

DOJ SUIT COULD SIGNAL BROADER USE OF CLEAN AIR ACT'S CRIMINAL PENALTIES

October 15, 2004

The Justice Department's (DOJ) high-profile prosecution of a New Jersey pipe manufacturer for alleged criminal violations of the Clean Air Act (CAA) and other environmental laws could signal broader DOJ use of criminal prosecutions under the air law, industry and government attorneys say.

In *U.S. v. Atlantic States, et. al*, a case pending in federal district court in New Jersey, the department is seeking to impose criminal penalties for alleged violations of CAA Title V permit requirements for excess carbon monoxide (CO) and nitrogen oxide (NOx) emissions, as well as efforts by senior company officials to intentionally present false or misleading data on emissions levels from stack tests, according to DOJ's indictment.

Until now, the department has generally only relied on the air law's criminal provisions -- contained in section 113 (a) -- to prosecute improper asbestos removal and smuggling of chlorofluorocarbon (CFC) refrigerants, an industry attorney says. That section of the law provides for fines and a prison sentence of not more than five years for violations. Penalties can be doubled for a second infraction.

Under the company's Title V permit, Atlantic States was prohibited from burning more than 55 gallons of waste paint per day and could not burn any tires in its incinerator. But the government alleges that the company's management ordered employees to burn tires and more than 55 gallons of waste paint each day, resulting in CO emissions in excess of permit levels. Management also falsely reduced readings to lower the average hourly CO readings below the 2,500 parts per million maximum allowed under the permit.

The New Jersey case, while only in the initial investigative phase, could serve as an example of the department's willingness to seek criminal sentences for CAA violations, industry and DOJ attorneys say. The Atlantic States case reflects the department's change in strategy, a DOJ source says. While the law has not changed since Congress created Title V in 1990, DOJ's focus on bringing prosecutions under the law has increased, the source says. Relevant documents are available on InsideEPA.com.

In addition, David Uhlmann, the head of DOJ's Environmental Crimes Section, cited the case during an Oct. 1 American Bar Association (ABA) conference as an example of current litigation where the department is prosecuting Title V violations in part because of "years of attempts to defraud EPA."

Uhlmann told attendees of the ABA's Criminal Enforcement of Environmental Laws conference that the department was seeking to bring more CAA prosecutions because they represent "the number one public health problem in the United States." He said the department was also seeking to increase

criminal prosecutions of Clean Water Act (CWA) permit violations, instances of worker endangerment and hazardous material transportation requirements.

While environmentalists generally support the department's increased focus on criminal enforcement in CAA cases, one source says the environmental community will be skeptical of DOJ's claims until they see more prosecutions.

The source cites a series of recent studies by an academic group that found a significant drop in criminal environmental prosecutions during the Bush administration. The studies, issued by the group Transactional Records Access Clearinghouse (TRAC), examined the cases of all 15,156 defendants found guilty of environmental crimes in the 12-year period since President Clinton first took office.

But when examined by the administration within which they occurred, a Sept. 7 study found a 31 percent increase from the first to second Clinton terms, but an 18 percent drop in the Bush years. For those sent to prison, the numbers during the Clinton years went from 315 to 339, up 8 percent. But during the Bush Administration defendants sent to prison slipped to 243, a 28 percent decline.

Another TRAC study, unveiled Sept. 23, showed a drop in CAA prosecutions by 41 percent between the second Clinton term and the first Bush term.

In the New Jersey case, DOJ is alleging that senior company officials directed incineration of excess waste paint and used tires in violation of Title V and pre-construction permit requirements for CO. For example, company officials directed employees to melt "plate and structural steel, instead of scrap iron . . . during stack tests in an effort to deceive state and federal environmental officials by fraudulently lowering the concentration of one or more pollutants," the indictment says.

In the case of one company official, DOJ's indictment charges the official directed employees to operate the incinerator with no scrap iron "to lower the average hourly carbon monoxide readings below the 2,500 parts per million maximum [allowed in the permit] in order to deceive state and federal environmental officials."

Atlantic States Cast Iron Pipe Co. is a subsidiary of McWane Inc., an Alabama company whose officials are also facing a slew of charges for alleged criminal violations of the CWA and other environmental laws. Both prosecutions followed a series of investigative reports in the New York Times and on public television. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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68877

Justice Department Suit May Signal Increase In Air Act Criminal Prosecutions

October 14, 2004

The Justice Department's high-profile prosecution of a New Jersey pipe manufacturer for alleged criminal violations of the Clean Air Act (CAA) and other environmental laws could signal broader use of criminal prosecutions under the air law, industry and government attorneys say. The case, *U.S. v. Atlantic States, et al.*, is pending in federal district court in New Jersey, where the department is seeking to impose criminal penalties for alleged violations of CAA Title V permit requirements for excess carbon monoxide (CO) and nitrogen oxide (NOx) emissions, as well as efforts by senior company officials to intentionally present false or misleading data on emissions levels from stack tests.

Until now, the Department of Justice (DOJ) has generally only relied on the air law's criminal provisions - contained in section 113 (a) -- to prosecute improper asbestos removal and smuggling of chlorofluorocarbon refrigerants, an industry attorney says. That section of the law provides for fines and a prison sentence of not more than five years for violations. Penalties can be doubled for a second infraction.

Under the company's Title V permit, Atlantic States was prohibited from burning more than 55 gallons of waste paint per day and could not burn any tires in its incinerator. But the government alleges that the company's management ordered employees to burn tires and more than 55 gallons of waste paint each day, resulting in CO emissions in excess of permit levels. Company officials are also being accused of falsely reporting CO to show emissions below the 2,500 parts per million maximum allowed under the permit.

The case, while only in the initial investigative phase, could serve as an example of the department's greater willingness to seek criminal sentences for CAA violations, industry and DOJ attorneys say. It reflects the department's change in strategy, a DOJ source says. While the law has not changed since

Congress created Title V in 1990, DOJ's focus on bringing prosecutions under the law has increased, the source says.

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While attorneys for Atlantic States declined to comment for this story, the company did issue a press release responding to the original indictment in the case. In a Dec. 15, 2003, release, company officials said they were "dismayed to learn the DOJ has decided to take action we believe to be both unwarranted and unnecessary. . . . we are confident this proceeding also will confirm the considerable progress Atlantic States and [parent company] McWane have achieved in environmental, health and safety excellence through substantial investment and the efforts of management and employees."

An industry attorney says the department has sought criminal prosecution for air act violations in only limited cases. The Atlantic States case could open the door to further criminal prosecutions under CAA, the attorney says.

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EPA Seeks Unspent State Funds To Ease Superfund Budget Shortfall

August 20, 2004

SCOTTSDALE, AZ -- EPA is attempting to recover as much as \$250 million in unspent Superfund and brownfields funds the agency has distributed to states over the past 14 years to address funding shortfalls that have prevented the agency from beginning cleanup at all eligible Superfund sites, EPA officials say.

State officials are not opposing the move as long as EPA consults with them to ensure that funding is not taken away from ongoing projects, several state sources say. However, one state source cautions that some states may be forced to develop annual funding strategies for cleanups because they may not be able to rely on long-term funding from EPA.

The move comes as the agency faces new pressure from House Democrats to "come clean" about the growing funding shortfall facing the program in order to secure an increase in annual appropriations.

Mike Cook, director of EPA's Office of Superfund Remediation and Technology Innovation, told state waste officials here Aug. 17 that the move is necessary because the agency only has enough money this year to begin cleanup at approximately half of the sites eligible to be added to Superfund. For example, while approximately 60 sites are eligible to be added to Superfund this year, the agency only has funding to address 25 to 30 of them, Cook said. The outlook for next year will be similar, he added.

As a result, EPA is planning to examine unspent funds provided to state governments to determine whether any of that money remains unused and could be redistributed to start new Superfund cleanups. This practice is known as deobligation.

Cook told attendees that EPA will need to be "very aggressive" in deobligating these funds to increase the number of new starts.

Speaking to the Association of State and Territorial Solid Waste Management Officials' 2004 State Superfund Managers Symposium, Cook said the agency is targeting about \$158 million in funds that were provided to states for Superfund cleanups, assessments and studies, as well as \$92 million in brownfields funds that were provided to states before enactment of the brownfields law in 2002.

Prior to passage of the law, EPA brownfields funds were drawn from the Superfund account. But the brownfields law provided dedicated funding for brownfields projects and those funds cannot be spent at Superfund sites, an agency source says.

However, another agency source cautions that most of the brownfields funds that Cook cited could not be returned to EPA because they were originally awarded to states in five-year revolving loans, which are still active.

Of the money the agency is targeting, 75 percent would return to headquarters for national distribution and the other 25 percent would stay within the relevant EPA region, an agency source says.

