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Sustainability

Patagonia Inc. and 12 other companies register to become California's first benefit corporations, a new class of companies required to create positive impacts as a whole. The new corporations are authorized under state legislation that took effect Jan. 1. **32**

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A federal appeals court will hear challenges to EPA's greenhouse gas regulatory program, as several states and industry groups seek to have the rules overturned. This is the first legal challenge since EPA began regulating GHGs. **22**

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EPA expects to finalize some major rules in 2012, including a final rule regulating coal ash. The agency still is working through close to a half-million comments received on the proposed rule. **26**

Water Quality Standards

Regulations to clarify which waters are subject to federal jurisdiction and curb stormwater runoff from post-construction and redevelopment sites will top the list of Clean Water Act issues in 2012. Other key issues include rules to reduce fish kills from cooling water intake structures. **30**

EPA Fails to Manage Nanomaterial Risk

The Environmental Protection Agency has insufficient information and procedures in place to manage effectively the human health and environmental risks of nanomaterials, according to a report by the agency's inspector general.

"Even if mandatory reporting rules are approved, the effectiveness of EPA's management of nanomaterials remains in question for a number of reasons," the report said. According to the report released Dec. 29, 2011, the pesticide and chemical offices "do not have a formal process to coordinate the dissemination and utilization of the potentially mandated information."

The report, *EPA Needs to Manage Nanomaterial Risks More Effectively*, evaluates actions the agency has taken or proposed taking under authority granted by the Toxic Substances Control Act and Federal Insecticide, Fungicide, and Rodenticide Act. The actions include a proposed data collection and significant new use TSCA regulation that the White House Office of Management and Budget has had under review for more than one year. Limitations in the agency's TSCA authority also might thwart the effectiveness of EPA's oversight, the inspector general said.

The report is available at <http://www.epa.gov/oig/reports/2012/20121229-12-P-0162.pdf>.

California, EPA Collaborate on Toxics

California and federal regulators Jan. 12 agreed to collaborate on efforts to eliminate the use and generation of toxic chemicals in making consumer products.

At a ceremony in San Leandro, Calif., the state Department of Toxic Substances Control and federal EPA signed a memorandum of understanding outlining a strategy for sharing information and processes to advance each agency's green chemistry program. By working together, the agencies will avoid duplication of effort, and the partnership will help promote consistent methodologies for evaluating alternative chemicals, the agencies said in announcing the agreement.

Joint efforts likely are to focus on evaluating safer alternatives to toxic chemicals, developing chemical information databases, and training and educational opportunities, according to the memorandum of understanding. Activities, however, would be subject to each agency's available funding and resources. DTSC is developing regulations to implement California's Green Chemistry Initiative (18 BECB 402, 12/26/11).

The memorandum of understanding between California and EPA is available at http://dtsc.ca.gov/PollutionPrevention/GreenChemistryInitiative/upload/GC_MOU_USEPA_DTSC.pdf?tw_p=tw.

Hazardous Emissions

A federal court vacates EPA’s decision to delay the effective date of revised air pollution standards for boilers and incinerators, saying the delay was unlawful. EPA in 2011 finalized the standards under a tight court-ordered deadline, but the agency immediately began a reconsideration process. 19

Hazmat Transport

The Pipeline and Hazardous Materials Safety Administration will extend the expiration date of all fireworks transportation approvals scheduled to expire in 2012. All fireworks explosive classification approvals, commonly known as EX numbers, scheduled to expire between Jan. 1 and Dec. 31, will expire two years from the date indicated in the approval, PHMSA says. 25

Water Quality Standards

An EPA final general permit for stormwater discharges from construction that does not include turbidity limits is up for review by the White House. At the same time, the agency is seeking more data to correct an error that resulted in a faulty turbidity limit established in the 2009 effluent limitation guidelines. 27

Toxic Substances

No Lead Level Safe In Blood, Advisers Say

A federal advisory committee Jan. 4 told the Centers for Disease Control and Prevention that no level of lead in children’s blood can be considered safe.

CDC’s Advisory Committee on Childhood Lead Poisoning Prevention said the agency officially should recognize that any concentration of lead in children’s blood may be harmful and all childhood exposure to lead should be prevented, Vikas Kapil, chief medical science officer for CDC’s National Center for Environmental Health and the Agency for Toxic Substances and Disease Registry, told Bloomberg BNA Jan. 5.

CDC estimates that approximately 250,000 U.S. children age 1 year to 5 years have blood lead levels greater than 10 micrograms per deciliter, the level at which CDC recommends public health actions be initiated. If the committee’s recommendations were adopted, there would be approximately 450,000 children with blood lead levels between 5 µg/dL and 10 µg/dL, according to a report, *Low Level Lead Exposure Harms Children: A Renewed Call for Primary Prevention*, which the committee adopted Jan. 4.

The committee recommended that CDC consider any child to have an elevated blood lead level if the concentration of lead in his or her blood exceeds the level of the 97.5th percentile of U.S. children—meaning 2.5 percent of children would be deemed to have elevated levels, Kapil said. The 97.5th percentile would be determined based on the blood levels CDC measures every two years in its Na-

tional Health and Nutrition Examination Survey, the advisory committee’s report said.

The report is available at <http://www.cdc.gov/nceh/lead/ACCLPP/activities.htm>.

Webinar

Panel Reviews Finance For Clean Energy in Buildings

Bloomberg BNA will host a webinar Jan. 26 titled “PACE for Industrial and Commercial Buildings-2012 Renaissance,” which will review the leading sources of capital, risk management, and insurance available through this new Property Assessed Clean Energy model; delineate how the markets (industrial facilities, commercial offices, hospitals, schools, and the military) are served; outline the financing techniques and structures related to senior mortgages, liens, and covenants; identify the leading state markets and trends in various states; describe what commercial/industrial customers are seeking in this marketplace; and provide details on the forward curve in community development, new markets, new financing sources, green buildings, and construction industry support.

This 90-minute webinar features Michael J. Zimmer, counsel with Thompson Hine LLP in Washington, D.C.; Martha Paschal, managing director of Malachite LLC in Bethesda, Md.; and Charles McGinnis, director of strategic projects for the Building Efficiency Division of Johnson Controls Inc. in Madison, Wis. More information is available at <http://www.bna.com/enviroment-health-safety-upcoming-t6006/>.

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Air Pollution Control

Update

Appeals Court Blocks EPA Cross-State Rule; Predecessor Program to Remain in Place

A federal appeals court temporarily blocked an Environmental Protection Agency rule targeting power plant emissions that cross state lines, leaving an existing air pollution reduction program in place for at least several months (*EME Homer City Generation L.P. v. EPA*, D.C. Cir., No. 11-1302, stay ordered 12/30/11).

The Cross-State Air Pollution Rule is expected to be on hold through at least the spring while the U.S. Court of Appeals for the District of Columbia Circuit weighs legal challenges to the rule. In the meantime, a predecessor program, the Clean Air Interstate Rule, will continue to regulate interstate transport of power plant emissions.

The cross-state rule was set to require emission reductions beginning Jan. 1, but the D.C. Circuit Dec. 30, 2011, granted the petitioners' motions to stay the rule. The court said it expects to hear the case by April.

EPA said it was disappointed the health benefits of the new rule will be delayed, but the agency Jan. 3 told Bloomberg BNA it has confidence in the rule's legality. The stay order "is not a decision on the merits of the rule, and EPA firmly believes that when the court does weigh the merits of the rule it will ultimately be upheld," the agency said.

Jeff Holmstead, a former EPA assistant administrator for air and radiation and now an attorney for

Bracewell & Giuliani LLP, Jan. 3 told Bloomberg BNA that the court rarely stays EPA rules. He called the Dec. 30, 2011, order "a pretty big deal."

"These three judges believed that there was a good likelihood that this rule was flawed in some way, and we know they wouldn't have issued the stay unless that were the case," Holmstead said.

The rule, which EPA released in August 2011, would require power plants in 28 states to reduce emissions of nitrogen oxides and sulfur dioxide that migrate across state lines. It is intended to help downwind areas meet national ambient air quality standards for ozone and fine particulate matter (76 Fed. Reg. 48,208, 8/8/11; 18 BECB 230, 7/25/11).

Court Vacates EPA Decision to Delay Air Standards for Boilers, Incinerators

A federal court Jan. 9 vacated EPA's decision to delay the effective date of revised air pollution standards for boilers and incinerators, saying the delay was unlawful (*Sierra Club v. Jackson*, D.D.C., No. 11-1278, 1/9/12).

