year 2014 target to decide whether 59 pesticide chemicals screened in the first tier of the program must undergo additional testing in its second phase, in part because the agency has struggled to complete weight-of-evidence (WoE) determinations for the chemicals.

Additionally, industry has been urging EPA to finalize the tier 2 battery of assays before making tier 1 decisions, which could also be a factor in missing the FY14 target, according to Christopher Borgert, a consultant who works with industry clients on EDSP issues.

EPA completed just three of its planned 59 decisions in FY14, and those three were chemicals that EPA found to be exempt from endocrine screening requirements, according to the congressional justification document for EPA's proposed FY16 budget.

The agency's failure to meet its FY14 decision goal is similar to its experience in FY13, when EPA had a target of completing 20 decisions and completed none. The congressional justification document indicates that staff completed four decisions in FY11 and FY12.

The justification explains that the target of 59 chemical decisions was developed in anticipation of completing WoE determinations for the first list of chemicals, but "WoE determinations have proven to be more complex than originally anticipated and are now targeted for completion in FY2015."

EDSP consists of two tiers of screening. Tier 1, containing 11 assays, screens chemicals the agency believes may interact with human androgen, estrogen or thyroid hormones. If a chemical is flagged in tier 1 assays, additional, more expensive testing would be required under tier 2 of the program, which is intended to provide dose-response data for risk assessment and possible regulation.

Over the past three years, EPA has received the results of the tier 1 testing it required for the first group of chemicals, all of which were pesticides. These are the chemicals and data that agency staff is now processing to make the WoE determinations of whether the chemicals should undergo further screening in tier 2 of the program.

EPA issued the tier 1 test orders for the first group of EDSP chemicals in 2009, years after Congress mandated the testing in 1996. But the latest delay in the program may not be a concern to industry groups whose chemicals are under assessment.

"There's timing in all of this," Borgert says, adding that if EPA "releases these [determinations] before you have tier 2 set and in place, you put people in a bind because you raise questions [about chemicals] without a means to answer them; it raises havoc in the market."

No chemicals have been screened in EDSP tier 2, as the agency is still finalizing the assays to be used in the second tier.

EPA Jan. 30 announced that it has produced draft test guidelines for three of the tier 2 tests, those utilizing non-mammalian species tests, including a "Japanese quail 2-generation reproduction test; [a] Medaka extended 1-generation reproduction test[] and [a] Larval amphibian growth and development assay . . ." The agency set a March 31 comment deadline.

The agency explains that the test guidelines' release follows a June 2013 Scientific Advisory Panel (SAP) meeting where the advisors "reviewed draft protocols and supporting data for the four non-mammalian Tier 2 tests," including the three above and a fourth additional test known as the "mysid 2-generation toxicity test." This fourth test is not yet ready for public comment, the agency adds.

"Although the mysid 2-generation toxicity test was generally supported by the . . . SAP, the data were not considered fully reliable across all endpoints and the results were not repeatable across laboratories without recommended improvements," EPA explains in a Jan. 30 *Federal Register* notice. "The . . . SAP and public commenters also stated that endpoints in the mysid 2-generation toxicity test are also provided to a large extent by the current mysid chronic life cycle test, a test used effectively to assess the risk of chemical substances that may disrupt invertebrate growth, development, and reproduction. . . . Based on all of these factors, the Agency intends to consider and potentially incorporate, as appropriate, test design features from the mysid 2-generation toxicity test when updating and finalizing the existing draft mysid chronic life cycle test guideline assessing development, growth, reproductive, and toxicity endpoints."

Ellen Mihaich, the scientific coordinator for the Endocrine Policy Forum, a group of chemical manufacturers who have or expect to receive EDSP test orders, says the Organisation for Economic Co-operation and Development (OECD) is also in the process of finalizing validated test guidelines for two of the three assays on which EPA is seeking comment. The fish and frog assays "have just completed OECD review," Mihaich says, adding that the assays' guidelines are anticipated to be approved by the National Coordinators in April.

Mihaich describes the 2-generation bird study as having had "much less scrutiny" than the fish and frog assays since it was not part of the recent OECD activities. She anticipates that EPA will receive more extensive comments on the bird assay draft guidelines than the other two assays.

Mihaich does not believe that the fourth test, the mysid 2-gen assay, is currently needed in the tier 2 battery. "We already have a 1 generation mysid study that is a valid EPA guideline and information from that is perfectly fine for risk

assessment if there is a concern for invertebrates," she says.

The congressional justification indicates a loss of $3.3 million from ESDP's budget in the FY16 budget compared to FY15 enacted funding levels, saying the "change reflects a reduction to the [EDSP] as a result of the deployment of the computational toxicology [high throughput] model that reduces the workload in developing new assays."

Elsewhere, the budget justification indicates that EPA's research office, which is developing the new toxicity testing methods is receiving a $10.9 million increase, and some additional 12.7 full-time equivalent employees, "to expand the breadth of the . . . CompTox research program to include more assays that can cover the biology of interest (including thyroid), more emphasis on estimating relevant exposures to individual and multiple chemicals, and better integration of human and ecological risk evaluations. This is critical to enhancing and accelerating our understanding of chemicals risks and exposure. Overall, this increase will significantly enhance the predictive capacity of the computational models and data both for evaluating the impact of existing chemicals as well as for selection of safer alternates." — *Maria Hegstad*

EPA Seeks NAS Study On Low-Dose Risks . . . begins on page one

adequately justify the paper's conclusions (*Inside EPA*, May 9).

