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## Long-term reauthorization of CFATS remains uncertain

BY HEIDI SLINKARD BRASHER

The Chemical Facilities Anti-Terrorism (CFATS) program was authorized by the Department of Homeland Security (DHS) to regulate chemical facilities for anti-terrorism purposes. Section 550 of the DHS Appropriations Act, 2007 (Public Law 109-295), which provided DHS with such authority, is set to expire on October 4, 2011.

Under Section 550, DHS was required to establish risk-based performance standards for security at chemical facilities, develop vulnerability assessments, and develop/implement site security plans. DHS must then review and approve each facility's assessment plan and implementation, even if the facility's plan was not a DHS-developed plan. Disapproval is only to occur if the facility's plan or assessment fails to comply with the regulations.

A chemical facility having more than specified quantities of certain chemicals is required to perform a "Top Screen" to assess the facility's potential vulnerabilities. The Top Screen is to be submitted to DHS, which then determines whether the facility's risk status is high enough to warrant further regulation. Implementation of the interim final rule provided for four risk-based tiers of these high-risk facilities, with performance-based requirements including development of vulnerability assessment, formation and submittal of site security plans, and implementation of the site security plan. As of March 2011, approximately 40,000 chemical facilities had registered and completed their Top Screen, with 8,000 being required by DHS to submit their site vulnerability assessment.

On May 16, 2011, the House Energy and Commerce Committee approved H.R. 908, Full Implementation of the CFATS Act, with an extension until 2018, and a single amendment which would eliminate duplicative background checks for employees who have already been cleared pursuant to the Maritime Transportation Security Act (i.e., employees who hold a Transportation Workers Identification Credential – TWIC card).

Another House Chemical Security Bill, H.R. 901, was approved on June 22, 2011, and has been sent to the House Homeland Security Committee. It also reauthorizes CFATS until 2018. Unlike H.R. 908, H.R. 901 contains several amendments, including establishing time limits for DHS approval of security vulnerability assessments or site security plans and annual reporting requirements regarding CFATS' effect on job creation or elimination.

The Senate Committee on Homeland Security and Governmental Affairs voted favorably for a three-year reauthorization of CFATS in S. 473 on June 29, 2011. It is noteworthy that S. 473 does not contain the proposed mandate that would require consideration of use of "inherently safer technology" – i.e., alternative chemicals or processes.

Despite recent committee movement, many in the industry remain concerned that the reauthorization bills will not receive full Congressional attention before the October 4, 2011, expiration and the fall recess. This would likely have the effect of extending the current CFATS program for one year and slide the issue of a lengthier reauthorization to the over-filled congressional back burner.

# Endangered species litigation — Potential impact on pesticide use in production agriculture

BY CHRIS PAUL

On May 30, 2007, the Center for Biological Diversity filed a lawsuit alleging that the U.S. Environmental Protection Agency (EPA) was failing to comply with Section 7(a)(2) of the Endangered Species Act (ESA) in regard to 47 pesticides and 11 species that are listed as endangered or threatened under the ESA (*Center for Biological Diversity v. EPA*, Case No. 07-2794-JCS, N.D. Cal.).

The species identified in the lawsuit are all reportedly found in the greater San Francisco Bay area: Alameda whipsnake, bay checkerspot butterfly, California clapper rail, California freshwater shrimp, California tiger salamander, delta smelt, salt marsh harvest mouse, San Francisco garter snake, San Joaquin kit fox, tidewater goby and the valley elderberry longhorn beetle.

Various allegations of impacts on the environment and the specific species harmed were claimed by the plaintiffs. These included a broad claim that the pesticides contaminated waters throughout the San Francisco Bay area, claims that Bay area sediments were impacted, and claims that pesticides could harm aquatic life and the identified species by causing acute toxicity and stress, reproductive and immunity disorders, endocrine disruption, cancer, birth defects, neurological impacts, skeletal malformations, weight loss and decreased resistance to disease. In short, the pesticides were blamed for about every possible problem, even where no evidence of actual causation was presented. *This is not said to diminish concerns that pesticides can, in certain doses, present serious problems, but the claims in this case were much more of the “could cause” rather than a “did cause” nature.*

Ultimately, 75 pesticide ingredients fell under scrutiny in this case (see link). The EPA agreed to a stipulated injunction to resolve the lawsuit. The stipulated injunction commits EPA to:

- A schedule by which EPA will review the registrations of pesticides containing any of 75 pesticide ingredients for their potential effects to one or more of 11 federally-listed threatened or endangered species (see link) in eight counties around the San Francisco Bay area;
- Identify interim pesticide use limitations intended to

reduce exposure to the 11 species during the time EPA is assessing these pesticides in consultation with the U.S. Fish and Wildlife Service;

- Develop and make available a brochure to inform pesticide users of the stipulated injunction and the 11 species involved;
- Mail copies of the stipulated injunction to all registrants of the pesticides subject to the stipulated injunction;
- Provide to certain retail establishments shelf tags they may use to identify certain pesticides identified in the stipulated injunction as “urban use” pesticides;
- Annually notify certain retail establishments and certain user organizations that the stipulated injunction is still in effect and refer them to EPA’s website for further information; and
- Display on its website a copy of the stipulated injunction, maps identifying the areas where the interim injunctive relief applies, and fact sheets for the 11 species identified in the stipulated injunction.

