Message

From: Hubbard, Joseph [Hubbard.Joseph@epa.gov]
Sent: 4/2/2020 10:05:11 PM
To: AO OPA OMR CLIPS [AO_OPA_OMR_CLIPS@epa.gov]
Subject: Daily Clips 4/2/2020

Daily Clips 4/2/2020

Enforcement

Wheeler pushes back on critics of enforcement policy
https://www.eenews.net/eenewspm/2020/04/02/stories/1062770319

EPA Chief Says Virus-Linked Looser Enforcement Rules 'Very Mild'
https://news.bloomberglaw.com/environment-and-energy/epa-chief-says-virus-linked-looser-enforcement-rules-very-mild

EPA, Industry Defend Virus Enforcement Guidance As Limited, Reasonable
https://insideepa.com/daily-news/epa-industry-defend-virus-enforcement-guidance-limited-reasonable?s=em1

EPA enforcement move meets API wish list — and then some
https://www.eenews.net/greenwire/stories/1062760565

COVID19

Total cases rise to 15 as first employee dies
https://www.eenews.net/greenwire/2020/04/02/stories/1062769235

Alberta relaxes environmental rules amid COVID-19, following Trump's EPA
https://www.nationalobserver.com/2020/04/02/news/alberta-relaxes-environmental-rules-amid-covid-19-following-trumps-epa

EPA reminds Americans to flush only toilet paper
https://www.capegazette.com/article/epa-reminds-americans-flush-only-toilet-paper/200238

EPA Cracking Down on Misbranded Coronavirus Treatment Products
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IG Audit

EPA inspector general wants more public input on ethylene oxide exposure
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Air

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Land & Chemical

US Supreme Court Update: Cases to Watch for CERCLA Practitioners
https://www.law.com/thelegalintelligencer/2020/04/02/us-supreme-court-update-cases-to-watch-for-cercla-practitioners/?slreturn=20200302125627

EPA Finds Asbestos Use Poses Risk to Chloralkali Workers
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Water

Lawsuit Prompts Review of Plastic Pollution Impacts on Hawaiian Waters
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Air

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Wheeler pushes back on critics of enforcement policy

Corbin Hiar, E&E News reporter Published: Thursday, April 2, 2020

EPA

EPA Administrator Andrew Wheeler during a hearing last month. Francis Chung/E&E News

EPA this afternoon vigorously defended its controversial enforcement policy during the novel coronavirus crisis, pushing back on claims by lawmakers and the agency's former leaders.

The policy, issued late last week, relaxes routine monitoring requirements for facilities across the country for an unspecified period of time (*E&E News PM*, March 26).

"EPA's enforcement authority and responsibility remains active," Administrator Andrew Wheeler said in a news release highlighting a letter the agency's enforcement chief had sent to every member of Congress.

"This is not a nationwide waiver of environmental rules," he added. "We will continue to work with federal, state and tribal partners to ensure that facilities are meeting regulatory requirements, while taking appropriate steps to protect the health of our staff and the public."

But Wheeler took a more confrontational tone with critics of the agency's new policy — including his Obama-era predecessor, Gina McCarthy, who described it to E&E News as "don't ask, don't tell for pollution."

"While we are working hard to protect Americans & the workers who employ critical services, former Obama officials Gina McCarthy and Cynthia Giles are busy spreading misinformation to incite unnecessary anxiety," he said in a tweet thread, referring to the former EPA administrator and enforcement chief.

"In the process, they seemed to have forgotten their own actions," he said, before listing a series of moves Giles took to exercise enforcement discretion in response to Superstorm Sandy. "The reality is, the current #COVID19 pandemic presents an unprecedented situation that impacts all areas of all 50 states."

But in separate interviews earlier this week, McCarthy and Giles defended those actions as targeted and appropriate responses to clear public health threats.

"It certainly is true that in an emergency situation, there can be circumstances that could legitimately give rise to a narrow-tailored 'No Action Assurance,' where doing that is necessary to protect the public," Giles said, referring to promises EPA can make to not penalize facilities for pollution.

By way of example, she recounted granting assurances to certain power plants that needed to shut down before hurricanes without taking every environmental and safety precaution because the alternative — remaining in operation during the storm — would have been much worse.

On the other hand, "this entire document that was issued [last] Thursday is a No Action Assurance," said Giles, who's currently a guest fellow at Harvard Law School. "That's what it is."

In nearly identical letters to the Senate and House, EPA said that its new enforcement policy "does require case-by-case determinations," wrote Susan Bodine, the current enforcement chief. "But under the Temporary Policy, those determinations will be made after the pandemic is over and EPA reserves the right to disagree with any assertion that noncompliance was caused by the pandemic."

The letters were addressed to Sen. Dianne Feinstein (D-Calif.) and Reps. Mike Quigley (D-Ill.) and Katie Porter (D-Calif.), each of whom had sent EPA letters in recent days critical of the new policy.

Yet McCarthy, who now leads the Natural Resources Defense Council, and other environmentalists worry that the Trump administration won't disagree with any of those assessments — if it reviews them at all. Facilities are

required to keep records showing how the pandemic prevented them from doing routine monitoring and only need to provide them to EPA "upon request."

NRDC and a coalition of environmental and public health groups yesterday urged EPA to require facilities to inform the agency when the coronavirus has affected their ability to do monitoring and post those notifications online. The agency is still reviewing their emergency petition (*Greenwire*, April 1).

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https://news.bloomberglaw.com/environment-and-energy/epa-chief-says-virus-linked-looser-enforcement-rules-very-mild

EPA Chief Says Virus-Linked Looser Enforcement Rules 'Very Mild'

EPA Administrator Andrew Wheeler said the agency's response to relaxing enforcement due to the noval coronavirus pandemic has been "very mild" compared to the Obama administration's similar approach to natural disasters.

In an interview on Thursday, Wheeler said the pandemic has put the Environmental Protection Agency in the unusual position of handling requests for guidance from all 50 states, as opposed to the small handful of states that it had to respond to in past crises.

In contrast, Wheeler pointed to the EPA under former President Barack Obama, when the agency issued 13 separate enforcement discretion actions and five fuel waivers in the wake of Hurricane Sandy, which he said mainly only affected four states in 2012.

"They went above and beyond what we did for those four states during the hurricane," Wheeler said, speaking by telephone from his office, where he said he has been going every single day.

On March 26, the EPA offered temporary relief to facilities affected by the coronavirus pandemic, saying it won't seek penalties for certain missed obligations.

The new guidance acknowledges that some entities can't perform routine compliance monitoring, integrity testing, sampling, laboratory analysis, training, and reporting or certification activities.

The guidance, which took effect retroactively to March 13, has no end date.

'Fluid' Situation

Susan Bodine, the EPA's assistant administrator for enforcement and compliance assurance, told Bloomberg Law that the policy was left open-ended because the "situation is very fluid."

"We don't know when this crisis will be over," Bodine said. "What we are paying very close attention to is when state and local health departments let people go back to work because then we won't need any enforcement discretion," she said.

Bodine emphasized the agency will post notifications about relaxed enforcement waivers online for the public to view.

A group of 11 Democratic senators made that request of Wheeler on Wednesday.

Wheeler also said he doesn't think bad actors have any greater opportunity to flout environmental rules under the temporary policy than they ordinarily do.

"We're always going to have some bad actors, and we go after them," he said. The EPA has been increasing the number of criminal enforcement cases it pursues, according to Wheeler.

Blames Politicization

He theorized that political motivations may be driving environmental groups to criticize the enforcement guidance.

"It's sad that there are people out there trying to politicize a very routine enforcement discretion that we do on a regional basis whenever there's an emergency such as a hurricane," Wheeler said.

In a Thursday letter to Rep. Katie Porter (D-Calif.), Bodine wrote that the EPA is continuing to enforce its regulations. The letter was also sent to Sen. Dianne Feinstein (D-Calif.) and Rep. Mike Quigley (D-Ill.).

"The agency strongly disagrees with those who argue that a more appropriate response to this public health crisis would be to force facilities to either shut down or to put people at risk by keeping all their workers at the facility at the same time" to keep performing routine monitoring and reporting, Bodine wrote.

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https://insideepa.com/daily-news/epa-industry-defend-virus-enforcement-guidance-limited-reasonable?s=em1

EPA, Industry Defend Virus Enforcement Guidance As Limited, Reasonable

EPA and many industry attorneys are defending the agency's guidance limiting civil enforcement for reporting and monitoring during the coronavirus pandemic as a responsible and limited response to the unprecedented restrictions imposed to address the health emergency, stressing that the guide is not, as some critics charge, a "license" to pollute.

"This action was necessary to avoid tying up EPA staff time with questions about routine monitoring and reporting requirements and instead allow EPA to focus on continued protection of human health and the environment," the agency said in a March 30 statement.

EPA stressed that the guidance shows the agency will not seek penalties for noncompliance with monitoring and reporting requirements if it agrees the noncompliance was due to the pandemic.

Additionally, the agency notes the policy does not say that EPA will excuse excess pollution but instead will "consider the pandemic, on a case-by-case basis, when determining an appropriate [enforcement] response."

The agency developed the policy to allow it to "prioritize its resources to respond to acute risks and imminent threats, rather than making upfront case-by-case determinations regarding routine monitoring and reporting."

The statement comes in response to charges from environmentalists and other critics that the March 26 guidance will become an indefinite enforcement waiver.

Some environmentalists filed an April 1 emergency petition urging the agency to quickly issue rules requiring companies that take advantage of the policy to publicly disclose when they stop monitoring or reporting their emissions, along with a detailed justification for doing so. The petition also urges EPA to notify the public by publishing that information within one day of notice from the companies.

But EPA's enforcement discretion guide is backed by many industry lawyers including Patrick Traylor, a former Trump appointee in EPA's enforcement office who returned to private practice last fall, joining Vinson & Elkin. He tells *Inside EPA* in a March 30 interview that the guidance is not a "nationwide wavier of environmental rules."

