

The Environmental Manager's COMPLIANCE ADVISOR

The environmental manager's smart choice for news and compliance solutions

January 4, 2010

www.blr.com

Issue 750

CONTENTS

Compliance Report3

Climate Drama in Three Acts3

Fed Seeks Revisions for
Hearing Protection5

Turning Water Enforcement Around ..6

Most

Misunderstood Regs.....8

OSHA Serious Violations

News

Dioxin Testing for Municipal
Combustors2

eDisclosure Still Available2

Coal Dust Accumulations13

Cleaning Up Nano-Contamination ..14

Modifying SWPPPs14

NESHAP for Asphalt Manufacturers ..15

NESHAP for Paints and
Allied Products15

Washington Watch9

Methyl Bromide Uses for 2010; RPS
Status; Endangered Species and
Climate Change

From the States.....11

CA: Bald Tire Epidemic?;

MA: Fed Approves Dry-Cleaning
Program;

NV: Mercury Emissions from Mine Sites

Federal Register Digest12

Enforcement16

Waste Violations Come in Bunches
RMP Resolution in Ohio



Disposing of Li-SO₂ Batteries

Managers who want to dispose of fully discharged lithium/sulfur dioxide (Li-SO₂) batteries should be aware of two issues: the potential of these batteries to exhibit the hazardous waste characteristic of reactivity and the presence of acetonitrile, a hazardous waste constituent.

Li-SO₂ batteries are high performance alternatives to the common alkaline battery. Used in applications ranging from flashlights to emergency radios to portable equipment, Li-SO₂ batteries have a denser concentration of energy and a long storage life, and they are particularly well equipped to operate in a wide temperature range.

In 1984, EPA issued a policy indicating that Li-SO₂ batteries “clearly exhibit” the characteristic of reactivity. In other words, Li-SO₂ batteries would need to be managed as hazardous waste. However, that guidance did not address the matter of fully discharged Li-SO₂ batteries. Subsequently, EPA cited research performed by the U.S. Army on Li-SO₂ batteries that were discharged to a voltage of 1 volt or less. The results of this research “adequately demonstrated” to EPA that Li-SO₂ batteries discharged to this level would not be considered reactive under the Agency’s hazardous waste regulations.

EPA emphasizes that the Army tested specific types of Li-SO₂ batteries. Hence, information from that research

Returning Abandoned Pipelines to Service

PHMSA regulations at 49 CFR 195.402(c)(10) specify the steps an owner or operator must take to ensure that a Part 195 jurisdictional pipeline (i.e., a pipeline that must comply with PHMSA’s pipeline regulations) is properly abandoned. Mainly, the pipeline must be safely disconnected from any operating pipeline system, purged of

should be extrapolated to other batteries with “proper care,” said the Agency.

Furthermore, all Li-SO₂ batteries may be managed under the streamlined requirements of the federal universal waste program. This program is intended to expedite management of certain categories of waste that were formerly subject to the full RCRA Subtitle C regulations. The universal waste rule is particularly advantageous for managers seeking to recycle universal waste. When the goal is to land-dispose of these wastes, the regulations become stickier.

Specifically, disposal of discharged Li-SO₂ batteries in solid waste landfills is subject to the federal land disposal restrictions (LDRs). Research indicates that Li-SO₂ batteries are reasonably expected to contain acetonitrile at a level greater than its universal treatment standard of 38 milligrams per kilogram.

Therefore, acetonitrile in Li-SO₂ batteries or any other underlying hazardous constituent exceeding its universal treatment standard (UTS) must be treated to the UTS level before the batteries are land-disposed.

An EPA letter discussing the Agency’s position on disposal of fully discharged Li-SO₂ batteries is available at www.blr.com/enviro_download. Type in **111100** when prompted.

combustibles, and sealed to minimize safety and environmental hazards. But do any regulations affect the return of an abandoned pipeline to service?

According to a letter of interpretation signed by John A. Gale, director of PHMSA’s Office of Regulations on April 6, 2009, a pipeline that is abandoned as

(continued on page 2)

Terms of Use: BLR grants you, the individual or organization subscribing to this newsletter, the right to copy up to three (3) news items per issue for electronic distribution, provided that the distribution is solely within your organization and the BLR copyright notice is retained on each copy. Any other copying, internal or external electronic distribution, or reproduction without BLR’s written permission is a violation of copyright law and this grant.

required by 195.402(c)(10) is no longer subject to Part 195. However, the letter adds that “ceasing normal operation of a pipeline does not remove the pipeline from PHMSA jurisdiction.”

Basically, this means that there are no regulations applicable to the abandoned pipeline unless the intention is to return it to service.

“The abandoned pipeline may not be returned to service unless the pipeline was maintained according to Part 195 requirements while it was abandoned, or meets the requirements of a newly designed and constructed pipeline,” states the letter.

Dioxin Testing for Municipal Combustors

Some small municipal waste combustors (MWCs) are required to conduct annual stack tests to demonstrate compliance with federal dioxin and furan limits under the federal plan requirements at 40 CFR Part 62, Subpart JJJ. However, the subpart provides two exemptions from that requirement.

First, under 40 CFR 62.15250(a), if three consecutive annual stack tests demonstrate compliance with the dioxin/furan limits, testing of the facility is not required for the 2 subsequent years.

Second, under 40 CFR 62.15250(b), tests may be conducted every other year if testing shows that a unit has had dioxin/furan emissions less than or equal to 30 nanograms total mass per dry standard cubic meter at 7 percent oxygen for 2 consecutive years.

The either/or applicability of these two provisions to allow exceptions to annual testing may not have been apparent to the Minnesota Pollution Control Agency (MPCA), as discussed in a

Clean Air Act applicability letter from EPA’s Air Enforcement and Compliance Assurance Branch.

In response to a request from the Polk County Solid Waste Management Facility (SWMF), which operates two small MWCs, MPCA indicated that Polk County was subject to the 30 nanogram requirement (62.15250(b)) even though the county preferred to show compliance for 3 consecutive years and thus earn the 2-year exemption under 62.15250(a).

Under the federal plan, small MWCs are defined as units that have a daily combustion capacity between 35 and 250 tons of municipal solid waste or refuse-derived fuel and that were constructed on or before August 30, 1999. Units in states with EPA-approved state plans would be subject to state regulation and not EPA’s jurisdiction.

In the case of the Polk County’s small MWCs, no state plan was in force; therefore, EPA’s interpretation of the provisions takes the upper hand.

Accordingly, EPA concluded, “Sec. 62.15250(b) has no effect on dioxin testing at the small MWC Units at the Polk County SWMF because the Polk County SWMF qualifies for and has elected to implement 40 C.F.R. Sec. 62.15250(a) for dioxin testing.”

EPA’s letter of applicability regarding the Polk County small MWCs is available at <http://cfpub.epa.gov/ADI>. Select Recent ADI Updates and then June 17, 2009. The letter is numbered **0900012**.

eDisclosure Still Available

Readers are reminded of the EPA’s electronic self-disclosure pilot program (eDisclosure), which was introduced in August 2008 and is still running.

The program was developed to advance the appeal of the federal audit policy, which encourages regulated entities to systematically discover, disclose, and correct violations of environmental regulations.

Disclosing parties that meet the criteria of the audit policy (see <http://www.epa.gov/oecaerth/incentives/auditing/auditpolicy.html>) are entitled to penalty mitigation up to 100 percent.

The audit policy has several goals, including urging companies to adopt environmental management systems and other self-regulating tools that make compliance reviews and audits a routine part of conducting business. When used, the audit policy also eases the strain on the inspection and enforcement resources of EPA and other regulatory agencies.

eDisclosure is testing whether the regulated community will make more use of the audit policy if self-disclosures can be submitted electronically.

“Submitting audit policy disclosures electronically makes self-reporting violations easier, speeds EPA processing times, and reduces transaction costs by ensuring that each disclosure contains complete information, and will assure consistency in how disclosures are processed and reviewed by EPA,” says the Agency.

The scope of the eDisclosure pilot program is limited. Right now, only violations of the Emergency Planning and Community Right-to-Know Act may be edisclosed in all EPA regions except Region 6. The Region 6 states of Arkansas, Louisiana, New Mexico, Oklahoma, and Texas may use eDisclosure to self-disclose violations of other federally enforceable environmental laws.

Another limitation of the pilot program is that business confidentiality claims may not be asserted with

(continued on page 13)

Robert L. Brady, J.D., *Publisher*; Peggy Carter-Ward, *Editor in Chief*; Clare Condon, *Managing Editor*; Ana Ellington, *Senior Editor*; William C. Schillaci, *Content Editor*; Sherry Newcomb, *Content Production Specialist*; Joan Carlson, Linda Costa, Sandra Fisher, Corinne Weber, *Proofreaders*; Agnes D. Franks, *Marketing Manager*; Rebecca MacLachlan, *Graphic Designer*; Alice Rand, *Customer Service, Reprints Ext. 2267*.

Environmental Manager’s Compliance Advisor is issued by BUSINESS & LEGAL REPORTS, INC. Editorial and business offices are located at 141 Mill Rock Road East, P.O. Box 6001, Old Saybrook, CT 06475-6001. © 2010 Business & Legal Reports, Inc.