What does this mean for use of pesticides with these ingredients, and other pesticides, at other locations? First and foremost, users must use all pesticides and other chemicals as directed by manufacturer instructions and good application practices. Proper use is not only effective use, but also reduces potential legal exposures and actual damage to the environment. That said, some groups will invariably misuse legal processes to push a no-chemical use agenda. Further, some regulators may be complicit in using the legal process, including tacit acceptance or even encouragement of agency defendant status, to enter into settlements such as that in this case to effectively limit pesticide use without engaging in the otherwise required administrative and scientific steps to establish actual harm and develop proper regulations.

Users of pesticides must be prepared to address the science of both impact of pesticide use on the environment, and impact of non-use on crop yields and quality. Users of pesticides must also recognize that they face a public relations disadvantage that requires preparation for addressing these issues of science in the best available forum, which is likely the courts, and most certainly not in the media. Aggressive legal intervention may be the best vehicle to present a complete case to a neutral fact-finder (the court) that has the tools and the duty to apply known standards for determining scientific fact, and can require an actual showing of cause and effect before arbitrarily limiting use of legal and useful products.

» [You can view the complete list of the 75 pesticide ingredients here](#)





# PHMSA publishes ANPRM: Safety of gas transmission pipelines

BY VICKIE BUCHANAN

On August 25, 2011, the Pipeline and Hazardous Materials Safety Administration (PHMSA) published an Advance Notice of Proposed Rulemaking (ANPRM) in the *Federal Register* (76 Fed. Reg. 53086-53102) and is considering whether changes to pipeline security regulations (49 CFR parts 190-199) are prudent and necessary. While PHMSA is confident that integrity management requirements have raised the level of safety of gas transmission pipelines in high-consequence areas, certain recent events such as the explosion in San Bruno, California, in September 2010, and inspections of IM programs have revealed a potential need to improve and clarify some IM requirements. In the ANPRM, PHMSA seeks public comment on 14 topics within two broad categories:

Should IM requirements be revised and strengthened to bring more pipeline segments in HCAs? Topics falling within the purview of this question include:

- Modifying the definition of HCAs
- Revising the requirements for collecting, validating and integrating pipeline data
- Making requirements related to the nature and application of risk models more prescriptive
- Strengthening requirements for applying knowledge gained through the IM program
- Strengthening requirements on the selection and use of assessment methods

Should non-IM requirements be strengthened or expanded to address other issues associated with pipeline system integrity? Topics falling within the purview of this question include:

- Valve spacing and the need for remotely- or automatically-controlled valves
- Corrosion control
- Pipe with longitudinal weld seams with systemic integrity issues
- Establishing requirements applicable to underground gas storage
- Management of Change
- Quality Management Systems
- Exemptions applicable to facilities installed prior to the regulations
- Gathering lines

PHMSA discusses each of these topics in detail in the ANPRM and then provides several questions under each topic that it would like to see responses to during the public comment period. Comments on the ANPRM must be submitted by December 2, 2011.

» [The ANPRM is available here via the PHMSA website](#)

# NRC's framework for the EPA's incorporation of sustainability in principles and decision-making

BY MARY ELLEN TERNES

On August 2, 2011, the National Research Council issued a report providing a framework for incorporating sustainability into the U.S. Environmental Protection Agency's principles and decision-making. The EPA requested the framework to assist it in better assessing the social, environmental and economic impacts from its decision-making process.

The NRC committee responsible for developing the framework used the 1969 National Environmental Policy Act's congressional declaration of national environment policy: "to create and maintain conditions under which humans and nature can exist in productive harmony, that permit fulfilling the social, economic and other requirements of present and future generations." The NRC's recommended approach goes beyond health and environmental risk associated with pollution to address other issues threatening future generations, including depletion of natural resources, climate change and loss of biodiversity.

NRC recommends the EPA utilize the "three pillars" approach considering environmental, social and economic impacts, including "health" in the "social pillar." NRC also recommends that the EPA articulate its vision for sustainability, develop its own sustainability principles to support its decision-making process, and consider development of an active program implementing sustainability assessment and management for specific activities and decisions.

» [Read about all of NRC's recommendations](#)



# Document destruction— Spoliation or legitimate process?

BY CHRIS PAUL

A federal appeals court found memory chip designer Rambus was wrong to shred hundreds of boxes of documents that were potentially relevant in two patent infringement lawsuits it filed. The court said it was clear Rambus had destroyed documents, but it was not clear the action was so serious that a lower court should have dismissed its suit. It sent the dismissal back to the U.S. District Court in Delaware, adding that the lower court might still decide that the records destruction was serious enough for Rambus to lose the case it brought against Micron Technology, the top U.S. maker of memory chips for computers. In another ruling, the appeals court found Rambus destroyed documents related to a patent suit it had successfully brought against Korea's Hynix Semiconductor. It asked a California court in that case to review its ruling in view of the document destruction.