Such a move, which EPA would have called a "no-action assurance," is not what EPA enforcement chief Susan Bodine authorized, Traylor explains.

Instead, the move seeks to triage potential noncompliance into three categories in a way that "is elegant and reasonable," he says.

The first is EPA's indication that it will not seek civil penalties if facilities cannot monitor or report as they are required to. The second is where EPA says it will take the pandemic into consideration if pollution increases occur but promises no relief. And the third category is the suggestion that the agency could offer no-action assurances for violations if they occur at critical infrastructure.

"I don't agree with folks who think this is a terrible thing. It is a necessary thing," he says. "EPA is saying, 'Look, we're going to exercise maximum enforcement discretion for'" monitoring and reporting violations, which are likely to be widespread, due to a lack of available workers complying with stay-at-home orders.

In a March 27 blog post, he noted that "smart companies" should not have to "face a Hobson's choice between environmental compliance and maintaining critical production in a reeling economy."

'Difficulties Complying'

And Lawrence Schnapf, an attorney who focuses on environmental issues in transactions, tells *Inside EPA* that the guidance is necessary. "The fact is that many facilities are having difficulties complying with monitoring and reporting requirements [during the pandemic]. If EPA did not take this action, the agency would find itself overwhelmed with administrative claims of *force majeure* and other statutory defense for non-compliance."

He adds that the limited guidance "does not apply to non-compliance posing potential for acute risks and imminent threats."

Traylor stresses the policy does not mean that EPA will not enforce against missed monitoring but that "companies can have maximum comfort that EPA is going to exercise its discretion not to seek civil penalties" if the lapse is due to the pandemic. That is because a failure to monitor is "relatively less important than violations that actually cause pollution," he notes.

However, he acknowledges that if monitoring and reporting are not occurring, then it could be impossible to know if a violation occurs.

"You have to take every reasonable step to avoid that outcome," he says, noting that under normal circumstances a facility that misses a required monitoring could be forced to shut down. "There could certainly be data gaps" if a head chemist at a water treatment plant gets sick or a laboratory test is not available. "But are we willing to say because we don't have compliance data, the plant must shut down? I don't think we would say that. There could be gaps but the alternative is much worse, especially for critical infrastructure."

If pollution controls malfunction, that is a much different situation under the guide, Traylor notes, because the triage is attempting to clear out less important violations to allow enforcers to focus on more important violations. These types of issues require facilities to notify EPA and state enforcers immediately and the "policy is much more ambiguous about how EPA responds" including saying the agency will consider the circumstance, which provides "a lot less comfort."

He adds that EPA is "not giving any kind of blanket assurance. . . . I get it, people are nervous, but [Bodine] is a lot smarter than that. She is not going to signal to the regulated community you can willy-nilly turn off" pollution controls.

The third category addressed in the guidance is EPA holding "out the prospect that it could actually issue no-action assurances for critical infrastructure" defined by the Department of Homeland Security. Then, EPA would determine whether a no-action assurance is required in order to keep critical infrastructure running even if there is a violation.

Traylor is "not surprised" that the agency issued the guide because EPA is "essentially just describing in more detail how to exercise general enforcement discretion," which he says the agency does all the time.

Some industry attorneys were surprised that EPA went forward with such a sweeping document "given the complexities covering many different industries and circumstances," one source noted last week.

Traylor acknowledges that the document "is quite broad" but says that is "commensurate with the breadth of the problem."

He adds he would be "very surprised" if EPA had issued a blanket no-action assurance, "but giving guidance for how EPA enforcement will think about" bringing a case -- or not -- is something that is to be expected.

Traylor notes the policy says ongoing cases will continue but that it may delay future enforcement actions, including inspections. While EPA will not signal it will halt inspections, it will want to "make sure the juice is worth the squeeze in terms of public health," he says, given the potential health risks of sending inspectors into the field. -- *Dawn Reeves*(dreeves@iwpnews.com)

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https://www.eenews.net/greenwire/stories/1062760565

EPA enforcement move meets API wish list — and then some

Kelsey Brugger and Corbin Hiar, E&E News reporters Published: Wednesday, April 1, 2020

PANDEMIC

American Petroleum Institute CEO Mike Sommers. API

Three days before EPA issued a policy signaling to industry it would not penalize companies for failing to comply with environmental laws during the novel coronavirus pandemic, the American Petroleum Institute sent the agency a wish list.

The oil and gas lobby got more than it had hoped for.

"This policy, it didn't miraculously happen. It came about because this administration is spending more time concerned about the fossil fuel industry than it is about people and their health," Obama-era EPA chief Gina McCarthy said. "All I know is that API wrote a letter. And then, not a very long time [passed], and this came out."

The nationwide policy was an unprecedented move by EPA and came as the Trump administration continues to march ahead with a deregulatory agenda. It also came as President Trump's quest for "energy dominance" has suffered due to depressed energy demand worldwide.

Environmental law requires the energy industry to self-monitor and self-report most violations from pollution activities.

While EPA was generally expected to offer relief on some specific enforcement issues due to the pandemic, the agency edict functions as a blanket nonenforcement assurance, critics say. It grouped together all industries and all types of environmental compliance. The approach had historically been used only in a particular region ahead of an extreme weather event like a hurricane, enforcement experts said.

Specifically, the EPA policy gave 17 examples of categories of compliance obligations that industry might not be able to meet amid COVID-19. Those include reporting and monitoring of air pollution, greenhouse gas emissions, wastewater, leaks, sewage, lab tests and others.

All but one of the examples was pulled from API's March 23 letter where the oil lobby asked for relief related to "non-essential compliance discretion." The API letter included 28 examples of "physical challenges" with on-site testing, monitoring and reporting requirements.

"I was kind of stunned by the breadth of their request," said Joel Mintz, an environmental professor and author of "Environmental Enforcement: Cases and Materials." "Clearly, their influence was a big deal."

The policy also said the agency could issue "No Action Assurances" for "critical infrastructure" on a case-by-case basis. API President Mike Sommers specifically called the oil and gas industry "critical infrastructure" in his recent letter (*E&E News PM*, March 26).

API Senior Vice President Frank Macchiarola said in an email that API was "pleased EPA responded to the concerns of several other industries — and our letter — in a timely fashion. There is a national crisis that includes the need to protect our workers while they are providing the nation's fuels."

Macchiarola maintained that the policy was intended to help industry comply with Centers for Disease Control and Prevention social distancing guidance during the pandemic.

"A considerable amount of monitoring involves actual physical measurements in facilities," Macchiarola said. "For example, leak detection contract technicians sign in and out of process units and as they complete their traverses, they come into contact with operators, engineers, and others by necessity."

He added that pollution control equipment continues to operate "as our industries [continue] to follow requirements by federal and state programs."

Yet Mintz countered that if companies have workers who are "healthy enough to operate," they should be able to comply with most environmental reporting.

The EPA policy directs companies to "act responsibly" and says compliance that is not "reasonably practicable" due to COVID-19 would be overlooked. It says the agency does not expect to seek penalties for routine compliance where EPA agrees COVID-19 was the cause of noncompliance. Companies will be expected to submit relevant documents "upon request."

Patrice Simms, a former EPA attorney who is now with Earthjustice, objected to the "reasonably practicable" threshold.

"What the heck does that mean?" he asked.

Simms added: "What is really important about this is that announcements of enforcement discretion are only relevant when someone is failing to follow the law."

As of 6 p.m. yesterday, API said it had not submitted any waivers of noncompliance nor did it have any information on whether its member companies had.

But McCarthy, who now leads the Natural Resources Defense Council, doubted that oil and gas companies weren't taking advantage of EPA's new policy.

"It would be great if [API] had a more straightforward answer," she said. "If companies decided not to take advantage of this, I applaud them. But that's generally not why you need to have regulations.

"I cannot imagine that every company is going to be as gracious as apparently the folks at API think. Or maybe API just hasn't asked them."

NRDC and a coalition of environmental groups today urged EPA to abandon its new enforcement changes, which McCarthy described as "a don't ask, don't tell policy for pollution" (*see related story*).

Earlier this week, EPA issued a press release seeking to debunk media coverage of the policy.

"EPA expects regulated entities to comply with all obligations and if they do not, the policy says that EPA will consider the pandemic, on a case-by-case basis, when determining an appropriate response," EPA Administrator Andrew Wheeler wrote in a press release. "The development of the policy was a group effort, involving multiple calls ... and drafts shared among EPA staff and managers, both career and political, at both headquarters and in the regions."

By deadline, EPA did not respond to a question on whether the agency included input from environmentalists or other stakeholders when crafting the policy.

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https://www.eenews.net/greenwire/2020/04/02/stories/1062769235

Total cases rise to 15 as first employee dies

Sean Reilly, E&E News reporter Published: Thursday, April 2, 2020

EPA

EPA is attempting to thwart the spread of the coronavirus among its staffers. Claudine Hellmuth/E&E News(illustration); Francis Chung/E&E News(EPA photo); CDC(virus)

At least 15 EPA employees have now been diagnosed with COVID-19, a spokeswoman said today of the steadily growing total, which includes a veteran Philadelphia staffer who died Tuesday of the disease borne by the new coronavirus.

The staffer "was a long-time member of the EPA Region 3 family and will be sorely missed," EPA Administrator Andrew Wheeler said in an agencywide email yesterday.

While EPA declined to identify the name of the employee who died on privacy grounds, *The Trentonian*newspaper reported that he was Grant Dufficy, a New Jersey resident and 22-year EPA employee who worked as an engineer.

"Yesterday was the hardest and saddest day of my life," his daughter, Katie Dufficy, wrote in a Facebook post cited by the newspaper. "Not only did we lose a father and husband, but I lost my best friend truly one of the most amazing, laid back, go with the flow person who was full of knowledge and loved to give to the world. Never said no to any of us and gave us the world, so we never had to struggle."