Subscription price: \$349.95 annually for complete service. Periodicals postage paid at Old Saybrook, CT 06475-9998, Standard Mail enclosed. POSTMASTER: Send address changes to *Environmental Manager’s Compliance Advisor*, 141 Mill Rock Road East, P.O. Box 6001, Old Saybrook, CT 06475-6001.

Authorization to photocopy items for internal or personal use, or the internal or personal use of specific clients, is granted by Business & Legal Reports, Inc., provided that the base fee of U.S. \$0.50 per copy plus U.S. \$0.50 per page is paid directly to Copyright Clearance Center, Customer Service, 978-750-8400, or check CCC Online at: <http://www.copyright.com>. For those organizations that have been granted a photocopy license by CCC, a separate system of payment has been arranged. ISSN #0887-9753.

Compliance Report

Climate Drama in Three Acts

Endangerment, Copenhagen, and East Anglia U.

Reactions to EPA's formal finding that greenhouse gases (GHGs) in the atmosphere endanger both public health and the environment were complicated by two other events—the simultaneous start on December 7, 2009, of the 15th United Nations Climate Change Conference (COP 15) in Copenhagen, Denmark, and allegations several weeks earlier that researchers at the highly regarded Climatic Research Unit at the University of East Anglia (UEA) in the United Kingdom suppressed views by reputable scientists who downplayed the human contribution to climate change.

The endangerment finding is required by the Clean Air Act (CAA) before EPA can issue a final rule compelling automakers to control emissions of GHGs from light-duty motor vehicles.

Moreover, once that rule is issued, EPA believes it has the authority to move forward with its GHG tailoring rule, which will compel large stationary sources of GHGs to install technologies to control emissions.

While EPA has announced no other regulatory actions to address GHG emissions, the finding opens the door for the Agency to develop such regulations whenever and wherever it perceives a need to protect public health and the environment.

What the Finding Means

Supporters of mandatory measures to control GHG emissions viewed the endangerment finding as critical for several reasons.

First, it follows up on a decision by the U.S. Supreme Court in April 2007 in *Massachusetts v. EPA*, which found that GHGs are pollutants as defined by the CAA and that the Agency has the authority to regulate their emission from motor vehicles.

But apart from GHGs meeting the definition of a CAA pollutant, the Act provides no explicit guidance on how EPA should establish a regulatory regime to control and reduce emissions. Pretty much all parties on both sides of the issue agree that any economywide regulation of GHGs should not be undertaken by EPA under its current statutory authority and that new legislation is essential to authorize and guide what will certainly be the most far-reaching and economically consequential environmental undertaking in U.S. history.

This summer the House passed its version of an energy/climate bill, but no such action has occurred in the Senate. The endangerment finding is thus seen as a sharp incentive to spur Congress into pushing through an agreement on an energy and climate bill that will be signed by President Obama.

Second, the endangerment finding sends a signal to the international community that one way or another, GHGs will be regulated in the United States, with the first action occurring as early as March 2010 when the final light-duty motor vehicle rule is expected.

More than a decade after other nations committed to mandatory GHG reductions under the 1997 Kyoto protocol, there can be no denying that the endangerment finding and the motor vehicle rule indicate that the U.S. is at least beginning to fall into step with most of its trading partners.

Industry Worried

In the context of COP 15, the endangerment finding may then effectively serve as a negotiating chip. Or, as Bob Stallman, president, American Farm Bureau Federation, notes, the finding and its timing “could have more to do with political science than climate science.”

Stallman represented one of a host of industry organizations that released statements claiming the endangerment finding would lead to over-regulation

of every business, large and small, which emits or contributes to GHG emissions; loss of U.S. jobs to developing nations, primarily China and India, which have announced no plans for obligatory GHG reductions; and further misery for a U.S. economy still reeling from 10 percent unemployment.

Interestingly, much of EPA's finding focuses on how climate change will ravage agriculture by drying up water sources and cause more extreme weather events that devastate crops. But the agricultural sector seems more concerned by the potential regulation of livestock, which is a source of methane emissions, one of the six leading GHGs.

“The livestock industry is particularly concerned with certain production facilities that will fall within regulatory parameters,” said Darrin Ihnen, president of the National Corn Growers Association. “The intended purpose of the Clean Air Act was never to regulate every farm in America as part of the overall effort to curb greenhouse gas emissions.”

That concern was echoed by the American Forest and Paper Association (AF&PA), which fears use of the CAA as a blunt tool will fail to recognize the “carbon neutrality of biomass combustion and the contributions of working forests and forest products to sequester carbon and reduce greenhouse gases.”

“Making CO₂ an official air pollutant will trigger a cascade of regulatory programs that will stifle good energy efficiency and renewable energy projects,” said AF&PA President and CEO Donna Harman. “Legislation that preserves U.S. competitiveness is a far better way to regulate greenhouse gas emissions.”

Competitiveness was also on the mind of Charles T. Drevna, president of the National Petrochemical & Refiners Association, who views the endangerment finding as a means to a “short-term international public

(continued on page 4)

relations victory” that is particularly risky given remaining uncertainties about solid GHG-reduction commitments from China and India. Drevna also questioned the science behind EPA’s finding.

While the Agency asserted that the science remains “overwhelmingly consistent that current and future greenhouse gas concentrations in the atmosphere do endanger both public health and public welfare,”

Drevna countered that that same science is “selective” and based on models that failed to account for numerous uncertainties and assumptions.

Cooked Data

Science, good or bad, is at the core of the UEA controversy, which the media found inflammatory enough to earn the moniker Climate-gate. Much data generated by the university’s climate researchers were incorporated in the Fourth Assessment of the United Nation’s Intergovernmental Panel on Climate Change (IPCC), which EPA, in turn, relied on heavily in its endangerment finding.

In a letter to EPA Administrator Lisa Jackson, four Republican lawmakers requested that EPA withdraw the endangerment finding as well as the light-duty rule until the Agency can demonstrate that the science underlying these regulatory decisions was not compromised by the UEA revelations.

According to those who have reviewed the suppressed information, the charges of cooking the data are a tempest in a teapot.

Also, scientists in the United Kingdom have pulled together to counter the negative impact of Climate-gate on negotiations in Copenhagen.

On December 10, 3 days into the Copenhagen meeting, the UK Meteorological Office released a document signed by 1,200 scientists, which stated that “observational evidence for global warming and the scientific basis for concluding that it is due primarily to human activities are deep and extensive” and “we uphold the findings of the IPCC Fourth

Assessment Report, which concludes that ‘Warming of the climate system is unequivocal’ and that ‘Most of the observed increase in global average temperatures since the mid-20th century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations’.”

Finding Found Timely

Those who welcome the endangerment finding and have high hopes for Copenhagen and climate legislation in 2010 have tried to downplay the significance of Climate-gate by saying little or nothing about it.

“The endangerment finding released today confirms what we have been told by America’s top scientists and leading scientists of the world—that unchecked global warming is perilous to human health and our environment,” said Barbara Boxer, chair of the Senate Environment and Public Works Committee. “It is now clear that if we take our responsibility seriously to protect and defend our people from this threat, the Senate has a duty to act on climate change legislation that includes major components of the work done by the Energy and Environment Committees.”

One of many critical discussions in the Senate will focus on EPA’s role in any carbon regulatory scheme based on the CAA. Although the Agency may have lit a fire with its endangerment finding, the House legislation conceded to industry interests by withdrawing EPA’s authority to write carbon-based regulations until a new law takes effect.

“The pollution reduction bill passed by the House was a step in the right direction, but it does not go far enough toward realizing America’s clean energy future,” said Congressman Eliot Engel (D-NY). “One of its shortcomings is that it would limit the EPA’s authority, under current law, to regulate emissions under the Clean Air Act. I am encouraged to see the EPA is nonetheless exercising its legal authority to control emissions of greenhouse gases.”

That sentiment was shared by Earthjustice President Trip Van Noppen, who encourages Congress

to “preserve the Clean Air Act tools” underlying the endangerment finding.

“This is the most proven way our nation has to reduce air pollution and all of the damage it causes in our communities,” said Van Noppen.

“While there is no time to waste, today’s EPA finding shows that Congress and the agency can work together to address global warming, using both the new climate bill and the tried-and-true solutions of the Clean Air Act. Clean Air Act tools are an essential part in the global warming fight and the EPA needs these tools in order to be able to protect public health and welfare from the harms of global warming.”

Eyes on the Senate

The bill currently battling its way through the Senate would not handcuff EPA’s authority under the CAA to regulate GHG emissions.

Should EPA’s power to regulate remain intact in any final Senate bill, the two chambers would need to resolve the difference in conference. This highlights the fact that with all the excitement surrounding Copenhagen and Climate-gate, the real game for the U.S. is where EPA takes its endangerment finding and what Congress does to alter or stop that movement or leave it untouched.

EPA’s endangerment finding and related information are at <http://www.epa.gov/climatechange/endangerment.html>.

—William C. Schillaci
BSchillaci@blr.com

◆ If you have any questions or comments about the content in the *Advisor*, contact Bill Schillaci at bschillaci@blr.com.

For all other questions, please contact BLR’s Customer Service Department at 800-727-5257.