EPA in 2011 finalized the standards under a tight court-ordered deadline, but the agency immediately began a reconsideration process. EPA delayed the rules' May 20, 2011, effective date while the reconsideration was proceeding, but the U.S. District Court for the District of Columbia said the agency did not justify the delay under the standard for a stay of an agency action by a court.

In the opinion, Judge Paul L. Friedman acknowledged that "vacating the Delay Notice likely will have an effect on industry facilities throughout the country: they will finally, more than 12 years after a clear

congressional mandate, have to comply with overdue Clean Air Act emission standards."

Existing sources will have until March 2014 to comply with the rules, an industry source told Bloomberg BNA Jan. 10. The court's decision means new sources will have to comply immediately, although it was unclear if any such boilers exist, the source said.

James Pew, an Earthjustice attorney representing the Sierra Club, in a statement to Bloomberg BNA Jan. 10, described the court's decision as rejecting EPA's "attempt to suspend health protections against the toxic pollution from industrial boilers."

On March 21, 2011, EPA published final rules setting national emission standards for hazardous air pollutants for area source and major source boilers (76 Fed. Reg. 15,554 and 76 Fed. Reg. 15,608, respectively). The

agency also finalized new source performance standards for sewage sludge incinerators and solid waste incinerators (76 Fed. Reg. 15,372 and 76 Fed. Reg. 15,704, respectively).

The agency had been under a court-ordered deadline to finalize the rules, and after promulgating the final regulations, EPA immediately announced its intent to reconsider portions of the standards for area source boilers, major source boilers, and solid waste incinerators (76 Fed. Reg. 15,266, 3/21/11).

Then in May 2011, shortly before the rules were to go into effect, EPA published a notice in the *Federal Register*, saying it would delay the effective date for the major source boiler and solid waste incinerator standards until the agency completed its reconsideration process or until legal challenges are resolved (76 Fed. Reg. 28,662, 5/18/11).

Air Pollution Control

Update

Air Toxics

EPA Agrees to Revise Reciprocating Engines Rule

EPA has agreed to revise emission standards for a common type of stationary engine to settle a court challenge to a 2010 rule that plaintiffs said was too strict for emergency operations, according to a notice published Jan. 4 (77 Fed. Reg. 282).

According to the notice, the proposed settlement agreement would revise the national emission standards for hazardous air pollutants for reciprocating internal combustion engines.

EnerNOC and three fellow petitioners filed a pair of lawsuits Oct. 19, 2010, in the U.S. Court of Appeals for the District of Columbia Circuit challenging the NESHAP (*EnerNOC Inc. v. EPA*, D.C. Cir., No. 10-1336, 10/19/10).

The 2010 NESHAP drew a number of lawsuits, not just the pair from the EnerNOC group. EPA's notice did not mention the other lawsuits.

Under the settlement, EPA agreed that by April 20 it will propose revisions to the NESHAP to allow for as much as 60 hours per year of operation of the engines in emergency conditions. EPA also agreed to revise a new source performance standard for stationary internal combustion engines for the sake of consistency with the revised NESHAP.

EPA also said its administrator "will sign a final action on this proposal" by Dec. 14.

The agency said if the final form of the new rule is substantially the same as stipulated in the settlement agreement, EnerNOC and its fellow petitioners promptly will file a stipulation of dismissal of the lawsuits. The other petitioners are EnergyConnect Inc., CPower Inc., and Innovative Power LLC.

Comments on the proposed agreement referencing Docket ID. No. EPA-HQ-OGC-2011-1030 are due by Feb. 3 and may be submitted at <http://www.regulations.gov>.

Emissions Trading

Forestry Projects Would Lead Offsets for Cap-and-Trade

Forest management and planting projects likely are to make up the largest segment of domestic carbon offsets under any future U.S. cap-and-trade program for greenhouse gas emissions, according to a report published by the Electric Power Research Institute.

However, forestry projects face challenges, such as insufficient land and high project costs, according to *Case Studies of Greenhouse Gas Emissions Offset Projects Implemented in the United Nations Clean Development Mechanism: Learning by Doing and Implications for a Future United States Offsets Program*.

Other carbon offset projects, such as renewable energy and landfill-to-gas operations, may be banned or are not feasible in the United States, the report said.

The report, published Dec. 21, 2011, looked at six types of projects undertaken through the United Nations' Clean Development Mechanism, the world's largest offset program. CDM allows wealthy nations to earn credits toward their emission reduction targets under the Kyoto Protocol if they invest in projects that save or reduce greenhouse gas emissions in developing nations.

The report looked at afforestation and reforestation, agricultural methane destruction, hydrofluorocarbon-23 destruction, landfill gas, renewable energy, and waste heat recovery projects.

Under any future U.S. cap-and-trade program, electric utilities and other companies could need to purchase offsets to make up for exceeding their emission allowances.

If U.S. policymakers opted for permanent credits, forest carbon sequestration projects could be a popular offset, the report said. However, forestry projects potentially are riskier than other types of projects because they can experience unintentional reversals, according to the report.

Climate Change

Determinations on Greenhouse Gas Data Reproposed by EPA

EPA Jan. 10 issued a proposed rule outlining the type of information that would be considered confidential when submitted to the agency by six industries under a mandatory reporting program for greenhouse gas emissions (77 Fed. Reg. 1434).

The proposal covers electrical equipment manufacturing, electricity transmission, fluorinated gas production, geological sequestration of carbon dioxide, import and export of fluorinated greenhouse gases, and injection of carbon dioxide.

The proposal on confidentiality determinations is a new version of a proposed rule issued in July 2010 that covered those six industries and dozens of others. In response to comments on that proposal, the agency excluded the six industries when it issued a final rule in May 2011 (76 Fed. Reg. 30,782, 5/26/11; 18 BECB 180, 6/13/11).

The new proposal would require the six industries to disclose their calculation and test methods, emissions, facility and unit identification information, and some unit and process characteristics.

However, customer, supplier, and vendor information; emissions factors; production and throughput data; and raw materials consumed all would be treated as confidential.

In the new proposal, EPA said it was clear "there were significant changes to the data" required under the mandatory greenhouse gas reporting rule since the initial proposed rule in 2010.

"There were changes in the types of data to be submitted, and new data elements were added," EPA said. The changes also "affected many of the data reporting categories and data elements."

Comments on the proposed rule referencing Docket ID. No. EPA-HQ-OAR-2011-0028 are due by March 12 and may be submitted at <http://www.regulations.gov>.

Climate Change

California Appeals District Court Decision Blocking Low-Carbon Fuel Standard

The California Air Resources Board Jan. 5 filed an appeal to overturn a federal district court decision temporarily blocking the state from implementing its low-carbon fuel standard (*Rocky Mountain Farmers Union v. Goldstene*, 9th Cir., No. 09-cv-02234, 1/5/12).

The appeal, filed in the U.S. Court of Appeals for the Ninth Circuit, seeks to overturn a preliminary injunction granted by the U.S. District Court for the Eastern District of California that found the low-carbon fuel standard violated the commerce clause of the U.S. Constitution.

District Court Judge Lawrence J. O'Neill issued the preliminary injunction Dec. 29, 2011, temporarily blocking California's fuel standard because it "impermissibly discriminates against out-of-state corn ethanol and impermissibly regulates extraterritorially in violation of the dormant commerce clause" (*Rocky Mountain Farmers Union v. Goldstene*, E.D. Cal., No. 09-cv-2234, 12/29/11).

The dormant commerce clause is inferred from Article 1, Section 8 of the Constitution, which grants Congress the sole authority to regulate commerce among the states, thereby forbidding individual state action that unduly regulates commerce.

Petroleum and ethanol industry groups had sued California in the district court to block the standard, which established a policy to account for lifecycle greenhouse gas emissions from all vehicle fuels.

A California Air Resources Board spokesman Dec. 30, 2011, told Bloomberg BNA it would file an appeal of the injunction "immediately."

California was joined in its appeal by the Conservation Law Foundation, Environmental Defense Fund, Natural Resources Defense Council, and Sierra Club, which all had intervened in the district court lawsuit on the side of the state.

California's standard, issued in 2009, accounted for emissions associated with production, transportation, and consumption of gasoline, diesel, and alternative fuels (16 BECB 149, 5/18/09).