Grant Dufficy had been battling both the flu and COVID-19, according to his daughter's post. An obituary indicated he was 63.

At least two other EPA employees in Philadelphia have also tested positive for the virus, according to emails sent last Friday and Mondayby Cosmo Servidio, who heads the Region 3 office. Both employees were

recovering at home, Servidio said. Other workers who may have come in contact with the two workers had been asked to self-quarantine for 14 days from the respective dates they were last in the office, he said.

"The safety and well-being of you and your families is paramount," Servidio wrote in urging employees to follow guidelines from the Centers for Disease Control and Prevention. "Continued communication throughout this rapidly evolving situation is critical and we will provide further guidance as new information becomes available."

While a complete breakdown was not immediately available, other COVID-19 cases involving EPA employees have been reported in Atlanta, Boston, Montana and the agency's Washington headquarters. While the 15 confirmed cases are a tiny fraction of EPA's 14,000-strong workforce, the total is up sharply from a week ago (*Greenwire*, March 26).

"The health and safety of our employees is our top priority and that is why we have encouraged all EPA employees to telework," agency spokeswoman Corry Schiermeyer said in an email today. "EPA is taking swift action in the event someone becomes symptomatic, or has potentially been exposed to the coronavirus."

Region 3, headquartered in Philadelphia, encompasses the District of Columbia, as well as Delaware, Maryland, Pennsylvania, Virginia and West Virginia.

Reporters Kevin Bogardus and Corbin Hiar contributed.

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https://www.nationalobserver.com/2020/04/02/news/alberta-relaxes-environmental-rules-amid-covid-19-following-trumps-epa

Alberta relaxes environmental rules amid COVID-19, following Trump's EPA

By Emma McIntoshNews, Energy, Politics April 2nd 2020

The Alberta government has relaxed its environmental oversight rules for industry, saying that forcing companies to fully comply during the COVID-19 pandemic would cause "hardship."

The March 31 order, done through a mechanism that doesn't require the approval of cabinet, was signed by Environment and Parks Minister Jason Nixon. It allows companies who are normally required to report to the government about the condition of the environment they work in, including air emissions, to temporarily suspend that reporting.

"There is hardship in having to comply with routine reporting requirements... during this public health emergency," reads the order.

South of the border, similar movesshave been made by the U.S. Environmental Protection Agency on orders from the Trump administration.

The pause in environmental reporting doesn't apply to drinking water facilities. And companies must still notify the province of emergencies and record the information they would normally report, the order says.

What people are reading

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- Carbon pricing not going anywhere, Trudeau says

The relaxed rules would end either on Aug. 14, or 60 days after Alberta ends its current state of emergency, whichever comes first. Nixon could also choose to end it sooner at his discretion.

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https://www.capegazette.com/article/epa-reminds-americans-flush-only-toilet-paper/200238

EPA reminds Americans to flush only toilet paper

The U.S. Environmental Protection Agency is encouraging all Americans to flush only toilet paper, not disinfecting wipes or other nonflushable items that should be disposed of in the trash.

Flushing only toilet paper helps ensure that toilets, plumbing, sewer systems and septic systems will continue working properly to safely manage the nation's wastewater. While EPA encourages people to disinfect their environments to prevent the spread of COVID-19, everyone is reminded never to flush disinfecting wipes or other nonflushable items; they should be thrown in the household trash.

Preventable toilet and sewer backups can pose a threat to human health and present an extra challenge to water utilities and their workforce. Flushing anything other than toilet paper, including disinfecting wipes, can damage internal plumbing, local sewer systems and septic systems. Fixing these backups is costly, and takes time and resources away from ensuring that wastewater management systems are otherwise working properly.

EPA thanks wastewater utilities and their workforce for their courageous efforts at a time when resources may be stretched thin. Having fully operational wastewater services is critical to containing COVID-19 and protecting Americans from other public health risks. The nation's wastewater employees are everyday heroes who are on the front lines of protecting human health and the environment every single day.

For more information, go to www.epa.gov/coronavirus.

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https://news.bloomberglaw.com/environment-and-energy/epa-cracking-down-on-misbranded-coronavirus-treatment-products?usertype=External&bwid=00000171-3129-df6d-abfd-f13db3c50000&qid=6885493&cti=FGOV&uc=1320000080&et=FIRST_MOVE&emc=neve_bf%3A6&access-ticket=eyJjdHh0IjoiTkVWRSIsImlkIjoiMDAwMDAxNzEtMzEyOS1kZjZkLWFiZmQtZjEzZGIzYzUwMDAwIiwic2lnIjoicElyT1RjcE1nR3lldy9kU3dST0JINUR2MmUwPSIsInRpbWUiOiIxNTg1ODI1NDkxIiwidXVpZCI6IjBEc2I1Z09wQUNNUFVBN1NPc2xINUE9PTJSaWVLMmhFdDFSaTluN1haTEh3Tmc9PSIsInYiOiIxIn0%3D

EPA Cracking Down on Misbranded Coronavirus Treatment Products

The EPA is stepping up enforcement against products making unproven antiviral or disinfectant claims in light of the coronavirus pandemic.

The Environmental Protection Agency recently blocked a shipment of allegedly antimicrobial plastic cards from Japan and Hong Kong from entering U.S. ports in Honolulu and Guam. The cards, containing chlorine dioxide and worn on a lanyard around the neck, falsely claimed they provided anti-viral and anti-bacterial protection, the agency said.

"This is the tip of the iceberg," said Thomas Brugato, special counsel at Covington and Burling LLP who specializes in environmental and pesticide law. "I think we'll definitely see more cases like this."

Given the clear public health implication of pandemic, it was only a matter of time before the EPA began targeting consumer products making unverified anti-viral claims like the ones in the blocked shipments, Brugato said.

The agency said it's working with U.S. Customs and Border Protection to monitor and possibly deny entry of other products making illegal claims. Meanwhile, Amazon.com Inc.removed the plastic cards, made by Japan's Toamit Company, from its online marketplace at the agency's request.

"It is critical that people only use EPA-registered disinfectants and follow label directions for proper use," said John Busterud, the agency's Pacific Southwest regional administrator. "EPA will not tolerate companies selling illegal disinfectants and making false or misleading public health claims during this pandemic crisis."

Using unregistered or misbranded products can be harmful to human health, cause adverse effects, and fail to stop the spread of Covid-19, the disease caused by the new coronavirus, the EPA said.

Adhering to Standards

The ramped up enforcement on bogus disinfectants stands in contrast with the agency's guidance document released March 26 that allowed enforcement discretion for a variety of environment regulations in light of the Covid-19 pandemic.

Products that claim to kill or repel bacteria or germs are considered pesticides under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), and therefore must be registered with the EPA before they're distributed or sold. Disinfectants used against microorganisms are considered antimicrobial pesticides.

The EPA reviews product data as part of the registration process to see if they adhere to federal standards for safety and efficacy, an agency spokeswoman told Bloomberg Law.

"Unregistered products have not had the same review," she said.

The agency said monitoring occurs by screening products intended for import, as well as following up on tips and complaints. Enforcement is typically issued through stop-sale orders and penalty actions authorized under FIFRA sections 13 and 14, respectively.

Working With Groups

In addition to Customs and Border Protection, the government also works with industry trade groups to identify and flag knockoff products on various e-commerce platforms.

"The coronavirus pandemic further highlights the dangers that can come from unregulated and illegal products making false claims, and in this case, that can cause serious public health concerns," said Owen Caine, executive vice president of government relations at the Household Consumer Products Assocation.

When consumers evaluate products that can be used to fight Covid-19, Caine said it is imperative that they follow the direction of the EPA's list of approved antimicrobial products.

"Too many bad actors exist on the Internet, making false claims about what their products can do, and this situation highlights why there needs to be more regulation on e-commerce platforms," he said.

In response to the new coronavirus, the EPA has employed an expedited process for reviewing products making antimicrobial or anti-viral claims, often returning a decision within 14 days, compared to the 90 days it normally takes. Once such claims are approved, these disinfectants can be labeled and marketed accordingly.

To contact the reporter on this story: Adam Allington in Washington at aallington@bloombergenvironment.com

To contact the editors responsible for this story: Gregory Henderson at ghenderson@bloombergenvironment.com; Rebecca Baker at rbaker@bloombergenvironment.com

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https://insideepa.com/daily-news/environmentalists-seek-reporting-firms%E2%80%99-use-epa%E2%80%99s-virus-policy

Environmentalists Seek Reporting On Firms' Use Of EPA's Virus Policy

A coalition of environmental organizations is petitioning EPA to quickly issue an emergency rule that would require companies that make use of the agency's enforcement discretion policy during the coronavirus pandemic to disclose when they stop monitoring or reporting their releases and provide a justification for doing so.

The April 1 emergency rulemaking petition, filed under the Administrative Procedure Act and the petition clause of the First Amendment, also urges EPA to publish any reported information within one day of receiving notice from a company.

The groups further called on EPA to issue a final rule within seven days, arguing that any further delay would likely lead to widespread noncompliance in the meantime, resulting in serious damage to public health, especially because those most impacted by lack of monitoring are already overburdened communities and people living near emitting facilities.

In addition, Democratic lawmakers are stepping up their oversight of the policy, questioning how the agency will continue to protect public health if it has waived such requirements.

An EPA spokeswoman says the agency "will review" the environmentalists' petition.

The petition responds to EPA's March 26 guidance that says the agency will exercise its enforcement discretion during the pandemic in cases where facilities are unable to comply with reporting, monitoring and other requirements.

Environmentalists and others have slammed the policy as "nationwide waiver of environmental rules," though EPA officials and many industry lawyers have defended the policy as a responsible and limited response to the unprecedented restrictions imposed to address the health emergency.

But the petition comes as EPA's Office of Inspector General (OIG) released an April 1 report finding that the agency's enforcement numbers have significantly declined over the past dozen years, unrelated to the COVID-19 pandemic.