Fed Seeks Revisions For Hearing Protection

Testing and Labeling Changes Proposed

by David Bell

EPA is proposing to update its 30-year-old standards for hearing protection devices (HPDs). The intent of the move is to open the marketplace to a new generation of technologically superior HPDs that were not foreseen by the 1979 regulation and make available more reliable information for purchasers and end-users as well as increased awareness about using the devices properly to help prevent noise-induced hearing loss.

Employers are not likely to have to replace existing HPDs, and current models will continue to be available for at least 30 more months, although OSHA could change its related policies once EPA issues the final rule, which is expected in the next 3 to 6 months.

The proposed changes are in response to knowledge gained over the past 30 years about the real-world performance of HPDs and the development of such new technology as custom-molded earplugs and active noise reduction devices. Proposed revisions to Subpart B of 40 CFR Part 211 will incorporate new methodologies for testing, rating, and labeling the effectiveness of HPDs in accordance with updated American National Standards Institute (ANSI) standards.

Any financial burden of the new rule is expected to fall mainly on manufacturers. Both existing and new designs manufactured after the implementation date of the new system will have to be tested, labeled, and retested periodically. Analysis sponsored by EPA concluded that the cost of testing and labeling any HPD will total less than 1 percent of its wholesale price.

Behind the Changes

Under the Noise Control Act of 1972, devices designed to be worn by individuals to protect themselves from loud noises must be rated and labeled for their effectiveness in attenuating

sound levels. For example, a noise reduction rating (NRR) of 16 means that most users could expect a 16 decibel (dB) reduction in perceived noise from a given HPD when worn properly. In theory, a worker exposed to 90 dB could reduce that exposure to 74 dB, a level well within OSHA noise exposure limits.

Some of the more advanced HPDs available today had not been invented when the original rule went into effect, so they cannot be tested and certified for use as HPDs in this country under existing regulations. The following factors are also prompting the rule change:

- The current test system is based on a 1974 standard that ANSI updated in 2008. ANSI has withdrawn *Method for the Measurement of Real-Ear Protection of Hearing Protectors and Physical Attenuation of Earmuffs*, the S3.19-1974 performance test standard that is mandated by the current federal regulation, and replaced it with ANSI/ASA S12.6-2008, *Methods for Measuring the Real-Ear Attenuation of Hearing Protectors*.
- The existing system is based on C-weighted decibels (dBC); however, OSHA requires the use of the A-weighted decibel (dBA), which more closely represents human hearing. This requires either a conversion or subtraction of 7 dB from the NRR.
- There is variability in the actual attenuation that can be achieved with an HPD, depending on the individual and how it is used. The single-number NRR implies a precision that does not exist, even in the laboratory.
- Practitioners have found that the current single-number NRR tends to overestimate real-world performance, so much so that OSHA recommends derating, or reducing, the NRR by 50 percent in certain applications. The National Institute for Occupational Safety and Health recommends derating the NRR 25 percent for earmuffs, 50 percent for foam earplugs and custom-molded earplugs, and 75 percent for all other earplugs, including semi-inserts.

New Testing Requirements

The new rule is designed to overcome these deficiencies by updating required test procedures to the new ANSI standard, allowing direct subtraction of the NRR from dBA sound levels and assigning the NRR as a range that allows for human differences in HPD use, rather than a single number. The lower end of the NRR range will represent how much attenuation most minimally trained users can expect, and the upper end of the range will indicate the predicted reduction realized by more highly motivated and trained users.

Twenty subjects would be required for testing certain passive HPDs, rather than the current 10.

Also, new test procedures will be implemented for new-generation devices. Manufacturers will now have to file test data with EPA, retest products every 5 years, and re-label them if the NRR changes by 3 dB or more. The proposed rule also includes provisions for enforcement.

Finally, EPA is making allowances for certain manufacturers that market and sell their products exclusively over the Internet by permitting electronic labeling.

The proposed rule intends a broad definition of HPDs to include "all devices or materials sold as explicit or implicit hearing protection devices on the basis of their ability to reduce the level of sound entering the user's ears and thus serve to protect the user's hearing." Generally, it applies to the following:

- Passive devices that rely solely on their structural elements to block or otherwise control the transmission of sound into the ear canal and that do not use electronic circuits or acoustic elements to reduce the entry of external sound.
- Active or electronic devices that contain electronic components to increase or decrease the transmission of sound into the ear canal.
- Earplugs that are designed to be inserted into the ear canal and held in place principally by virtue of their fit inside the ear canal.

(continued on page 6)

(continued from page 5)

- Earmuffs designed to cover ears.
- Active noise reduction devices that use electrical and structural elements singly or in combination to reduce the sound transmitted to the ear canal through acoustic cancellation of the air-conducted and/or bone-conducted external sound.
- Amplitude-sensitive devices designed to produce a change in sound attenuation as a function of the external sound level.
- Communication headsets featuring a voice communication device that are also designed to reduce the level of sound at the users' ears by either structural elements and/or electronic means.
- Custom-molded devices made to conform to a specific person's ears and ear canals.
- Helmets that provide impact protection to the head or skull and that are designed to reduce the external sound through either structural elements and/or electronic means.
- Semi-insert earplug-like devices consisting of soft pods or tips that are held in place by a lightweight band.

Addressing Concerns

EPA has been working on updating the rule since 2003. This effort was prompted by published research on the actual effectiveness of HPDs in workplace settings as well as concerns voiced by professional and trade organizations, manufacturers, and other federal agencies about the current test method, validity of the single-number NRR, and content of the information required on labels.

"The most-expressed concern was with the currently-required NRR," according to EPA. "In particular, it was alleged that most purchasers and users of hearing protectors have a limited understanding of the NRR, believing that the higher the numerical rating, the better the product. While technically correct ... purchasers or users may select products primarily on the basis of NRR differences as small as one decibel, whereas issues of comfort, compatibility with safety equipment, communication needs, and ease of use can be of equal or greater importance to the ultimate user."

Safety managers responsible for purchasing HPDs might use the lower range of the new NRRs to ensure that workers are protected; however, that could underestimate the amount of attenuation provided to some workers or prevent them from hearing important safety-related communications or warning signals. Using the higher number could overestimate the attenuation for minimally trained workers, just as the single-number NRR currently does.

The comment period for the proposed rule ended in November, and EPA is weighing input it received. Stakeholders have registered technical concerns, and there is some disagreement over which of two product test methods EPA should mandate in the final rule. Of greater interest to purchasers of HPDs is the proposed time frame for taking older HPDs off the market.

EPA is proposing a 30-month transition period, but the National Hearing Conservation Association and 3M are among those asking for a 24-month interim in which only HPDs bearing the old NRR labels can be sold. This would be followed by an 18-month transition period during which manufacturers can begin introducing products with new labels for sale alongside the older ones, for a 42-month total transition. The International Safety Equipment Association is recommending a 60-month transition period.

While EPA is responsible for setting the standards and managing the testing and labeling process, it remains up to OSHA to determine how to apply the new NRR labels in the workplace. Among the uncertainties are which value—the higher or lower—should be considered in determining the adequacy of an HPD and whether to continue derating the NRR. Whether or not EPA's objective of making the NRR a more accurate reflection of how well HPDs protect their users will depend, in part, on such factors.

EPA's proposed revisions to the product noise labeling regulation for hearing protection devices are at <http://www.regulations.gov/search/Regs/home.html#documentDetail?R=0900006480a01551>.

David Bell is editor of Noise Regulation Report. Contact him at info@noisereport.com.

Turning Water Enforcement Around States Inconsistent, Says EPA

Apart from expressing the intention to write a rule requiring holders of NPDES permits to submit discharge monitoring reports (DMR), there are few if any concrete actions EPA has announced as part of its recently released *Clean Water Act Enforcement Action Plan*. However, even though the plan is short on specifics, EPA does take the opportunity to indicate its desire to execute a major shift in its enforcement priorities from the largest facilities to sources causing the most harm to water.

The plan outlines the Agency's current thinking on the poor state of the nation's waters; the various conditions that have contributed to the low quality; the uneven performance of authorized states and EPA regional offices in establishing compliance through permits; the equally poor enforcement record these authorities have built up; and the highly incomplete accumulation of information about the regulated community.

These issues have accumulated since the passage of the Clean Water Act (CWA) in 1972. At that time, the major concern was to regulate about 100,000 "large pipe" facilities that were polluting surface water virtually without control.

Today, the regulated community numbers about 1 million, and many of these are smaller sources covered by general permits for construction and stormwater. Existing regulatory tools developed under the CWA have not kept pace with changes in the regulated sectors. But more important, EPA's approach to the whole issue of water enforcement is also greatly out of step. The Agency also throws some of the blame for the current state of affairs at state water agencies that have not taken a strong hand in either the types of NPDES permits they issue or in how these permits are enforced.

"State enforcement response to serious violations, whether at large or smaller facilities, is not what it should be," says EPA. The Agency says it

also bears responsibility because it has not required states to submit compliance and enforcement information about the hundreds of thousands of smaller facilities, particularly when these facilities are geographically clustered, which may be causing far greater damage than large facilities.

When states are not required to report enforcement data, there may be less of an incentive to undertake strong enforcement. But the problem goes deeper, says EPA, because even with the focus on large entities, the rate of significant noncompliance at these facilities is approximately 24 percent, meaning one out of every four has had significant violations. Moreover, state and EPA data indicate that formal enforcement actions were taken against only 26 percent of the facilities in significant noncompliance in 2008.