Another EPA source says the agency faces no time limits on when it can use the funds because their use is not tied to any fiscal year.

The agency is looking as far back as 1990 to determine whether unused funds remain from cooperative agreements the agency signed with states. Those agreements provide funding for activities such as cleanup projects, enforcement actions and staff training.

For example, the agency is looking to recover funds from Texas that were originally provided for a state-led cleanup at the Texarkana Wood Preserving Co. Superfund site in Texarkana, TX. Cleanup plans for the site have stalled because of community opposition, a Region 6 source says, leaving some funds unused, another agency source says.

State officials say they are not opposing EPA efforts to deobligate funds, as long as the agency consults with them to ensure that funding is not taken away from ongoing projects. If a state has the lead in an ongoing cleanup, there is no need for deobligation, one source says. But if a project were inactive, states would not oppose using that money for a higher-priority project.

Another state source says deobligating funds will force states to change their funding strategy to focus on annual priorities, rather than multi-year plans. States will have to be more efficient in using their delegated funds, the source says, because EPA may take that money back and redistribute it.

Meanwhile, Democrats on the House Energy and Commerce Committee told EPA Administrator Mike Leavitt in a letter late last week that data recently provided by agency officials show a funding shortfall for the program of \$263 million in fiscal year 2004. As a result, 46 sites in 27 states have not been funded or will be inadequately funded in FY04.

"To continue to manage this important public health program in this manner is highly irresponsible," Reps. John Dingell (MI), ranking member of the House Energy & Commerce Committee, and Hilda Solis (CA), ranking member on the Subcommittee on Environment & Hazardous Waste, told Leavitt in the Aug. 13 letter.

"It is past time to come clean with the American public, cease minimizing the problem and provide Congress and the public with complete and comprehensive funding information about each site [that is not adequately funded]," the letter says.

The letter says officials in the White House Council on Environmental Quality (CEQ) and Office of Management and Budget (OMB) have been "pressuring" EPA to keep regional officials from

acknowledging the need for additional cleanup funding. CEQ officials denied the charge and questioned the source of the allegations.

The lawmakers call on the agency to provide, by Sept. 7, more data on the impact of funding shortfalls, including cleanup work that has yet to be performed at various sites.

However, an agency source says lawmakers should focus their attention on congressional appropriators instead. "We have a standing request for increased appropriations and that would certainly help a lot," the source says. "We wish [appropriators] would support the agency's budget" request. -- Stephen Langel

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Source: Inside EPA via InsideEPA.com

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68037

EPA IMPOSES NEW COST-BENEFIT REVIEWS TO COMPLY WITH OMB GUIDANCE

June 25, 2004

EPA is expanding its internal review process for assessing pending regulations to comply with recent White House requirements for agency cost-benefit and other economic analyses, according to a recent agency memo obtained by Inside EPA.

The new process, which requires EPA's Office of Policy, Economics and Innovation (OPEI) to conduct additional reviews of regulatory cost-benefit analysis for major rules, is drawing strong criticism from officials across the agency, who expect the additional reviews to add months to the current review process.

The new reviews are being applied to 10 major rules EPA is developing this year, including the interstate air transport rule and several other major air quality rules, a water rule regulating water intake structures at existing power plants, drinking water rules regulating groundwater and disinfection byproducts and a waste rule regulating coal combustion wastes, according to an attachment to the memo.

EPA may also apply the review process to six other rules in 2004 if agency officials determine they are economically significant, the attachment says. These include clean air rules for regulating fine particulate matter (PM_{2.5}), air toxics from mobile sources, locomotive and marine engines, as well as waste rules setting standards for assessing whether property developers are eligible for Superfund liability exemptions and for increasing industrial recycling.

Officials in the water and waste offices say several of these pending regulatory proposals are likely to be delayed as a result of the additional reviews. The extra requirements "cause a lot of headaches," for EPA

and "produce more delay than value added," one agency source says. Some officials are also concerned that as the presidential election nears, many of these rules "get hotter politically," making their promulgation less likely.

However, an economist in EPA's air office says the new requirements are "not a major change" but only a "re-emphasis" of existing practices that will not delay upcoming air regulations. The air office source says EPA's air office is "in pretty good shape" since it already fulfills many of the new requirements in the memo and has adequate time to provide any extra analysis.

The additional reviews are meant to ensure that the agency complies with guidance, issued by the Office of Management & Budget (OMB) last September, imposing new cost-benefit analysis requirements on agencies. OMB guidance, known as Circular A-4, applies to rules that cost over \$100 million to implement.

The circular's requirements apply to draft proposed rules submitted to OMB after Dec. 31, 2003 and draft final rules submitted after Dec. 31, 2004. Among other things, Circular A-4 requires agencies to place a greater emphasis on the uncertainty of their estimated benefits of regulations. Emphasizing uncertainty can raise questions about the effectiveness of regulations (see related story).

While EPA had not initially planned to make changes to its existing regulatory review process to comply with Circular A-4, the agency shifted gears and imposed the new process after OMB returned several rules to EPA for additional review, including a clean air rule for Best Available Retrofit Technology (BART), one informed EPA source says. "OMB was upset," that the agency had failed to comply with A-4, the EPA official says.

OMB's spokesman did not respond to requests for comment. But OMB regulatory chief John Graham urged agencies in a memo last March to implement the circular. Graham warned agencies in the memo that "OMB may return a rule to an agency if its regulatory analysis does not conform to Circular A-4," though it is not clear whether this referred to EPA's BART rule.

An OPEI source says the reviews are necessary after OMB rejected the BART rule and several other EPA rules for lacking the necessary economic analyses. "These people [criticizing the new review process] are maybe in denial about A-4," the source says. And the source adds that the reviews "save time in the short run," because it takes even longer to promulgate a rule if OMB rejects it.

In response to OMB's concerns, Stephen Johnson, EPA's acting deputy administrator, issued a memo late last month creating the new review process. "In order to improve the quality of our regulations,

some inconsistencies with how the Agency conducts its regulatory analysis need to be addressed," Johnson says in the memo. The memo is available on InsideEPA.com.

The memo requires OPEI to create special economic teams to ensure cost-benefit analyses for major EPA rules are consistent with Circular A-4 requirements, and EPA's own cost-benefit requirements, before proposals are submitted to OMB. The economic teams include program staff, and OPEI analysts and economists, and will undertake extensive analysis of the rules' economic impact on relevant regulated industries.

"I have instructed OPEI to schedule a Final Agency Review process for rules only if all aspects of the required analysis have been satisfactorily completed," Johnson says.

To help program offices develop economic analyses before inter-agency review, the agency's National Center for Environmental Economics (NCEE) is also developing an Economics Analysis Checklist.

One EPA source says the agency is also requiring OPEI to review regulations once they return to the agency from OMB review for signature. Previously, all EPA offices, including OPEI, would review major rules. Once program offices agreed with the proposal, it would be sent to OMB. When OMB completed its review, the rule would return to the administrator for signature.

Industry and EPA sources say the new review requirements could also delay a pending waste rule that creates an electronic system for tracking hazardous waste shipments.

In the memo, Johnson is also asking each office's assistant administrator to meet with OMB to discuss their regulatory and policy agenda for the rest of the year. The meetings are expected to begin sometime in July, the document states. During these meetings, agency officials are expected to describe the type of analysis being done for each pending rule and the status of that work. This information was due to be delivered to OPEI by June 11.

Johnson also calls on all programmatic offices to follow EPA and OMB's information quality guidelines in preparing these rules. Following these guidelines is necessary to "ensure and maximize the quality of disseminated information, including its objectivity utility, and integrity," according to the memorandum.

In addition, OPEI is training agency personnel on how to comply with the new requirements. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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67150

EPA Imposes New Cost-Benefit Reviews To Comply With OMB Guidance

June 24, 2004

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EPA may also apply the review process to six other rules in 2004 if agency officials determine they are economically significant, the memo says. These include clean air rules for regulating fine particulate matter (PM_{2.5}), air toxics from mobile sources, locomotive and marine engines, as well as waste rules setting standards for assessing whether property developers are eligible for Superfund liability exemptions and for increasing industrial recycling.

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COURT RULING MAY HAND U.S. CLEANUP LIABILITY AT HUNDREDS OF SITES

May 7, 2004

A precedent-setting federal appellate decision leaves the Defense Department (DOD) and other federal agencies potentially liable for cleanup costs at hundreds of waste sites where private contractors operated federally-owned factories during World War II, sources familiar with the case say.

The ruling could affect sites operated by chemical, automobile and other manufacturing companies, sources say.

The U.S. Court of Appeals for the Federal Circuit held April 28 in *DuPont v. U.S.* that a standard indemnification clause DOD included in contracts signed with private contractors throughout World War II extends to cleanup liability incurred when Congress passed the Superfund law in 1980. Relevant documents are available on InsideEPA.com.