Climate Change

Power Plants Accounted for 72 Percent Of Greenhouse Gases Reported in 2010

Power plants emitted 2.3 billion metric tons of carbon dioxide-equivalent (CO₂e) in 2010, 72.3 percent of reported emissions nationwide, according to data released by EPA Jan. 11.

EPA released data for calendar year 2010, the first year industries were required to report their greenhouse gas emissions to the agency. EPA's 2009 mandatory greenhouse gas reporting rule requires sources with emissions greater than 25,000 tons per year to report their emissions annually (74 Fed. Reg. 56,260; 16 BECB 307, 10/5/09).

Petroleum refineries emitted 183 million metric tons of carbon dioxide-equivalent in 2010, the second-largest category at 5.7 percent of emissions. Chemical manufacturers were the third-largest source with 175 million metric tons of emissions, or 5.4 percent of all reported emissions.

More than 6,700 entities reported their greenhouse gas emissions to EPA. The data collected represent 80 percent of all U.S. emissions, EPA said. Carbon dioxide accounted for 95 percent of direct greenhouse gas emissions, followed by methane at 4 percent.

More information on the 2010 emissions reporting is available at <http://www.epa.gov/climatechange/emissions/ghgdata/index.html>.

State Briefs

Illinois

Government plaintiffs Jan. 5 filed an appeal of a federal district court's dismissal of claims that Midwest Generation LLC is responsible for violations of the Clean Air Act at five Illinois power plants it purchased in 1999 (*United States v. Midwest Generation LLC*, 7th Cir., No. 12-1026, 1/5/12). The government has argued that Midwest Generation should be held liable for violations of the Clean Air Act's prevention of significant deterioration requirements at the five coal-fired power plants. The violations allegedly occurred before the company purchased them (*United States v. Midwest Generation LLC*, N.D. Ill., No. 09-cv-5277, 3/16/11). The U.S. District Court for the Northern District of Illinois first dismissed the case in March 2010, but the government submitted an amended complaint offering new evidence of the company's liability, and the court again dismissed the case in March 2011 (18 BECB 101, 4/4/11). Most recently, the court said the Department of Justice and the state of Illinois did not offer any new facts to support its arguments.

Pennsylvania

Essroc Cement Corp. will pay \$33 million in injunctive relief and a \$1.7 million civil penalty to resolve alleged violations of the Clean Air Act, according to a proposed settlement filed Dec. 29, 2011 (*United States v. Essroc Cement Corp.*, W.D. Pa., No. 2:11-cv-01650, 12/29/11). The company, which is based in Nazareth, Pa., and is the eighth-largest cement producer in the country, also will spend \$745,000 on environmental mitigation projects. The settlement is a part of the government's initiative to target large polluters, EPA and Department of Justice officials said, and it is expected to reduce emissions of nitrogen oxides and sulfur dioxide. EPA in January 2009 issued a notice of violation, alleging the company modified a plant in Bessemer, Pa., without obtaining preconstruction permits and operating pollution control technology. Essroc has denied the allegations. The settlement covers six cement plants in Indiana, Pennsylvania, Puerto Rico, and West Virginia. The three states and Puerto Rico also signed the consent decree.

Air Outlook 2012: Part 1

Court to Hear Challenges to Greenhouse Gas Rules in 2012

A federal appeals court will hear challenges to the Environmental Protection Agency's greenhouse gas regulatory program in 2012, as several states and industry groups seek to have the rules overturned.

This is the first legal challenge since EPA began regulating greenhouse gases, and the court's decision will shape the agency's climate change program as EPA readies its second round of vehicle emission standards and prepares rules to limit emissions from power plants and refineries.

Industry groups and several states argue the greenhouse gas rules are overly broad and do not fully consider the economic impact on affected businesses. Moreover, they contend that EPA's permitting regulation, known as the tailoring rule, violates the Clean Air Act because it alters the permitting thresholds specified in the statute.

Gina McCarthy, EPA assistant administrator for air and radiation, told Bloomberg BNA she is confident the rules will be upheld.

"The more we dig into this, the more comfortable we get with our legal position. We're very comfortable this is a court challenge we will win," she said.

Argument Scheduled for February

The U.S. Court of Appeals for the District of Columbia Circuit will hear oral arguments Feb. 28 and 29 in the first challenges to EPA rulemakings that address greenhouse gas emissions.

Industry groups and some states are challenging three EPA rules:

- the endangerment finding that concludes vehicle emissions threaten the environment (74 Fed. Reg. 66,496; *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 09-1322, oral argument scheduled 11/2/11),

- greenhouse gas emission standards for cars and light-duty trucks (75 Fed. Reg. 25,324; *Coalition for Responsible Regulation v. EPA*, D.C.

Cir., No. 10-1073, oral argument scheduled 11/2/11), and

- the tailoring rule, which limits greenhouse gas permitting to only the largest stationary sources of emissions (75 Fed. Reg. 31,514; *Coalition for Responsible Regulation v. EPA*, D.C. Cir., No. 10-1092, oral argument scheduled 11/2/11).

Chief Judge David Sentelle and Judges Judith Rogers and David Tatel will hear oral argument for all three rules Feb. 28 and 29.

Michael Gerrard, senior counsel at Arnold & Porter LLP and director of the Center for Climate Change Law at Columbia Law School, told Bloomberg BNA it is unlikely the court would overturn either the endangerment finding or subsequent vehicle emission standards for cars and trucks.

"The more we dig into this, the more comfortable we get with our legal position."

— GINA MCCARTHY,
EPA

"The endangerment finding flows directly from *Massachusetts v. EPA*, and the vehicle rule flows out of the endangerment finding," he said.

In *Massachusetts v. EPA*, the U.S. Supreme Court said the agency could regulate carbon dioxide using its authority under the Clean Air Act (*Massachusetts v. EPA*, 127 S. Ct. 1438, 63 ERC 2057 (2007)) (14 BECB 115, 4/9/07).

Tailoring Rule Most Vulnerable

The tailoring rule for stationary source permitting requirements could be more vulnerable, attorneys said.

Eric Groten, an attorney at Vinson & Elkins LLP representing the Coalition for Responsible Regulation, an association of business and trade groups affected by the greenhouse gas rules, told Bloomberg BNA the

tailoring rule is the "easiest, fattest target at which to shoot."

"You can pull pretty hard on the thread of what the statutory thresholds are, and EPA pretty clearly ignored them and did so in an arbitrary way," he said.

Clean Air Act Section 169(1) requires stationary sources with emissions greater than 250 tons per year to obtain prevention of significant deterioration permits. Sources with emissions greater than 100 tons per year are required to obtain Title V operating permits.

The tailoring rule requires new sources that emit more than 100,000 tons per year of carbon dioxide-equivalent and modified sources that increase their emissions by more than 75,000 tons per year to obtain PSD and Title V operating permits.

Rules Rely on Three Doctrines

The tailoring rule relies on the doctrines of "absurd results," "administrative necessity," and "one-step-at-a-time," which EPA argues allow it to depart from the text of the Clean Air Act when administering the statute as written would be impossible.

If the court does overturn the tailoring rule, Gerrard said the judges likely will be careful in how the rule is remanded or vacated. Both Sentelle and Rogers were on the panel that in 2008 remanded EPA's Clean Air Interstate Rule, a power plant emissions trading program. The rule originally was vacated, but "that quickly led to chaos," Gerrard said. The court subsequently reversed its vacatur, remanding the rule to EPA for correction instead.

"It's possible that experience will help persuade the court that they should not vacate, that they should tell EPA to fix the problem without striking down the whole program," Gerrard said. "It would be very ironic if the D.C. Circuit found the tailoring rule is invalid because it regulates too few sources and then goes back and vacates the rule in a way that no sources are regulated."

Waste Management Update

Toxic Releases Increased 16 Percent In 2010, EPA Analysis of Data Shows

About 3.93 billion pounds of toxic chemicals were released into the environment nationwide in 2010, a 16 percent increase from 2009, according to an Environmental Protection Agency analysis of toxic chemical release data issued Jan. 5.

The increase mainly is due to changes in the metal mining sector, which usually involves large facilities handling large volumes of material, EPA said. In metal mining, even a small change in the chemical composition of the ore being mined may lead to big changes in the amount of toxic chemicals being reported nationally, the agency said.

The chemical and primary metals industries also reported increases in toxic releases in 2010, EPA said.

Other possible reasons for an increase include changes in chemical use, management methods, production, release estimation methods, or composition of the economy, the analysis said.