These trends may result from poor transparency, or the limited ability of the public to see clearly how the regulated community is performing and what enforcement agencies are doing about it.

Call to Congress

Overall, the Agency recognizes the urgent need to “revamp its enforcement and compliance program to focus on the most significant sources of water pollution and the most significant violations from those facilities.”

EPA also holds that its portfolio of existing rules do not cover all areas in need of regulation. In other words, even with ideal enforcement, significant problems will continue. For example, lawmakers who wrote the CWA have traditionally been criticized for omitting provisions to control nonpoint sources of pollution, such as suburban stormwater and agricultural runoff. EPA subtly makes its point that a revision of the CWA to address nonpoint source pollution would be welcomed.

The Agency also explicitly states its desire that any CWA rewrite resolve mounting problems created by two U.S. Supreme Court decisions (*SWANCC v. Army Corps of Engineers* and *Rapanos v. United States*) that “added layers of confusion regarding which water bodies are covered by the CWA in many parts of the country.”

The plan describes general actions EPA will undertake to address these large and complex problems. Most of these measures involve initial steps only, basically improving communication with states, industry, environmental groups, and other stakeholders on how to turn around the national CWA compliance and enforcement program. Regarding transparency, EPA’s thinking at this stage is to make more information about performance by the regulated community easily available to the public in formats that the public will easily understand. The Agency believes that a publicly accessible database for facility water performance similar to the toxic release inventory (TRI) “can be an effective driver for improved performance and accountability.”

Three-Part Approach

In the enforcement plan, EPA states that input from its outreach efforts on improving NPDES compliance and enforcement was “surprising in its coalescence” around the following three themes for action.

Target enforcement to the most important water pollution problems.

New approaches are needed to revamp the enforcement program to tackle violations of existing law by the sources of pollution posing the biggest threats to water quality and public health. EPA makes the point that the biggest threats do not necessarily come from the biggest facilities. Also, it is difficult to tailor the current framework for large-facility enforcement to other types of facilities and impacts.

The plan seeks to establish an EPA/state work group to analyze sectors and determine whether water quality problems are due to regulatory issues, inadequate permits, or compliance-related issues. Once problems are defined, EPA will try to tailor responses to the specifics of that sector and the specific water quality challenges. Responses might include enforcement actions, fixes to unclear or problematic regulations, or permit modification or reissuance to be more protective of water quality. In the context of this review, the effect of clusters of permitted facilities and their cumulative impact on water quality will also be reviewed.

A critical step is to link environmental information to compliance data to inform the targeting of compliance and enforcement efforts. EPA says it will incorporate data about water quality standards, existing water quality status (including information developed in conjunction with establishing total maximum daily loads for impaired water bodies), permit limits, and effluent violations to evaluate where violations contribute to water quality impairment. These data currently reside in different systems and have not been routinely used together to target serious problems. This effort would include analyzing newly available information on pollutant loadings and toxicity against compliance history and watershed impairment information to identify facilities that require additional compliance monitoring or civil or criminal enforcement attention.

While developing its new approach, EPA says it will commit to making timely, easily accessible, and understandable information available to the public concerning violations/violators, actions EPA and states are taking to address them, and the effects of these actions on water quality.

Strengthen oversight of clean water enforcement performance.

Here the plan targets states. While EPA recognizes that some states have stellar water compliance programs that have served as “laboratories” for the federal government, other states are not issuing strong and protective permits—sometimes apparently to improve their own compliance and enforcement data—or are not taking enforcement actions to achieve compliance and remove economic incentives to violate the law.

Under the plan, actions to which states commit as articulated by aging CWA memoranda or agreements will be clarified or updated to contemporary conditions. EPA says it must set clear expectations for what is acceptable performance for permitting and enforcement programs and how that performance will be measured. The goal is to develop a standard set of expectations as a basis for negotiating “consistent enforcement agreements

(continued on page 8)

with each state, remedying the outdated, inconsistent and sometimes problematic memoranda of agreement.”

The Agency emphasizes that while new approaches and expectations are designed, ongoing oversight can work to raise the bar of performance for the current system. “Strong enforceable permits are the cornerstone for effective enforcement, and the two work together to protect the nation’s waters,” states EPA. “Underperforming” states can also expect EPA to use its authority to disapprove permits that are not protective of water quality and initiate enforcement actions against dischargers to address serious violations.

Improve accountability and transparency. Data sent to EPA by the states are often low in quality, accuracy, and completeness. Solutions to these problems are difficult because resources are insufficient to report and process the breadth of NPDES information. State water program resources are often drained by the work of manually entering data reported on paper DMRs to data systems. The resources needed to ensure complete data entry are not available to most states; hence, a large amount of important information is not entered. One of the chief resulting concerns is that lack of easily accessible data hinders transparency. According to EPA, “transparency is not a replacement for regulatory

enforcement, but can be an effective driver for improved performance and accountability.”

EPA reports that a consensus suggestion from co-regulators and stakeholder groups was to implement electronic reporting for facilities that are required to submit reports to a regulatory agency.

EPA says it recently deployed a new electronic reporting tool called NetDMR that enables regulated facilities to submit their DMRs electronically to the national data system or a state system. Information from NetDMR can be shared immediately between state and federal systems through EPA’s National Environmental Information Exchange Network.

Presently, EPA can only encourage use of NetDMR. But pilot projects using electronic reporting tools show limited rates of success unless the tool is mandated. The full benefits of electronic DMR reporting can only be achieved when implementation is close to 100 percent, says the Agency.

Consequently, to fully realize the transformation of reporting and data, EPA says it will develop a rule to require NPDES permittees to provide DMRs electronically to EPA or states, using either NetDMR or an equivalent state electronic DMR system. Paper DMR forms will be phased out.

Under the plan, EPA also says it will “move immediately” toward making

additional data that are not enforcement confidential available to the public.

Short-Term Actions

The plan also includes three short-term actions to address known compliance and water quality issues.

- First, EPA will pursue new strategies to enforce existing rules limiting pollution from concentrated animal feeding operations (CAFOs), especially where they occur in areas close to imperiled waters.
- Second, EPA will revisit the division of work with states, many of which are facing near-term serious resource problems, to better utilize existing resources and make sure in the near term that the most serious water pollution violations are addressed.
- Third, EPA will now press for immediate electronic reporting. NetDMR is available for facilities to electronically report their DMRs. The Agency says it will urge facilities to shift to electronic reporting right away to reduce data entry costs and increase the accuracy and timeliness of information available to the public.

EPA’s *Clean Water Act Enforcement Action Plan* is available at www.blr.com/enviro_download. Type in **111135** when prompted.

—William C. Schillaci
BSchillaci@blr.com

Most Misunderstood Regs

OSHA Serious Violations

There are five types of OSHA violations. The most egregious of these are willful violations, repeated violations, and failure to abate. For each willful and repeated violation, OSHA can fine an employer up to \$70,000. A failure-to-abate violation can bring a maximum penalty of \$7,000 per day for every day the violation continues beyond the prescribed abatement date.

The two remaining violation categories are other-than-serious violations and serious violations. An other-than-serious violation is one that

has a direct relationship to job safety and health, but probably would not cause death or serious physical harm. A serious violation is one where there is substantial probability that death or serious physical harm could result, and the employer knew or should have known of the hazard.

Employers who are committed to compliance with all worker safety codes can still fall prey to serious and other-than-serious violations for many reasons, including lax supervision, ignorance of standards, unexpected job-site demands and situations, inadequate arrangements with subcon-

tractors, and adverse weather. While some employers in certain industrial sectors may believe that human fallibility and unexpected conditions may make some types of less-than-serious violations unavoidable, there should be no reason to allow a situation where a serious violation might occur. Being aware of what constitutes a serious violation will help employers avoid them.

OSHA inspectors use the following four-step process to determine whether a serious violation has occurred. We reference examples of possible violations of OSHA permissible

exposure limits (PELs) taken from the November 2009 edition of *OSHA's Field Operations Manual*.

- First, identify the type of potential exposures to a hazard the violated standard or the general duty clause is designed to prevent. Example: An 8-hour time-weighted average sample reveals regular, ongoing employee overexposure to methylene chloride at 100 ppm in apparent violation of the 75 ppm PEL for this chemical.

- Second, identify the most serious injury or illness that could reasonably be expected to result. For conditions involving exposure to air contaminants or harmful physical agents, the inspector must consider the concentration levels of the contaminant or physical agent in determining the types of illness that could reasonably result from the exposure.

- Third, determine whether the type of injury or illness identified in step 2

could include death or serious physical harm. Example: An employee develops chronic beryllium disease after long-term exposure to beryllium at an air concentration above 0.004 mg/m³, and his or her breathing capacity is significantly reduced. This illness would constitute serious physical harm.

- Fourth, determine whether the employer knew or, with the exercise of reasonable diligence, could have known, of the presence of the hazardous condition. Unless the employer either admits to being aware that the hazardous condition existed or acknowledges that he or she could have known about the condition, proving that there was knowledge of a hazardous condition is the most challenging aspect of establishing a charge of a serious violation. OSHA inspectors would need to find proof of such knowledge. For example, there would

need to be evidence that the hazard was in plain sight and obvious, that the employer failed to regularly inspect the workplace for hazards, or that the employer failed to train and supervise employees regarding the particular hazard.