The appeals court said "it was not clear error" for the Delaware court to conclude that the Rambus document policy was aimed at boosting its litigation strategy by limiting the fact-finding efforts of opponents. Micron had won in the Delaware court when a judge invalidated 12 Rambus patents, citing document destruction by Rambus as the reason. But Rambus won against Hynix in a separate trial when a federal judge in California found that nine Rambus patents were valid and had been infringed.

According to court records, Rambus used at least two "shred days" as part of a strategy to get ready for litigation over its patents. Despite a stated goal of getting rid of all documents once they were old enough under document management policies, employees were instructed to look for helpful documents to keep, i.e., documents that would help prove Rambus had intellectual property rights. Rambus employees were told there would be "pizza, beer, champagne, etc." at a 1998 shred day. "It is undisputed that Rambus destroyed between 9,000 and 18,000 pounds of documents in 300 boxes," the appeals court said in its majority opinion in the Micron case.

Rambus designs memory chips and licenses technology used in them to other chipmakers. Much of Rambus' income has come from patent litigation against companies it accuses of not paying for its technology. Shortly following the ruling the stock price dropped sharply. Shareholder suits against Rambus management will likely follow.

# SIDEBAR

## Greenhouse gas emissions from aircraft

A federal court has ordered the Environmental Protection Agency to determine whether greenhouse gas emissions from aircraft pose a threat to public health and the environment. Environmental groups sued the EPA in 2010, alleging the agency had failed to respond to their petitions asking it to make an endangerment finding for greenhouse gas emissions from aircraft, marine vessels and other non-road engines within the 90 day-period required by the Clean Air Act. Judge Henry H. Kennedy Jr. said the agency must undertake the endangerment finding for greenhouse gas emissions from aircraft, and granted EPA's request to dismiss the claims related to marine vessels and other non-road engines. See, *Center for Geological Diversity v. EPA, D.D.C.*, No. 10-00985, 7/5/11.

» [More information about \*Center for Geological Diversity v. EPA, D.D.C.\*](#)

## Proposed revisions to definition of solid waste, again

On July 22, 2011, EPA proposed additional revisions to the 2008 revision to the definition of solid waste. 76 *Fed. Reg.* 44094 (to be codified at 40 CFR Parts 260, 261 and 266). With this revision, EPA intends to introduce new safeguards for recycling hazardous materials, an activity encouraged by the 2008 redefinition, in addition to additional provisions encouraging recycling.

The proposed new safeguards include: (1) replacing the transfer-based exclusion with alternate hazardous recyclable materials standard; (2) adding a regulatory definition of "contained" and additional recordkeeping requirements for generator-controlled exclusion; (3) making all four legitimacy factors (materials must provide a useful contribution to the recycling process or to a product or intermediate; recycling must produce a valuable product or intermediate; materials must be managed as valuable commodities; products of recycling must contain levels of hazardous constituents comparable to those in analogous products) mandatory and requiring documentation; (4) applying the regulatory definition of legitimate recycling to all hazardous waste and hazardous secondary material recycling; and (5) possible application of the contained standard, notification and recordkeeping for speculative accumulation to existing recycling exclusions.

The proposed additional provisions encouraging recycling include: (1) alternative standard allows generators longer accumulation time (one year) if there is a reclamation plan in place; (2) retaining the generator-controlled exclusion for recycling performed on-site, at the same company, or under certain tolling agreements; (3) providing a petition process for instances where legitimacy factors are not met, but recycling is still legitimate; and (4) EPA has requested comment on a targeted exclusion for higher-value hazardous solvents which are remanufactured into commercial-grade products.

» [Review the proposed rule and EPA guidance materials](#)

# EPA green lights E15 despite resistance from industry groups

BY JARED BURDEN

The Environmental Protection Agency (EPA) has partially waived Clean Air Act restrictions on gasoline containing 15% ethanol, so-called E15. This clears the way for gasoline producers to begin blending the new product for passenger vehicles made on or after 2011. These new standards were widely supported by ethanol producers, but many industry and even environmental groups have derided the decision.

Ethanol fuel blends have been a contentious topic for several years. Spurred on by corn subsidies and an ethanol blender's tax credit, ethanol blends have been a popular cost-saving product for refineries and gas stations alike. Some experts have suggested that E15, capitalizing on the competitive advantages of ethanol, may soon become the most prevalent fuel in the country for light vehicles. According to many experts, this could have profound implications for many economic and social facets of everyday life, including used vehicles, small engines, underground storage tanks and even community health.

On July 7 of this year, a subcommittee of the House Science, Space and Technology Committee held a hearing allowing experts from various groups affected by the new regulation to voice their opinions. Among the participants were representatives of the oil and gas industry, marine engine manufacturers, alternative fuel nonprofits and the poultry industry. Most were not supportive of the change, although different reasons were given.

Robert Greco III, representing the American Petroleum Institute, was first to remark. His testimony focused on current tests and research indicating that E15 could have detrimental effects on a wide range of engines and mechanical equipment. For vehicles, he pointed out test results illustrating E15 could cause engine failure, erratic or false fuel gauge readings, as well as increased emissions. In particular, the high ethanol blend appears to affect seals and gaskets the most, implicating everything from small engines to common equipment for fuel pumps and safety devices. Several experts concur with this opinion. Jeff Wasil, the emissions certification engineer for BRP Evinrude Marine Engine, testified that "if E15 becomes the standard gasoline in the marketplace, millions of consumers will run the risk of having their vehicles, boats, lawnmowers and other gasoline-powered devices damaged because they will not have the option of fueling them properly." According to many at the hearing, the increased prevalence of E15 will lead to the destruction or decreased performance of many older vehicles as well as small and marine engines, causing significant losses to consumers.