The court rejected government arguments that the Anti-Deficiency Act (ADA), which prohibits open-ended indemnification clauses in government contracts without a specific statutory basis, invalidated the contracts' indemnification provisions.

Instead, the court agreed with arguments from DuPont, the chemical industry and government contractors that the Contract Settlement Act (CSA) of 1944 authorized the indemnification. Under the CSA, the government "agree[s] to assume, or indemnify the war contractor against, any claims by any person in connection with such termination claims or settlement."

According to sources familiar with the case, the decision sets a precedent for hundreds of industrial facilities the government owned but private companies operated during the war. The case is the first appellate decision interpreting the indemnification clause's application to cleanup liability at WWII-related facilities. Because the government used similar indemnification language in most of its contracts for hundreds of similar facilities, the decision will "affect a substantial number of World War II contracts," one attorney familiar with the case says.

Many of these facilities are now Superfund sites or Formerly Used Defense Sites, a category of contaminated sites that the Army Corps of Engineers is responsible for cleaning up, another attorney following the case says. DuPont ran at least 25 facilities using the same indemnification clause, including the Hanford site in Washington, which is the largest radioactive waste site in the country.

However, one industry source cautions that many federal agencies that may now be liable for cleanup costs as a result of the Federal Circuit's ruling are "dragging their feet" in cost recovery negotiations in other cases as they await a decision from the Supreme Court in *Cooper Industries v. Aviall*. That case centers on whether private parties must first receive a government order to clean up a site in order to recover cleanup costs.

Government agencies like DOD are now citing a Bush administration brief to the high court arguing that private parties who voluntarily clean up sites without an EPA order are not eligible to seek cleanup costs from other liable parties.

In one case involving DuPont sites in New Jersey, a federal district court in the state agreed with DOD that DuPont could not recover cleanup costs because EPA had not ordered the company to conduct a cleanup.

A Justice Department spokesman declined to comment on the appellate ruling, saying the decision was still under review and the government had not yet decided whether to appeal it.

DOD officials did not return calls seeking comment.

The DuPont case centers on the Morgantown Ordnance Works site in Morgantown, WV. In 1940, the government commissioned DuPont to build and operate a plant in West Virginia to produce chemicals for use in munitions.

Under the pact, the U.S. agreed to indemnify DuPont for any liability it would face in its operation of the facility "arising out of or in connection with the performance of the work" the agreement required.

In 1984, EPA notified DuPont that it was adding the facility to the Superfund National Priorities List. The company then entered into a consent order to pay over \$1.3 million to conduct a remedial investigation/feasibility study at the site.

DuPont sought to recover some of these costs from the government in 2002, but the U.S. Court of Federal Claims rejected the claim. The trial court upheld government arguments that the ADA bars the government from providing contractors with the kind of indemnity the contract provides.

However, the appeals court rejected these arguments, citing ADA provisions that exempt contracts or obligations that are "authorized by law."

The appeals court noted that the government and DuPont signed a supplement to the original agreement in 1946 where the government reiterated its agreement to uphold the original indemnification clause. The supplement was signed two years after Congress passed the CSA.

"The CSA authorized the government to include the Preservation of Indemnity Clause in the Termination Supplement it entered into with DuPont in 1946, and that Clause ratified and preserved the broad and indefinitely enduring indemnity the government granted DuPont in 1940 -- an indemnify broad enough to include DuPont's [Superfund] liability," the court concluded. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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66385

RULING ALLOWS CONSTITUTIONAL TEST OF SUPERFUND'S REVIEW LIMITS

March 5, 2004

A federal appellate court has set the stage for the first-ever constitutional challenge to the Superfund law's controversial limits on judicial review that EPA relies on to enforce cleanup decisions.

The U.S. Court of Appeals for the D.C. Circuit held March 2 that General Electric Co. (GE) has the right to challenge the constitutionality of Superfund law provisions that bar private parties from contesting EPA cleanup decisions until after the cleanup is complete. The court remanded the dispute back to the U.S. District Court for the District of Columbia for a review on the merits of GE's arguments.

While an EPA source says the agency expects no immediate impact on cleanups as a result of the ruling, industry sources say that if GE eventually prevails on the merits, it could force Congress to provide additional due process protections.

The ruling is also significant because it may allow GE to challenge EPA cleanup decisions at the Hudson River and other costly sites where the company is a liable party.

At issue is the Superfund enforcement scheme that allows EPA to issue unilateral administrative orders and other cleanup mandates but generally bars private parties from challenging those orders in federal court until after the cleanup is complete.

Industry groups have long argued that this scheme unfairly requires them to spend the time and money cleaning up a site when they may not be the responsible party, without the opportunity of challenging the order in court until after the cleanup is complete. At the same time, some community groups have also opposed the so-called bar on pre-enforcement review in cases where they believe EPA's cleanup requirements are not strict enough.

Until now, courts have generally barred constitutional challenges from proceeding because they were based on challenges to site-specific cleanup orders.

But in this case, *GE v. EPA*, the court held that the company could challenge the provisions' constitutionality because the plain language of section 113(h), which bars pre-enforcement review, does not preclude courts from considering the scheme's constitutionality. While that provision does preclude "any challenges to removal or remedial action selected under" the law's enforcement mechanisms, it does not prevent challenges to the Superfund statute itself, the court found.

"G.E.'s facial challenge does not fit within the plain text" of section 113(h)'s exclusion, the court says.

The court also rejected EPA's argument that such challenges would undermine the Superfund statute's goal of forcing polluters to clean up their contamination. The agency had argued that, if successful, GE's constitutional challenge would hinder or delay EPA's ability to compel contaminated site cleanups.

The court found instead that a decision in GE's favor "would afford EPA an opportunity to provide due process review at an early stage," while a holding rejecting the company's claim would "remove a later impediment to EPA's enforcement action." And the court found that because this was a purely legal challenge, there was no potential for producing inconsistent programmatic results based on different facts. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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65228

EPA Vows Few Fixes In Response To IG Finding Of Toxics Reporting Errors

February 20, 2004

EPA officials are not promising many fixes to its toxics release reporting program in response to an inspector general's (IG) report released earlier this month that indicates the agency may be significantly over-reporting the amount of toxic waste being released into the environment because of facility errors in reporting the data.

While the IG report focused on over-reporting of heavy metals sent to wastewater treatment plants, an IG source says the concerns raised in this report could also apply to other EPA programs that use TRI data, including waste management and clean air programs. "The possibility exists that these kinds of errors could be done by other facilities," the source says, because the form the agency uses is the same across EPA programs.

According to an IG source, the mistake was "egregious" in its effect on the overall amount of waste reported and may serve to undermine the credibility of the program. "It doesn't help the [TRI] program at all," the source says, because industry officials and other interested parties will use such mistakes to argue that TRI is inaccurate and unreliable. The IG recommended that the agency determine why the software missed these mistakes and explain what changes EPA would make as a result.

The over-reporting is significant because federal and local regulators rely on the data to set priorities, measure progress and target areas of special and immediate concern. Many industry officials have long complained that the reporting system is burdensome and overstates pollution releases, while some environmentalists use the data to argue for stricter standards.

While agency officials say they will eventually fix their controversial form for industry to report toxic releases, the officials say the agency's interpretation of federal law prevents them from making changes to the Toxics Release Inventory (TRI) database to correct toxics reporting errors -- unless facilities revise or withdraw incorrect reports.

"It is the TRI program's long-standing interpretation of section 313(j) [of the Emergency Planning and Community Right-to-Know Act (EPCRA)] that the TRI database should reflect data as submitted by facilities pursuant to TRI reporting requirements. Consistent with this interpretation, The TRI program does not believe that it should unilaterally make substantive changes to the database without receipt of a certified revision or withdrawal from the reporting facility," EPA said in a November 2003 response to the IG.

As a result, the IG is urging EPA to be more aggressive in obtaining corrected data from facilities.

EPA's response also states the agency will seek to enhance its current auditing software to flag spikes and overall pollutant increases or decreases for further evaluation.

EPA is already considering a host of other reforms to the program to limit reporting burdens and reduce reportable emissions. Among other things, the agency is considering allowing facilities to use an expedited TRI reporting process, raising reporting thresholds for small businesses and other facilities, and allowing facilities to report "ranges" of emissions.

The IG's Feb. 2 report analyzes the agency's use of TRI to determine the amount of pollutants sent to publicly owned treatment works (POTWs) from seven industrial facilities. The report finds that the agency was unable to detect reporting errors by various companies, which led to an over-reporting of transfers to POTWs by nearly 1.2 million pounds from 1999 to 2000.