Total releases in 2010 also were higher than 2008 but lower than 2007 and previous years, EPA said. Many of the toxic releases are regulated under EPA programs and requirements to limit harm to humans and the environment, EPA said.

Under the Emergency Planning and Community Right-to-Know Act, covered facilities are required to report to EPA and the states by July 1 on releases of certain chemicals that exceed a certain threshold. Among the industries required to report are commercial hazardous waste facili-

ties, electric utilities, manufacturing, and metal mining.

EPA enters the data into the Toxics Release Inventory database, which currently covers more than 665 chemicals. The inventory is designed to provide citizens, emergency planners, public health officials, and others with data to make decisions about the health and welfare of their communities, EPA said.

The 2010 data also show that total air releases decreased 6 percent from 2009, continuing a trend seen over the past several years. Industry sectors with the largest decreases in air releases included electric utilities and the plastics and rubber industry, according to the analysis.

The 2010 TRI analysis is available at <http://www.epa.gov/tri/NationalAnalysis/index.htm>.

Disposal of Coal Ash Metals in Ponds Rose 9 Percent in 2010, Report Says

Power plants disposed of 112.8 million pounds of toxic metals or metal compounds from coal ash into ponds in 2010, an increase of 9 percent over the previous year, according to an analysis released Jan. 5 by the Environmental Integrity Project.

The analysis found that pond disposal reached the highest level since 2007, the year before the Tennessee Valley Authority's Kingston Fossil Plant spilled nearly 1 billion tons of coal ash sludge into the Clinch River and surrounding properties, although the totals have fluctuated in recent years (16 BECB 23, 1/26/09).

Disposal of metals from coal ash declined from 109.5 million pounds in 2008 to 103.5 million pounds in 2009, before increasing in 2010.

Spurred by the Kingston spill, EPA is working on a final rule to regulate

coal ash disposal (18 BECB 343, 10/31/11) (see related story, p. 26).

James Roewer, executive director of the Utility Solid Waste Activities Group, told Bloomberg BNA the increased level of ash stored in ponds could stem from less reuse of ash by industry because of the potential for stricter regulation by EPA.

The Environmental Integrity Project says the disposal of coal ash into ponds poses significant public health risks. The group wants EPA to regulate coal ash as a hazardous waste, although the agency also is considering continuing to regulate it as nonhazardous solid waste (17 BECB 154, 5/17/10).

In addition to the Kingston incident, the report cites an October 2011 spill from the Oak Creek Power Plant in Wisconsin that sent coal ash into

Lake Michigan. Coal ash typically contains arsenic, chromium, lead, and other pollutants, according to the report.

The EIP analysis, based on data provided to EPA through the Toxics Release Inventory, found just 10 states—Alabama, Georgia, Illinois, Indiana, Kentucky, Michigan, Minnesota, Missouri, North Dakota, and Ohio—accounted for nearly three-quarters of total pond disposals in 2010. Alabama produced the most with over 14.7 million pounds.

The Environmental Integrity Project analysis is available at <http://op.bna.com/env.nsf/r?Open=aada-8q8njf>.

Waste Management

Update

Maine

State Officials Question Mercury Take-Back Programs

State environmental officials in Maine are questioning the cost-effectiveness of take-back programs for products containing mercury and urged the Legislature not to expand a groundbreaking “product stewardship” law enacted in 2010.

In a report to the Legislature, released Dec. 30, 2011, the Maine Department of Environmental Protection said the state has spent \$2.5 million over the last decade on recycling efforts that have removed a little more than 400 pounds of mercury from the environment.

Lawmakers should re-evaluate whether the three mercury reduction programs, covering compact fluorescent light bulbs, switches in automobile components, and thermostats, should continue, “taking into consideration relatively low recycle rates of product categories, accounting for innovations which have resulted in manufacturer process changes, and allowing the opportunity for private sector leaders to maintain management of program operations and outcomes,” the report said.

The product stewardship law, signed in 2010, established a manufacturer take-back program incorporating three existing laws for collecting and recycling mercury-containing products, electronic waste, and rechargeable batteries.

The statute also authorized DEP to propose additional “products and product categories that when generated as waste may be appropriately managed under a product stewardship program.”

The agency, however, recommended proposing “no new products or product categories” during the current legislative session.

The report is available at <http://maine.gov/dep/waste/productstewardship/2012report/index.html>.

New York

Brooklyn Canal Cleanup Must Stop Pollutant Sources

The potential success of a range of cleanup alternatives for the Gowanus Canal in New York City depends on the control of upland sources of contamination, according to an EPA feasibility study released Jan. 3.

The study is part of the remediation process that began in 2010 with inclusion of the Brooklyn waterway on the superfund National Priorities List, the first such listing of a New York City site in more than a decade.

“In order for any of the proposed remedial alternatives to be effective, upland sources of contamination must be controlled,” the study found. Those sources include discharges from combined sewers, former gasworks sites, and other contaminated sites along the canal, it said.

An EPA investigation found high levels of sediment contamination from copper, lead, mercury, polychlorinated biphenyls, polycyclic aromatic hydrocarbons, and other metals.

The site, which has housed industrial operations for decades, is located in a mixed residential-industrial neighborhood. As part of the superfund process, EPA is seeking community input on the cleanup plan.

The feasibility study lays out seven remediation alternatives for the canal’s sediment, ranging from taking no action to following the most extensive option of dredging the entire soft settlement column, solidifying the top 3 feet to 5 feet of native sediment in targeted areas, and capping it with a treatment layer, an isolation layer, and an armor layer.

The feasibility study for the Gowanus Canal cleanup is available at http://www.epa.gov/region02/superfund/npl/gowanus/pdf/2011-12-19_Gowanus_Canal_Draft_Text.pdf.

Recycling

Policy Paper Urges Product Stewardship Efforts

The National Solid Wastes Management Association Jan. 5 released a policy paper generally supporting product stewardship legislation but calling for greater cooperation among government agencies, manufacturers, and waste management companies to successfully implement product stewardship programs.

With more states passing and revising product stewardship legislation, NSWMA stressed the programs should “reduce, reuse, and recycle as much of the waste stream as economically viable while minimizing environmental impacts.” The group said it supports solid waste and recycling efforts that protect the environment and are cost-efficient.

A total of 32 states have passed 70 different product stewardship laws, according to the paper.

Product stewardship emphasizes the role of manufacturers in the end-of-life management of their materials. Products previously covered under these laws include batteries, carpeting, electronic products, mercury-containing devices, and paints, among others.

Federal action on used electronics recycling seems unlikely. Reps. Gene Green (D-Texas) and Mike Thompson (D-Calif.) introduced the Responsible Electronics Recycling Act of 2011 (H.R. 2284), but Congress never acted on the legislation (18 BECB 216, 7/11/11). Similar bills in 2009 and 2010 also stalled (17 BECB 327, 10/18/10).

NSWMA Chief Executive Officer Bruce Parker said in a Jan. 9 statement, “We offer practical experience in how to make recycling work effectively. We look forward to continuing to increase recycling in America.”

The NSWMA policy statement is available at <http://www.environmentalistseveryday.org/docs/EIA-EPR-Policy-010512.pdf>.

Washington

Kaiser Proposes Cleanup For Spokane Trentwood Site

Kaiser Aluminum & Chemical Corp. is proposing a \$31.6 million plan to clean up contaminated soil and groundwater at a mill in Spokane, Wash., including either excavating or capping contaminated near-surface soils, according to an official with the state's Department of Ecology.

Ecology Department Site Manager Teresita Bala told Bloomberg BNA that Kaiser would contain contaminated soils at greater depths by applying a cap to prevent water infiltration that would cause the contaminants to pollute groundwater.

In the meantime, the Washington Ecology Department is seeking public comment on alternatives to clean up the contaminated soil and groundwater at the Kaiser site.

Kaiser has been producing sheet aluminum since 1946 at the 525-acre Trentwood site. While the company has conducted interim cleanup operations, contaminants still remaining at the site include metals, such as arsenic, chromium, and lead; polychlorinated biphenyls; and volatile organic compounds, Bala said Jan. 6.

Kaiser has conducted remedial action since 1994 on two plumes of petroleum contamination in groundwater to contain them and remove petroleum floating on the surface of the groundwater, Bala said.

The company has recovered more than 4,000 gallons of petroleum products so far.