Many experts also agree that widespread use of E15 will have an environmental impact as well. Wasil pointed out that engines burning E15 run hotter than those burning conventional fuel and therefore produce higher emissions. Heather White, chief of staff and general counsel to the Environmental Working Group, a nonprofit research organization, has pointed out that E15 may lead to an increase in the release of dangerous contaminants into

the air. In particular, she claims that "[t]he more a vehicle burns higher ethanol blends, the more it emits the toxic pollutants acetaldehyde, formaldehyde and nitrous oxide."

The EPA claims that it has made its decision to waive the Clean Air Act's requirements for E15 according to the best science. Moreover, it has mandated that any service station offering E15 to clearly label pumps so that consumers can make an informed choice. However, if, as some predict, E15 becomes the most prevalent fuel on the market, consumers may have little choice.

## Pipeline safety reauthorization

BY CHRIS PAUL

A bill (S. 275) to reauthorize pipeline safety programs cleared the Senate Commerce, Science and Transportation Committee on May 5, 2011. The bill would:

- Include stiffer penalties for violators
- Include fines for obstructing pipeline investigations
- Include fees for reviewing pipeline designs
- Eliminate exemptions and require all local and state government agencies and their contractors to notify "One-Call" notification centers before digging
- Require installation of automatic or remote-controlled shutoff valves on new transmission pipelines
- Require time limits for accident and leak notification by pipeline operators to local and state government officials and emergency responders
- Require the Secretary of Transportation to evaluate whether integrity management system requirements should be expanded beyond currently defined high-consequence areas
- Provide summary of pipeline emergency response, inspections, and standards available to the public on PHMSA's website
- Allow PHMSA to recover costs for oversight of major pipeline design and construction projects

Unlike the original version of the bill, the manager's substitute would allow PHMSA to maintain a status indication of each pipeline company's emergency response plan, a description of the plan's requirements, and a detailed summary of each plan, excluding information about the location and amount of worst-case discharge scenarios as well as proprietary information. The original bill would have required posting of the complete emergency plan, which drew objections from representatives of the pipeline industry who said security would be compromised.

In response to the pipeline explosion in San Bruno, California, the bill will also require all intrastate and interstate pipeline operators to verify records for all gas transmission lines in Class 3 and 4 areas, and Class 1 and 2 areas in high-consequence areas to establish maximum allowable operating pressures. Why this is necessary is unclear, as PHMSA issued an advisory in January requiring all pipeline operators to do detailed analyses to verify that all information about pipelines and pipeline structures was accurate and up-to-date.



# Identifying protected waters

BY HEIDI SLINKARD BRASHER

The U.S. Environmental Protection Agency (EPA) and the U.S. Army Corps of Engineers are in the final stages of updating their Draft Guidance on Identifying Waters Protected by the Clean Water Act (“Guidance”). While the period for public comment was extended from July 1 to July 31, the groups do not anticipate the extension will slow their efforts. Instead, they plan to take into consideration continued stakeholder and public comment while finalizing the update.

The Guidance is not new. Previous guidance on the scope of “waters of the U.S.” was issued in 2003 and 2008 by field staff for use by field staff. The intent was to identify which waters fall within the definition of “waters of the United States” and, therefore, the protection of the Clean Water Act. While not a legal document and not binding on the government, the Guidance provides a framework for application of the law and valuable insight regarding agency staff views of the scope of the protection.