Also be aware that an OSHA inspector only has to determine that a death or serious injury would probably occur *if* there was an accident/incident relating to the violative condition. The inspector does not have to demonstrate that there is a *likelihood* that an incident or illness *will* occur. Likelihood is considered in the penalty assessment phase, not in the classification of the violation.

OSHA's Field Operations Manual is available at www.blr.com/enviro_download. Type in 111137 when prompted.

Washington Watch

Methyl Bromide Uses for 2010

In accordance with the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer and Title VI of the CAA, EPA has proposed critical use exemptions (CUEs) for methyl bromide for 2010.

Methyl bromide is an odorless, colorless, toxic gas that is controlled under the CAA as a Class I ozone-depleting substance (ODS).

Methyl bromide is also applied in the United States and throughout the world as a fumigant to control insects, weeds, rodents, pathogens, and nematodes.

Under the Protocol and the CAA, production of methyl bromide was set for termination in 2005. However, the Protocol and CAA also authorize CUEs that permit the production and import of methyl bromide for uses that do not have technically and economically feasible alternatives and for which the lack of methyl bromide would result in significant market disruption.

EPA's proposal covers exemptions for 15 crops or uses, including tomatoes, strawberries, peppers, cucurbits, orchard replants, and postharvest uses.

According to the Agency, the proposal represents a continued reduction of CUEs for methyl bromide from earlier years due to the market introduction of alternatives.

Under the proposal, EPA would permit the production and import of up to 2,276 metric tons of methyl bromide (8.9 percent of the 1991 baseline) for critical uses in 2010.

In addition, the proposal would allow distribution of an additional 690 metric tons (2.7 percent of the 1991 baseline) of critical stock allowances (CSA) to producers, importers, and distributors. CSAs allow holders to sell methyl bromide for critical uses from stocks that were manufactured/imported before January 1, 2005.

EPA's proposed 2010 CUEs for methyl bromide were published in the November 23, 2009, *Federal Register*.

RPS Status

According to DOE, 24 states plus the District of Columbia have renewable portfolio standards (RPSs) or a requirement that electricity providers obtain a minimum percentage of their power from renewable energy resources by a certain date. Five other states—North Dakota, South Dakota, Utah, Virginia, and Vermont—have nonbinding goals for adoption of renewable energy instead of an RPS.

State progress on RPSs has been impressive considering the failure of the federal government to enact a national RPS.

However, the Energy Information Administration (EIA) points out that a combination of federal incentives has resulted in increased use of renewable energy in states without mandatory RPSs.

Perhaps the most important of these federal incentives has been the production tax credit, says EIA, which awards tax credits to entities that

(continued on page 10)

generate electricity using renewable technologies that are eligible for the program.

“Increases in renewable generation have often been most significant when both an RPS mandate was in effect and a production tax credit was available to electricity producers,” states EIA.

Another important feature of some state policies, as well as most proposed federal policies, is a renewable electricity credit (REC) trading system. This mechanism allows an electricity producer who generates renewable electricity to either trade or sell certificates of generation to other electricity suppliers who do not generate enough RPS-eligible renewable electricity to meet their RPS requirement. RECs allow energy suppliers in regions of the country with limited sources or renewable energy to purchase compliance credits from suppliers with more access to resources.

“The flexibility provided by the REC’s trading mechanism is helpful in limiting costs because diverse sources of renewable energy are spread throughout the United States,” says EIA.

In one study conducted in 2007, EIS said a federal standard that required that 15 percent of electricity sales by 2020 be derived from renewable resources would result in a tripling of electricity generated from biomass as well as large increases in wind and solar photovoltaic generation by 2030.

Retail electricity prices were predicted to rise by an average 0.9 percent above the price level by 2030 without the federal RPS standard, but natural gas prices would fall as a result of the lower demand for natural gas from the electric power sector.

Several RPS proposals are now pending in the U.S. Congress.

A chart showing state RPS goals is available at www.blr.com/enviro/download. Type in **110921** when prompted.

Endangered Species and Climate Change

EPA’s National Center for Environmental Assessment (NCEA) has issued a draft framework to categorize the relative vulnerability of species to climate change.

The peer-reviewed framework uses four modules that:

- (1) Categorize a species’ baseline vulnerability to extinction or major population reduction;
- (2) Categorize a species’ vulnerability to future climate change;
- (3) Develop a matrix that gives an overall score of the species’ vulnerability to non-climate and climate change stressors; *and*
- (4) Qualitatively determine the uncertainty in the estimate of a species’ vulnerability.

Hector Galbraith of the Manomet Center for Conservation Sciences and Jeff Price of the World Wildlife Fund developed the framework and tested it on five species listed under the U.S. Endangered Species Act (ESA).

According to the categorization formula, four of the species are critically vulnerable:

- The golden-cheeked warbler;
- The salt marsh harvest mouse;
- The Mount Graham red squirrel; *and*
- The Lahontan cutthroat trout.

The desert tortoise was characterized as highly vulnerable and the bald eagle—now delisted, except for the Southwest population—was categorized as less vulnerable.

According to the authors, the most vulnerable species tend to be restricted in their distributions, small in population size, undergoing population reductions, and found in habitats that are likely to be most adversely affected by future climate change.

Conversely, species like the bald eagle, which are widely distributed, are flexible in their habitat preferences and are considered to be stable or increasing, scored least vulnerable.

Compliance Quiz

Under federal OSHA regulations employers are required to provide employees with hearing protectors when the employee is exposed to a workplace 8-hour time-weighted average that meets or exceeds:

- a. 85 decibels
- b. 95 decibels
- c. 110 decibels
- d. 130 decibels

Answer on page 16

The results also indicate that major areas of uncertainty complicate any evaluations of vulnerability.

For the species tested, the greatest uncertainties are associated with

- Relatively poor knowledge about the potential for direct, physiological effects on animal species,
- The relationships between changes in temperature and precipitation regimes, and
- The physiologies and behaviors of animals.

A Framework for Categorizing the Relative Vulnerability of Threatened and Endangered Species to Climate Change is available at <http://cfpub.epa.gov/ncea/cfm/recordisplay.cfm?deid=203743>.

SPCC Plan Amended Rule Effective – January 14, 2010

Are you one of the 400,000 facilities required by the EPA’s amended Spill Prevention, Control, and Counter-measure (SPCC) plan rule? If you are, your plan must be in compliance with the November 2009 amendment that is effective January 14, 2010, and addresses the prevention, containment, and/or cleanup of oil spills from reaching surface waters.



Updated to address this recent amendment, this book will help you prepare, implement, and maintain your plan. It clearly outlines your SPCC requirements and takes you step-by-step through the development of your plan.

FREE 30-Day Trial! Call 800-727-5257 TODAY!

Mention code: BE13232

17003400/BLR1/\$149

From The States

CALIFORNIA

Bald Tire Epidemic?

California ranks among the worst in the nation in tire safety, reported the state Integrated Waste Management Board (IWMB), citing data developed by the Rubber Manufacturers Association (RMA).

About 28 percent of vehicles surveyed in Los Angeles and San Diego had one or more bald tires, while 10 percent of vehicles surveyed in Sacramento had at least one bald tire, said IWMB.

Nationwide, the survey shows a 20 percent increase in the number of vehicles with dangerously low tire tread, compared to a similar survey conducted by the National Highway Traffic Safety Administration in 2001.

Bald tires are not being replaced most likely because vehicle owners are putting off tire replacement in the recent tough economic times, in turn, creating more dangers on the road.

IWMB and RMA recommend two methods to determine sufficient tire tread depth:

- **The Penny Test.** Insert a penny between the tire tread lines with Abraham Lincoln's head upside down. Test a couple of spots on each tire. If you can see the entire top of his head, your tread is less than 2/32nds of an inch deep—below the level of safety—and it's time to replace your tires.
- **Wear bars.** All tires have "wear bars," or tread indicators, built into them. These indicators are raised sections spaced intermittently in the bottom of the tread grooves. When they appear "even" with the outside of the tread, it's time for tire replacement.

"More than 64 percent of drivers admit they don't know how to check their tire tread depth," said RMA Senior Vice President of Public Affairs Daniel Zielinski. "By showing people that proper tire maintenance is

quick and easy, we hope to help save thousands of lives."

It's also important to check the air pressure of each tire once a month while tires are cool to the touch. Under-inflation can be dangerous and is the leading cause of wear and tear on tires.

Other factors include improper wheel alignment and infrequent tire rotation.

California currently generates 44 million scrap tires a year, which represents 1.1 tires per person.

Tire replacement can cost up to \$80 to \$150 per tire and, according to U.S. EPA, keeping your tires at the proper inflation level can save you \$100 to \$200 in fuel each year.

MASSACHUSETTS

Fed Approves Dry-Cleaning Program

In a direct final rule, U.S. EPA has approved the state Department of Environmental Protection's (DEP) program to regulate perchlorethylene (perc) emissions from dry cleaners that are nonmajor or area sources of HAPs. DEP's Environmental Results Program (ERP) for perc thereby applies to dry cleaners in lieu of EPA's NESHAP, which the Agency issued in 1993 and amended three times in 2006 and 2008.