Kaiser also is proposing to contain a plume containing PCBs by pumping the contaminated groundwater from the plume and re-injecting it into the petroleum hydrocarbon plumes, Bala said.

"They contend that when you inject PCBs in the petroleum plumes it may biodegrade," Bala said. "We want a study to show that that actually happens and that it happens at a reasonable rate. We will also ask them [Kaiser] to conduct a pilot study to see if PCBs in the groundwater can be effectively removed by treatment."

More information about the site alternatives and filing comments on the proposal is available at <https://fortress.wa.gov/ecy/gsp/Sitepage.aspx?csid=7093>.

Hazmat Transport

PHMSA Announces Two-Year Extension for Fireworks Approvals Due to Expire in 2012

The Pipeline and Hazardous Materials Safety Administration will extend the expiration date of all fireworks transportation approvals scheduled to expire in 2012, according to a clarification published in the Jan. 5 *Federal Register* (77 Fed. Reg. 429).

All fireworks explosive classification approvals, commonly known as EX numbers, scheduled to expire between Jan. 1 and Dec. 31, will expire two years from the date indicated in the approval, PHMSA said in the notice. A revised EX classification approval reflecting the new expiration date automatically will be sent to the approval holder.

Once the two-year extension expires, the manufacturer or its designated agent will have to submit an application for renewal. PHMSA also announced that fireworks EX numbers scheduled to expire after Jan. 1, 2013, will not be extended.

The notice further clarifies a June 2011 policy clarification that limited the issuance of EX numbers to manufacturers. PHMSA described its previous policy as "redundant and burdensome" because multiple approvals were issued to distributors, importers, manufacturers, and retailers for transportation of the same fireworks device.

Under the new policy, PHMSA only will reissue EX classification approvals that have been submitted by the product's manufacturer or the manufacturer's designated agent. If the manufacturer was not the original applicant, the manufacturer will have to submit a new application when the product's EX classification approval expires.

PHMSA also said EX approvals are nontransferable and cannot be acquired in connection with the sale of a business, acquisition, or merger.

PHMSA's clarification and further guidance on the fireworks approval policy are available at <http://op.bna.com/env.nsf/r?Open=smy-8q7uas>.

For further information, contact Ryan Paquet, director of the Approvals and Permits Division of the Office of Hazardous Materials Safety, at (202) 366-4512.

State Briefs

New Hampshire

A New Hampshire metal foundry and its president Jan. 6 pleaded guilty in federal court to unlawfully storing hazardous amounts of cadmium and lead at its manufacturing site (*United States v. Wiehl*, D. N.H., No. 10-cr-112-01, *pleas entered* 1/6/12). Franklin Non-Ferrous Foundry Inc. and its president, John R. Wiehl, pleaded guilty to one count of unlawful storage of hazardous waste under the Resource Conservation and Recovery Act. Under a plea agreement, the government will recommend two years probation for the company and two years probation, including six months of home confinement, and a public apology from Wiehl. The offense carries a maximum fine of \$500,000 for the company and \$250,000 for Wiehl. Sentencing is set for April 25.

New York

Erie County, N.Y., would pay a \$275,000 penalty to settle alleged violations of the Resource Conservation and Recovery Act and Clean Water Act under a proposed consent decree filed Dec. 21, 2011, in federal court (*United States v. County of Erie, W.D.N.Y.*, No. 1:11-cv-01083, *proposed consent decree filed* 12/21/11). In addition to the fine, the county would implement Spill Prevention Control and Countermeasure plans to address oil stored at underground and aboveground tanks around the county and submit to a full RCRA audit. Each of the facilities was used for distribution, storage, and transfer of oil, according to the Department of Justice, which announced the settlement in a Jan. 5 *Federal Register* notice (77 Fed. Reg. 518).

Waste Outlook 2012: Part 1

EPA Expects to Finalize Rules for Coal Ash, DSW in 2012

The Environmental Protection Agency is expected to finalize some major rules in 2012, including a final rule regulating coal ash that is anticipated toward the end of the year, according to agency officials and industry representatives.

Mathy Stanislaus, EPA assistant administrator for solid waste and emergency response, said the agency would work “as expeditiously as possible [this] year” on issuing a final coal ash rule, saying it is a priority. However, the agency still is working through close to a half-million comments received on the proposed rule, he said.

EPA will issue an analysis on the potential health risks from the beneficial reuse of coal ash in April, according to Stanislaus. He said the two main objectives of the final rule are to address the risk of a failure of a coal ash impoundment and groundwater impacts of leaching from coal ash landfills.

Two Options Proposed

EPA proposed two options in May 2010 for regulating coal ash following the failure of an impoundment at a Tennessee Valley Authority facility in Kingston, Tenn., in December 2008, which spilled coal ash over 300 acres of land (17 BECB 154, 5/17/10). One option would designate the substance as a special waste under Subtitle C of the Resource Conservation and Recovery Act, the cradle-to-grave regulatory program for hazardous waste. The other option would continue to manage it as nonhazardous waste under Subtitle D of RCRA, leaving regulatory authority with the states.

Jackson said a majority of states have told EPA that coal ash regulation should be left to the states, but that was the arrangement when the Tennessee spill happened.

Mary Zdanowicz, executive director of the Association of State and Territorial Solid Waste Management Officials, said she does not know what the rule would look like but said, “It’s going to be a firestorm no matter which way they go.”

Meanwhile, the House in October 2011 passed a bill (H.R. 2273) that would prohibit EPA from regulating coal ash as a hazardous waste, leaving primary regulatory authority with the states (18 BECB 343, 10/31/11). Companion legislation (S. 1751) was introduced the same month in the Senate, but no committee action has been scheduled. The White House opposes the legislation, saying it does not sufficiently address risks of coal ash disposal and management. It has not threatened to veto the measure, however.

“It’s going to be a firestorm no matter which way they go.”

— MARY ZDANOWICZ,
ASTSWMO

In addition to the coal ash rule, Stanislaus said the agency plans to issue a final rule promulgated during the Bush administration that would scale back the Definition of Solid Waste rule, a measure promulgated during the George W. Bush administration that exempted 1.5 million tons of spent hazardous materials, sludges, and byproducts from the definition of hazardous waste if they are legitimately recycled. Because hazardous wastes are a subset of solid wastes, that means the otherwise hazardous materials essentially are unregulated, assuming certain conditions are met.

Third-Party Recycling

Among other things, the expected rule would withdraw the exemption for hazardous secondary materials sent to a third-party recycler. EPA agreed to issue a final rule on the Definition of Solid Waste by Dec. 31 under a settlement agreement with the Sierra Club (18 BECB 247, 8/8/11). “We will be meeting that deadline,” Stanislaus said.

In March 2011, EPA promulgated a final rule identifying which nonhazardous secondary materials may be

burned in boilers or solid waste incinerators (76 Fed. Reg. 15,456, 3/21/11; 18 BECB 67, 3/7/11).

The rule designates which materials when burned are defined as solid waste under RCRA and subject to emission standards for incinerators under Section 129 of the Clean Air Act, and which are considered fuel and subject to less strict boiler standards under Section 112 of the act (40 C.F.R. 241).

The rule was issued as part of a larger set of rules setting emission standards for industrial boilers and incinerators. EPA proposed changes to all of the rules in early December 2011 (18 BECB 403, 12/26/11).

The proposed revisions would clarify that biomass and other plant material should be classified as fuel rather than waste when burned. The revisions also add a process allowing facility operators to petition EPA to list certain materials as fuels, not wastes. The revisions also would list resinated wood products and tires managed under established tire collection programs as fuels.

Industry Concerns

Chaz Miller, director of state programs for the National Solid Wastes Management Association, said EPA’s proposed revisions did not allay industry concerns.

“It didn’t contain what anybody on the industry side hoped it would,” he said. Industry still has concerns about the regulatory criteria for nonhazardous secondary materials to be considered legitimate, nonwaste fuels. Subjecting some materials to a legitimacy test, such as construction and demolition materials, would be a “very time-consuming burden,” Miller said.

In addition, Stanislaus said EPA is continuing its shift from waste management to materials management, or looking at disposed material not as a waste but rather a resource.

Bruce Parker, president of NSWMA, said he expects an overall reduction in the waste stream in 2012 as part of the movement toward zero waste. “If they can reduce their waste stream, that reduces the bottom line.”

Water Pollution Control

Update

EPA Submits Permit for Construction Sites Minus Turbidity Limits for Stormwater Runoff

A final general permit for stormwater discharges from construction that does not include turbidity limits has been submitted for White House review by the Environmental Protection Agency.