The just-issued report, which finds for example that EPA inspections decreased by 33 percent over that time period, could spur additional calls for EPA to continue to require robust monitoring and reporting, not less.

The environmentalists' petition says EPA's "non-enforcement policy . . . creates an immediate and serious risk to people and communities affected by pollution" that is "heightened by EPA's broad invitation to regulated industries to suspend monitoring and reporting without public disclosure."

It asks EPA to publish within seven days a "final, enforceable rule to ensure that, at a minimum, the public receives prompt notice of any facility's failure to conduct required monitoring or reporting" based on the policy. Without such information, it argues, the public cannot adequately protect themselves against increased risk of harm.

"We fully appreciate the disruption and harm caused by the COVID-19 pandemic. But EPA's unprecedented non-enforcement policy creates a clear opportunity for abuse. The final rule we petition for here is necessary to lessen the health risk."

Groups signing the petition include the Natural Resources Defense Council (NRDC), Public Citizen and a slew of environmental justice groups.

'Cruel Paradox'

NRDC president Gina McCarthy, who served as EPA chief during the Obama administration, called EPA's guidance "a cruel paradox." In a statement announcing the petition, she accuses the agency of using an "unprecedented public health crisis to justify allowing polluters to put our health at greater risk."

Those concerns were echoed on an April 1 press call by the People's Action coalition, which represents environmental justice communities.

Detroit resident Emma Lockridge says EPA's decision to allow lapses in required monitoring in order to prioritize more important types of enforcement shows that poor communities are "always at the bottom. . . . We're the expendables and that is not something that can continue to happen."

Also, Lois Gibbs of People's Action notes that it is as important to keep monitoring industrial pollution as it is to keep healthcare workers and police on the job. Signaling that monitoring is expendable is "like saying we can't find police officers" so traffic laws will not be enforced.

Several Democratic lawmakers echoed environmentalists' concerns in a series of oversight letters submitted to EPA.

Sen. Tom Carper (D-DE), the ranking Democrat on the environment committee, together with 10 other Senate Democrats sent an April 1 letter asking EPA Administrator Andrew Wheeler to explain how the agency will achieve its mission of protecting human health and the environment while following its enforcement discretion guide.

The agency's mission includes "monitoring air and water quality," the letter notes, and it asks the agency to commit to publishing promptly the details of any enforcement waivers it issues as well as the criteria is will use to agree to relax enforcement obligations under the document.

The letter addresses other issues as well, including asking EPA to extend all pending public comment periods for rulemakings, to provide information on its pandemic plan that is guiding its operations in light of COVID-19, and to describe how it is ensuring the health and safety of its staff despite the fact that it continues to seek to restrict telework.

Additionally, the House Sustainable Energy & Environment Coalition charged in an April 1 letter that "Waiving enforcement will only add to the severity of the COVID-19 crisis. . . . While our doctors and nurses work urgently to keep people healthy . . . you are granting polluting industries a free pass to contaminate our air and water, likely adding patients to healthcare providers already overwhelming caseloads." -- *Dawn Reeves*(dreeves@iwpnews.com)

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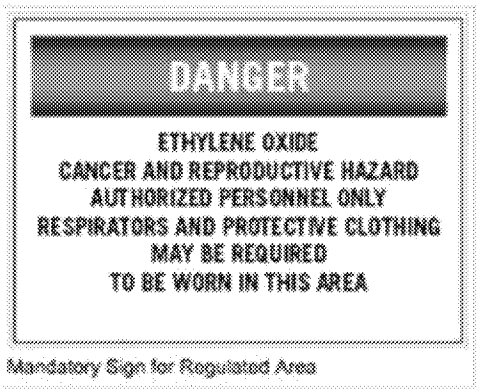
https://www.medicaldesignandoutsourcing.com/epa-inspector-general-wants-more-public-input-on-ethylene-oxide-exposure/

EPA inspector general wants more public input on ethylene oxide exposure

April 2, 2020 By Nancy Crotti Leave a Comment



(Image from U.S. Occupational Health and Safety Administration)

The U.S. Environmental Protection Agency's inspector general this week recommended opening a channel of communication between government officials and people who live near 25 plants that use ethylene oxide (EtO), including eight used for sterilizing medical devices.

But EPA administrator Andrew Wheeler objected, publicly indicating that his office was blindsided by the request.

The forum would provide residents in all communities near 25 EPA-designated, EtO-using or -producing facilities the ability to discuss health concerns related to EtO exposure with the agency or state officials. The EPA identified EtO as a "new and significant driver of cancer risk" in its 2014 National Air Toxics Assessment (NATA). It released that information in 2018, acknowledging it was based on emission inventories reported for 2014 and prompting backlash from the medtech industry.

The list of 25 facilities includes the following medtech sterilization operations:

- An Edwards Lifesciences plant in Anasco, Puerto Rico.
- A B. Braun Medical plant in Hanover, Pa.
- A Becton Dickinson plant in Covington, Ga.
- Sterigenics plants in Willowbrook, Ill., Smyrna, Ga., and Santa Teresa, N.M.
- A Medline Industries plant in Waukegan, Ill.
- Midwest Sterilization Corp.plants in Laredo, Tex., and Jackson, Mo.
- A Terumo plant in Lakewood, Colo.
- A Viant Medical plant in Grand Rapids, Mich.

The Sterigenics Willowbrook plant and the Viant plant in Michigan are now closed.

The inspector general's office said it developed its list using data from EPA-generated lists of facilities that contributed to elevated estimated cancer risks at the census-tract level in the 2014 NATA, census block-level measurements and information from EPA-designated regions. Census tracts are small, relatively permanent statistical subdivisions of a county with boundaries that normally follow visible features, such as roads and streams. Census tracts ideally contain about 4,000 people and 1,600 housing units.

The EPA considers 22 of the 25 facilities as contributing to an elevated estimated cancer risk equal to or greater than 100 in 1 million at the census-tract level. All the medtech sterilization facilities on the list are considered commercial operations and fall into this category. The three facilities whose emissions the EPA considers pose a greater cancer risk are industrial EtO sites.

The EPA had previously recommended completing more refined investigations of risk before conducting significant public outreach, the inspector general's management alert said.

Wheeler countered that previous discussions with the inspector general's office put them on the same page regarding public input. The EPA has been in regular contact with communities and stakeholders potentially affected by ethylene oxide emissions, according to a news release.

"Most surprising is that in our final meeting with the IG's office on this matter they provided no indication that there would be any unresolved issues," Wheeler said in the statement. "As a result, we are formally requesting the EPA IG rescind the report so it can be appropriately updated."

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https://news.bloombergenvironment.com/environment-and-energy/epa-still-working-on-new-rules-not-tied-to-virus-wheeler-says

EPA Still Working on New Rules Not Tied to Virus, Wheeler Says

EPA Administrator Andrew Wheeler said the agency is still trying to push out rules that aren't tied to the new coronavirus pandemic—whenever the White House is ready to review them.

In an interview Thursday, Wheeler said the Environmental Protection Agency hasn't paused work on any of its priority regulations. These include dealing with its reworking of the mercury rule and listing of per- and poly-fluoroalkyl substances, or PFAS, as hazardous substances under the Superfund law.

The EPA is pushing ahead despite a nationwide social distancing order and the White House's focus on reviewing policies and rules to address Covid-19, the disease caused by the coronavirus, Wheeler told Bloomberg Law.

"Our rulemaking's continuing," he said. "Our people are working. They're working at home. They're working at remote locations. They want to work. The American people want to know that we're on the job. We have a lot to do."

Wheeler said the EPA isn't delaying sending any rules to the Office of Management and Budget, which must review them prior to publication.

But the OMB said it is prioritizing actions that deal directly with the coronavirus—unless the agency comes across a rule that has a specific deadline attached to it, Wheeler said.

The Trump administration has directed all rulemaking activities to continue, despite growing calls from lawmakers, state attorneys general, and regulated entities to postpone consideration of any rule that doesn't address the pandemic.

"Work on behalf of the American people must continue during this period," White House regulatory chief Paul Ray wrote in a March 23 memo to agency leaders.

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https://www.ttnews.com/articles/ig-audit-shows-general-decline-epas-enforcement-monitoring-activities

IG Audit Shows a General Decline in EPA's Enforcement, Monitoring Activities

April 2, 2020 2:15 PM, EDT

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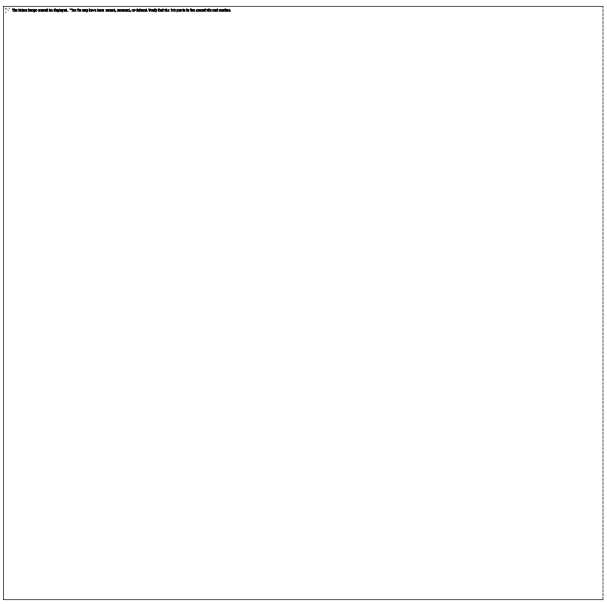
A new audit conducted by the Environmental Protection Agency's Office of the Inspector General has documented a general decline from fiscal years 2006 to 2018 in the EPA's compliance monitoring activities, enforcement actions and enforcement results.

In addition, the audit said overall funding for the EPA's enforcement program declined during that same time as did the number of enforcement staff.