DEP's NEP for dry cleaners contains provisions that both match and differ from NESHAP requirements. But overall, EPA has determined that the state's program is at least as stringent as the federal rule. EPA's approval, which was issued as a direct final rule, makes DEP's dry-cleaner ERP federally enforceable.

This is in fact the second time DEP's dry-cleaner ERP received EPA's approval. EPA first approved the ERP in 2002 in place of the 1993 NESHAP for dry cleaners. Following promulgation of the three amendments, DEP was again required to demonstrate that its program was at least as

stringent as the amended NESHAP. The state revised the dry-cleaning ERP and in November 2008, requested that EPA again approve its program in place of the national program.

EPA states that its review of DEP's revised dry-cleaning ERP focused on how the ERP matched up with five amended areas of the NESHAP:

- Added definitions;
- Control requirements for new dry cleaners installed after December 21, 2005;
- Requirements for dry cleaners installed in a building with residence after December 21, 2005;
- Requirements for transfer machines; *and*
- Monitoring and reporting requirements.

For definitions and control requirements for new dry cleaners installed after December 21, 2005, DEP's ERP requirements matched the federal requirements.

For dry cleaners co-located with residences and monitoring, DEP's requirements exceed the stringency of the NESHAP.

Specifically, the ERP requires weekly monitoring for leaks instead of the monthly monitoring required by the NESHAP.

The ERP also prohibits collocation of dry cleaners and residences as of November 5, 2008, while the prohibition in the NESHAP is limited to new facilities.

Only with reporting provisions are DEP's requirements less stringent than the annual reporting required under the NESHAP. However, EPA contends that even with the reduced reporting requirements, the ERP is more stringent than the NESHAP and, therefore, merits approval.

EPA's direct final rule approving DEP's ERP for dry cleaning was published in the November 23, 2009, *Federal Register*.

(more States on page 12)

NEVADA

Mercury Emissions From Mine Sites

Preliminary results from research funded by the Nevada Division of Environmental Protection (NDEP) and Nevada mining companies indicate that the large majority of mercury emissions from two active gold mines are generated from regulated, point-source activities.

One objective of the research was to identify the level of mercury emissions from nonpoint source activities at the mines, mainly fugitive emissions from waste rock, heap leaches,

tailings impoundments, active pit surfaces, stockpiles, and reclaimed sites.

The study focused on mercury emissions from mining activities at Newmont's Twin Creeks Mine northeast of Winnemucca and Cortez Pipeline, a Barrick property south of Battle Mountain.

Results showed that mercury emissions from mining disturbances are approximately 20 percent of the mercury emitted by the regulated point sources at these two gold mines.

Heap leaching and tailings impoundments produced the greatest emissions, according to the study.

The researchers emphasized that the amount of mercury emitted from these types of disturbances can vary

significantly among mines, depending on the mercury concentration at the disturbed site, the moisture content of the tailings, and whether the heaps are actively being leached with cyanide.

"We are pleased to see that, although some mercury is released as a result of mining disturbances, the amount emitted is significantly less than the current point source emissions where we are, and have been, focusing our mercury reduction efforts," said Leo Drozdoff, NDEP administrator.

"The study also shows that current reclamation practices will return these emissions to near natural levels."

The final report will be available after peer review in early 2010.

Federal Register Digest

Part I: Federal Actions of General Applicability

AIR

GHG

Endangerment finding: Final rule finding that six GHGs taken in combination endanger both the public health and the public welfare of current and future generations. **Contact:** Jeremy Martinich, 202-343-9927. **Reference:** 74 FR 66495 (12/15/09).

NSR

Fugitive emissions: Interim final rule providing an additional stay of regulations concerning the inclusion of fugitive emissions. **Contact:** Carrie Wheeler, 919-541-9771. **Reference:** 74 FR 65692 (12/11/09).

STRATOSPHERIC OZONE

Essential use allowances for 2010: Proposed rule allocating essential use allowances for import and production of Class I ozone-depleting substances for calendar year 2010. **Contact:** Jennifer Bohman, 202-343-9548. **Reference:** 74 FR 65719 (12/11/09).

Controlling HCFC production: Final rule adjusting the allowance system controlling U.S. consumption and production of hydrochlorofluorocarbons (HCFCs). **Contact:** Staci Gatica, 202-343-9469. **Reference:** 74 FR 66411 (12/15/09).

Precharged appliances: Final rule banning the sale or distribution of air-conditioning and refrigeration appliances containing HCFC-22, HCFC-142b, or blends containing one or both of these substances, beginning January 1, 2010. **Contact:** Julius Banks, 202-343-9870. **Reference:** 74 FR 66449 (12/15/09).

SULFUR DIOXIDE

Primary NAAQS for SO₂: Proposed rule revising the primary sulfur dioxide (SO₂) NAAQS to provide requisite protection of public health with an adequate margin of safety. **Contact:** Dr. Michael J. Stewart, 919-541-7524. **Reference:** 74 FR 64809 (12/8/09).

CEQ

WATER

Uniform planning standards: Notice of initiation of revisions of the draft "Economic and Environmental Principles and Guidelines for Water and Related Land Resources Implementation Studies" to establish uniform planning standards for water resource projects. **Contact:** Terry Breyman, 202-456-9721. **Reference:** 74 FR 65102 (12/9/09).

Interagency Ocean Policy Task Force: Notice of availability of the Interagency Ocean Policy Task Force's "Interim Framework for Effective Coastal and Marine Spatial Planning." **Contact:** Michael Weiss, 202-456-3892. **Reference:** 74 FR 67178 (12/18/09).

CERCLA (SUPERFUND)

NPL

Kerr-McGee Reed-Keppler Park: Direct final notice of deletion of the Kerr-McGee Reed-Keppler Park Superfund site located in West Chicago, Illinois, from the NPL. **Contact:** Timothy Fischer, 312-886-4737. **Reference:** 74 FR 64615 (12/8/09).

DEPARTMENT OF ENERGY (DOE)

CONSERVATION STANDARDS

Enforcing compliance: Notice of grace period from enforcement for any violations of energy-efficiency certification for residential products that are remedied within 30 days of this notice. **Contact:** Laura Barhydt, 202-287-5772. **Reference:** 74 FR 65105 (12/9/09).

Residential water heaters, direct heating equipment, and pool heaters: Notice of proposed rulemaking amending energy conservation standards for residential water heaters (other than tabletop and electric instantaneous models), gas-fired direct heating equipment, and gas-fired pool heaters. **Contact:** Mohammed Khan, 202-586-7892. **Reference:** 74 FR 65851 (12/11/09).

PENALTIES

Inflation adjustment: Final rule adjusting civil penalties for inflation as mandated by the Debt Collection Improvement Act of 1996. **Contact:** Preeti Chaundhari, 202-586-8078. **Reference:** 74 FR 66029 (12/14/09).

DEPARTMENT OF TRANSPORTATION

PHMSA

Standardized notification process: Notice of issuance of an advisory bulletin to inform pipeline operators about the standardized notification process for operator qualification plan transmittal from the operator to PHMSA. **Contact:** Warren Miller, 816-329-3815. **Reference:** 74 FR 64123 (12/7/09).

Chemical oxygen generators: Final rule confirming the November 16, 2009, effective date of the direct final rule revising the quantity

limitation for packages of chemical oxygen generators transported aboard cargo aircraft only. **Contact:** T. Glenn Foster, 202-366-8553. **Reference:** 74 FR 65696 (12/11/09).

EPA

REGULATORY AGENDA

Semiannual agenda: Notice of publication of EPA's semiannual regulatory agenda to update the public about regulations and major policies currently under development, reviews of existing regulations and major policies, and rules and major policymakings completed or canceled since the last agenda. **Contact:** Caryn Muellerleile, 202-564-2855. **Reference:** 74 FR 64496 (12/7/09).

HUMAN HEALTH

PESTICIDES

Antimicrobial pesticide products: Notice announcing the development of two voluntary pilot programs for certain factual label statements and logos for antimicrobial pesticide products. **Contact:** Michael Hardy, 703-308-6432. **Reference:** 74 FR 65119 (12/9/09).

Clothianidin: Final rule establishing tolerances for residues of clothianidin. **Contact:** Laura Nollen, 703-305-7390. **Reference:** 74 FR 65021 (12/9/09).

Novaluron: Final rule establishing tolerances for residues of novaluron. **Contact:** Laura Nollen, 703-305-7390. **Reference:** 74 FR 65029 (12/9/09).

Risk assessment: Notice of availability of a policy paper on "Revised Risk Assessment Methods for Workers, Children of Workers in Agricultural Fields, and Pesticides with No Food Uses" that describes how EPA will assess pesticide risks not governed by the federal Food, Drug, and Cosmetic Act. **Contact:** Deborah Smegal, 703-308-0175. **Reference:** 74 FR 65121 (12/9/09).

2,6-DIPN: Final rule establishing time-limited tolerances for residues of 2,6-diisopropyl-naphthalene (2,6-DIPN), including its metabolites and degradates. **Contact:** Leonard Cole, 703-305-5412. **Reference:** 74 FR 66574 (12/16/09).

Chlorimuron ethyl: Final rule establishing tolerances for residues of chlorimuron ethyl, including its metabolites and degradates. **Contact:** Beth Benbow, 703-347-8072. **Reference:** 74 FR 67082 (12/18/09).