Specifically, the agency did not catch a mistake that several companies made when they reported more than 1.16 million pounds of copper, lead, chromium, and silver being transferred to POTWs when it was actually sent to private recovery operations and recyclers. While EPA has software to detect increases, or spikes, in reported releases, the agency could not explain why it did not catch these mistakes or how it would improve its software to avoid future mistakes, the report concludes.

Among other things, the report found that confusion with EPA's Form R for reporting releases may have contributed to industry errors. Industry officials have long sought changes to the form, charging that it is confusing and does not clearly differentiate between toxic material being transferred for further processing or being discharged.

The IG study appears to back industry charges, finding in this case that the seven facilities reported pretreatment releases being sent to POTWs rather than to reprocessors. As a result, the IG found that the seven facilities incorrectly reported they had "released" 1.16 millions pounds of heavy metals to POTWs, when in fact they had "transferred" these wastes to reprocessors. For example, the over-reporting resulted in EPA making a 492,000-pound overstatement of copper transfers to POTWs in 2000, when the transfers actually had actually declined from 1999 levels.

While agency officials say they will seek to revise the form to prevent future errors, agency officials suggest they may not be able to revise it as part of their current review of the document being conducted with the White House Office of Management and Budget (OMB).

A source with the Association of Metropolitan Sewerage Agencies argues that these problems beg the question, "Are there larger, more serious problems elsewhere?" The source says that because EPA missed these problems, there may be numerous inaccurate results across other programs.

This study is part of a larger review by the IG of the agency's pretreatment program to determine how effective it has been in reducing the transfer of industrial pollutants to wastewater treatment facilities. The IG is preparing another report, on the pretreatment program itself, which will be directed to the Office of Water, the report says. -- Stephen Langel

6141

EPA TOXICS LISTING TRUMPS ARGUMENT OVER CHEMICAL'S SECURITY VALUE

October 10, 2003

EPA's determination earlier this month that a ubiquitous cyanide compound can be regulated as a toxic pollutant under the Clean Water Act (CWA) comes despite industry arguments that the determination may undermine homeland security efforts by dissuading manufacturers from using the substance to treat radiation poisoning from "dirty bombs" and other threats.

The agency announced Oct. 6 that ferric ferrocyanide (FFC), a widespread compound used in numerous consumer and industrial products, should be regulated as a toxic pollutant under the CWA. The determination also means the chemical will be regulated as a hazardous substance under the Superfund law, because the agency incorporates CWA toxics listings into Superfund decisions.

The decision may subject a host of industrial sectors, including aluminum, cosmetics, pharmaceuticals, utilities, photographic and salt production, to new environmental reporting regulations and hazardous waste cleanup requirements.

FFC is ubiquitous in the environment, both because it is a by-product of manufactured gas plants that produce gas from coal and oil and as a key ingredient in salt used to de-ice roads.

EPA's decision comes after years of research and review stemming from a 1995 court order by the U.S. Court of Appeals for the 1st Circuit requiring the agency to review the issue to determine whether National Grid, a utility, was liable for millions of dollars in Superfund cleanup costs at a contaminated landfill in Massachusetts. In response to the court order, the Clinton administration issued a preliminary determination during its final days that FFC was a toxic pollutant.

According to an agency source, the 1st Circuit is planning a hearing for the end of the month to consider National Grid's liability given EPA's decision.

However, industry representatives strongly opposed the preliminary determination, arguing that EPA never intended to regulate FFC under the water law. Earlier this year, industry sought to bolster their opposition to any regulation, arguing that a Bush administration decision to uphold the Clinton-era determination will hamper homeland security and public health efforts because of the role FFC is expected to play as an antidote to radiation poisoning.

Industry officials pointed to a January decision by the Food & Drug Administration (FDA) encouraging manufacturers to submit marketing applications for using FFC to treat people for exposure to radioactive elements, such as cesium-137. In a Feb. 4 Federal Register notice, FDA formally approved FFC for this use.

"Today's action is part of our continuing effort to foster the development and availability of countermeasures to terrorist attacks," Health & Human Services Secretary Tommy Thompson said in a statement announcing the decision. FDA Commissioner Mark McClellan added that FFC would be

especially useful in treating citizens exposed to radioactive materials released through dirty bombs. Cesium-137 is considered a potential component in dirty bombs, which contain radioactive and conventional materials.

EPA's decision will have "far-reaching policy overtones," an industry attorney wrote EPA water chief Tracy Mehan earlier this year, because "it clearly is one of the president's top priorities for his administration to confront the many challenges of homeland security in a well-coordinated and effective manner."

An agency determination that the same substance that can be used to meet a homeland security need is also a toxic substance will undermine this policy, the industry letter says. "It could be harmful and confusing," the letter says, for EPA to reach this conclusion because manufacturers would be hesitant to produce FFC if they are concerned about potential environmental liability. "Certainly no manufacturers would then step forward to enter that market," the letter says.

While EPA has long held that cyanide was a toxic pollutant under the CWA, EPA has never specifically determined whether FFC -- a member of the cyanide family of compounds -- was also subject to regulation.

However, EPA's announcement shows that the agency believes the list of toxic pollutants under the CWA contains broad categories of substances for regulation. EPA found that "the toxic pollutant list as a whole, and each of the listed pollutants, are meant to be broad categories or families of compounds," the agency's administrative determination says.

The determination says a broad interpretation is warranted because the listing does not impose regulatory requirements, and instead establishes how a pollutant may be regulated in effluent limitation guidelines and under clean water permits. "From the very beginning of EPA's implementation of CWA . . ., the agency has taken an inclusive approach to listing toxic pollutants, and has looked to the actual regulation of the pollutants through effluent standards to focus on particular compounds," the paper says.

EPA also concluded FFC is a pollutant under the CWA because of scientific evidence that the compound will release cyanide into the environment under certain conditions. Specifically, peer reviewers found that FFC releases cyanide into the environment when exposed to water and sunlight.

An EPA source says the agency noted industry's concerns that EPA's decision may undermine FDA efforts and the two agencies coordinated EPA's final decision. FDA is "okay with the decision," the source says.

And, the source says, the agency does not believe that it is inconsistent for a substance with beneficial uses to also be considered hazardous. For example, zinc and numerous related compounds, such as zinc oxide, have beneficial uses, but can be hazardous under certain circumstances. "Releases to the environment is a different scenario" than a substance's approved uses, the source says.

And the source adds that EPA is not making any new law, but instead is affirming what has always been agency policy regarding toxic compounds. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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62804

EPA Decides To Regulate Toxin Despite Industry's Homeland Security Concerns

October 8, 2003

EPA has decided to list a ubiquitous cyanide compound for possible regulation under the Clean Water Act, despite industry arguments that such a move would undermine homeland security efforts by dissuading manufacturers from stockpiling and using the substance to treat radiation poisoning from "dirty bombs" or similar terrorist attacks.

The agency announced Oct. 6 that ferric ferrocyanide (FFC), a widespread compound used in numerous consumer and industrial products, should be regulated as a toxic pollutant under the water act. The determination also means the chemical will be regulated as a hazardous substance under the Superfund law, because the agency incorporates water act listings into Superfund cleanup decisions.

The decision may subject a host of industrial sectors, including aluminum, cosmetics, pharmaceuticals, utilities, photographic and salt production, to new environmental reporting regulations and hazardous waste cleanup requirements.

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EPA's decision comes after years of research and review stemming from a 1995 court order by the U.S. Court of Appeals for the First Circuit requiring the agency to review the issue to determine whether National Grid, a utility, was liable for millions of dollars in Superfund cleanup costs at a contaminated landfill in Massachusetts. In response to the court order, the Clinton administration issued a preliminary determination during its final days that FFC was a toxic pollutant.

According to an agency source, the First Circuit is planning a hearing for the end of the month to consider National Grid's liability given EPA's decision.

However, industry representatives strongly opposed the preliminary determination, arguing that EPA never intended to regulate FFC under the water law. Earlier this year, industry sought to bolster their opposition to any regulation, arguing that a Bush administration decision to uphold the Clinton-era determination will hamper homeland security and public health efforts because of the role FFC is expected to play as an antidote to radiation poisoning.

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"Today's action is part of our continuing effort to foster the development and availability of countermeasures to terrorist attacks," Health & Human Services Secretary Tommy Thompson said in a release announcing the decision. FDA Commissioner Mark McClellan added that FFC would be especially useful in treating citizens exposed to radioactive materials released through dirty bombs. Cesium-137 is considered a potential component in dirty bombs, which contain radioactive and conventional materials.

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And the source adds that EPA is not making any new law, but instead is affirming what has always been agency policy regarding toxic compounds. -- Stephen Langel

White House Deadline May Pressure EPA To Limit Waste Reporting

March 28, 2003

Industry officials are claiming an initial victory in their efforts to limit the reporting of wastes sent offsite for disposal after the White House's Office of Management and Budget (OMB) set an Oct. 31 deadline for EPA consider the concerns of recycling and treatment facilities with regard to the current reporting forms.