Recently funded by EPA, the new study is intended to last 30 months and cost $1.4 million. The new committee of approximately 14 members "will develop a strategy for evaluating whether EPA's current regulatory toxicity-testing practices allow for adequate consideration of evidence of low-dose adverse human effects that act through an endocrine-mediated pathway," according to the proposal outlining the study. *The proposal is available on InsideEPA.com. See page 2 for details. (Doc. ID: 178893)*

The issues before the NAS are important ones that toxicologists, pharmacologists and endocrinologists have long struggled over. The Endocrine Society and other regulatory toxicology critics are increasingly concerned that chemicals that can disrupt the hormone, or endocrine, system may be less predictable by existing regulatory testing methods because they cause effects at low doses. This is posited to occur in part because these chemicals' nonmonotonic dose-response (NMDR) curves can change direction and may not follow the predictable upward slope of many chemicals' dose-response curves. Current EPA test methods do not account for such outcomes and could incorrectly predict chemicals' risks, they say.

In response to a review of studies raising such concerns and published in 2012, EPA's toxics office requested what became a multi-month review from the research office resulting in the draft white paper, an EPA statement about the relevancy of these so-called NMDRs, and whether existing testing methodologies are health protective. EPA's white paper, released in draft form in 2013, found there is sufficient evidence to acknowledge that NMDRs exist, but concludes that does not require altering the existing regulatory toxicity testing regime.

The Endocrine Society and other critics have charged that toxicology tests upon which EPA and other agencies base their assessments of some chemicals' human health risks could be missing effects that are not occurring at the relatively high doses at which regulatory testing traditionally occurs. Several of the society's members also faulted the agency's draft paper for misrepresenting key studies the researchers conducted, leading to flawed conclusions in the draft white paper (*Inside EPA*, Aug. 2, 2013).

"EPA has asked the [NAS] to assist in developing a strategy for determining whether low-dose human health effects are being missed by the agency's reliance on current toxicity-testing methods," the proposal says. "The strategy will be based on an evaluation of at least two chemicals that affect the estrogen or androgen system."

The new committee will also address another challenge facing EPA, known as systematic review. This is a method for collecting and evaluating scientific literature, intended to answer specific questions in a transparent and methodical way.

EPA's influential but embattled Integrated Risk Information System (IRIS) program is exploring various systematic review approaches to adopt for that program's use, a key focus of its chief, Ken Olden. NAS' last report on the IRIS program, also released last spring, commended EPA for its efforts and recommended that the agency follow through and implement the use of systematic review for developing the influential IRIS assessments.

However, the approach has some ongoing challenges for environmental risk assessment, because it has been traditionally used in the pursuit of evidence-based medicine, where the studies reviewed are all of a similar nature. The challenge is in adapting it for use in environmental risk assessment, where studies are often epidemiology or animal toxicology research. Perhaps more challenging is determining how to evaluate mechanistic studies in the systematic review approach.

"[S]ystematic reviews will be performed to address questions about the relationship between the selected chemicals, populations, and end points," the proposal states. "The reviews will be used to support the integration of evidence from human and animal data streams. The nature and relevance of the dose-response relationships, including evidence of NMDR relationships, will be evaluated."

Once the chemicals for review are selected, the committee may add up to two additional members who have chemical-specific expertise, the proposal says. The proposal indicates that the committee will hold eight meetings, including "a scientific workshop to support the conduct of systematic reviews of human and animal toxicology data for two or more chemicals that affect the estrogen or androgen system. The workshop will seek to identify examples of relevant chemi-

cals, populations/model systems, and end points of interest for further study using systematic-review methods."

"The committee will evaluate the results of the systematic reviews, demonstrate how human and animal data streams can be integrated, determine whether the evidence supports a likely causal association, and evaluate the nature and relevance of the dose-response relationship(s). The committee will consider how to use adverse outcome pathway (AOP) or other mechanistic data, including high-throughput data and pharmacokinetic information, to elucidate under what circumstances human and animal data may be concordant or discordant." — *Maria Hegstad*

Appeals Court To Weigh Calls To Stay Herbicide Over Industry Objections

An appeals court has denied a producer's motion to delay consideration of environmentalists' requests to stay EPA's registration of a controversial herbicide designed for use on genetically-modified (GM) crops, signaling the court will weigh substantive arguments in the advocates' challenge despite industry calls to move the case to another court.

Environmental groups have challenged EPA's Oct. 15 registration of Dow AgroSciences' Enlist Duo, which contains 2,4-dichlorophenoxyacetic acid (2,4-D) and glyphosate for use in six Midwestern states. The registration allows use of Enlist on GM corn and soybean seeds, despite environmentalists' claims the product will pose risks to human health and the environment, as well as to certain endangered species.