Dinotefuran: Final rule establishing tolerances for combined residues of dinotefuran. **Contact:** Sidney Jackson, 703-305-7610. **Reference:** 74 FR 67098 (12/18/09).

Endothall: Final rule establishing tolerances for indirect or inadvertent combined residues of endothall. **Contact:** Sidney Jackson, 703-305-7610. **Reference:** 74 FR (12/6/09).

Fluoxastrobin: Final rule establishing tolerances for combined residues of fluoxastrobin and its Z isomer. **Contact:** John Bazuin, 703-305-7381. **Reference:** 74 FR 67108 (12/18/09).

RCRA

HAZARDOUS WASTE

Emissions-comparable fuel: Proposed rule withdrawing the conditional exclusion from regulations for so-called emissions-comparable fuel. **Contact:** Mary Jackson, 703-308-8453. **Reference:** 74 FR 64643 (12/8/09).

Part II: Federal Actions Affecting Individual States

AIR-STATE IMPLEMENTATION PLANS

CALIFORNIA

San Joaquin Valley: Proposed rule partially approving and partially disapproving revisions to the San Joaquin Valley Unified Air Pollution Control District portion of the California SIP concerning NOx emissions from solid fuel-fired boilers, steam generators, and process heaters. **Contact:** Idalia Perez, 415-972-3248. **Reference:** 74 FR 65042 (12/9/09).

Monterey Bay: Direct final rule approving revisions to the Monterey Bay area portion of the California SIP concerning the Monterey Bay area maintenance plan for continued attainment of the 8-hour ozone standard through 2014. **Contact:** Sarvy Mahdavi, 415-972-3173. **Reference:** 74 FR 66916 (12/17/09).

SJVUAPCD: Proposed rule approving revisions to the San Joaquin Valley Unified Air Pollution Control District (SJVUAPCD) portion of the California SIP concerning the reduction of animal matter and VOC emissions from crude oil production, cutback asphalt, and petroleum solvent dry cleaning. **Contact:** Joanne Wells, 415-947-4118. **Reference:** 74 FR 67154 (12/18/09).

eDisclosure form. Complete instructions are available at <http://www.epa.gov/oecaerth/incentives/auditing/edisdisclosure.html>.

Coal Dust Accumulations

The growing alarm about the dangers of accumulations of combustible dust is not limited to factory-type settings. According to data collected by the Mine Safety and Health Administration (MSHA), excess accumulation of

NEW JERSEY AND NEW YORK

Various areas: Final rule determining that various ozone nonattainment areas in New Jersey and New York have attained the 1-hour and 8-hour standards for ozone. **Contact:** Robert F. Kelly, 212-637-4249. **Reference:** 74 FR 63993 (12/7/09).

NORTH CAROLINA

Great Smoky Mountains National Park: Final rule approving a request by the North Carolina DENR to redesignate the Great Smoky Mountains National Park 1997 8-hour ozone nonattainment area to attainment for the 1997 8-hour ozone standard. **Contact:** Jane Spann, 404-562-9029. **Reference:** 74 FR 63995 (12/7/09).

PENNSYLVANIA

CAIR: Final rule approving revisions to the Pennsylvania SIP concerning the requirements of CAIR and other requirements that interact with CAIR. **Contact:** Marilyn Powers, 215-814-2308. **Reference:** 74 FR 65446 (12/10/09).

WATER

CALIFORNIA

Operations off southern California: Notice of availability of final NPDES general permit modifications for discharges from offshore oil and gas exploration, development, and production facilities located in federal waters off the coast of southern California. **Contact:** Eugene Bromley, 415-972-3510. **Reference:** 74 FR 64074 (12/7/09).

MAINE

Stormwater discharges: Notice of final determination requiring that stormwater discharges from impervious areas equal to or greater than 1 acre in the Long Creek watershed be authorized by a permit. **Contact:** Jennie Bridge, 617-918-1685. **Reference:** 74 FR 64075 (12/7/09).

MASSACHUSETTS AND NEW HAMPSHIRE

Hydroelectric generating facilities: Notice of availability of final NPDES general permits for specific discharges at hydroelectric generating facilities in Massachusetts and New Hampshire. **Contact:** William Wandle, 617-918-1605. **Reference:** 74 FR 64074 (12/7/09).

combustible materials is the "most frequently cited standard" in underground coal mines and the third most-cited standard for surface coal mines.

MSHA's regulation at 30 CFR 75.400 states: "Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on diesel-powered and electric equipment therein."

(continued on page 14)

News (continued from page 2)

respect to any information submitted through eDisclosure. If you are asserting a business confidentiality claim or if you would like to self-disclose a violation of another environmental law and are not located in a Region 6 state, you may send your self-disclosure to the appropriate EPA contact.

Managers who wish to take advantage of eDisclosure must register at EPA's Central Data Exchange and access an

(continued from page 13)

According to MSHA, “coal dust” is defined as particles of coal that pass a No. 20 sieve. It is this fraction of the coal that participates in the dust explosion reaction. Tests have shown that intermittent piles of coal dust are more hazardous than smooth layers because the irregular piles are eroded more readily by the air movement generated during an explosion. As little as two 300-pound piles, under experimental conditions, caused an explosion to propagate when the entry was otherwise adequately rock-dusted to 65 percent incombustible content.

The brevity and absence of detail in the MSHA regulation provides MSHA compliance inspectors with considerable latitude in determining if a violation is occurring. Volume V (Coal Mines) of MSHA’s *Program Policy Manual* states:

“Imminent danger conditions normally can be considered to exist when accumulations of coal dust, float coal dust, loose coal, and other combustible materials are exposed to probable explosion and fire ignition sources, and the conditions observed could reasonably be expected to cause death or serious physical harm to a miner if normal mining operations were permitted to proceed in the area before the dangerous conditions are eliminated. There may be times when the inspector’s interpretation of what is an accumulation of float coal dust, loose coal and coal dust and/or other combustible materials will differ with the opinion of others. However, the inspector should base his decision upon the facts surrounding each occurrence, and document such facts as the dimensions, type, specific location, and all other related factors. The inspector’s decision as to what is an accumulation must be an objective one based on the facts or circumstances surrounding each occurrence.”

The coal mine volume of the *Program Policy Manual* is at <http://www.msha.gov/REGS/COMPLIAN/PPM/PMVOL5E.HTM>.

Cleaning Up Nano-Contamination

Cleanup managers should make a habit of checking information on emerging contaminants provided at EPA’s Clu-in website (<http://www.clu-in.org>).

An “emerging contaminant” is defined as a chemical or material that is characterized by a perceived, potential, or real threat to human health or the environment or a lack of published health standards. A contaminant may also be emerging because a new source or a new pathway to humans has been discovered or a new detection method or treatment technology has been developed.

Clu-in publishes helpful fact sheets on emerging contaminants. One recent fact sheet on nanomaterials (NM) provides some valuable data for anyone tasked with a nano-cleanup. Here are some selections:

- The mobility of NMs in porous media is influenced by their ability to attach to mineral surfaces to form aggregates. For example, NMs that readily attach to mineral surfaces may be less mobile in groundwater aquifers; smaller NMs that can fit into the interlayer spaces between soil particles may travel longer distances before becoming trapped in the soil matrix; and soils with high clay content tend to stabilize NMs and allow greater dispersal.
- The potential mechanisms of biodegradation of NMs are the subject of current investigation. Some fullerenes such as C60 and C70 have been found to biodegrade after several months. Many NMs containing inherently nonbiodegradable inorganic chemicals like metals and metal oxides may not biodegrade as readily.
- Although nanoscale zero-valent iron (nZVI) is widely used in site remediation, information is limited on its fate and transport in the environment. While increased mobility due to the smaller size may allow for efficient remediation, there are insufficient data regarding whether such NMs could migrate beyond the contaminated plume area and persist in drinking water aquifers or surface water.
- Analysis of NMs in environmental samples often requires the use of multiple technologies in tandem. This can include the use of size separation technologies combined with particle counting systems, morphological analysis, and/or chemical analysis technologies.

Limited information is available about technologies that can be used to control NMs in water and wastewater streams. NMs in groundwater, surface water, and drinking water may be removed using flocculation, sedimentation, and sand or membrane filtration.

The emerging contaminant fact sheet on NMs is at <http://www.clu-in.org/download/contaminantfocus/epa505f09011.pdf>.

Modifying SWPPPs

Owners and operators of industrial facilities often ask under which conditions they should modify the stormwater pollution prevention plans (SWPPP) they must develop and implement under NPDES individual or general permits. In a 2009 guidance document, EPA gives the following examples of events that “if they result in a change in control measures or procedures, will require prompt revision of the SWPPP to reflect the new facility conditions.”

- A change in the composition of the stormwater pollution prevention team or new responsible official.
- An unauthorized release or discharge (e.g., a spill or leak) at your facility.
- A discharge that violates a numeric effluent limit.
- You become aware that your control measures are not stringent enough for the discharge to meet applicable water quality standards.
- An inspection or evaluation of your facility by a regulator determines that modifications to the control measures are necessary to meet the non-numeric effluent limits in your permit.
- Construction or a change in design, operation, or maintenance at your facility significantly changes the nature of pollutants discharged in stormwater or significantly increases the quantity of pollutants discharged.
- The average of four quarterly sampling results exceeds an applicable benchmark.