At the same time, the agency is seeking more data to correct an error that resulted in a faulty turbidity limit established in the 2009 effluent limitation guidelines. In August 2010, a federal appeals court gave EPA time to revise the turbidity limit.

The National Pollutant Discharge Elimination System permit being issued under the Clean Water Act's stormwater program will replace a general permit issued in 2008 for construction-related runoff. The 2012 permit will cover stormwater discharges from construction activities that disturb one or more acres of land

or smaller sites that are part of a larger development.

The final revised NPDES general permit was submitted to the White House Office of Management and Budget for interagency review Dec. 23, 2011, according to OMB's website, and EPA anticipates issuing the final permit before the 2008 permit expires Feb. 15, the agency said in a Jan. 5 e-mail to Bloomberg BNA.

In the upcoming general permit, EPA said it is including the 2009 effluent limitation guidelines. EPA also said it is excluding the numerical turbidity limit of 280 nephelometric units from the 2012 NPDES permit because the limit was based on a faulty calculation. EPA stayed the turbidity limit in 2010. The agency said it is working on a new one (18 BECB 396, 12/12/11).

EPA's final 2012 NPDES general construction permit would be implemented in four states—Idaho, Massachusetts, New Hampshire, and New Mexico—the District of Columbia, Puerto Rico, most Indian lands, and the U.S. territories, and it would serve as a model for other states writing their own permits.

EPA is seeking comment on what kinds of treatment technologies are best available. Comments referencing Docket ID No. EPA-HQ-2010-0884 are due by March 5 at <http://www.regulations.gov>.

For more information, contact Jesse Pritts in EPA's Office of Water's Engineering and Analysis Division at (202) 566-1038 or pritts.jesse@epa.gov.

Justices Appear Receptive to Argument For Judicial Review of EPA Compliance Orders

U.S. Supreme Court justices Jan. 9 appeared receptive to the argument that EPA wetlands compliance orders are subject to judicial review before EPA begins enforcement actions in federal court (*Sackett v. EPA*, U.S., No. 10-1062, oral argument 1/9/12).

During oral arguments, Justice Stephen G. Breyer emphasized that the order was not a warning of potential liability but rather an order to remedy violations. Justice Elena Kagan similarly asked why the presumption of review did not apply to compliance orders, and Justice Ruth Bader Ginsburg said the petitioners asked for a hearing on the order and were denied by EPA.

At issue is an order against Chantell and Michael Sackett, who

filled in about a half-acre of their property near Priest Lake, Idaho, so they could build a house. EPA issued a compliance order against the couple in November 2007, alleging the parcel is a wetland subject to the Clean Water Act and the Sacketts violated the act by filling in their property without first obtaining a dredge or fill permit under Section 404 of the act.

The Sacketts then sued EPA under the Administrative Procedure Act, challenging the compliance order as arbitrary and capricious and a violation of their due process rights. The U.S. District Court for the District of Idaho granted EPA's motion to dismiss the lawsuit due to lack of subject matter jurisdiction. That decision was upheld by the U.S. Court of Appeals

for the Ninth Circuit (*Sackett v. EPA*, 622 F.3d 1139, 71 ERC 2036 (9th Cir. 2010)) (18 BECB 219, 7/11/11).

Despite the holdings in the federal circuits, the Supreme Court justices were skeptical in their questioning. Justice Samuel Alito asked what homeowners are supposed to do when EPA says it thinks their property contains wetlands.

Deputy Solicitor General Malcolm L. Stewart responded for the federal government and said EPA generally contacts property owners first to discuss alleged violations before proceeding to compliance orders.

The Supreme Court's oral argument is at http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-1062.pdf.

Water Pollution Control

Update

Water Quality Standards

EPA Seeks New Data On State Program Costs

EPA is seeking White House approval to update a 10-year-old analysis of how much it costs states to run water quality programs.

According to a Jan. 10 *Federal Register* notice, EPA said it has sought the White House Office of Management and Budget's permission to collect data about state resource needs and expenditures to update the *State Water Quality Program Management Resource Analysis* report dating back to 2002 (77 Fed. Reg. 1,484).

EPA said the report would enable the agency to "comprehend resource expenditures and needs for the administration and management of the water quality programs."

The last report, issued in 2002, found that state water quality programs faced a funding shortfall ranging from \$735 million to \$960 million. It also identified state water quality program funding needs ranging between \$1.54 billion and \$1.68 billion, while states were able to spend only about half that amount.

EPA expects about 20 state agencies to participate at an estimated cost of about \$49,740 in total.

Alexandra Dunn, executive director and general counsel for the Association of Clean Water Agencies, told Bloomberg BNA she expects the current data collection to find an even greater gap in resource needs versus expenditures because states have to deal with not just new but also expanded water quality programs.

Comments referencing Docket ID No. EPA-HQ-OW-2011-0424 are due by Feb. 9 and may be submitted at <http://www.regulations.gov>.

For more information, contact Kit Farber in EPA's Planning, Information, and Resource Management staff in the Office of Wastewater Management at (202) 564-0601 or farber.kit@epa.gov.

Water Quality

Reclaimed Water Ignored Under Existing Regulations

A National Research Council study released Jan. 10 said there are no specific regulations under the Clean Water Act and Safe Drinking Water Act to address the use of reclaimed water, which in most cases is treated wastewater, for potable drinking water purposes.

The NRC report on the study, *Water Reuse: Potential for Expanding the Nation's Water Supply Through Reuse of Municipal Wastewater*, said, however, there are many regulations that have a bearing on water reuse operations.

For instance, the report said, EPA regulates direct wastewater discharges to surface waters through its permitting process and to wastewater treatment facilities through the pre-treatment program. These discharges have a direct impact on the quality of reclaimed water that is used directly as potable water.

Moreover, the report said, drinking water regulations also need to be revised or adjusted because they affect the quality of the reclaimed water that is used for potable purposes.

The study recommended that EPA at least establish federal risk-based standards under the Clean Water Act to regulate nonpotable uses of treated municipal wastewater, municipal wastewater effluent, or reclaimed water. These serve as a baseline for state regulations governing the use of reclaimed water and offer some uniformity, the report said.

According to the report, EPA needs to update its inventory of chemicals that are regulated under the Clean Water Act's national pre-treatment program because in many communities, municipal wastewater treatment plant discharges are a significant source of drinking water supplies.

The report is available at <http://dels.nas.edu/Report/water-reuse/13303>.

Drilling

EPA, Interior, States To Focus on Fracturing

Hydraulic fracturing, a drilling technique that has played a primary role in the U.S. shale gas boom, will be a focus of study and regulation by EPA, the Department of the Interior's Bureau of Land Management, and the states in 2012.

BLM is considering a range of regulations for hydraulic fracturing, or fracking, on federal lands. Interior Secretary Ken Salazar told a Nov. 16, 2011, House Natural Resources Committee hearing that much of the current regulations are "outdated" and "reflect neither the significant technological advances in hydraulic fracturing nor the tremendous growth in its use."

Salazar said BLM is studying best practices within the industry and considering revisions to disclosure requirements for chemicals used in fracturing, well-bore integrity standards, and requirements on management of produced water.

States and regional agencies continue to revise their regulations. The New York Department of Environmental Conservation is working on a revised generic environmental impact statement for gas drilling in the Marcellus Shale. The Delaware River Basin Commission was about to complete new rules in late 2011 to govern the use of water in gas drilling within its four-state jurisdiction, but those rules were delayed to deal with misgivings in Delaware and New York.

Deciding whether to regulate the use of diesel fuel in fracking will be a priority for EPA, Cynthia Dougherty, director of the agency's Office of Ground Water and Drinking Water, told Bloomberg BNA. EPA plans to release, before the end of the year, a variety of information on fracking, including the chemicals in fracturing fluids; volume of water use; effects on water availability; and recycling, treatment, and disposal methods used for fracturing wastewaters (18 BECB 188, 6/13/11).

Chesapeake Bay

New Bay Restoration Plans Must Be Stronger, EPA Says

Final state plans being developed by the states for reducing pollution in the Chesapeake Bay during the next five years will need to make up for shortcomings in their plans covering the first phase of the cleanup, an EPA official told members of the Chesapeake Bay Commission.

In a response to questions submitted by commission members and staff, EPA Region 3 Administrator Shawn Garvin said the states' Phase II watershed improvement plans should compensate for "weak Phase I WIP strategies."