The case has become mired in an array of preliminary requests, before the sides have fully briefed their arguments. Environmental groups have filed two separate motions to stay the registration pending the court's review and Dow has motioned to transfer the case from the U.S. Court of Appeals for the 9th Circuit to the D.C. Circuit.

In addition to challenging the registration in federal court, environmentalists are drumming up opposition to pesticides designed for use with GM crops, like Enlist Duo, in Congress. A source with the office of Rep. Chellie Pingree (D-ME) says the representative is circulating to other legislators a letter to President Obama, backing environmentalists' concerns that the Enlist component glyphosate is destroying the habitat of Monarch butterflies and threatening the species.

The 9th Circuit, in a Feb. 13 order, denied a recent motion from Dow urging the court to rule on the company's Dec. 15 motion to transfer the case to the D.C. Circuit before accepting additional briefs on a pair of environmentalist requests to stay EPA's registration of Enlist Duo, pending the court's hearing of the challenge to EPA's registration decision. *The order is available on InsideEPA.com. See page 2 for details. (Doc. ID: 178892)*

EPA Oct. 15 registered Enlist Duo for use in six Midwestern states, where the agency found it would not affect endangered species, and has also proposed expanding the registration to 10 additional states. The agency has said that use of Enlist would displace other products containing glyphosate, which is already approved for use on GM crops, and not increase use of that controversial herbicide.

Environmental and food safety groups have long opposed Enlist Duo, arguing that approving use of the decades-old 2,4-D on GM crops would pose risks to human health and the environment and drastically increase use of an older, more toxic herbicide, something that GM crops were designed to deter. Conventional farmers have said that Enlist is needed to combat weeds that are increasingly resistant to glyphosate.

While arguments for transferring the case to the D.C. Circuit have been fully briefed, the 9th Circuit has not yet ruled on that motion, which environmentalists oppose. EPA has indicated it has no position on the transfer.

The court's order denies Dow's request to put on hold environmentalist calls for staying the registration until the transfer motion is decided. The order also extends the deadline for EPA and Dow to respond to environmentalists' most recent request to stay the registration of Enlist Duo pending review, until March 13, at EPA's request.

Meanwhile, environmentalists are also seeking support in Congress for calls for EPA to stop approving new herbicides for use on GM crops and restrict glyphosate to protect Monarch butterflies. Advocates are seeking to accomplish this, in part, by petitioning the U.S. Fish and Wildlife Service (FWS) to list Monarchs as threatened under the Endangered Species Act (ESA).

A source with Pingree's office says Pingree is circulating to other legislators a letter to Obama backing environmentalists' arguments that herbicides designed for use with GM crops, and particularly glyphosate, are threatening Monarch butterflies. The letter also suggests that an ESA listing, which Center for Food Safety (CFS) and other environmental groups sought late last year, would help.

In the letter, Pingree targets herbicide spraying, specifically of glyphosate on GM crops, as a primary threat to Monarch populations, saying the herbicide destroys milkweed in the Midwest, a migratory path and breeding ground for many Monarchs.

"The Endangered Species Act has the necessary legal mechanisms to ensure that the ecosystems that the monarchs depend on are adequately protected, and the recovery planning process of the ESA is one of the most successful and powerful tools that can restore the monarch butterfly," the letter says.

The Congressional letter, slated to be sent to Obama, follows CFS' Feb. 5 briefing of Pingree's staff on a new CFS report "Monarchs in Peril: Herbicide-Resistant Crops and the Decline of Monarch Butterflies in North America" which targets glyphosate, the ingredient in Enlist that has been used with GM crops since the 1990s, as the primary culprit.

In the report, CFS recommends that EPA halt approvals of new herbicides designed for use on GM crops, suspend or

restrict pesticides that pose risks to Monarchs, and expedite the registration review of glyphosate, which is currently underway.

The report builds on environmentalists' petition to the FWS to list Monarchs as a threatened species, which wildlife officials are currently considering, and also backs arguments in the Natural Resources Defense Council's (NRDC) petition last February to EPA to review risks of glyphosate to Monarchs.

NRDC raised that concern again in a Dec. 18 request for the 9th Circuit to stay EPA's registration of Enlist Duo in six states, pending review. CFS and other environmental groups then filed the subsequent request to stay the registration on Feb. 6, raising concerns that EPA's registration violates the ESA because the agency did not consult with federal wildlife officials on potential risks to whooping cranes and the Indiana bat, despite finding the registration could expose those species to 2,4-D. — *Dave Reynolds*

House Advances EPA Cyanotoxins Bill Without Democratic Amendments

The House Energy and Commerce Committee has approved by unanimous voice vote a bill that would require EPA to develop promptly a strategy for managing the risks of cyanotoxins in drinking water, with committee leaders rejecting efforts from Democratic lawmakers to attach funding and climate change provisions to the legislation but pledging to consider the issues in later debates.

The bill, H.R. 212, which was introduced by Rep. Bob Latta (R-OH), requires EPA to develop and submit to Congress within 90 days a strategic plan for "assessing and managing the risk associated with cyanotoxins in drinking water; to establish a list of cyanotoxins that are harmful to human health when present in drinking water — including the known adverse effects of those cyanotoxins and the factors that caused them to proliferate — and to develop health advisories for those on the list as well as technical guidance and assistance for states in monitoring the cyanotoxins. *Relevant document are available on InsideEPA.com. See page 2 for details. (Doc. ID: 178862)*

Democrats raised concerns at a Feb. 5 subcommittee hearing and markup of the bill that the legislation is unable to fully tackle cyanotoxin contamination in drinking water or prevent future harmful algal blooms that can create cyanotoxins (*Inside EPA*, Feb. 13).