OMB's decision means industry will still have to report offsite waste disposals for an upcoming Toxic Release Inventory (TRI) reporting deadline of July 1. But industry sources say they believe the October deadline will put pressure on EPA to amend the current reporting forms in time for future reporting deadlines.

Waste treatment and recycling industry groups, including the Environmental Technology Council (ETC), the Steel Manufacturers Association and the Metals Industry Recycling Coalition have been critical of the agency's decision last November to count materials sent to offsite disposal facilities as "releases" under TRI.

Specifically, industry officials want EPA to change the reporting form, known as Form R, to clarify that parties sending waste for offsite disposal must not report that shipment as a "release," but rather a "transfer." These groups have argued that the designation of these actions as releases gives the incorrect impression that materials are being dumped, spilled, or emitted into the air or water instead of being properly disposed.

But EPA initially rejected industry efforts to amend the form, charging that claiming disposal in an offsite facility constitutes a release under the Emergency Planning and Right-to-Know Act (EPCRA), which created the TRI program.

However, EPA on March 18 released a new version of the form that shows OMB approval through Oct. 31. OMB usually grants approval of such forms for an entire calendar year, the industry source says. Under the Paperwork Reduction Act, OMB has authority to review and approve all information

collection requests conducted by federal agencies in order to ensure, among other things, that the data collected have practical utility.

Industry sources say they view this as an opportunity to win changes to the form. "We're taking it as a very positive sign," an industry source says, because OMB believes that "this issue is still up in the air and has not been concluded." The source says that OMB officials could not change the form this year because there was not enough time to make the changes and ensure that the forms could be filed by their July 1 due date.

And the source says that industry groups are now changing their strategy, focusing less on the inequities of the reporting requirements and more on their allegations that the current requirements violate EPCRA and the Pollution Prevention Act (PPA). According to ETC documents, EPCRA requires that the agency only count "on site" releases, not off-site disposal. And the PPA requires EPA to report on facility-specific disposals, rather than disposal that take place at other facilities.

"EPA is violating its own statutes," the source says, "off-site releases are contrary to the regulations." The source adds that the problem is that the agency is philosophically opposed to changing TRI. There are "institutional pockets in EPA who believe that any change to TRI is sacrilegious." But the source says the groups do not anticipate using litigation to change the TRI. Instead, the group is hoping to convince OMB to make the changes.

According to the source, policy-based arguments have not been effective in getting the agency to change its stance on TRI. The legal argument, however, is "more persuasive to people in the agency who are locked into what has been a long-time policy to expand releases," the source says.

Originally, industry had focused their arguments on the inequities of the reporting requirement. For instance, transferring materials to a waste handler must be reported as a release, while the handler must also report the same material as a release when it is sent to a disposal facility.

Industry has argued that reporting these transfers as releases results in double counting because the same wastes are considered released to the environment twice. The reporting mandate also creates the erroneous impression that two times as much waste is being generated, the groups claim, which may dissuade businesses from properly disposing of their wastes.

EPA officials did not return calls seeking comment. -- Stephen Langel

EPA FACES POTENTIAL SUPERFUND SHORTFALL OF OVER \$80 MILLION

June 21, 2002

EPA officials have determined that the agency likely faces an \$80 million funding shortfall in the Superfund program for the remainder of the current fiscal year, a development that has forced at least one regional office to shift money from other programs and functions to complete cleanup work, according to a confidential planning document obtained by InsideEPA. The document is available on InsideEPA.com.

The document comes at a time when EPA is facing increasing criticism for a slowdown in the rate of cleanup completion in the Superfund program, prompting calls from House Democrats and a host of key senators to reauthorize lapsed taxes that are used to pay for Superfund cleanups.

In a June 6 memorandum, Remedial Action Advice of Allowance Funding Plan for FY2002, EPA lays out its funding needs by region for the remaining two quarters of fiscal year 2002, including how much additional funding is necessary for ongoing and new Superfund projects. According to the document, the agency is relying on \$82.4 million in funding that is "deobligated" from the regional Superfund program budgets and other programs in order to fund ongoing cleanups at sites and begin new remedial projects.

"Remedial action funding will be made available . . . as deobligated funds become available," the document says, referring to ongoing cleanup projects. Later, the document explains that new projects are also contingent on these funds. "Funding for all new start remedial action is contingent upon . . . the availability of funds from the national deobligation pool."

Deobligated funds are monies the agency has allocated to contractors at Superfund sites that is not spent. These funds are then used to increase the available balance the agency can use for other Superfund projects. The memorandum shows that the amount of anticipated deobligated funds varies widely by region. EPA is depending on Regions II, VI and IX for the bulk of the money, with their contribution being nearly \$40 million.

In addition to relying on deobligated Superfund money, the agency is also asking some regions to use other regional funds to pay for the shortfall. According to the document, Region VI has agreed to fund \$5 million in ongoing cleanup at the Tar Creek, OK Superfund site "from regional resources."

A high-ranking agency official says the document shows that many regions will not receive "as much money as they could ideally use, and ideally would like." The source adds that any shortfalls will not prevent the cleanups from moving forward, but says ongoing projects receiving funds are the "lucky sites." According to the document, "deobligation and recertification of unexpended prior year funds are critical to the success" of ongoing and new cleanup projects.

But another EPA official disagrees that there is any indication of a shortfall, saying that the document only lays out the monies that the agency will allocate for Superfund activities. The memorandum "allocates the money available to us, no more, no less," the source says. The source says the agency is also awaiting the release of \$100 million in already appropriated funds that EPA will be able to use as of September, but the high-ranking agency source says this money still will not cover the additional \$80 million needed.

A House Democratic source says the document proves the Bush administration has not requested sufficient funding for the Superfund program, causing the dramatic slowdown since the administration took office. The source also says the document proves that EPA's arguments to justify the slowdown, including complex mining and contaminated sediment site cleanups, are baseless. EPA's claims that "mining sites are the expensive sites of the future -- how is that relevant" to the FY02 budget projections, the source asks. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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53941

EPA EYES SWEEPING SUPERFUND LISTING CHANGES DUE TO FUNDING WOES

May 17, 2002

AUSTIN, TX --- A high-level EPA Superfund official says the agency is considering whether to completely revamp the criteria the agency uses to list sites on the National Priorities List (NPL) because of the agency's funding woes. The new listing criteria would depart from the agency's traditional reliance on the Hazard Ranking System (HRS) -- which measures a site's relative risk -- to determine NPL listings, and would include consideration of a host of other factors like the potential cost and duration of a cleanup.

The announcement is drawing considerable public criticism from EPA staff, who say using the new criteria is inappropriate. Several EPA officials also warned that morale is "at an all-time low" over the Bush administration's handling of the Superfund program.

The comments also come as EPA officials revealed to Inside EPA the names of several sites that the agency held off on listing because of funding concerns, many of which are mining sites.

But the comments appear to confirm long-standing Democratic complaints that the agency is not requesting adequate funding for the Superfund program, which they say has led to a slowdown in the number of completed cleanups and forced the agency to delay beginning cleanup work at a host of sites in Region VI.

During a May 14 EPA conference here on Superfund site assessment, Michael Cook, the new director of EPA's Office of Emergency & Remedial Response (OERR), told EPA regional staff and other attendees that funding pressures were forcing the agency to reevaluate which sites it places on the NPL. EPA is "entering a period of years where we will have to meter funds . . . there is not nearly enough money to meet" Superfund's needs, Cook said.

Cook explained that the future use of the HRS would be considered both by an internal panel considering the future of the Superfund program and the National Advisory Council on Environmental Policy & Technology, an external stakeholder panel whose membership the agency is expected to announce next week.

According to EPA documents, the HRS, as detailed in EPA's Superfund regulatory blueprint, is the principal mechanism the agency uses to list sites on the NPL. "It is a numerically based screening system that uses information from initial, limited investigations -- the preliminary site assessment and the site inspection -- to assess the relative potential of sites to pose a threat to human health or the environment," the documents say. Sites are scored using a number of criteria, including the likelihood that contaminants are released or could be released, the characteristics of the waste and whether the waste affects people or sensitive environments. HRS evaluates four exposures pathways: groundwater migration, surface water migration, soil exposure and air migration.

Cook said the agency would now be establishing short-term criteria changes for listing sites on the NPL, taking into account the insufficient funding. Specifically, Cook said the agency must prioritize listings based on the risk a site poses. "We need to set priorities more clearly based on risk."

Cook also said the agency would seek out smaller, more manageable sites to designate, saying in a separate interview that the agency would consider how quickly a cleanup could be completed. The potential cost of the cleanup will be another factor, Cook said.