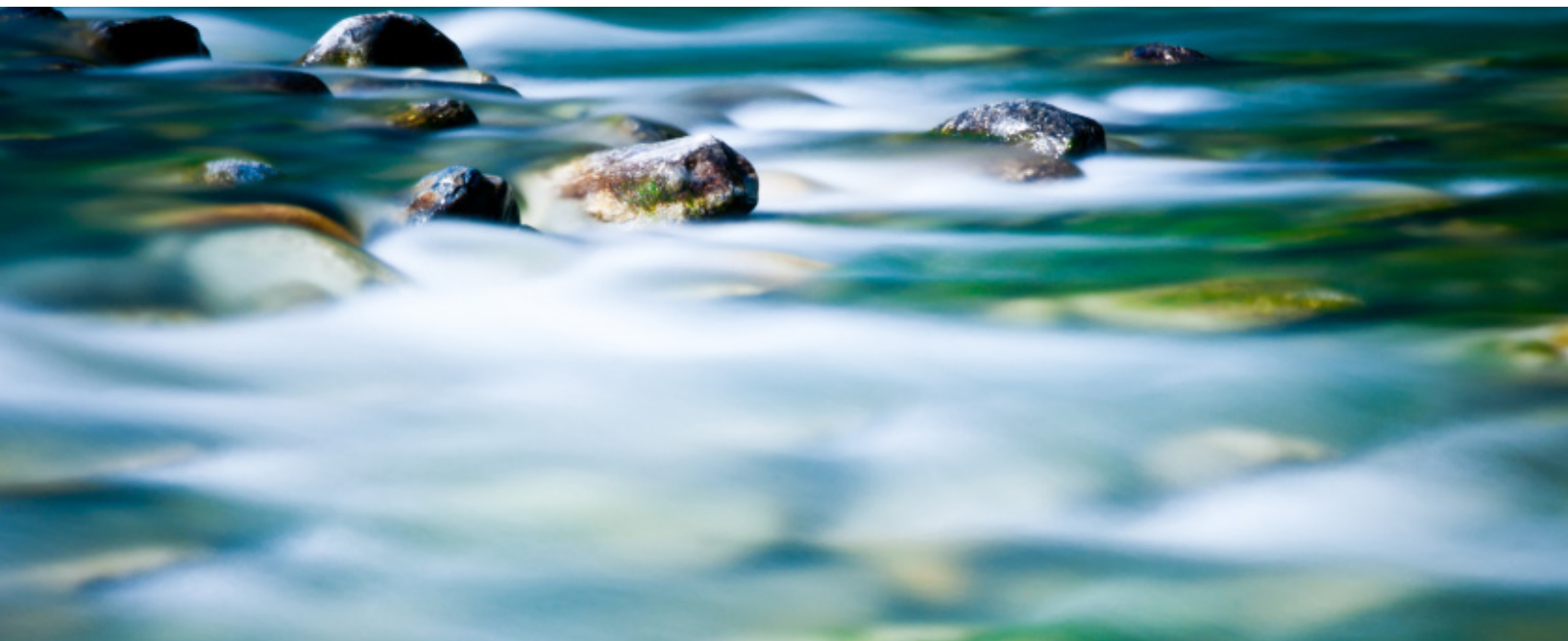
The desire to update the 2008 Guidance document arose following the U.S. Supreme Court decisions in *Rapanos v. United States* and *Solid Waste Agency of Northern Cook County v. U.S. Army Corps* (“SWANCC”). Courts and agencies around the country attempted to determine how “waters of the U.S.” may have changed as a result of these decisions. The fact that the justices of the U.S. Supreme Court could not even agree on how to categorize water in the *Rapanos* decision furthered the desire to update the Guidance document to reflect the agency’s position on the identification of protected waters. Again, while the Guidance contains much information and insight, it does not carry the force of law and it is not required that the government or each individual field officer follow the document’s provisions. Nonetheless, it is a valuable tool; not only is it valuable to those within the agencies who are attempting to carry out the law, but it is also valuable for those attempting to comply with government regulation.

The draft Guidance contains several sections:

- Traditional navigable waters classification
- Interstate waters classification
- “Significant nexus” standard, as described by Justice Kennedy in the *Rapanos* decision
- Tributary jurisdictional issues
- “Adjacent wetlands” jurisdiction
- “Other waters” classification
- Examples of waters generally not considered “waters of the U.S.”
- Necessary documentation to support decisions regarding whether waters are protected

The agency’s interpretation of the statutes, regulations implementing the statutes, and case law is valuable to those who interact with the agency on water issues. Within each of the sections of the Guidance is valuable legal and scientific information regarding the relevant areas of regulation and considerations the agency will make in determining whether particular water is protected, within the bounds set by the U.S. Supreme Court. Additionally, the Guidance contains an appendix which contains the legal and scientific bases for the sections within the document.

While the time to comment on the draft Guidance document has passed, those with an interest in water issues should keep an eye out for the final product, which will supersede the 2008 Guidance upon finalization.





# EPA 2011-2013 enforcement initiatives

BY MARY ELLEN TERNES

Heads up! The Environmental Protection Agency is actively pursuing enforcement consistent with its 2011-2013 enforcement initiatives:

1. Reducing discharges of raw sewage and contaminated stormwater into surface waters
2. Preventing animal waste from contaminating surface and ground waters
3. Cutting toxic air pollution that affects communities' health
4. Reducing air pollution from largest sources, especially coal-fired utilities, cement, glass and acid sectors
5. Reducing pollution from mineral processing operations
6. Improving environmental compliance within energy extraction sector

With its enforcement initiatives, the EPA conveys its intent to focus enforcement efforts with respect to particular pollutants, media and industry sectors. Regarding sewage and stormwater, the EPA is focusing on operation of publicly owned treatment works and combined sewer overflows (CSOs), sanitary sewer overflows (SSOs) and municipal separate storm sewer systems (MS4s), and seeks increased use of green infrastructure and other innovative approaches to reducing these discharges.

Regarding toxic emissions, the EPA is focusing on excess emissions caused by facilities' failure to comply with the EPA's leak detection and repair requirements and restrictions on flaring, and to address excess emissions during start-up, shutdown and malfunction events, focusing on local communities that are disproportionately impacted by pollution from multiple sources.

With respect to the large air pollution emission sources,

despite the EPA's previous enforcement focus on large refineries, coal-fired power plants, cement manufacturing facilities, sulfuric and nitric acid manufacturing facilities and glass manufacturing facilities, the EPA says there's more work to do, so those of us working in these industries, the pressure is definitely not off.