They offered several amendments at the full committee markup Feb. 12 to address their concerns but withdrew the amendments after committee Chairman Fred Upton (R-MI) said they were not germane. Upton and Environment and Economy Subcommittee Chairman John Shimkus (R-IL) urged the Democratic lawmakers to work with the Senate to incorporate funding and other considerations in other legislation.

Sens. Sherrod Brown (D-OH) and Rob Portman (R-OH) introduced similar cyanotoxin legislation Feb. 11.

Committee Republicans cited mostly administrative concerns for urging the authors of the amendments to withdraw them and vowed to consider the issues as part of later House debates as well as when EPA Administrator Gina McCarthy meets with the panel.

"I think we'd be delighted to have another discussion but we only saw this amendment at eight this morning," Upton told Rep. Paul Tonko (R-NY) of his amendment to reauthorize the drinking water state revolving fund (DWSRF) to implement H.R. 212. Tonko introduced a version of the amendment during the subcommittee markup Feb. 5, but it failed on voice vote. The version introduced at the full committee markup would have authorized an increase of the DWSRF by $20 million for each fiscal year between fiscal year 2016 and FY19, double his proposal introduced in the subcommittee.

Other amendments offered and withdrawn sought to boost climate resiliency, to address drinking water risks from hydraulic fracturing, and to require assessments related to drought prevention and the security of drinking water systems.

Rep. Lois Capps (D-CA) introduced an amendment that would require the plan put forth in H.R. 212 to include climate resiliency and mitigation strategies, echoing a bill she has introduced in previous sessions of Congress that would create a new grant program to provide funds to local drinking water utilities to implement such programs.

"We are woefully unprepared to address these problems. Mitigating and adapting to these threats will require significant infrastructure funding we should be adding to the SRF and other infrastructure programs to help local communities actually implement these strategies," Capps told the panel.

"We are going to raise the issue of climate change whenever it's appropriate to bring it up," Rep. Frank Pallone (D-N.J.) said, expressing support for the Capps amendment. "It is a major issue that impacts almost everything we do in this committee."

Rep. John Sarbanes (D-MD) offered a fracking amendment, which would have required EPA to develop a strategic plan for managing drinking water-related risks associated with hydraulic fracturing operations.

"EPA has been hard at work on the assessment side, but it doesn't have in place a strategic plan to manage drinking water impacts that will be identified," Sarbanes said, referring to the agency's forthcoming study on the drinking water impacts of hydraulic fracturing. "We are going to have a good study from EPA and it would be kind of a waste, when we receive that study, not to know there's a strategic plan in place."

And Reps. Jerry McNerny (D-CA) and Yvette Clarke (D-NY) both offered withdrawn amendments on risk assessments. McNerny's amendment dealt with drought prevention, and Clarke's amendment would have established "risk-

based" performance standards for the security of covered water systems.

Many of the committee's Democrats expressed concerns that the panel was not given enough time to fully consider the bill and all its amendments because it was moved through subcommittee faster than normal procedure — having a hearing and a markup on the same day.

"I would venture to say probably half of the full committee hasn't done a deep dive on the issue," Rep. Anna Eshoo (D-CA) said of H.R. 212.

"We went right from a regular hearing to a markup the same day. I think that in every case we're gonna have amendments that will be declared non-germane and members are going to withdraw, but I would ask in each case that we take some time before we go to the floor and either in the context of this bill or further down the road, we have some further discussions and try to accommodate and deal with these issues," Pallone said.

In the Senate, Brown and Portman have introduced S. 462, which would direct the EPA administrator to publish a health advisory and submit reports with respect to microcystins in drinking water, and S. 460, which would "amend the Safe Drinking Water Act to provide for the assessment and management of the risk of algal toxins in drinking water, and for other purposes."

In a Feb. 11 statement, Brown and Portman said their legislation is a companion to H.R. 243, which Rep. Marcy Kaptur (D-OH) introduced earlier this year. Kaptur's bill, which has not moved out of committee, is similar to H.R. 212, and she is a co-sponsor of Latta's bill.

"The water crisis in Toledo last summer highlighted the importance of protecting the Great Lakes from harmful algal blooms," Brown said. "Our bill will ensure that drinking water operators have the information they need to ensure safe drinking water for Ohio residents and businesses. Congress must pass this bill now."

"I'm pleased to renew our push to ensure that all levels of government work together to determine if our drinking water is safe for human consumption," Portman stated. "As we continue to work to ensure that Ohioans have access to safe and clean drinking water, the passage of this legislation will be an important step toward identifying what is safe and what is not." — *Amanda Palleschi*

Business Proponents Ask High Court To Strike Down Drug Take-Back Law

Business proponents, including the U.S. Chamber of Commerce, are seeking friend-of-the-court status to add their support to the pharmaceutical industry's recent petition to the Supreme Court to reverse an appellate court ruling that requires industry to finance a novel drug take-back program viewed as a model for other counties and states across the country.