"To place the decline in enforcement results in context, we also analyzed the trends in the resources available to the EPA for conducting enforcement," the audit report said. "Overall, the total number of enforcement full-time equivalents dropped from 3,301 in FY 2006 to 2,605 in FY 2018, a 21% decrease."As part of its mission, the EPA enforces environmental statutes and regulations at approximately 40 million regulated federal and private entities, such as pesticide manufacturers or oil refineries, the IG audit said.



The IG audit made no recommendations to the EPA.

Among the IG's findings:

- The numbers of enforcement actions initiated and concluded by the EPA decreased by 52% and 51%, respectively, when comparing fiscal years 2007 and 2018.
- The number of inspections that the EPA conducted decreased by 33% when comparing fiscal years 2007 and 2018. In the time period the IG examined, the EPA conducted the fewest inspections in fiscal year 2018.
- There were 58% fewer enforcement actions with injunctive relief in fiscal year 2018 than in 2007. Over those 12 years, the EPA estimated the lowest value of injunctive relief in fiscal year 2018 at $3.9 billion, and estimated the highest injunctive relief value in fiscal year 2011 at $21 billion.
- The value of environmental benefit commitments to reduce, treat or eliminate pollutants varied from fiscal years 2012 through 2018, but decreased by 64% when comparing fiscal years 2012 and 2018. The number of commitments also decreased by 31% when comparing fiscal years 2012 and 2018.
- Except for a slight rebound in fiscal years 2015 and 2016, the total number of EPA referrals to the Department of Justice decreased each year. In fiscal year 2018, referrals dropped below 100 for the first time in the 13-year period analyzed.

In a written response to the audit, EPA said the report does not fully reflect several enforcement and compliance results in fiscal years 2018 and 2019.

"Additionally, the report fails to note that our enforcement and compliance program focuses on achieving compliance using many tools, not limited to the number of individual enforcement actions taken," EPA said.

However, the IG said the compliance monitoring activities and enforcement actions form the "foundation of the EPA's enforcement program."

The industry is struggling to attract a new generation of technicians to maintain and repair increasingly high-tech trucks. Seth Clevenger spoke in Atlanta with Technology & Maintenance Council President Robert Braswell and Chairman Stacy Earnhardt to find out who's fixing the trucks of tomorrow. Hear a snippet, above, and get the full program by going to RoadSigns.TTNews.com.

"The FY 2018-2022 U.S. EPA Strategic Plan states that after the EPA identifies a violation of regulation or law through an inspection, tip or self-report, the agency 'will enforce the rule of law in a timely manner and take action against those that violate environmental laws to the detriment of human health or the environment.' "

The IG report noted that in 2020, the U.S. Government Accountability Office reported that the EPA collects a range of information about its compliance and enforcement efforts.

The GAO found that while the EPA collected data on formal enforcement activities, it did not consistently collect data about compliance assistance and informal enforcement activities for its national databases, the IG audit said.

Additionally, the GAO found that several of the EPA's FY 2018 enforcement-related reports did not disclose known limitations about the agency's enforcement data.

"Without this information, readers of the EPA's annual reports risked drawing inaccurate conclusions or information from the data," the IG said. "The GAO did not assess the reliability of the data but rather critiqued the agency's inconsistency in stating the known limitations of the data in some FY 2018 enforcement-related reports.

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https://www.law360.com/articles/1259312

EPA Watchdog Confirms Dramatic Enforcement Drop

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Law360 (April 1, 2020, 5:23 PM EDT) -- Enforcement activities at the U.S. Environmental Protection Agency are down across the board over a recent 10-year period, in some categories by more than 50%, the EPA's internal watchdog said in a report issued Wednesday.

The EPA Office of Inspector General said in its report that the number of enforcement cases the agency initiated dropped 52% from 2007 to 2018.

But the watchdog noted a couple of other crucial details that are relevant to the drop: Funding for the EPA's enforcement program decreased by 18%, and the number of enforcement staff decreased by 21% over the same time period.

"While identifying the trends is important, it is equally important to understand the key factors explaining the trends," the report said.

The watchdog said it is preparing another report that will include "an expanded discussion about the enforcement trends," such as trends in regional and statute-specific federal

enforcement results.

Other findings from the report include that the number of cases in which the EPA imposed injunctive relief on violators went down 58% from 2007 to 2018. The OIG gave the example of an enforcement against MarkWest Liberty Midstream Resources LLC, which in 2018 agreed to pay for about $2.6 million in technology to reduce pollution.

Enforcements that resulted in penalties were down 53% over the same time period. One such instance was when Pembina Pipeline Corp.-owned Aux Sable Liquid Products LP in 2018 agreed to pay a $2.7 million civil penalty for allegedly exceeding carbon emissions limits at the largest natural gas processing plant in the United States.

The EPA criticized the OIG's report for not giving the whole story.

"The IG's bean-counting exercise ignores technological advances in compliance monitoring over the past decade and fails to acknowledge the meaningful results that the agency has achieved for public health and the environment," EPA spokesperson Corry Schiermeyer said in a statement Wednesday.

The agency noted that most of the decline in the number of actions occurred before 2017, when President Donald Trump took office.

"The report also ignores the recent reversal of that trend in many measures by failing to present newer data," Schiermeyer said.

For example, the EPA said that in fiscal year 2019 more than 1,900 facilities voluntarily disclosed violations, resulting in a 20% higher rate of compliance compared with 2018.

The agency also noted that it opened 170 criminal cases in 2019, an increase from 128 in FY 2018.

"Additionally, the report fails to note that EPA's enforcement and compliance program focuses on achieving compliance using many tools, not limited to the number of individual enforcement actions taken," the agency said.

Under Trump, the Office of Enforcement and Compliance Assurance has renamed key programs to emphasize a softer approach to delegating more power to states, and OECA Assistant Administrator Susan Bodine has taken several actions to work more cooperatively with businesses before resorting to more punitive enforcement measures.

--Editing by Haylee Pearl.

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https://www.webmd.com/cancer/news/20200401/epa-didnt-tell-residents-about-gas-risks-report

EPA Didn't Tell Residents About Gas Risks: Report

By Brenda Goodman, MA, Andy Miller

Brenda Goodman is a senior news writer for WebMD. Andy Miller is editor and CEO of Georgia Health News.

April 1, 2020 -- A new government report has rebuked the U.S. Environmental Protection Agency for failing to tell residents about the health risks they face by living near facilities that release cancer-causing ethylene oxide gas.

In 2018, the EPA made a list of 25 "high priority" facilities in the U.S. that emit ethylene oxide gas into the environment at levels that exceeded the agency's threshold for acceptable lifetime cancer risk.

According to a new "management alert" from the EPA's inspector general, the agency has only met with residents living around nine of those facilities. In some cases, those meetings -- in Georgia and Illinois --came only after furious residents demanded more government action.

The report comes just as a federal district judge has issued a temporary restraining order against Cobb County's fire marshal and building manager for blocking the operations of a commercial sterilization company in the Atlanta suburbs.

The restraining order allows the company, Sterigenics, to resume full operations at least temporarily. The FDA and the U.S. Department of Health and Human Services have also urged the state to allow another Georgia sterilizer, BD, to resume full operations.

Both companies say their services are needed to respond to the COVID-19 pandemic.

The 2018 EPA report determined that residents living in 109 census tracts in 17 metro areas around the U.S. faced unacceptable cancer risks from breathing small amounts of ethylene oxide in outdoor air. The EPA says cancer risks from airborne toxins like ethylene oxide are unacceptable when they rise above 100 cases of cancer for every million people exposed over 70 years.

The agency posted the report on its website but did not issue a news release. The EPA did tell states about its findings. But some, like Georgia, took no action to inform residents until reporters broke the story locally.

People living in some affected areas still have had no guidance from their state or federal governments about the issue.

Georgia state Rep. Erick Allen, a Smyrna Democrat who has sponsored legislation to increase regulation over sterilizing plants using ethylene oxide, expressed frustration with the timing of the report. "The time for transparency and education was years ago," he said.

"It infuriates me that they continue to hide in the shadows of paperwork and more and more studies, yet they never do anything to inform communities so they can at least have a fighting chance to save their families," said Cindy Jordan, a Covington resident and member of the grassroots group Say No to EtO.

The inspector general's report says public meetings are planned in 2020 for residents living around five of the remaining facilities:

- Edwards Lifesciences, a commercial sterilizer in Anasco, Puerto Rico
- B. Braun Medical, a commercial sterilizer in Allentown, PA
- Union Carbide Corp, a chemical maker in Institute, WV
- Croda, a chemical maker in New Castle, DE
- Union Carbide Corp. a chemical maker in South Charleston, WV

There are still no plans by the EPA to inform residents living near 11 other facilities, in Texas, Louisiana, New Mexico, and Wisconsin. The facilities in Texas and Louisiana are responsible for some of the highest emissions of ethylene oxide in the U.S. These are:

- BCP Ingredients, a chemical maker in St. Gabriel, LA
- Union Carbide, a chemical maker in Taft, LA
- Huntsman, a chemical maker in Port Neches, TX
- Eastman Chemical Texas Operations in Longview, TX
- Taminco US, a chemical maker in St. Gabriel, LA
- Sasol Chemicals, a chemical maker in Westlake, LA
- Air Products Performance Manufacturing, a chemical maker in Reserve, LA
- Midwest Sterilization Corp., a commercial sterilizer in Laredo, TX
- Shell Technology Center, a chemical maker in Houston
- Sterigenics Santa Teresa, a commercial sterilizer in Santa Teresa, NM
- Air Products Performance, a chemical maker in Milton, WI

The Inspector General's Office says it recommended that the EPA improve its risk communication efforts to affected neighborhoods and communities.

The EPA responded by saying that it would do more "refined investigation" of risks in these areas and, based on these reports, support communication efforts by states.

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https://www.enr.com/articles/49084-epa-would-allow-some-project-work-before-clean-air-permits-are-granted

EPA Would Allow Some Project Work Before Clean-Air Permits Are Granted

Pam McFarland

Reversing a long-standing interpretation of its own regulations, the U.S. Environmental Protection Agency has issued "guidance" to its regional offices and states, and seeks public comment, on its intent to ease air-pollution permit rules for facility construction under the federal Clean Air Act.