Commission Executive Director Ann Swanson Jan. 5 presented Garvin's responses at the winter meeting of the commission, which includes representatives from Maryland, Pennsylvania, and Virginia. The three states discharge the vast majority of the nutrients and sediments impairing the bay. The 49-million-acre watershed also includes the District of Columbia and parts of Delaware, New York, and West Virginia.

Commission members and staff asked EPA in November 2011 for detailed answers about its expectations for the Phase II watershed improvement plans. The states submitted draft Phase II plans Dec. 15, 2011, with final plans due March 15. Swanson said Garvin's responses provide unprecedented clarity that will help states develop the final Phase II plans.

EPA's total maximum daily load compliance plan directs seven jurisdictions in the watershed to have in place by 2025 all the policies, practices, and infrastructure necessary to restore the Chesapeake Bay ecosystem (18 BECB 14, 1/10/11).

The TMDL plan calls for the Phase I and Phase II watershed improvement plans to result in 60 percent of the necessary steps to be in place by 2017. A Phase III plan is intended to complete the job.

If states' Phase II plans fail to satisfy EPA, the agency may modify them, add "backstop" compliance steps, or initiate "enhanced oversight" of states' efforts.

Commission questions and EPA responses are available at <http://op.bna.com/env.nsf/r?Open=smiy-8q9t9u>.

Drilling

Fracking Waste Disposal Wells in Ohio Closed Pending State Study of Youngstown Earthquakes

Ohio is investigating whether wells used to dispose of hydraulic fracturing fluids may have contributed to a series of small earthquakes in northeastern Ohio, possibly by triggering an unidentified fault, the head of the Ohio Department of Natural Resources announced Jan. 3.

Operations at five injection wells near Youngstown have been suspended indefinitely pending the results of a scientific assessment of possible links with the quakes, said ODNR Director James Zehringer.

Meanwhile, the Youngstown City Council Jan. 4 passed a resolution favoring a moratorium on underground injection and hydraulic fracturing to extract natural gas until research shows the practices are not dangerous.

The Youngstown area, not known for seismic activity, has experienced 11 low-level tremors since March 2011, about three months after Northstar Disposal Services LLC began deep-earth injection of wastewater from a nearby D&L Energy Inc. natural gas drilling site that employs hydraulic fracturing. The most recent, a 4.0 magnitude earthquake, occurred Dec. 31, 2011, a week after a 2.7 magnitude quake shook the region.

Hydraulic fracturing, also known as fracking, involves high-pressure injection of water, sand, and chemicals to release shale gas trapped in deep underground formations. After drilling, the fluid usually is disposed of in injection wells. Thousands of gallons of fracking fluid were injected 9,200 feet into Northstar's wells daily until the company acquiesced Dec. 30, 2011, the day before the last quake, to ODNR's request that it stop as a precaution while the state assessed potential links to the earthquakes.

Following the last earthquake, Zehringer told reporters the "seismic events are not a direct result of fracking," noting there are 177 Class II injection wells operating in the state without incident.

Mike Hanson, coordinator of ODNR's seismic network set up by Columbia University seismologists, said the state suspects these earthquakes did not occur naturally. If triggered by the injection wells, quakes still could occur despite the moratorium, he said, because the pressure has not yet dissipated.

State Briefs

Alaska

EPA Jan. 3 issued a new five-year general permit covering discharges of wastewater related to oil and gas extraction activities at nearly all facilities on Alaska's North Slope. The new National Pollutant Discharge Elimination System permit, which will take effect Feb. 2, replaces a permit issued in 2004 that expired in 2009 but was partially extended while the new permit was being drafted, EPA said. The specific wastewaters permitted include dewatering from construction sites, releases from pressure testing of pipelines and storage tanks, and stormwater discharges associated with industrial activity, according to EPA. Not included are domestic wastewater or gray water, which the state will begin permitting. More information is available at <http://yosemite.epa.gov/r10/water.nsf/npdes+permits/general+npdes+permits/#oilgas>.

Minnesota

The Minnesota Department of Natural Resources has announced it will be stepping up efforts to control aquatic invasive species, such as Eurasian water milfoil and zebra mussels, with the opening of road check stations and a significant expansion of decontamination units. DNR official Luke Skinner June 9 told Bloomberg BNA that check stations will allow DNR officials to inspect boats, trailers, and other marine equipment for invasive species. Boats believed to carry invasive species will be subjected to high pressure and hot water to both clean them and kill the animals or plants, he said. By summer, Skinner said, DNR should have between 23 and 30 units operating. Further information is available at <http://www.dnr.state.mn.us/invasives/index.html>.

Water Outlook 2012: Part 1

Clean Water Act Jurisdiction, Stormwater Called Priorities

Regulations to clarify which waters are subject to federal jurisdiction and curb stormwater runoff from post-construction and redevelopment sites will top the list of Clean Water Act issues in 2012, according to Environmental Protection Agency officials and other sources.

Other key EPA regulations include rules to reduce fish kills from cooling water intake structures, require data from concentrated animal feeding operations, and revise the process governing state water quality standards. EPA also is expected to propose a rule setting effluent limits for coal-fired power plants.

“Clarifying the scope of the Clean Water Act is one of our top priorities,” Nancy Stoner, EPA acting assistant administrator for water, told Bloomberg BNA. “We are working on a rule right now and expect to send it” for review to the White House Office of Management and Budget.

EPA and the U.S. Army Corps of Engineers in May 2011 issued proposed guidance to clarify which waters are subject to Clean Water Act jurisdiction. The proposal drew opposition from builders, farmers, and industry groups, who say it would delay construction projects and curtail economic activity by requiring additional permits and imposing more costs (18 BECB 206, 6/27/11).

In proposing the guidance and seeking public comment, EPA also indicated it would pursue a regulation. In November 2011, House and Senate lawmakers urged EPA to withdraw the proposed guidance and not use the document as a basis for a planned rule on jurisdiction.

In response, an EPA spokeswoman then said the agency still was working on both documents.

EPA Considering Rule

Stoner said EPA and the corps are looking closely at what can be drawn from the proposed guidance for inclusion in a proposed rule, but she did not say the agencies would withdraw the guidance. Other sources told Bloomberg BNA the agency now

has set the guidance aside to work on a rule.

Under the proposed guidance, federal jurisdiction and permitting requirements would be expanded to include many intermittent and ephemeral streams and wetlands currently not covered. The proposal would replace previous guidance that attempted to interpret two U.S. Supreme Court decisions on what waters are subject to the Clean Water Act (*Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (SWANCC), 531 U.S. 159, 51 ERC 1838 (2001); *Rapanos v. United States*, 547 U.S. 715, 62 ERC 1481 (2006)).

“Clarifying the scope of the Clean Water Act is one of our top priorities.”

— NANCY STONER,
EPA

Don Parrish, senior director of government relations for the American Farm Bureau Federation, told Bloomberg BNA the proposed guidance represents “a breathtakingly broad assertion of federal authority.”

Stoner said the issue “seems to be misunderstood by some. . . . No new waters would be covered. What we’re talking about is protecting waters that used to be clearly protected prior to 2001, and that protection has eroded.”

Stormwater Rule Delayed

EPA had planned to propose by December 2011 a rule to limit stormwater runoff pollution from post-construction and redevelopment. The proposal has been delayed, and Stoner said EPA is working on a new target date.

Under a settlement agreement, the rule must be finalized by November (*Fowler v. EPA*, D.D.C., No. 1:09-cv-5, 5/11/10).

The upcoming rule is expected to contain provisions for communities

to use green infrastructure and could address the use of impermeable pavement to better absorb runoff.

No Mandate, Stoner Says

Cash-strapped state and municipal water officials said the rule could be technically difficult and costly for urban managers to implement.

However, Stoner said the agency is not considering mandating the use of green infrastructure. “It is a tool that we think would be frequently used to strengthen stormwater standards.” Promoting green infrastructure will continue to be an agency priority over the next year, she added.

Meanwhile, state and municipal officials are praising an EPA initiative that could help water providers address affordability concerns. EPA in October 2011 outlined what it calls a voluntary integrated planning approach, which would allow municipalities to develop and implement a unified plan addressing all Clean Water Act-related obligations, including combined sewer overflows, sanitary sewer overflows, and stormwater (18 BECB 414, 12/26/11).