In a Jan. 28 *amicus* brief filed by the chamber in *Pharmaceutical Research and Manufacturers of America (PhRMA), et al. v. County of Alameda*, the organization echoes the pharmaceutical industry's contention that a county ordinance mandating a medication take-back program financed by pharmaceutical companies "violates the [Constitution's] dormant Commerce Clause and threatens core federalism principles." A free enterprise group and educational non-profit also filed a separate *amicus* brief in support of the industry. *Relevant documents are available on InsideEPA.com. See page 2 for details. (Doc. ID: 178883)*

The pharmaceutical industry in its Dec. 29 petition argues the unanimous U.S. Court of Appeals for the 9th Circuit ruling in *PhRMA*, issued Sept. 30, could have wide-reaching adverse impacts across the United States, allowing local governments to create a variety of take-back programs mandating financing by nearly any type of interstate manufacturer — an approach industry says is not permitted under the Constitution's Commerce Clause (*Inside EPA*, Jan. 16).

According to the Supreme Court docket, the petition will be distributed for conference Feb. 27.

The 9th Circuit in September upheld an ordinance passed in 2012 by Alameda County that requires pharmaceutical companies whose products are sold in the county to establish, run and finance a drug take-back program for unwanted medications. Many local governments and citizen groups are concerned that a lack of such programs leads consumers to flush medications into wastewater systems, where they are eventually discharged and cause adverse developmental effects in fish and possibly humans.

The ruling was considered a landmark win for extended producer responsibility, and other localities have adopted or are considering similar measures. The pharmaceutical industry says in its petition it fears that "if the decision is allowed to stand, the proscribed Balkanization will be encouraged and become entrenched before another [c]ircuit invalidates a law precisely replicating the Ordinance."

The chamber, the world's largest business federation, says that in its brief it "addresses the extraterritoriality and federalism concerns raised by laws like Alameda County's, and the potential implications of both the Ordinance and the [9th Circuit] decision . . . for businesses nationwide." It adds that it is addressing issues that have not been dealt with in depth by the pharmaceutical industry's petition.

The chamber says that the Supreme Court "has long held that, under the dormant Commerce Clause, state and local governments have 'no power to project [their] legislation' into other jurisdictions, . . ., and that they are thus prohibited from regulating ' "commerce that takes place wholly outside [their] borders, whether or not the commerce has effects

within the State." ' "

"Yet the Ninth Circuit upheld the Ordinance without applying, or offering any reasoned analysis of, this extraterritoriality bar," which is a core federalism principle, the chamber says. In this case, the county stretches beyond its borders "to place burdens and conditions on transactions occurring outside the County," the brief says. By mandating these requirements, "the County has taken local waste and refuse responsibilities and shifted that burden to commercial actors in other states," it says.

The business group says other jurisdictions have begun to adopt similar drug take-back laws and could apply the 9th Circuit's interpretation to other industries and products. "The result may be a new network of local laws ensnaring distant manufacturers in a web of locality-specific obligations," it says.

The group argues the court should take up this issue now as it is a case of exceptional importance. "Further percolation of this issue will only worsen the jurisdiction-by-jurisdiction inconsistencies that the dormant Commerce Clause was meant to prevent," it says.

The 9th Circuit's ruling threatens to impose significant and immediate burdens on interstate commerce, the brief says, noting that companies will be forced to decide between spending money on the Alameda disposal program or taking measures to ensure none of their products are sold in that county.

"Left standing, the Ninth Circuit's decision would require *every* prudent pharmaceutical manufacturer dealing with national distributors to bear the substantial costs of establishing the collection and education operations required for a valid 'Product Stewardship Program,'" the brief says.

The Washington Legal Foundation (WLF), a public interest law firm that promotes free enterprise, and the non-profit Allied Education Foundation (AEF), also filed a joint *amicus* brief Jan. 28 in support of the pharmaceutical industry. These two groups particularly stress the Commerce Clause limits set by case law on taxation by state and local governments. The 9th Circuit said such case law was irrelevant to the county's ordinance, but WLF and AEF argue, "to the contrary, that the taxation case law is directly applicable to the Commerce Clause analysis because the Ordinance possesses many of the attributes of a tax."

Given the ordinance has similarities to a tax, tax-based criteria established by the Supreme Court for addressing Commerce Clause challenges to local taxes "are directly relevant here and strongly suggest that the Ordinance is inconsistent with the principles that animate the Commerce Clause," the WLF brief says. "In particular, there is serious reason to doubt that costs are fairly apportioned: the Ordinance requires a drug company to assume 100% of drug-collection responsibilities if *any* of the drugs it sells end up in Alameda County," it says.

WLF and AEF say the court should review the case to decide if the county's failure to meet the tax-based criteria "dictates a finding that the Ordinance cannot survive Commerce Clause scrutiny." The tax-based criteria involve a four-part test that allows for sustaining a state tax against a Commerce Clause challenge provided the tax meets four requirements: that it is applied to an activity "with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to the services provided by the State," according to the high court's 1977 decision in *Complete Auto Transit, Inc. v. Brady*.