But numerous EPA headquarters and regional officials attending the meeting blasted Cook's announcement. A Region X source argued that it was inappropriate for the agency to use the difficulty and size of a site as factors in deciding whether to add it to the NPL. An OERR source also criticized the move, arguing that the agency is supposed to clean up sites based on risk alone.

Meanwhile, there is a growing sense of frustration among EPA career staff about how the Bush administration is handling the Superfund program. An agency source says that career staff morale is "at an all-time low" because of a perceived shift by EPA political appointees away from making cleanup progress. According to the source, while the agency is placing greater emphasis on redeveloping contaminated lands, it is hesitating to list numerous heavily contaminated sites on the NPL.

Cook responded EPA was forced to make the changes because of funding concerns. "We have a very serious money problem." Cook also defended the move by explaining that the agency used financial factors in deciding whether to list a site when the Superfund taxes temporarily expired in 1985.

Meanwhile, -EPA officials have revealed a partial list of sites the agency is hesitating to add to the NPL because of funding concerns, including a number of large contaminated mining sites -- the type of site EPA claims is slowing progress under the Superfund program.

According to numerous agency sources, there are approximately 20 sites that were supposed to be added to the NPL last January, but were held up because EPA struggled to find adequate resources.

The mining sites that the agency has been forced to reject are the Eureka Mills site in Eureka, UT, along with the Anaconda and Rio Tinto sites in Nevada, EPA regional sources say. One regional source says the Eureka mining site is "one of the worst metal-contaminated" sites the source has seen.

The agency has also delayed adding several sites in New York, New Jersey and Puerto Rico, regional sources say. These sites include the Cuyhuga County site, Ellenville Scrap site and Crown Cleaners site in New York, the Atlantic Resources, Woodbrook Road and Quanta Resources site in New Jersey, and the Pesticide Warehouse site in Puerto Rico.

Cook said, however, that not all mining sites that should be listed could be listed because of insufficient funds. "We have a problem in virtually every historic mining site in the United States." But "we can't really take that on . . . we will have to set priorities," Cook said. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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53247

AMID BUDGET CUTS, EPA PREPARES FOR NEW SUPERFUND REFORM DEBATE

January 4, 2002

An increased focus on security issues and a related cut in cleanup spending will likely lead to a slowdown in Superfund cleanups -- particularly emergency removals -- during the new year, EPA, industry and environmental representatives say.

But the issue of future Superfund funding comes as EPA has convened a high-level public advisory committee to consider the future shape of the program, and the kind of funding the program should receive, after a congressionally mandated study found that the agency may still face significant cleanup responsibilities at so-called "mega sites" -- contaminated sediment and mining sites with an average cleanup cost of \$150 million.

The agency's newly formed advisory committee will almost certainly be the venue for a heated debate between stakeholders and the agency. Industry sources, for instance, say the cleanup slowdown is necessary and are preparing a strategy to convince EPA to respond to the change by allocating more cleanup responsibilities to states and utilizing more flexible cleanup authorities during the upcoming year.

But environmentalists argue that Superfund continues to be of great importance and are preparing to convince the administration to push for increased funding in FY03, including reauthorizing Superfund taxes to avoid any cleanup slowdown.

High-level EPA officials say the Superfund program will almost certainly face funding shortfalls in 2002 because of security concerns. But these sources believe that emergency removal actions, not long-term remediation work, will be hit the hardest. These sources add that the issue is the most pressing financial issue for the Superfund program and are awaiting recommendations from the agency's National Advisory Committee on Environmental Policy & Technology (NACEPT) before moving forward with any changes.

While EPA is slated for flat funding levels in FY02, a greater focus on security issues, including ongoing anthrax cleanup efforts, have led agency officials to believe that the agency may see shortfalls in the amount of money available for its removal program. EPA officials, along with environmentalists and industry representatives, are also awaiting the administration's FY03 budget proposal in February to see whether there is a decrease in overall EPA funds in the budget proposal because of the new focus on anti-terrorism, or a proportional decrease in the amount of money the Superfund program receives.

Industry sources say that the new focus on anti-terrorism will provide industry with the opportunity to argue for a diminished role for Superfund during the next fiscal year. Industry representatives will argue that Superfund should only be used as a "last resort" and instead other state and federal programs should handle most cleanups. One source says, "Superfund should be left to sites that have a national effect." Such an approach is necessary with greater amounts of funding being allocated toward anti-terrorism activities, the source adds. Industry groups will also argue that these other approaches are more cost-effective, efficient and quicker than Superfund and thus should be used more often.

These other alternatives include giving more responsibility to EPA's Resource Conservation & Recovery Act corrective action program and using the water program's Total Maximum Daily Load standard as the main measure for contaminated sediment site cleanup, rather than Superfund criteria, the source says. And the group will propose having state Superfund programs and state voluntary cleanup and brownfields programs take on more work.

While environmentalists agree that Sept. 11 changed EPA's priorities, instead of looking to transfer more responsibilities outside of Superfund, activists are preparing a strategy to convince the administration to increase funding for the program.

Environmentalists are particularly concerned that agency officials believe that there will be a slowdown in the cleanup of at least 20 Superfund sites because of less funding. While Congress is attempting to reimburse EPA for money taken from the Superfund program to fund anthrax cleanups, officials say that already existing shortfalls and the likelihood that future security spending will come from the program makes a slowdown likely.

Without increased funding, EPA will be left with three options, one environmentalist says: stop ongoing cleanups; slow down the cleanup process; or not list any more sites. None of these options is acceptable, the source says, and the situation has activists "extremely concerned."

EPA officials agree that there may be some slowdown in cleanup, but expect the immediate effect of less funding and changing priorities to be felt in Superfund emergency removal efforts rather than long-term remedial work. One high-ranking agency official says that while EPA does approximately 300 removals per year, the number may drop because of a lack of funding. The "effect on the removal program is the more immediate concern," the source says. Another agency source agrees, adding that "anthrax work will have an effect on removal funding . . . We hope we don't spend so much on anthrax that it effects [our] ability to do emergency removals."

But agency officials are waiting for the administration to decide on the amount of supplemental appropriations the agency will receive before it can be sure of how extensive the effects on the Superfund program will be. EPA "will look to supplemental funding in Congress for an answer" to budget concerns, one source says.

Environmentalists have responded to the situation by meeting with administration officials to attempt to convince them that additional Superfund funding is necessary, including a reauthorization of Superfund taxes. One source says it is time for the chemical industry's "tax holiday" from Superfund to end.

The taxes, which were placed on the oil, gas, chemical and other industries, have not been collected since their authorization expired in 1995, and the fund is expected to run out of money in 2003. Since the taxes expired, Congress has chosen to boost funding for the program from general taxpayer revenues while limiting expenditures from the trust fund to pay for the program.

But an industry source says that any attempt to reauthorize the taxes will likely fail. That source does not believe that when the proposal "goes up the political ladder it will fly." The fact that many of the industries that would pay the tax, including the oil, chemical and large manufacturing industries, are under enormous economic pressures after the terrorist attacks makes such a tax politically unfeasible, the source says. Instead, EPA officials will likely look to Congress and the administration for supplemental funding.

But so far administration officials have been unresponsive, saying that they must wait for Congress to act, an environmentalist says. However, the source says that Congress looks to what the administration says are its priorities in making funding decisions, and environmentalists must take action to force the

issue. So these groups are now deciding how to "highlight the importance of increased funding for the Superfund program." -- Steven Langel

Source: Inside EPA via InsideEPA.com

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50563

Amid Budget Cuts, EPA Prepares For New Superfund Reform Debate

December 26, 2001

An increased focus on security issues and a related cut in cleanup spending will likely lead to a slowdown in Superfund cleanups -- particularly emergency removals -- during the coming year, EPA, industry and environmental representatives say.

But the issue of future Superfund funding comes as EPA has convened a high-level public advisory committee to consider the future shape of the program, and the kind of funding the program should receive, after a congressionally mandated study found that the agency may still face significant cleanup responsibilities at so-called "mega sites" -- contaminated sediment and mining sites with an average cleanup cost of \$150 million.

The agency's newly formed advisory committee will almost certainly be the venue for a heated debate between stakeholders and the agency. Industry sources, for instance, say the cleanup slowdown is necessary and are preparing a strategy to convince EPA to respond to the change by allocating more cleanup responsibilities to states and utilizing more flexible cleanup authorities during the upcoming year.

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be hit the hardest. These sources add that the issue is the most pressing financial issue for the Superfund program and are awaiting recommendations from the agency's National Advisory Committee on Environmental Policy & Technology (NACEPT) before moving forward with any changes.