The guidance, sent on March 25, would allow work to begin on major projects that would be new stationary air pollution sources—such as power plants, industrial boilers, and manufacturing facilities, or modifications to those—before obtaining preconstruction permits required under the federal law's New Source Review program.

That program is a set of regulations under the law to protect public health and the environment from air pollution when major new air emissions sources are built or modified.

Most states administer their own programs under the law, but some are EPA-managed, according to the program website.

Industry groups and construction firms say EPA's draft guidance would enable projects on tight timelines to move forward in a timely manner, particularly those that are non-controversial.

In the guidance document released by Anne Idsal, EPA principal deputy assistant administrator, the agency asserts that earlier interpretations of its regulations were too narrow, impeding source owners or operators from starting any construction activity on a project site.

Idsal's new guidance contends that in the past, EPA has considered "almost every physical on-site construction activity that is of a permanent nature to constitute the beginning of 'actual construction.'"

In her memorandum to clean-air administrators, Idsal said the policy change is not subject to the normal public notice and comment period associated with a new rule. But EPA is allowing public comment on this through May 11.

As the guidance document is non-binding, however, state air administrators that oversee construction permitting have significant latitude as to whether they must follow it.

Environmental groups contend the policy change is just the latest in a series of moves by the Trump administration to roll back important environmental protections under the NSR construction permitting program.

The Harvard Environmental and Energy Law Program says that since 2017, EPA has issued notices, memoranda, guidance and letters that narrowed the definition of what "sources" are, limited pollution considered during the NSR review process, and did not enforce the program consistently, The Harvard program equates this to a near dismantling of the program.

Industry groups have chaffed under that interpretation, saying it is overly restrictive and prevents projects on a tight timeline from moving forward expeditiously.

The new proposed guidance will allow construction to begin—even on structures that are costly and potentially difficult to remove—as long as no work starts on an actual emissions unit.

EPA adds that any owner that begins construction on a project without a permit does so at its own risk.

Mike Rinkol, environmental services lead at Overland Park, Kan.-based Black & Veatch, says some projects would benefit from EPA's proposed approach. "On certain projects, if schedules are really tight, this allows [the contractors] to get on site" and do some preliminary work, he says.

Janet McCabe, former acting assistant administrator for EPA's Office of Air and Radiation during the second Obama administration and now director of Indiana University's Environmental Resilience Institute, says the new guidance doesn't consider that "if a company has already sunk a lot of capital into a project, it's very hard [for a permit authority] to say no to a permit."

Additionally, once foundations and permanent structures begin to be put in place, technologies available for emissions control may be more limited.

Implementing some of the best available control technologies required under the clean-air law might not be possible on a project already well underway, McCabe says, or they would be more expensive because of the way the structure has been built.

"Your options are much more open" before construction begins, she adds.

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https://www.law.com/thelegalintelligencer/2020/04/02/us-supreme-court-update-cases-to-watch-for-cercla-practitioners/?slreturn=20200302125627

US Supreme Court Update: Cases to Watch for CERCLA Practitioners

While there are several interesting environmental cases currently before the U.S. Supreme Court, two cases are particularly relevant for any legal practitioner handling Superfund cases, whether they involve site remediation issues or litigation over the cleanup costs.

By Alana E. Fortna April 02, 2020 at 12:40 PM

While there are several interesting environmental cases currently before the U.S. Supreme Court, two cases are particularly relevant for any legal practitioner handling Superfund cases, whether they involve site remediation issues or litigation over the cleanup costs. The two cases to watch are *Atlantic Richfield v. Christian*, Case No. 17-1498, and *County of Maui v. Hawaii Wildlife Fund*, Case No. 18-0260. Respectively, these two cases deal with the important legal questions of preemption and how groundwater discharges can be regulated and enforced. Both issues could have a significant impact on the scope of remediation and potential litigation at Superfund sites. CERCLA practitioners should watch for the opinions in these two cases.

The *Atlantic Richfield* appeal came out of the Montana Supreme Court, and it asks the court whether the Comprehensive Environmental Response, Compensation and Recovery Act (CERCLA), 42 U.S.C. Section 9601 preempts state common law remedies. The case involves the Anaconda Smelter Site, a Superfund site covering 300 square miles of property impacted by historical smelter and ore processing operations. The U.S. Environmental Protection Agency (EPA) placed the site on the National Priorities List in 1983 and identified Atlantic Richfield Co. as a potentially responsible party (PRP). After years of remedial investigation under EPA oversight, the EPA approved a remedial action plan for the cleanup of the site. The respondents in the appeal are a group of landowners who sued Atlantic Richfield alleging common law tort claims seeking more traditional damages, such as monetary damages and diminution of property value. However, the respondents also sought relief in the form of restoration, asking that Atlantic Richfield remediate or pay for remediation above and beyond the EPA-approved remedy. The respondents argued that Montana law supports their requested relief and requires Atlantic Richfield to restore the property to its pre-contamination state before the on-set of historical smelting operations. The critical question presented to the court is whether CERCLA preempts state common law claims for restoration that seek clean-up remedies that conflict with EPA-ordered remedies. The Montana Supreme Court held that landowners can pursue common law claims for restoration despite the conflict with EPA's remedy.

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EPA Finds Asbestos Use Poses Risk to Chloralkali Workers

The EPA will then have the option of proposing further regulations to prohibit or limit the manufacture, use, distribution, processing or disposal of asbestos.

EPA Findings Could Threaten Chloralkali Industry

The chloralkali industry, which has openly opposed the banning of asbestos, uses the product to manufacture semipermeable diaphragms for making chlorine. There are 11 chloralkali factories throughout the U.S., producing one-third of all domestic chlorine.

Although preliminary, the EPA review is a serious threat to the industry.

According to the latest U.S. Geological Survey Mineral Commodity Report, only 100 metric tons of asbestos were imported in 2019, a substantial drop from the year before and the smallest amount since records were first kept in 1910.

Asbestos is a naturally occurring mineral that was once used ubiquitously in many products. It was valued for its heat resistance and tensile strength, but is now heavily regulated.

The inhalation or ingestion of asbestos fibers can cause serious health problems, including lung cancer and mesothelioma.

Today, the manufacture or use of asbestos products such as vinyl floor tiles, insulation, corrugated paper, commercial paper and many other building materials is prohibited.

U.S. consumers have been dependent on imports of asbestos since 2002, when the last mine in the country was closed.

The biggest problem in the U.S. today is legacy asbestos, products that were made and used more than 30 years ago and remain in place throughout commercial and residential construction.

Asbestos Occupational Threats Remain

Among the findings in the recent evaluation were occupational conditions in use today that present an unreasonable risk to health:

- Processing and industrial use of asbestos diaphragms in the chloralkali industry
- Industrial use and disposal of asbestos-containing brake blocks in the oil industry
- Processing and industrial use of asbestos-containing sheet gaskets in chemical production
- Commercial use and disposal of aftermarket automotive asbestos-containing brakes linings
- Commercial use and disposal of other vehicle friction products
- Commercial use and disposal of other asbestos-containing gaskets

The executive summary of the draft also cited the risk to occupational nonusers, consumers and bystanders, particularly from aftermarket automotive brakes and gaskets.

The EPA did not evaluate hazards or exposures to the general population in this risk evaluation.

Although there are a handful of different types of asbestos, this review dealt only with chrysotile, the only form known to be imported, processed or distributed in the U.S.

EPA Review Cites Some Exceptions

The one notable exception to any health dangers in the use of asbestos was the specialized National Aeronautics and Space Administration (NASA) transport plane, nicknamed "Super Guppy."

According to the draft, the import, use, distribution and disposal of asbestos-containing brakes for the plane did not present unreasonable risk to anyone's health.

The EPA also did not find any unreasonable risk to the environment under any conditions of use that were examined.

The actual import and distribution of asbestos and asbestos products did not present unreasonable risk, the report said.

Asbestos is the ninth of the first 10 chemicals and substances to undergo risk evaluation under the Toxic Substances Control Act.

Asbestos Risk Evaluation Could Change

In April 2019, the EPA issued a Significant New Use Rule that amended the TSCA to prohibit the restarting of any previously discontinued uses of asbestos without review and consent by the EPA.

Legislative efforts to completely ban asbestos have been pushed in Congress throughout the past decade, but none have been successful.

"The preliminary conclusions, findings and determinations in this draft risk evaluation are for the purposes of identifying whether asbestos presents unreasonable risk or no unreasonable risk under the conditions of use," the draft summary states. "The final risk evaluation may change."

United States Environmental Protection Agency. (2020, March 30). Draft Risk Evaluation for Asbestos. Retrieved from https://www.epa.gov/assessing-and-managing-chemicals-under-tsca/draft-risk-evaluation-asbestos#docs

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https://www.dtnpf.com/agriculture/web/ag/news/world-policy/article/2020/04/02/idaho-landowner-still-unsure-state

Idaho Landowner Still Unsure About State of Property

Todd Neeley4/2/2020 | 8:46 AM CDT

"The EPA's determination that the Sacketts' vacant lot is a federally regulated wetland appears to remain in effect. We will ask the court of appeals to resolve that question in the Sacketts' favor if EPA won't clarify it. Otherwise, the Sacketts remain under the threat of future enforcement action or a citizen suit if they proceed to build on the lot."

CASE BACKGROUND

Under the Supreme Court case, Sackett v. EPA, the high court ruled EPA cannot threaten property owners with thousands of dollars in fines unless landowners have a chance to contest agency wetlands determinations.

Landowners have often learned about EPA wetland determinations by mail, with little chance to challenge those decisions.

The Sacketts were told by EPA and the U.S. Court of Appeals for the Ninth Circuit in San Francisco they could not get direct court review of EPA's claim that a two-thirds-of-an-acre parcel on their land is wetlands and that they must follow an EPA compliance order.