The groups say the ordinance operates like a tax, and argue that the ordinance fails to pass the first three factors under the four-part test.

In First-Time Ruling, Court Finds CERCLA Displaces Public Nuisance Claims

For the first time, a federal court has found that Superfund law, alone, is enough to displace federal common law public nuisance claims for damages, dismissing claims brought by Washington state residents living downstream and downwind from a Canadian metal smelter and fertilizer manufacturing facility.

"Plaintiffs' federal common law public nuisance claims have been displaced by [the Comprehensive Environmental Response, Compensation & Liability Act (CERCLA)] and therefore, must be dismissed," the U.S. District Court for the Eastern District of Washington held in a Jan. 5 ruling in *Barbara Anderson, et al. v. Teck Metals*. The court notes that no other court has previously "held whether CERCLA by itself, is sufficient to displace a federal common law public nuisance claim for damages." *The decision is available on InsideEPA.com. See page 2 for details. (Doc. ID: 178881)*

One attorney says the decision could aid in narrowing debate over when federal common law claims are displaced, especially in cases other than those involving the Clean Air Act.

At issue in the case were personal injury claims brought under an attempted class action suit by former and current residents of Northport, WA — about 20 miles downstream of a smelter in British Columbia, Canada, owned by Teck Metals. The smelter facility is along the Columbia River, which flows south to Northport.

The plaintiffs allege that various ailments from which they are suffering were caused by toxic releases from Teck's operations, with the plaintiffs particularly noting that air emissions from the facility move south and become trapped in the valley where Northport is located, according to court documents.

The plaintiffs say in their amended complaint that between 1921 and 2005, it is estimated that Teck emitted tens of thousands of tons of zinc and lead, more than 1,000 tons each of arsenic and cadmium and 136 tons of mercury into the

air.

In its decision, the district court followed the rule set down by the Supreme Court on displacement, which found in a 2011 ruling in *Connecticut v. American Electric Power (AEP) Co., Inc.* that the test for whether Congress excluded federal common law claims "'is simply whether the statute speak[s] directly to [the] question at issue,'" the district court says. The high court "'has instructed that the type of remedy asserted is not relevant to the applicability of the doctrine of displacement,'" the court says, citing three past decisions by the 3rd Circuit and the Supreme Court.

The district court goes on to say "the fact CERCLA does not provide a damages remedy for personal injuries is irrelevant to whether CERCLA displaces and precludes Plaintiffs' federal common law public nuisance claims in the case at bar."

The plaintiffs argued that the "question at issue" was whether the mining company could be held liable for personal injuries prompted by the contamination the company allegedly caused in the Upper Columbia River Region under the federal common law of nuisance, the court says. The plaintiffs contended that "'the legislative history of CERCLA confirms that Congress rejected the inclusion of any statutory personal injury provisions within CERCLA and thus did not intend to occupy the field of personal injury liability caused by contaminants,'" the decision says.

But the court rejected this view as "too narrow" in terms of determining the "question at issue," saying the plaintiffs focused on the available remedies, which as previously noted "is irrelevant. The 'question at issue' is liability for the release and threatened release of hazardous substances. This is the harm of which Plaintiffs complain," District Court Judge Lonny R. Suko says in his opinion.

"Congress has spoken directly to this issue via CERCLA and has provided a 'sufficient legislative solution' to warrant a conclusion that CERCLA occupies the field to the exclusion of federal common law."

CERCLA provides a comprehensive liability and cleanup scheme to address releases of hazardous substances by making polluters strictly liable for cleanup costs and natural resource damages, the judge says, noting the nuisance claims therefore are displaced and should be dismissed.

While the nuisance claims have been dismissed due to CERLCA's displacement of them, the case is continuing as plaintiffs are also making negligence and strict liability claims.

John Lazzaretti, an attorney with Squire Patton Boggs, commented on his law firm's blog that Suko's opinion offers a framework for applying the high court's decision in *AEP* outside of the Clean Air Act. In *AEP*, the Supreme Court found that the Clean Air Act's broad air regulations had displaced federal common law claims aimed at abating greenhouse gas (GHG) emissions, and established the "question at issue" test, Lazzaretti says. But, he notes, the U.S. Court of Appeals for the 9th Circuit in *Native Village of Kivalina v. Exxon Mobil Corp.* — a case involving other GHG-related claims — found that applying the test can be "complicated."

The 9th Circuit recognized the difficulty in applying the test "in light of the flexibility plaintiffs are accorded in framing their claims and developing new theories of liability," Lazzaretti says in the blog posting. With the focus on the alleged conduct rather than the type of injuries, Suko's decision, "will help narrow the debate in future cases and make clear in contexts outside the Clean Air Act when federal common law claims have been displaced and where there is still a place for federal common law claims to fill the interstices in environmental statutes," he says in the blog.

Inhofe Plans Push For Legislation To Revamp EPA Brownfields Program

Senate Environment & Public Works (EPW) Committee Chairman James Inhofe (R-OK) plans to push as a high priority a bill that would reauthorize and revamp EPA's brownfields grants program, eyeing legislation he backed during the last Congress that would have created a set-aside for technical assistance grants to rural and disadvantaged communities, among other revisions.