With respect to mineral processing operations, the EPA wants to reduce pollution from an industry which the EPA says generates more toxic and hazardous waste than any other industrial sector based on the EPA's Toxic Release Inventory.

Finally, within the energy extraction sector, the EPA is focusing on air, surface water and ground water impacts from new energy extraction techniques and accelerated development.

This means more EPA oversight of regulated activities, including inspections, cease and desist orders, and requests for industry information to inform the EPA in its implementation of its enforcement initiatives. Industry should anticipate seeing more EPA Requests for Information pursuant to the Clean Air Act (CAA) Section 114, Clean Water Act (CWA) Section 308, Resource Conservation and Recovery Act (RCRA), Section 3007, or the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA or "Superfund") Section 104. Pursuant to the CAA and CWA statutory sections, the EPA is authorized to require those subject to these statutes to furnish information, conduct monitoring, provide entry to the administrator or authorized representatives, and make reports as may be necessary to carry out the objectives of the statutes. Pursuant to the RCRA statutory section, the EPA is authorized to request information regarding handling of hazardous wastes, and pursuant to the CERCLA statutory section, the EPA is authorized to request information regarding actual and/or threatened "releases" of hazardous substances, pollutants or contaminants as defined by CERCLA. Failures to respond or inadequate responses are subject to enforcement, and the EPA can use the information provided in responses for administrative, civil or criminal enforcement actions.

» [Review the EPA's enforcement initiatives](#)

# OSHA ramps up regulatory enforcement, use of general duty clause citations

BY CHRIS PAUL

The U.S. Department of Labor announced its semi-annual regulatory agenda on July 7, 2011, and numerous items involve the Occupational Safety and Health Administration.

Jordan Barab, deputy assistant secretary of labor for OSHA, recently stated that OSHA's regulatory agenda includes extension of enforcement beyond traditionally targeted manufacturing and construction sectors. Barab said that OSHA is issuing more willful citations, which carry maximum fines of \$70,000 per penalty, ostensibly in an effort to achieve a greater deterrent effect. Barab also defended OSHA's increased use of general duty clause citations as well as the issuance of negative press releases by the agency when it issues citations. He said that OSHA will continue to use these statutory general duty clause "catch all" citations to address alleged workplace hazards not specified in regulations, including those affecting employees due to summer heat.

Some of the more interesting and significant are as follows:

1. **Combustible dust (pre-rule)** – OSHA is planning to develop a combustible dust standard for general industry.
2. **Infectious diseases (pre-rule)** – OSHA is planning to issue an infectious disease standard wherein employers must establish a comprehensive infection control program and institute measures to protect employees in healthcare and other "high risk environments" from infectious disease exposures.
3. **Preventing backing injuries and fatalities (pre-rule)** – OSHA is seeking comment on technological and non-technological solutions to prevent backover incidents. Emerging technologies in the field of operations include devices, such as cameras, radar and ultrasonic devices to help monitor the presence of workers on foot in blind areas, and monitoring technology, such as tag-based warning systems that use radio frequency (RFID) on equipment to detect electronic tags worn by workers. The use of spotters and internal traffic control plans can also make backing operations safer. While backing incidents can prove fatal, workers can suffer severe, non-fatal injuries as well. A review of OSHA's IMIS database found that backing incidents can result in serious injury to the back and pelvis, fractured bones, concussion, amputation and other injuries. OSHA believes that it is necessary to request information from those involved in backing operations and the general public to better understand how to prevent backing incidents.
4. **Injury and illness prevention program (I2P2) (pre-rule)** – Under I2P2, employers would be required to inspect, identify and correct hazards in their workplaces.

5. **Occupational exposure to crystalline silica (proposed)** – A notice of a proposed rule to create stricter exposure limits for silica will soon be published according to the regulatory agenda.
6. **Walking working surfaces and personal fall protection systems (proposed)** – Slips, trips and falls are among the leading causes of work-related injuries and fatalities. OSHA has been working to update these rules to reflect current technology available to reduce these risks.
7. **Recording and reporting musculoskeletal disorders ("MSD") (proposed)** – Under the proposal, employers would have to check an additional box for injuries or illnesses related to MSD on their OSHA 300 logs.
8. **Modernizing OSHA's recording and reporting requirements (proposed)** – OSHA proposes issuing a notice of proposed rulemaking to change its reporting system to both update and modernize the "efficient and timely collection of data to improve the accuracy and availability of relevant records and statistics." In turn, OSHA would be expanding its authority under the 29 CFR 1904 recordkeeping regulations to collect and make injury and illness information available under the regulations.
9. **Electrical power transmission and distribution; electrical protective equipment (final)** – This will, among other things, update the construction industry standard for the safety of workers during the construction of electric power transmission and distribution lines. OSHA will also revise various general industry requirements affecting electric transmission and distribution work, including updating the provisions for providing electrical PPE to appropriate workers. This rule is scheduled to be issued in September 2011.
10. **Hazard communication (final)** – OSHA has pushed back the date for issuing the final rule on "harmonizing" the hazard communication standard in 29 CFR 1910.1200 with the United Nation's Globally Harmonized System for Classification in Labeling of Chemicals ("GHS"). The new rule, scheduled to also be issued in September 2011, is supposed to deal with problems associated with multiple sets of requirements for labels and safety data sheets for U.S. manufacturers, distributors and others involved in international trade. The GHS is designed to allow for one global system by using standardized pictograms and hazard statements.