The American Farm Bureau Federation filed amicus briefs both in support of the Sacketts' petition to the court to review the case and on the merits of the case after the Supreme Court accepted the case.

In writing the opinion for the unanimous court, the late Justice Antonin Scalia said, "We conclude that the compliance order in this case is final agency action for which there is no adequate remedy other than APA (Administrative Procedure Act) review, and that the Clean Water Act does not preclude that review."

In his opinion, Justice Samuel Alito lashed out at the Clean Water Act.

"The reach of the Clean Water Act is notoriously unclear," he wrote. "Any piece of land that is wet at least part of the year is in danger of being classified by EPA employees as wetlands covered by the act, and according to the federal government, if property owners begin to construct a home on a lot that the agency thinks possesses the requisite wetness, the property owners are at the agency's mercy."

Yet, the Ninth Circuit Court of Appeals later ruled against the Sacketts in their appeal challenging whether EPA ever proved there are wetlands on their property.

LETTER NOTIFICATIONS

EPA usually notifies farmers and other landowners by letter, warning them to either repair damage to wetlands or face thousands of dollars in fines for violations.

In many cases, orders were issued even without the opportunity for landowners to challenge EPA wetland determinations.

The Sacketts bought a small parcel in 2005 with the intent to build a home.

They obtained a county permit to build, but EPA claimed the property is wetlands and ordered the couple to return the land to what EPA said was its original state or pay penalties -- all without the ability to challenge EPA's wetland ruling.

The Sacketts found nothing in the paperwork connected with the permitting process indicating that their property was considered a wetland, they said. In addition, there were houses on land surrounding the Sackett lot, with no known EPA actions on those properties.

The Sacketts wanted to contest EPA's claim, but the Ninth Circuit Court of Appeals ruled the couple would first have to go through a years-long wetland permit process that could cost some 12 times the value of the land.

Todd Neeley can be reached at todd.neeley@dtn.com

Follow him on Twitter @toddneeleyDTN

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https://biologicaldiversity.org/w/news/press-releases/lawsuit-prompts-review-plastic-pollution-impacts-hawaiian-waters-2020-04-02/

Lawsuit Prompts Review of Plastic Pollution Impacts on Hawaiian Waters

HONOLULU— Responding to a lawsuit from environmental groups, the Trump administration has ordered Hawaii to examine the impact of plastic pollution on its waters, beaches and wildlife.

The U.S. Environmental Protection Agency this week notified state officials that it is withdrawing its 2018 approval of the "list of impaired waters" required under the Clean Water Act "specifically with respect to the consideration of plastics in Hawai'i waterbodies for which Hawai'i received data and information." Hawaii now has until May 29 to evaluate whether plastic pollution is impairing any of the state's water bodies, including threats to wildlife and people.

The Center for Biological Diversity, Sustainable Coastlines Hawaii and Surfrider Foundation sued the EPA in February for failing to protect 17 coastal water bodies around Hawaii from widescale plastic pollution that covers beaches, degrades coral reefs and threatens birds, fish, sea turtles and other wildlife.

"This is great news for Hawaii, which has been hit hard by plastic pollution," said Maxx Phillips, the Center's Hawaii director. "The ocean plastic pollution crisis is a public health crisis. Plastic permeates our waters, chokes wildlife and carries toxins onto our beaches, through our food web, and eventually onto our tables. It's time for Hawaii to finally address this threat."

Plastic pollution in Hawaii ranges from microplastics that contaminate coastal waters and harm marine life to massive piles of plastic waste along Kamilo Beach, nicknamed "Plastic Beach." Studies indicate that 17 water bodies around the Hawaiian islands are impaired by plastic pollution.

"Our plastic pollution activists in Hawaii and around the nation are pleased to see this decision," said Angela Howe, Esq., Surfrider Foundation's legal director. "This is a critical first step to address marine plastic pollution through our nation's water quality protection laws and to help prevent future degradation of beaches, coral and marine life."

The Clean Water Act requires the EPA to designate as "impaired" all water bodies that fail to meet state water-quality standards. Once a water body is designated as impaired, officials must take action to reduce the pollution.

"We're excited to see progress that will recognize plastic as a detrimental pollutant that infects our waters, coastlines and lives," said Rafael Bergstrom, executive director of Sustainable Coastlines Hawaii. "This decision gives us hope that our institutions are beginning to take seriously the responsibility of protecting our most precious resources. With collective effort from community, government and business, we can turn the tide on plastic pollution."

Plastic pollution poses a serious threat to Hawaii's water quality and vulnerable marine ecosystems. Microplastics, or plastics that have broken into tiny pieces, are emerging as a major threat to marine wildlife and water quality. Microplastics can absorb environmental toxins and get eaten by fish and other marine life, and can eventually be consumed by humans.

Plastic pollution has been accumulating in our oceans for decades and is expected to outweigh all the fish in the sea by 2050. Much of that plastic comes from Asian countries that process American plastic waste. But surveys have found a significant percentage of the plastics contaminating Hawaii's waters originate within the state.

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https://www.eenews.net/climatewire/2020/04/02/stories/1062763069

Trump's car rule would cause more pollution deaths

Maxine Joselow, E&E News reporter Published: Thursday, April 2, 2020

EMISSIONS

The Trump administration's rollback of clean car standards could lead to a net negative cost to society, including hundreds of premature deaths from air pollution, according to its own analysis. b k/Flickr

On Page 1,525, the Trump administration's rule to roll back emissions standards for cars offers a striking assessment: it could cause 444 to 1,000 premature deaths from air pollution.

That's just one remarkable figure tucked away in the Safer Affordable Fuel Efficient (SAFE) Vehicles Rule, which EPA and the Department of Transportation released earlier this week.

Other figures show the rollback could result in a net cost to society of $13.1 billion and also cause hundreds of additional cases of respiratory illnesses in comparison to the clean car standards established by President Obama, according to an E&E News review of the document.

In public remarks, Trump administration officials have insisted the rollback would benefit society by increasing traffic safety and lowering the price of new cars.

But to critics, including half a dozen former EPA staffers, these figures tell a different story: The rollback could harm public health and the economy at a time when the country is reeling from the effects of the COVID-19 crisis.

"We're in the middle of the coronavirus catastrophe, which is killing people, and they're doing a rule that is actually going to be harmful to people's health and lead to more deaths," said Chet France, a former career staffer in EPA's transportation office.

"It's absolutely astounding to me," added France, who now serves as a consultant for the Environmental Defense Fund.

Mustafa Santiago Ali, who spent 24 years at EPA focused on environmental justice and now works at the National Wildlife Federation, agreed with that assessment.

"Let's be clear because lives are at stake," Ali said. "Over 100,000 people are dying prematurely from air pollution each year in our country and the numbers have been increasing since 2017."

The rollback, he added, would result in "an increase in chronic disease, making our most vulnerable more susceptible to viruses like COVID-19."

In response to a detailed list of questions from E&E News, EPA and DOT pushed back on the notion that the rule would harm the public.

"The SAFE Rule makes newer, safer, cleaner cars more accessible to American families, savings lives and creating jobs," a spokesman for the National Highway Traffic Safety Administration, the division of DOT responsible for the rule, said in an email.

Premature deaths

Trump administration officials have asserted repeatedly that the SAFE Vehicles Rule would save lives.

In particular, they contend that the rule would lead to 3,300 fewer traffic fatalities through model year 2026. A model year refers to the year in which a new car is marketed.

Their argument goes like this: The rollback will reduce the price of new cars. That will encourage more Americans to ditch their older cars and purchase newer, safer models. The presence of newer, safer cars on the nation's roads will then prevent thousands of fatal car crashes.

Transportation Secretary Elaine Chao reiterated this argument on a conference call with reporters after the SAFE Vehicles Rule was released.

"We estimate that this historic update to fuel economy standards will, one, save thousands of lives [and], two, prevent hundreds of thousands of injuries," Chao said.

But Dave Cooke, senior vehicles analyst at the Union of Concerned Scientists, questioned the accuracy of the 3,300 figure.

Cooke said the Trump administration misinterpreted something called the "rebound effect," an economic theory that predicts people will drive more if their cars get better gas mileage.

That led the administration to greatly overestimate how many miles people would drive — and how many car crashes would occur — if the Obama-era standards were left in place, he said.

If the administration had corrected its errors related to the "rebound effect," it would have found that the rule would only prevent 700 traffic fatalities, Cooke said.

Then there's this: The projected traffic fatalities do not account for the lives lost from air pollution.

The aforementioned figures on Page 1,525 of the rule show that the rollback could significantly increase air pollution from vehicle tailpipes, which could lead to an additional 444 to 1,000 premature deaths and an additional 235 emergency room visits due to respiratory illnesses.

"So on the low end, the deaths from air pollution may cancel out the lives saved from car crashes," Cooke said. "And on the high end, the rule may cause even more fatalities."

Richard Revesz, director of the Institute for Policy Integrity at the NYU School of Law, was more blunt.

"These are not minor health issues. These are premature deaths," Revesz said. "So the administration's not only burying the numbers, it's also burying more people."

An EPA spokeswoman stressed that the estimates of premature deaths are "not an exact science."

"The premature death numbers reflect an approximation of possible impacts in statistical lives but are arrived at through short-form tools which are not an exact science," spokeswoman Andrea Woods said in an email to E&E News. "EPA has recently completed a study to try to improve these tools, as they frequently overestimate by as much as 10% the impacts of criteria pollutants.

"This speaks to the impacts of emissions from all vehicles on the road already," she added. "This is a significantly long period of time to estimate impacts over, which further speaks to the uncertainty around the numbers being seen as an exact impact."

'More harm than good'

Trump administration officials also have asserted that the SAFE Vehicles Rule would provide a net benefit to society.

On the conference call with reporters, for instance, Chao called the rule a "win-win-win solution" for consumers, the economy and the environment.