"A Brownfields reauthorization this Congress is one of my top priorities [in] the 114th Congress," Inhofe said in a written statement provided to *Inside EPA*. He noted his sponsorship of a bipartisan bill during the last Congress — S. 491, also known as the Brownfields Utilization, Investment, and Local Development Act — and said while the program has been successful, "reauthorization would allow for improvements in the grants process to make it even more effective and useful, including improvements for small communities and disadvantaged areas."

The legislation is one of five priorities Inhofe has announced upon becoming chairman of the committee last month, along with a highway transportation bill, Endangered Species Act oversight, Toxic Substances Control Act reauthorization and strict oversight of EPA's rules.

While S. 491 had bipartisan support and was approved by the EPW committee under then-Chairwoman Barbara Boxer (D-CA) last year, an earlier version of the legislation that would have prioritized funding for rural or disadvantaged areas drew EPA concern.

During a committee hearing in July 2013, EPA waste chief Mathy Stanislaus warned against carving out certain "end-uses" for brownfields grants, such as for rural communities, due to the fear it would disrupt the existing national competitive process used in the agency's grant program. The grants are used by communities to assess and clean up brownfields — which often are contaminated urban properties with redevelopment potential.

"[C]learly we should look at rural communities and being able to get them resources, but if we, upfront, divide [the]

end-uses, I'm a bit concerned that that may have the unintended consequence of dampening" what has been a successful competitive process, Stanislaus said.

During markup last April, lawmakers replaced language in the bill that would have given rural areas, small communities, tribes and economically disadvantaged areas priority when seeking EPA technical assistance grants under the program with an amendment that would instead have authorized a set-aside in technical assistance grants for these types of communities.

The move to include a measure in the bill benefiting rural communities came after some Central Plains and South Central states charged that rural areas are being passed over for the awards in favor of more populated Rust Belt cities, prompting EPA and lawmakers to look for fixes. Some lawmakers from states with smaller populations had sought a rural measure to increase access to brownfields grants for rural communities. The bill in the 113th Congress was introduced by Inhofe, Sens. Mike Crapo (R-ID) and Tom Udall (D-NM) and the late Sen. Frank Lautenberg (D-NJ).

S. 491 also would have made other changes to the brownfields program, including increasing the limit for individual cleanup grants; allowing EPA to award multi-purpose grants to communities, rather than only awarding separate assessment and cleanup grants; and expanding eligibility for grants to certain publicly owned sites and non-profit groups. It also would have called specifically for the consideration of waterfront brownfield sites when awarding grants and would have established a program to provide grants at sites appropriate for clean energy development.

In his statement, Inhofe says he does not yet have a timeline for reintroducing the legislation.

Meanwhile, a spokeswoman for Smart Growth America, a coalition that in part backs the expedited cleanup of brownfields, welcomed President Obama's fiscal year 2016 budget proposal for EPA's brownfields program, calling it "ambitious." It would increase the FY15 enacted budget of $153 million to $189 million, she says. In its FY16 budget justification document, EPA says it plans to award about 151 assessment grants, and 24 direct cleanup cooperative agreements.

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Kogan says that even though the law does not allow direct suits, it can be read as creating a right "to be unburdened by improperly peer-reviewed information" — and that opponents of EPA rules could invoke that right when suing under the APA, which allows challenges to any "final agency action" that is allegedly "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."

In prior rulings, courts have held that an agency's denial of an IQA petition is not a "final action" subject to APA suit, because it is not "an action by which rights or obligations have been determined, or from which legal consequences will flow," which is the test established by the Supreme Court in the 1997 ruling *Bennett v. Spear*.

While the *Bennett* standard bars suits over IQA petition responses, Kogan says EPA's endangerment finding, its denial of requests to reconsider that finding, and its forthcoming climate rules are all unquestionably final actions whose development involved scientific findings subject to IQA procedures — meaning underlying violations of the IQA could support a decision that EPA violated the APA in taking those steps.

Linking alleged IQA violations to EPA rulemakings could also help plaintiffs establish that they were directly injured by the agency's actions, Kogan continues. Litigants seeking to overturn a rule or other action must show that they suffered a negative impact from the agency's conduct, but courts have generally ruled that IQA violations do not in themselves satisfy that test.

The paper argues that without EPA's scientific findings, which were subject to IQA peer-review requirements, "it would not have been possible to issue [the determination], and consequently, it would have been neither necessary nor possible to promulgate the GHG emissions-control regulations they subsequently triggered."

Opponents of EPA's GHG rules already raised the alleged IQA violations involved in the endangerment finding in connection with its forthcoming GHG rules for existing power plants.

Most recently, the Institute for Trade, Standards and Sustainable Development (ITSSD), a free-market group that Kogan serves as executive director, raised those concerns in its Aug. 13 comments on the agency's GHG rules for existing power plants. The group, which says it advocates for "scientifically and economically benchmarked and justified, market-driven" regulations, says that EPA failed to ensure proper peer review of 28 "core reference documents" that supported EPA's conclusion that GHGs endanger public health and welfare.