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EPA DEVELOPING FIRST-TIME DATABASE TO TRACK LAND-USE RESTRICTIONS

October 12, 2001

NS

EPA officials are in the preliminary stages of developing the first national database of land-use controls at contaminated properties in an effort to provide regulators and the public with adequate information on the types of deed and use restrictions in place at sites in their communities, EPA sources say.

The development of a national clearinghouse of so-called "institutional controls" (ICs) has long been a priority of environmentalists, who have worried that land-use controls, such as deed restrictions or fencing requirements, could become lost or ignored in the years or decades following their establishment.

The effort also comes as state officials say that only about half of all ICs are actually followed or are effective, while outside observers such as Resources for the Future (RFF) have begun pushing the agency for a national IC registry.

In an Oct. 2 Federal Register notice, EPA requested information from state and local officials on their efforts to monitor ICs in an attempt to develop a national database to track these controls at Superfund sites. EPA is seeking information from all 50 states, approximately 10 tribes and up to 200 local agencies, including planning, zoning, and real estate recording offices, to determine what tracking mechanisms they have in place and their cost.

EPA is seeking data on the purpose, scope, structure, information used and cost of such systems with an eye toward whether or not these approaches are compatible with a future national tracking system run by EPA. The comments are due by Dec. 3. EPA is now preparing surveys for stakeholders to fill out, providing information on their databases and those programs' costs. Relevant documents are on available our web site, InsideEPA.com.

The agency's Office of Emergency & Remedial Response will eventually use the information to develop guidelines for a national database. The tracking system will eventually be placed on the Internet and be open to all interested stakeholders. An EPA source says no time has been set for the completion of the study or the formation of the database.

The source says the agency has never undertaken such a broad request for information on IC systems. But the agency is doing so now because EPA has received so many questions from state and local authorities about the effectiveness of ICs and the agency's ability to respond to problems with such controls. The goal of the effort, the source says, is to provide more security for nearby residents, landowners and developers that the land where ICs are in place are safe for use.

During EPA's brownfields conference in Chicago last month, numerous state officials expressed concerns with current means of monitoring ICs and were especially critical of efforts to ensure these controls were followed in deed restrictions. EPA officials responded by promoting a pilot project to improve the IC program by turning over monitoring responsibilities to private contractors paid for by developers, known as the Guardian Trust.

According to an EPA source, the efforts outlined in the Federal Register notice will help the Guardian Trust program to be effective by providing the contractors with an understanding of what information is necessary to properly monitor ICs.

The source adds that the agency is using the effort and the prospect of a national database to respond to recommendations presented to EPA by RFF calling on the agency to improve its monitoring efforts at Superfund sites.

In June, RFF released a congressionally mandated report on the future of Superfund, which was critical of the agency's handling of sites after cleanup was complete. In particular, RFF recommended that EPA "develop a system to track the monitoring and implementation of institutional controls at [Superfund] sites." The current request for information on ICs is meant to be "responsive to RFF's questions" the source says.

An RFF source agrees that EPA is being responsive to the group's recommendations, adding that this is the first time that the agency has actually paid attention to their recommendations on ICs. The source notes that what RFF is looking for is a simple program that allows for IC monitoring, and wonders whether such an extensive information gathering process is necessary.

While the source says that there is some concern that such an extensive project might bog down the database effort in bureaucracy, "they're probably doing the right thing" by seeking so much input. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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48877

TOP EPA OFFICIALS ARGUE FOR FUTURE EXPANSION OF SUPERFUND PROGRAM

May 25, 2001

PORTLAND -- Top EPA Superfund and waste officials are making the case that the Superfund program may have to be expanded in the future because of a continued need for the agency to be involved in cleaning up large complex contaminated sites such as mine sites, as well as new categories of contaminated sites, such as asbestos and pesticide sites, that may have to be added to the Superfund National Priorities List (NPL) in the coming years.

Their arguments come as congressional lawmakers and other policymakers are awaiting the release next month of a long-awaited study aimed at providing backing to industry and Republican plans to ramp down the program.

Dan Thornton, an environmental scientist at EPA's Office of Emergency & Remedial Response, said at the agency's annual site assessment conference here May 22 that EPA will face a number of large and difficult sites in the future, creating the possibility that ramping down the Superfund program is unlikely.

"Every year since 1995 we have been faced with at least one major new initiative which fits this pattern of large projects with significant public health or environmental impacts," Thornton said. "How we prepare for these projects may well have a significant impact on our ability to remain the federal response backstop or last-resort authority," he said.

"There is a distinct pattern of major new workload sites requiring scant Superfund [money] and resources. Looking backwards or down the line from one facility often reveals there are many more just like it, ready to 'go Superfund'," he says.

His comments have been echoed by a host of top EPA waste officials. Stephen Luftig, EPA's acting deputy assistant administrator for the Office of Solid Waste & Emergency Response said that the idea of Superfund ramping down is "funny" to him because the amount of work in the program has remained

steady over the years. Mike Gearheard, the director of EPA Region 10's Office of Environmental Cleanup argued that the public sees Superfund as a "court of last resort," and an "environmental safety net." And Jennifer Wendel, the EPA Region 4 Site Assessment Process Manager said that there is "no end in sight for the potential universe of contaminated sites in Region 4," arguing against the notion that Superfund is slowing down.

The officials' comments come just weeks before Resources for the Future (RFF) is scheduled to release its long-awaited congressionally mandated report estimating total costs to complete cleanups at remaining Superfund and Superfund caliber sites through fiscal year 2009. Congressional sources have long said that the study will be used by appropriators as a road map for ramping down the cleanup program, and will likely drive any plans to reinstate all or portions of the expired Superfund taxes.

Congress ordered EPA to commission the study in report language in EPA's fiscal year 2000 appropriations bill. While Congress has always had the authority not to follow the direction of the study, House and Senate lawmakers concluded that an independent study into what was needed for the program ought to be done to provide future appropriators with better direction.

While Thornton did not quantify the total number of sites to be added to the Superfund NPL, he listed a number of site categories that would continue to present the agency with important cleanup work for years to come. These categories include contaminated sediment sites, mining waste sites, sites contaminated with the pesticide methyl parathion, vermiculite processing facilities, Formerly Utilized Defense Sites and Formerly Utilized Sites Remedial Action Program.

In addition, a number of other "related contaminant, multiple location" sites, such as large sites related to polychlorinated biphenyls, continue to present the agency with work years after they were first added to the NPL. Moreover, Thornton said there is still some uncertainty about the need to defer to the Superfund program contaminated waste management sites.

Thornton also noted that a recent General Accounting Office study identified 1,789 sites that were potentially eligible for listing, while a recent EPA Inspector General study recommended that EPA's Superfund cleanup office examine 44 earth materials and the likelihood that they may be associated with asbestos. In just one example, limestone, Thornton says there are 117 calcinating plants, approximately 200-250 limestone mines and as many as 100,000 limestone quarries that may require cleanup.

Bob Hersh, a fellow at RFF, said that one consideration, in looking at the types of sites added to the NPL, was the number of "mega-sites" added. Mega sites, Hersh explained, are sites costing at least \$50 million to remediate, with an average cost of \$140 million. The number of such sites added to Superfund

in the future would help determine whether the program would ramp down or expand, Hersh noted. And Hersh added that RFF's research shows, as Thornton argued, that the number of "mega sites" discovered each year had remained constant throughout the 1990's. -- Stephen Langel

Source: Inside EPA via InsideEPA.com

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46010

INTERVIEW WITH TIM FIELDS, FORMER CHIEF OF THE WASTE OFFICE

January 26, 2001

In a Jan. 18 interview with Inside EPA, former Assistant Administrator for the waste office Tim Fields urged his still-to-be-named successor to ensure that waste programs receive "appropriate" funding, cautioned that congressional funding cuts in the last two years would result in a slow-down in the pace of Superfund cleanups, and noted that Congress had boosted funding for underground tank and other hazardous waste cleanups.

Inside EPA: What would you consider to be EPA's greatest success in the last eight years?

Fields: If I had choose just one, I would probably point to the success in reforming Superfund ... There were a lot of concerns about fairness, pace of cleanup, cost of cleanup, but I think the Superfund reforms that we have implemented over the last eight years have fundamentally changed the program, and I think that is reflected in the cost of cleanup going down by 20 percent, the time of going through the process being reduced by 20 percent, everybody recognizing that the program is fair now.

Inside EPA: Do you think the next wave of EPA administrators will keep the ball rolling and continue with a lot of challenges that Superfund still faces? If you could speculate, what do think the biggest challenges are in store for the program?

Fields: Well, I think that the most immediate priorities would be appropriate legislative reform . . . The Senate Environment & Public Works committee has indicated that they want to tackle brownfields legislation, and for this next administration, including Christie Whitman, brownfields legislation is a

major priority for her as well. There is a lot of bipartisan support for that and I think that it is something that everyone would be supportive of.