Figures on Page 13 of the rule paint a different picture.

The figures address something called the "discount rate," which economists use to predict how the value of money declines over time due to inflation and other factors. Under a 3% discount rate, for instance, a dollar today would be worth 97 cents in a year.

For decades, federal agencies have used both a 3% discount rate and a 7% discount rate when evaluating the future costs and benefits of rules. But economists generally agree that a 3% discount rate yields more accurate results.

According to the figures on Page 13, under a 3% discount rate, the SAFE Vehicles Rule would have a net cost to society of $13.1 billion, while under a 7% discount rate, it would have a net benefit to society of $16.1 billion.

Margo Oge, the former director of EPA's transportation office under the Obama and Clinton administrations, said she couldn't recall producing a rule that had a net negative cost to society.

"When I was at EPA, we always used the 3% discount rate, and I don't think I ever experienced any regulatory effort where the cost to the consumer would be greater than the benefits," Oge said.

"It makes no sense to take a regulatory action that would negatively impact society," she added. "But that's exactly what they are doing."

The spokesman for the National Highway Traffic Safety Administration stressed that the rule had a net benefit to society under a 7% discount rate, which he asserted was more accurate.

"While cost and benefits are discounted at both 3% and 7% in the analysis ... 7% is a better approximation of the impacts of the standards," the spokesman said in an email.

"Discounting at 3% vastly understates the time value of money and leads to a significant undervaluation of upfront costs, such as new vehicle purchases, compared to future costs, such as fuel savings in 10 years," he added.

But Revesz said the Trump administration could have trouble defending the rule in court, noting that judges could be highly skeptical of its net cost to society under a 3% discount rate, which is widely accepted by economists.

"Under the Administrative Procedure Act, the administration's decision has to be set aside if it's arbitrary and capricious," Revesz said. "And at times, courts have equated net costly rules with arbitrary and capricious rules."

In the 2015 case *Michigan v. EPA*, for instance, the Supreme Court found that federal agencies must engage in "reasoned decision-making" that considers all relevant factors, including net cost to society.

"No regulation is 'appropriate,'" the justices explained in a 5-4 decision penned by the late Justice Antonin Scalia, "if it does significantly more harm than good."

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https://thehill.com/policy/energy-environment/490675-epa-loses-case-seeking-modeling-behind-obama-mileage-rollback

EPA loses case seeking modeling behind Obama mileage rollback

By Rebecca BeitschApril 01, 2020 - 04:53 PM EDT

The Environmental Protection Agency (EPA) was wrong to withhold information about how it devised its new fuel efficiency standards, a panel of judges ruled just a day after the Trump administration rolled back Obama-era mileage standards.

The 2nd Circuit Court of Appeals on Wednesday sided with the Natural Resources Defense Council (NRDC) and the Environmental Defense Fund, which sued the EPA to gain insight into a controversial modeling technique that many said oversold the benefits for rolling back the Obama administration's policy.

The new standards unveiled by the Trump administration Tuesday require automakers to produce a fleet averaging 40 mpg by 2026, rather than the previous requirement under the Obama administration to reach 55 mpg by 2025.

Environmental groups have vowed to sue over Tuesday's regulation, but the controversial rule has faced numerous suits throughout its development, including the case from the NRDC.

At issue in Wednesday's decision is the OMEGA modeling used to determine various outcomes from reducing mileage standards.

Part of the modeling attempted to forecast consumer behavior, assuming people would resist buying as many new cars given the tougher Obama-era fuel standards would likely make them more expensive. If true, used cars would likely stay on the road longer.

But Jeff Alson, a former senior policy adviser at EPA's Office of Transportation and Air Quality, which helps develop vehicle mileage and emissions standards, said the resulting analysis found a surge of roughly a trillion extra miles that would be driven by used cars.

"The miles driven should be about the same," Alson said, regardless of whether someone buys a new car or keeps driving an older one.

"If I have to go to work, I go to work; if i need to go to the store, I go to the store, but I'm not going to drive all of a sudden a lot more miles," he said, adding the formula "went haywire."

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EPA said it would review the court's decision.

The modeling and other analysis used to craft Trump's standards are sure to be a feature in future lawsuits over the regulation.

"The Trump administration has been trying to hide the real impacts of its plan to gut clean car standards," Pete Huffman, a lawyer with the Natural Resources Defense Council, said in a release. "With this decision, it will be even more clear to the public how dangerous and harmful to the economy this rollback really is."

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https://insideepaclimate.com/daily-news/2nd-circuit-backs-nrdcs-push-epa-release-vehicle-ghg-model

2nd Circuit Backs NRDC's Push For EPA To Release Vehicle GHG Model

In a win for environmentalists, a federal appeals court is ordering EPA to publicly release its computer model that could highlight faulty assumptions in the agency's rollback of vehicle greenhouse gas standards, saying the model is not "deliberative" data protected from disclosure under the Freedom of Information Act (FOIA).

It is not immediately clear how quickly the Natural Resources Defense Council (NRDC) and Environmental Defense Fund (EDF) -- the two groups that sued EPA -- will obtain the model. But representatives of the groups are already suggesting the data could raise further questions about the March 31 rollback rule that already shows net costs to the public under many of the Trump administration's own assumptions.

"The Trump administration has been trying to hide the real impacts of its plan to gut clean car standards," NRDC attorney Pete Huffman says in a statement in response to the April 1 ruling by the U.S. Court of Appeals for the 2nd Circuit in *NRDC and EDF v. EPA*.

"With this decision, it will be even more clear to the public how dangerous and harmful to the economy this rollback really is," Huffman adds.

The unanimous ruling by a three-judge 2nd Circuit panel finds that the so-called OMEGA model "is not deliberative," and that as such "its withholding under [FOIA] Exemption 5 was improper."

The ruling reverses an August 2019 district court decision upholding EPA's attempt to invoke that FOIA provision to withhold the model. Exemption 5 blocks release of documents that are a "memorandum or letter"; pre-decisional, and deliberative.

The lower court ruling held the model was both pre-decisional and deliberative, but the 2nd Circuit remanded the case to the lower court with instructions to "enter judgement for NRDC on its motion for summary judgement and for further proceedings consistent with this opinion."

Next steps in the case are not immediately clear, and it is possible EPA might appeal the panel's decision to the full 2nd Circuit -- steps that could delay release of the model.

An agency spokeswoman says EPA is reviewing the decision.

The appellate decision is the latest development in environmental groups' bid for the latest version of EPA's OMEGA model used to predict the response of the vehicle sector to GHG controls on automakers. Specifically, they sought the "core" components of that model, as opposed to various inputs that EPA has already released.

EPA has rebuffed those requests by claiming the model offers insight into agency's decision-making and is thus covered by deliberative process privilege.

Compliance Costs

Critics of the administration's rollback of vehicle GHG standards have long faulted the assumptions behind the policy, citing concerns that the administration relied on a different model from the Department of Transportation (DOT) -- and other associated inputs and assumptions -- that exaggerate the costs of compliance with GHG standards as well as the benefits of such standards.

The final regulation states that neither the agencies nor White House officials "relied upon the OMEGA model for the preparation of either the proposed or the final versions of the [rule]. Instead, as clearly expressed in rulemaking descriptions and documents accompanying both this final rule and the proposed rule, the agencies relied on a separate model to perform the analysis that helped to inform the agencies regarding potential effects of various fuel economy standards."

Legal observers are also watching the case for whether it sets a precedent for implementing a 2016 FOIA law establishing additional requirements for agencies to demonstrate harm from disclosure before withholding information, even if they have discretion on whether to disclose. This issue was one of several disputes aired during mid-January oral argument in the case.

The 2nd Circuit ruling rejects EPA's views that the core of the OMEGA model is deliberative and therefore exempt from disclosure.

"[T]he record shows that to the extent the full OMEGA model reflects any subjective agency views, it does so in the input files, not the core model," the appellate court writes.

The court offers various rationales for distinguishing the core OMEGA model from other computer models that have been exempt from disclosure in other cases.

The ruling also scoffs at EPA's effort to cite the agency's consideration of whether to incorporate new consumer behavior modeling into the OMEGA model as an example of deliberations shielded from FOIA disclosure, noting that the agency has essentially released that same information already.

"The example of the consumer choice submodel is particularly unhelpful to EPA's argument, as the record shows that the last publicly released version of the core model contained the consumer choice submodel notwithstanding the fact that EPA had not -- and still has not -- 'turned on' the submodel."

More broadly, "EPA's argument stretches the deliberative process privilege too far," the court writes.

"The release of the core model could, at most, reveal the various analytical tools EPA has at its disposal. It would not explain the factors that prompted development of a tool, nor would it expose rationales cutting against or in favor of its use," the ruling adds.

While the precise significance of environmental groups' victory is not yet clear, groups earlier his year pressed the court for a ruling in the case as soon as possible, citing a narrow window for incorporating the insights from the model into potential petitions for reconsideration of the rule once it went final.

'Target-Rich' Rule

In addition, one source close to the groups adds that if the model demonstrates further flaws in the administration's analysis for the rule, that will be an important part of upcoming court cases challenging the rollback.

"We need to get the OMEGA model so we can see what it shows. The fact that EPA refused to share it makes us suspicious, but we need to get it and run it."

The court's ruling comes just one day after EPA and DOT released their joint final vehicle GHG and fuel economy standards rollback, with the agencies' own estimates showing it could impose up to $22 billion in net costs to the public under a 3 percent discount rate.

The final rule also contained reduced estimates of per-vehicle costs complying with GHG controls, compared to the August 2018 proposal -- a fact that might blunt at least some of the differences between the rule's analysis and subsequent modeling runs by environmentalists after accessing the core model.

But a second source tracking the issue predicts that fresh OMEGA model runs by outside groups -- as well as further analysis of the final rule -- will further highlight flaws in the final rollback.

"It is a target-rich environment," the source says. -- ***Doug Obey*** (dobey@iwpnews.com)

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