**Pre-Rule** - OSHA soliciting public comment on whether or not to initiate rulemaking

**Proposed Rule** – OSHA proposes to add to or change existing regulations through solicitation of public comments on the proposal

**Final Rule** – OSHA responds to public comments on a proposed rule and may make revisions before publishing it in the Federal Register



# RCRA notice requirements

BY CHRIS PAUL

If a notice pursuant to the Resource Conservation and Recovery Act asserts that there is an ongoing release of pollutants, then it is unnecessary for a plaintiff to specify the date on which the violations occurred. That was the court's finding in *KFD Enterprises Inc. v. City of Eureka, N.D. Cal.*, No. 08-4571, 4/28/11. This federal court also found that the plaintiff's notice sufficiently alleged an "imminent and substantial endangerment" by asserting that the contamination involved was migrating toward a residential community's drinking water wells.

KFD Enterprises Inc. owns and operates a dry cleaner in Eureka, California. KFD filed suit against the city of Eureka under RCRA, the Comprehensive Environmental Response, Compensation, and Liability Act, and several theories of tort liability. KFD alleged the city, through acts and omissions as the owner-operator of the sewer system, caused or allowed releases of hazardous substances from the sewer system, which resulted in contaminated soil and groundwater.

The city moved to dismiss the RCRA count, arguing that KFD's notice did not contain sufficient facts to meet RCRA's notice requirements. The city said "a broadly worded letter alleging violations over a 20-year period is not sufficient to comply with the pre-suit notice requirements," and that because KFD did not specify the time period in which Eureka violated RCRA, it could not figure out when its sewer started leaking, for how long it had leaked, and what chemicals and in what concentrations.

The court found that "Although the notice does not specify a particular date or dates on which such leakage occurred, such specification is not required where, as here, the notice asserts the public entity's contribution to the pollution is essentially ongoing," and that KFD's assertion that pollution is "migrat[ing] beneath the downgradient residential community, toward water supply wells, surface water and nearby schools" to be sufficient notice of "imminent and substantial endangerment."

# New EPA air regulations proposed for oil and natural gas industry

BY MARY ELLEN TERNES

On July 28, 2011, the EPA proposed new regulations governing the oil and natural gas production industry sector (to be codified at 40 CFR Parts 60 and 63). With this action, the EPA proposes the following four air regulations for the oil and natural gas industry:

- A new source performance standard (NSPS) for volatile organic compounds (VOCs)
- A NSPS for sulfur dioxide
- An air toxics NESHAP (National Emission Standard for Hazardous Air Pollutants) for oil and natural gas production
- A NESHAP for natural gas transmission and storage.

The EPA is also proposing to add to the source category list any oil and gas operation not covered by the current listing and not previously subject to federal regulation.

The new NSPS source category listing includes well completions at new hydraulically fractured natural gas wells and at existing wells that are fractured or "re-fractured." The EPA is proposing to minimize VOC emissions from well completions by requiring "green completions," also called "reduced emissions completions," where special equipment separates gas and liquid hydrocarbons from the flowback that comes from the well as it is being prepared for production, currently utilized through the EPA's Natural Gas STAR program (not including exploratory or delineation wells). Also, the EPA proposes to require dry seal systems for centrifugal compressors and VOC emission limits for pneumatic controllers. The EPA proposes VOC emission reductions for condensate and crude oil storage tanks with a throughput of at least one barrel per day of condensate or 20 barrels per day of crude oil (equivalent to about 6 tons of VOC emissions per year) must reduce VOC emissions by 95 percent and new NSPS leak detection and repair requirements for natural gas processing plants.

Regarding air toxics, for oil and natural gas production, the EPA is proposing to remove the one ton per year benzene compliance option for large glycol dehydrators and require these units to reduce air toxics their emissions by 95 percent. In addition, the EPA is proposing to: (1) establish emission limits for small glycol dehydrators at major sources; (2) require all crude oil and condensate tanks at major sources to control their air toxics by at least 95 percent; and (3) tighten the definition of a leak for valves at natural gas processing plants. For natural gas transmission and storage, the EPA proposes to remove the one ton per year benzene compliance alternative for large glycol dehydrators and establish emission limits for small glycol dehydrators at major sources.

» [Review these new proposed rules in detail](#)



# Recent developments under the Clean Water Act: Proposed rule modifies cooling-water intake unit requirements

BY JESSICA JOHN BOWMAN

The Environmental Protection Agency has recently proposed a new rule under section 316(b) of the Clean Water Act. Section 316 governs the design, construction and use of cooling water intake structures, requiring that the “location, design, construction, and capacity” of such structures “reflect the best technology available for minimizing adverse environmental impact.” The proposed rule is designed to mitigate the impact of cooling water intake structures on fish and wildlife populations. In the ordinary course of operations, cooling water intake structures present a risk to fish, shellfish, and other wildlife; specifically, the cooling intake unit may impinge or entrain such organisms, causing fatalities and adversely affecting the ecological makeup of the body of water from which the water is drawn.