EPA also plans early in 2012 to propose revisions to rules for state water quality standards, which have not been revised since 1983. Provisions could address variances, antidegradation, and how states determine designated uses.

In other regulatory action, EPA said it is on track to finalize the cooling water intake rule in July, as scheduled, as well as revise effluent limits for coal-fired power plants.

In addition, EPA has extended the public comment period on a proposed rule on concentrated animal feeding operations, which it expects to finalize by July. The rule, which would require CAFOs to submit certain data to regulators, is opposed by agricultural groups.

EPA also has indicated it likely will approve a pending Florida rule setting standards to reduce nutrients, such as nitrogen and phosphorus.

Upcoming Comment Deadlines

Feb. 1 - March 10

Feb. 3	EPA proposed rule to amend regulations under 40 C.F.R. §§ 82.16 and 82.23 to revise the allowance system for controlling U.S. consumption and production of hydrochlorofluorocarbons (HCFCs) in response to a 2010 court decision vacating a portion of EPA's Dec. 15, 2009, final rule. If a hearing is requested, comments are due Feb. 21, 2012. Contact Luke Hall-Jordan in EPA's Stratospheric Protection Division at (202) 343-9591.	Ozone Depletion	77 Fed. Reg. 237, 1/4/12
Feb. 6	EPA notice on the Resource Conservation and Recovery Act definition of solid waste. Contact Richard Huggins in EPA's Office of Resource Conservation and Recovery at (703) 308-0017.	Solid Waste	76 Fed. Reg. 76,159, 12/6/11
Feb. 6	EPA notice on prevention of significant deterioration and nonattainment new source review under 40 C.F.R. Parts 49, 51, and 52. Contact David Painter in EPA's Office of Air Quality Planning and Standards at (919) 541-5515.	Air Pollution	76 Fed. Reg. 76,713, 12/8/11
Feb. 13	EPA proposed rule to make compliance by electric power plants with the Cross-State Air Pollution Rule sufficient to comply with best available control technology (BART) requirements to reduce regional haze. Contact Martha Keating in EPA's Office of Air Quality Planning and Standards at (919) 541-9407.	Air Pollution	76 Fed. Reg. 82,219, 12/30/11
Feb. 13	EPA proposed rule to set fuel economy and greenhouse gas emission standards for 2017-2025 model years light-duty vehicles. Contact Christopher Lieske in EPA's Office of Transportation and Air Quality, Assessment and Standards Division at (734) 214-4584.	Air Pollution	76 Fed. Reg. 74,854, 12/1/11; 77 Fed. Reg. 2,028, 1/13/12
Feb. 21	EPA reconsideration of and proposed rule amending the national emission standards for hazardous air pollutants for industrial, commercial, and institutional boilers. Contact Brian Shrager in EPA's Office of Air Quality Planning and Standards at (919) 541-7689.	Air Pollution	76 Fed. Reg. 80,598, 12/23/11
Feb. 27	EPA notice on an extension of the comment period for an Oct. 26, 2011, notice regarding the final 2010 Effluent Guidelines Program Plan. Contact William Swietlik at EPA at (202) 566-1129.	Water Pollution	76 Fed. Reg. 80,937, 12/27/11
Feb. 29	EPA notice on workshops to solicit input on the use of integrated municipal stormwater and wastewater plans to meet the water quality objectives of the Clean Water Act. Contact Kevin Weiss in EPA's Office of Wastewater Management at (202) 564-0742.	Water Pollution	77 Fed. Reg. 1,687, 1/11/12
March 6	EPA proposed rule to amend regulations under 40 C.F.R. §§ 9.1, 63.14, and Part 63, Subpart CC, and adopts regulations under 40 C.F.R. Part 65, Subparts H and L, to revise the NESHAP for petroleum refineries. Contact Brenda Shine in EPA's Office of Air Quality Planning and Standards at (919) 541-3608.	Air Pollution	77 Fed. Reg. 960, 1/6/12
March 9	Proposed rule revising the NESHAPs for group IV polymers and resins, pesticide active ingredient production, and polyether polyols production. Contact Nick Parsons in EPA's Office of Air Quality Planning and Standards at (919) 541-5372	Air Pollution	77 Fed. Reg. 1,268, 1/9/12

Editor's Choice

Benefit Corporations: Bright Future for Environment, Workers?

Outdoor clothing retailer Patagonia Inc. and 12 other companies Jan. 3 registered to become California's first benefit corporations, a new class of companies required to create positive impacts for society as well as shareholders.

The new corporations were authorized under state legislation (A.B. 361) signed into law Oct. 9, 2011, by Gov. Jerry Brown (D-Calif.), and took effect Jan. 1. The 12 other companies that registered for benefit corporation status in California were Cloud Currencies, DopeHut, Dharma Merchant Services, Give Something Back Office Supplies, Green Retirement Plans, Opticos Designs, Rimon Law, Scientific Certification Systems, Solar Works, Sun Light & Power, Terrassure Sustainable Land & Resource Development, and Thinkshift Communications.

The California statute is similar to a model law drafted by William H. Clark of Drinker Biddle and Reath LLP, and was facilitated by the nonprofit B Lab, which also confers the status of "Certified B Corporation" on companies it finds meet a high standard of social and environmental performance. Benefit corporations organized under state law do not need B Lab certification.

B Lab Certification

The first state to pass legislation creating benefit corporations was Maryland, which allowed benefit corporations in April 2010. Since then, Hawaii, New Jersey, New York, Vermont, and Virginia also have passed benefit corporation laws, and legislation is pending in Michigan, North Carolina, Pennsylvania, and Washington, D.C.

According to a Nov. 16, 2011, white paper, principally authored by Clark and Larry Vranka, of Canochet Group LLC, the major characteristics of a benefit corporation are a requirement that the corporation creates a material positive impact on society and the environment; an expansion of directors' duties to require consideration of nonfinancial stake-

holders as well as the financial interests of shareholders; and an obligation to report on its overall social and environmental performance using a comprehensive, credible, independent, and transparent third-party standard.

B Lab began certifying B corporations in 2007. Companies that wanted to create a beneficial social impact as part of their mission were finding there was no infrastructure to support them, Heather Van Dusen of B Lab told Bloomberg BNA Jan. 10. By establishing standards that would extend across geographical and industry lines, B Lab sought to provide that infrastructure.

"This is the future of business."

— HEATHER VAN DUSEN,
B LAB

"This is the future of business," Van Dusen said. B Lab's intention is to create a new sector of the economy as large as the nonprofit sector (7 percent to 9 percent of U.S. gross domestic product) and provide a platform from which "industry leaders can use business to solve social and environmental problems." In turn, this would set a standard for others to follow and create a marketplace for others to support, she added.

To become certified by B Lab, a company must complete an assessment review consisting of questions regarding various issues, such as corporate governance, environmental issues, job creation, the relevant community, and worker issues, and provide documentation for each area, Van Dusen said. In addition, B Lab conducts an annual onsite review of 10 percent of certified companies. Recertification is required every two years. The initial assessment varies according to the industry sector of the company seeking certification.

Under a traditional corporate structure, directors may consider only benefits to shareholders when making major corporate decisions.

Corporate decisions can have a negative impact on worker safety and health as a consequence of the single focus on maximizing profits to shareholders, Van Dusen said. However, she said, "[b]oth the benefit corporation structure and the B Corp legal requirement would enable and even require companies to take into consideration . . . other stakeholder interests."

Safety, Health Update

Stephanie Poole Nieman, director of developed market standards at B Lab, told Bloomberg BNA the assessment currently covers standard company safety and health practices and policies, but B Lab is working to improve its coverage of these issues. For example, in the current assessment of large manufacturing companies, the section on worker benefits asks whether the company provides health insurance and other benefit programs. A section on occupational safety and health inquires whether there is a worker safety and health committee and if the company has written policies and practices in place to minimize on-the-job accidents and injuries. Under the section on environmental practices, companies are asked about toxic chemical reduction methods, materials and toxicity audits, and indoor environmental air quality.

The focus on improving safety and health standards is under review by a working group funded by the Robert Wood Johnson Foundation. A revised version of the safety and health section of the assessment with additional coverage is expected to launch in 2013, with Version 4.0 of the assessment.

There are 28 new questions relating to safety and health under consideration, especially relating to the manufacturing sector, Nieman said. One area the working group is looking at is chemical toxicity as it relates to potential toxic contaminants from production; chemicals of concern, and local community exposure from company emissions.

BY BETH DUNCAN