The group in its comments notes that EPA offers as the basis for the existing source performance standards' "major assessments" by the federal government, the United Nations and the National Academy of Sciences (NAS), a body outside of government but funded substantially with federal dollars. These same assessments, deemed "highly influential" under the IQA, formed part of the body of research supporting the endangerment finding.

Similarly, the Southeastern Legal Foundation, another free-market group that is still seeking to challenge the GHG endangerment finding, Feb. 9 filed a new suit under the Freedom of Information Act seeking documents related to the agency's development of its finding.

"The purportedly 'scientific' information on which the Agency relied was the subject of a number of systematic manipulations, including collusions to withhold scientific information, deletion of emails and raw data to prevent discovery of key facts, manipulation of data and computer code to create false impressions, and concerted efforts to boycott key journals to excluded disagreement," the complaint says. — *David LaRoss*

EPA Critics Float New Strategy To Challenge Agency Rules Using Data Law

Backed by former White House regulatory review officials, a free-market advocate is proposing a new legal theory to allow states and private companies to sue EPA based on alleged violations of the Information Quality Act (IQA) in the development of a host of rules, dodging the long-standing holding that IQA violations are immune from judicial review.

Federal courts have long held that private plaintiffs lack standing to challenge agency actions under the IQA, finding that the law lacks an explicit right of action and that suits brought under the Administrative Procedure Act (APA) are not reviewable because challenged agency actions are not "final."

But in a February white paper published by the Washington Legal Foundation (WLF), Lawrence A. Kogan, a trade lawyer and free-market advocate, suggests that states and private plaintiffs could have standing to challenge EPA's greenhouse gas (GHG) endangerment finding on the theory that the plaintiffs have a right to be free from regulations that are founded on flawed science that contravenes the law's intent. *Relevant documents are available on InsideEPA.com.* *See page 2 for details. (Doc. ID: 179012)*

"The contemplated cause of action is based on the theory that Congress intended that the IQA . . . protect the *negative* right of a designated class of persons not to be burdened, financially or otherwise, by poor quality science that agencies disseminate in support of major regulations," Kogan says in the paper, "Revitalizing The Information Quality Act As A Procedural Cure For Unsound Regulatory Science: A Greenhouse Gas Rulemaking Case Study."

He suggests that a challenge to EPA's 2009 finding that GHGs endanger public welfare — the basis for EPA's climate regulatory program — could provide a venue for plaintiffs to test the theory.

"EPA's 2009 GHG Endangerment Findings and the decision-making process that led to those Findings, offer an ideal case study in how the IQA applies in the rulemaking context and how agencies contravene the law. . . . Such final agency action potentially gives rise to legal challenges of EPA's failure to comply with the IQA's peer-review standards," the paper says.

If courts accept Kogan's reasoning it would open the door for EPA's opponents to allege IQA violations in challenges against a broad array of other rules, including still-pending actions and some recently finalized regulations. For example, Jim Tozzi — formerly a high-ranking official in the White House Office of Management and Budget (OMB) — says in an introduction to the paper that Kogan's theory could also be used to challenge EPA's controversial new source performance standards (NSPS) for GHG emissions limits from power plants when the final version of that rule is released later this year.

"Another possible target of the type of IQA challenge [Kogan] proposes would be against EPA's failure to conduct a peer review of 'highly influential scientific information' in its determination that carbon storage and sequestration is a viable technology — the central component of its proposed rule to control emissions from new gas-fired power plants," Tozzi writes in the introduction.

Later in the white paper, Kogan says that a successful climate IQA suit would pave the way for further challenges to EPA actions including the pending rule to define which waters are subject to the Clean Water Act; 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.

Tozzi in his introduction to the paper says that if courts reject Kogan's legal arguments, the executive branch — in particular OMB — could step in to conduct more robust oversight of agencies' research and response to petitions under the IQA. And he also suggests that if the effort fails, "then it is time for the Congress to pass legislation which declares . . . the [IQA] to be judicially reviewable."

The IQA — also known as the Data Quality Act — generally requires agencies to ensure that scientific and other data used to develop policy stances are objective, reproducible and peer-reviewed. While the law requires agencies to accept and respond to petitions to correct allegedly flawed data used in rulemakings and other decisions, key federal courts have so far held that agency responses to IQA petitions are not final actions and therefore not judicially reviewable, eliminating an enforcement mechanism for private parties to pursue challenges on the merits if agencies deny their petitions (*Inside EPA*, July 4).

Despite the legal hurdles, EPA critics have continued to file IQA petitions seeking corrections of agency determinations. For example, conservative groups have long alleged that EPA ignored IQA requirements in its 2009 endangerment finding — which was a prerequisite for EPA regulation of vehicle GHG emissions and other sources after the Supreme Court ruled in *Massachusetts v. EPA* that GHGs are "pollutants" and subject to Clean Air Act regulation.

The endangerment finding has already survived one major court challenge, *Coalition for Responsible Regulation v. EPA*, in which the U.S. Court of Appeals for the District of Columbia Circuit upheld the agency's determination and the Supreme Court declined a petition for review.

But the WLF paper argues that the finding could be vulnerable to a second challenge, largely based on the IQA, even though courts do not allow suits directly challenging EPA's responses to IQA petitions.

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