- The cooling water intake structure withdraws cooling water from the waters of the United States and at least 25 percent of the water withdrawn is used exclusively for cooling purposes.

As these conditions suggest, many power-production and manufacturing facilities will be subject to the new rule. A significant number of existing power-production and manufacturing facilities are point-source dischargers that draw more than 2 MGD through a cooling water intake structure. Of these, the EPA estimates that 93 percent of power-generating facilities will satisfy the 25 percent cooling-water-use requirement, as most power-production facilities use water exclusively for cooling purposes. By contrast, the EPA projects that only 68 percent of manufacturing facilities meeting the aforementioned requirements will be subject to the rule, as a larger number of manufacturing facilities draw water for purposes other than cooling.

## New Reporting Requirements under the Proposed Rule

Under the proposed rule, those facilities with a design impact flow (“DIF”) of more than 2 MGD must submit additional information not currently required under NPDES permitting regulations, including proposed impingement mortality reduction plans, relevant biological survival studies, and the operational status of each water-intake unit. Facilities with an actual intake flow (“AIF”) of more than 125 MGD face additional reporting requirements, as discussed below.

## New Impingement- and Entrapment-Control Requirements under the Proposed Rule

The proposed rule implements new impingement and entrapment control standards for all existing facilities that meet the aforementioned eligibility criteria. Although the impingement-control requirements will apply uniformly to all facilities, the EPA has elected to vary the approach to entrapment-mortality controls on a facility-by-facility basis.

## Impingement-Mortality Controls

With respect to impingement-mortality controls, all existing facilities subject to the rule must meet either a design standard or a performance standard for impingement mortality. In other words, the facility must show that the number of impingement-related deaths falls within a prescribed upper limit. The facility may accomplish this by utilizing the best-available technology recognized by the EPA: travelling screens

incorporating fish buckets, a low-pressure spray wash, and a dedicated fish return line. The EPA does not specify a particular screen configuration, mesh size or screen operations that must be used in the travelling screens; so long as a facility can demonstrate that its screen configuration can satisfy the impingement mortality limits, the facility may choose among several available options for these and other elements.

The EPA recognizes that a reduction in through-screen intake velocity to 0.5 feet per second may be a more effective means of



## Facilities Subject to the Proposed Rule

The new rule will apply to existing facilities if:

- The facility is a point source that uses or proposes to use cooling water from one or more intake structures (whether it does so directly or through an independent supplier that provides cooling water to the facility pursuant to a contract or other arrangement);
- The total design intake flow of the cooling water intake structure or structures is greater than 2 MGD; and

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reducing impingement mortality than the use of the travelling screens, but acknowledges that this option is not feasible for all existing facilities. Accordingly, facilities may elect to comply with the impingement-mortality standards by demonstrating that the through-screen design velocity or the actual average intake velocity does not exceed 0.5 feet per second, rather than utilizing travelling screen technology. However, facilities that elect to use this alternative may be required to employ certain protective measures, such as a fish handling and return system, or otherwise demonstrate that species of concern are adequately protected by the reduced intake velocity.

### **Entrainment Controls**

Under the proposed rule, entrainment-mortality controls will be established on a case-by-case basis by the permitting authority. For all facilities with an intake of greater than 2 MGD DIF, a site-specific analysis of the effectiveness and feasibility of a number of candidate entrainment-control technologies will be conducted to determine whether it is appropriate to require additional controls. In some cases, it may be found that no additional controls beyond the already-established impingement controls would be justified.

Facilities with a cooling-water intake of greater than 125 MGD AIF will be subject to additional entrainment requirements. Such facilities would be required to submit an entrainment characterization study to be used by the director in determining the technology that should be incorporated at the particular site. In conducting the study, the facility must prepare an entrainment mortality data collection plan, which must include, among other things, a description of entrainment monitoring methods, taxonomic identification, latent mortality identification, and quality assurance and control procedures for data sampling and data analysis. The data collection must be submitted to the director for review and comment, and must be peer-reviewed by individuals selected in consultation with the director. In addition to the data collection plan, the facility will be required to provide site-specific information concerning the feasibility and associated incremental cost of implementing certain entrainment-control technologies, the revenue-impact of such technologies and the means of mitigating any such impact, and a discussion of water-quality and non-water-quality benefits and burdens associated with the technology, including data concerning increases in energy consumption, thermal discharges, air emissions, water consumption, noise, and risk to human safety. The director will consider these and other factors when determining the best technology available for use at each particular facility.

### **Additional Requirements for New Units**

New cooling-water intake units at existing facilities will be subject to additional requirements similar to those required at new facilities. Specifically, new units will be required to reduce intake flow to a level commensurate with that of a closed-cycle cooling unit. This may be accomplished by either incorporating a closed-cycle unit into the new unit design. Alternatively, a facility may demonstrate compliance by establishing that the new unit is roughly equivalent to a closed-cycle unit, reducing entrainment mortality by 90 percent of the reductions that would be obtained using a closed-cycle cooling system.

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