Remember, revisions to the SWPPP to document corrective actions require a new signed and dated certification statement by the responsible official. All other changes must be signed and dated by the person preparing the change.

EPA's *Developing Your Stormwater Pollution Prevention Plan: A Guide for Industrial Operators* is available at www.blr.com/enviro_download. Type in **111108** when prompted.

NESHAP for Asphalt Manufacturers

Asserting that its new national emissions standard for hazardous air pollutants (NESHAP) from asphalt refining and asphalt roofing manufacturing facilities targets sources that are already "well controlled," EPA has given the sector only 1 year, until December 2, 2010, to come into compliance with the emissions limits and other requirements.

The rule covers about 75 existing facilities and any new facilities in the sector, which are or will be nonmajor or area sources of HAPs. Specifically addressed are facilities that process asphalt and/or manufacture roofing products using saturation and/or coating processes that apply asphalt to a substrate. The emissions limits are as follows:

- Asphalt processing—limit polycyclic aromatic hydrocarbons (PAH) emissions to 0.003 lb/ton of asphalt charged to the asphalt refining (blowing still) operation. Alternatively, comply with a PM emissions limit of 1.2 lb/ton of asphalt charged to the asphalt refining operation.
- Asphalt roofing product manufacturing operations. Three subcategories of limits were established for:
 - Production lines that use a coater only—limit PAH emissions from all coating mixers and coaters to 0.0002 lb/ton of product or 0.06 lb PM/ton of product manufactured.
 - Production lines that use a saturator only—limit PAH emissions from all saturators (and wet loopers) to 0.0007 lb/ton of product manufactured or 0.30 lb PM/ton of product manufactured.
 - Production lines that use both saturators and coaters—limit PAH emissions from all saturators, wet loopers, coating mixers, and coaters to 0.0009 lb/ton of product manufactured or 0.36 lb PM/ton of product manufactured.

Because of existing new source per-

formance standards, state permitting requirements, and OSHA regulations, EPA believes the covered facilities are already employing the air pollution control equipment necessary to achieve the required emissions limits.

Hence, the Agency does not project that additional emissions reductions will occur as a result of the rule.

However, the rule does ensure that emissions limits already achieved are maintained, says EPA.

According to the Agency, the only new cost associated with the rule is about \$3,000 per facility per year to meet monitoring, recordkeeping, and reporting requirements.

EPA's final NESHAP covering asphalt processing and asphalt roofing manufacturing was published in the December 2, 2009, *Federal Register*.

NESHAP for Paints and Allied Products

Companies that manufacture paints and allied products should carefully review EPA's final NESHAP for area sources to determine if they are covered by the rule. Entities subject to the NESHAP have until December 3, 2012, to comply. Requirements include:

- Separate standards for metal HAP emissions and volatile HAP emissions;
- An initial visual emissions test using EPA Method 203C;
- Quarterly visible emissions tests using EPA Method 22; and
- Notification, recordkeeping, and reporting requirements.

The rule is applicable to owners and operators of area sources that perform paints and allied products manufacturing and processes and use or generate materials containing benzene, methylene chloride, and compounds of cadmium, chromium, lead, and nickel.

The rule does not apply to the manufacture of products that do not leave a dried film of solid material on the substrate, such as thinners, paint removers, brush cleaners, and mold release agents; the manufacture of electroplated and electroless metal films; the manufacture of raw materials, such as

resins, pigments, and solvents used in the production of paints and allied products; and activities by end users of paints or allied products to ready those materials for application.

Area sources that manufacture both coatings and resins are required to comply with the paints and allied products NESHAP as well as the area source NESHAP for chemical manufacturing.

For metal HAP emissions, the rule requires operation of a particulate control device during the addition of pigments and other solids that contain compounds of cadmium, chromium, nickel, or lead and during the grinding and milling of pigments and solids containing those metals.

For volatile HAP emissions, owners and operators must cover vessels that store or process materials containing benzene or methylene chloride lids.

The covers or lids can be of solid or flexible construction provided they do not warp or move around during the manufacturing process.

Mixing vessels that process or store materials containing one or more of the target volatile HAPs must be equipped with covers that completely cover the vessel, except for safe clearance of the mixer shaft.

Also, leaks and spills of materials containing benzene or methylene chloride must be minimized and cleaned up as soon as practicable, but no later than 1 hour from the time of detection.

EPA estimates that 110 of the 2,190 facilities in the source category are subject to the volatile HAP requirements and 460 facilities are subject to the metal HAP requirements.

The rule does not address VOC emissions from coatings, which the Agency intends to address in a separate rule.

EPA's final NESHAP for area sources in the paints and allied products manufacturing sector was published in the December 3, 2009, *Federal Register*.

Enforcement

Waste Violations Come in Bunches

Environmental enforcement officials often find that companies with lax hazardous waste compliance programs are typically in violation of multiple regulations.

This was allegedly the case with an Erving, Massachusetts, company that manufactures catalog, magazine, and newsprint papers.

According to the Massachusetts Department of Environmental Protection (MDEP), a September 2, 2008, inspection revealed that the manufacturer was storing hazardous waste at its facility beyond the time limit allowed by state hazardous waste regulations.

Other alleged violations were failure to properly label containers of hazardous waste, failure to clearly mark the hazardous waste accumulation area boundary, failure to post a hazardous waste sign, failure to keep hazardous waste accumulation containers closed, failure to have secondary containment, and failure to have an impervious surface on which to store hazardous waste.

As part of a settlement agreement with MDEP, the company agreed to correct the violations, remain in compliance, and pay a \$5,000 penalty.

RMP Resolution in Ohio

Sunoco Inc. agreed to pay a \$32,250 civil penalty and correct alleged deficiencies in its risk management plan (RMP) for the company's Toledo refinery.

According to Ohio EPA, the refinery has more than 35 million pounds of flammable mixtures that contain three to eight flammables in each mixture. RMP requirements are triggered when flammable substances are on-site in quantities of 10,000 pounds or more.

Based on an April 2008 inspection, Ohio EPA claimed that it found four violations at the refinery, including one that had been ongoing since a 2002 inspection. The alleged violations cited were

- Failure to address several recommendations in the process hazard analysis;
- Failure to certify annually that operating procedures are current and accurate;
- Failure to correct deficiencies in several pieces of equipment before further use; *and*
- Failure to document that compliance audit deficiencies have been corrected.

The settlement requires Sunoco to document that all corrective actions have been completed and deficiencies resolved. This includes submitting a written schedule to complete actions that were due to be completed in 2008, such as correcting improperly sized pressure relief devices.

Environmental Manager's Compliance Advisor

Board of Experts

Marc Karell, PE

Climate Change &
Environmental Services, LLC
1506 Henry Ave.
Mamaroneck, NY

karell@ccesworld.com
914-584-6720

Heather Aley Austin

Thompson Hine LLP
3900 Key Center
127 Public Square
Cleveland, OH

heather.austin@thompsonhine.com
216-566-5927

Jane E. Obbagy

Vice President
The Cadmus Group
57 Water Street
Watertown, MA

jobbagy@cadmusgroup.com
617-673-7178

Coming Up

- Drift Statements on Pesticide Labels
- Relief Under RCRA
- Airport Recycling Gets Off the Ground
- Most Misunderstood Regs: Applying for Lead Paint Repair Certifications

Answer to Compliance Quiz: a

EHS

BOOKSTORE

Order today ... WWW.BLR.COM • Use Priority Code: MQS1651



Employee Training Center

Web-based individual training with course monitoring.

53101200 ... Call for information

Audio Click 'n Train: HazCom

The ready-to-deliver effective toolbox training—no preparation required!

10017100\$149

More titles available



Safety Meetings Library

Over 1,100 OSHA training resources at your fingertips.

15400200\$495
(plus quarterly updates)

Safety Training Presentations

Customizable, effective, effortless, dynamic safety training.

11006100\$395
(plus quarterly updates)



Safety.blr.com

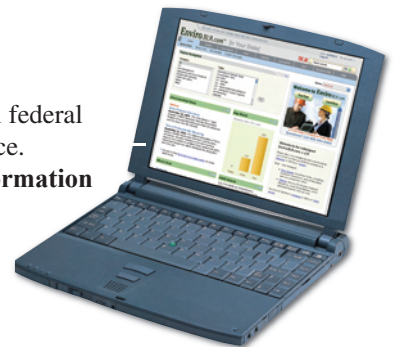
Online access to federal and state full-text regs, regulatory activity, news, best practices, and training.

53100100 ... Call for information

Enviro.blr.com

Online environmental EPA federal & state compliance resource.

5120xx00 ... Call for information



Environmental Compliance in [Your State]

Plain-English reviews of the federal regulatory structure with advice on compliance—includes monthly newsletters and more.

FXX\$595

The 7-Minute Safety Trainer

Prewritten safety training sessions done in just minutes.

11001500\$295
(plus quarterly updates)



OSHA Compliance Advisor Newsletter

Twice-a-month newsletters on the latest regulatory news items.

OCA\$299.95
(24 Issues)

The Environmental Manager's Compliance Advisor Newsletter

Bi-weekly intelligence report with environmental news and compliance.

EM\$299.95
(24 Issues)