I think another challenge for the Superfund program would be getting appropriate funding for the program and getting the tax, or some appropriate mechanism, for funding the program re-instituted. The tax expired six years ago now, and the current trust fund balance is getting down real low. We are going to be looking very carefully at the Resources for the Future study that is coming out around March 2001, which will make projections about the cost of Superfund between now and the next ten years. And I think that will be very important to the new Congress in making decisions about appropriate funding levels for the Superfund program into the future, as well as what type of legislative fixes will be needed for the program in the future.

Inside EPA: Do you believe the new Congress and the new administration will carry on your desire to reauthorize Superfund taxes?

Fields: The next administration will have to make decision themselves as to which position they favor, but we've been very clear. I would hope the next administration would adopt our position on this issue.

Inside EPA: What would you say in response to some of concerns being raised by chairmen of the new House Energy & Commerce and Transportation & Infrastructure Committees that the administrative reforms that EPA has instituted are still insufficient, and that they are still pushing for more comprehensive reform before adopting a new tax?

Fields: Comprehensive reform in Superfund is no longer needed. Members of Congress that were calling for, and are still calling for comprehensive reform, they need to look more carefully at the facts and realize that major overhaul of Superfund has been achieved in the past eight years, and rather now look at what are the appropriate targeted legislative reforms that ought to be made. We believe that there are appropriate targeted legislative reforms that are appropriate: brownfields legislation, which I mentioned earlier is one example, further relief for small businesses is another example. We're willing to look at piecemeal legislation as appropriate, but we definitely do not believe, and I believe the new administration will conclude, that comprehensive reform of Superfund is not appropriate. Senator [Michael] Crapo [(R-ID)], for example, wants us to address natural resource damages. I think that the new administration should be willing to work with him and talk about what things could be done. One of the things that could be considered, for example, by a new administration in that regard, would be to work with Congress to commission a study [looking at] the natural resources damages liabilities at Superfund sites in the next couple of years into the future and to come back to Congress after that congressionally mandated study were done with recommendations with what, if anything, could be done to better address natural resource damages concerns.

Inside EPA: Do you regret not being able to complete a national uniform voluntary cleanup guidance program and are states capable of running a voluntary cleanup program without EPA presence or EPA overfiling power?

Fields: I would hope to have EPA and the states having memorandum of agreements for all state voluntary cleanup programs. The reason why is not so much because it is a necessity in all cases, but the regulated community [has] a greater assurance of finality.

Regarding overfiling, we have never overfiled. In the history of this program, I know that some people are concerned that that may occur, but that fear has been demonstrated not to be real. We have never overfiled in the history of state voluntary cleanup programs, and we've never come in except when the state has requested that we come in.

Inside EPA: In light of that fact, is it necessary for EPA to retain that sort of authority if it is really something that it does not use?

Fields: Well, I think that, keep in mind that not all states are created equal, neither are all 10 EPA regions created equal, so there are differences. We believe strongly in the concept of the federal safety net. We need to have the ability to step in.

Inside EPA: What would be one thing that over your term at EPA, you wish you could have addressed?

Fields: I think the thing I would want to continue if I had more time would be to fully move all of my cleanup programs -- that includes federal facilities, oversight of DOD and DOE cleanups, RCRA corrective action, Superfund, brownfields, underground storage tanks -- I would like to fully see the completion of an effort in those programs where the focus is not just on environmental cleanup, but rather reuse of those properties once the cleanup is done. And that includes economic reuse, ecologic reuse, or recreational reuse of those properties.

Inside EPA: When it comes to what you were able to accomplish while at EPA, what sort of impact did the Republican Congress have on your ability to complete these programs?

Fields: ... The leadership was very helpful because as we looked to work with them over the last eight years on legislative fixes, that helped point us to administrative fixes ... Although we were not able to get comprehensive reform of Superfund legislation, I think that dialogue with the Congress, both with Republicans and the Democrats, was very helpful in pointing to some legislative fixes that we in EPA and the Justice Department, and others within the administration, could achieve and make the Superfund program work better. I think the dialogue has also been very helpful on the appropriations front . . . in helping us to define what the appropriate level of funding for the Superfund program should be over the last eight years ...

Inside EPA: What about the dispute between EPA and the legislature over small business exemption legislation?

Fields: ... I made a commitment that we would provide back to the Congress our recommendations on appropriate legislative reforms in that arena ... I did write a letter to Congressman [Thomas] Bliley [(R-VA)], to Congressman [Michael] Oxley [(R-OH)] and communicated to them what we, EPA, believe appropriate legislative reform in this arena should be, and how their bill could be fixed to be a bill that the administration would support. They subsequently wrote back to me and indicated that they did not fully agree with some of the recommendations we made for legislative changes in this arena. But it's just unfortunate because time ran out.

Inside EPA: Industry has made the argument that EPA sought to run the clock down to avoid having to agree with some sort of small business exemption legislation, that EPA took its time in responding and providing information so that it was too late to get something done. Is there any validity to that?

Fields: EPA was trying to facilitate a dialogue ... That required review by more than 15 agencies across the government, including the Justice department, the Agriculture department, Interior, White House Office of Management & Budget, but the time was running out. We did not have time to get a full agreement within the administration, but ultimately what I did, because I wanted to be responsive as I committed to at that hearing, we provided legislative language that represented EPA's views alone ...

Inside EPA: What are the OSWER program priorities and challenges that you will convey to your successor once one has been chosen?

Fields: In Superfund, the immediate program priority, for example, will be to get appropriate funding to keep the program going at the pace that it ought to be operated at. For each of the last four years, we have achieved 85 or more construction completions -- first time in the history of the program -- and that's because of the administrative reforms we've had. But because of the budget reductions that have occurred in the last couple of years, where we were funded at \$1.4 billion in FY 1999, \$1.45 billion in FY

2000. We would like to have been funded at \$1.5 billion in the last couple of years, where that has resulted in us saying that in FY 2001, because of those budget cuts that occurred in 1999 and FY 2000, we're only going to achieve 75 construction completions in FY 2001, 70 construction completions in FY 2002.

For the underground storage tank program, the most significant looming challenge there will be the whole issue of MTBE [methyl tertiary butane ether]. MTBE is being found increasingly in groundwater supplies in more and more states. Some of it is coming from leaking underground storage tanks. MTBE is more difficult to find and remediate in groundwater than other contaminants. There's more than \$1 billion that is going to be required to remediate ultimately, probably when they're all done.

Inside EPA: What would you suggest are appropriate measures to be taken against these challenges?

Fields: Well, I think Congress is going to have to consider appropriating more money to EPA. Right now, the budget has been roughly \$70 million annually for leaking underground storage tanks cleanup, oversight. I think that budget is going to have to be increased another \$5 to \$10 million annually to provide dollars for EPA and the states to provide appropriate oversight for these increasing number of cleanups involving MTBE contamination from underground storage tanks.

I think in RCRA the big issue will be the need for an increasing budget for corrective action. The budget was increased by \$5 million in FY 99. Last year the budget was increased by a little over \$10 million. I think as RCRA corrective action gets more complex, and we move toward getting to the 2005 goal of achieving the environmental indicators at the 1,714 facilities that are contaminated with various constituents around these hazardous waste facilities, we're going to have to get more money appropriated and authorized by Congress to fund the oversight by EPA and the states of corrective action at private facilities, as well as the roughly one-tenth of those facilities that are part of the federal facilities universe by DOD and DOE. I think that's a major challenge for the RCRA program.

Inside EPA: Any examples come to mind as a program that could come to a screeching halt?

Fields: ... If you try to change legislatively the [Superfund] program, in terms of remedy selection, in terms of natural resource damages, you can undo those reforms and cause so much process to be imposed on Superfund. When you pass new legislation, new changes to the national contingency plan are going to be required. Change the remedy selection process, new selection criteria, not the current non-selection, non-criteria, but something different. All those changes could bring Superfund cleanup to

a screeching halt. That's the kind of thing that we've been fighting against the last five to six years in Superfund.

Inside EPA: Would a particular example of this be the dispute over the use of dredging as a remedy at the Hudson River in New York?

Fields: That will be a debate the new Congress and the new administration will have to have a dialogue about. I don't think that's going to be a major issue in legislative changes to Superfund. That's more a debate on peoples' views on dredging.

Inside EPA: How do you see the future of the ombudsman office, especially in light of the recent allegations against EPA regarding the reassignment of investigator Hugh Kaufman and recent ombudsman guidelines?

Fields: ... We fully support the Ombudsman function and the national ombudsman within OSWER and the ten regional ombudsmen across the country. We have almost doubled the function of the ombudsman from what it was last year and the year before. They were being funded at \$500,000 and this year, they are being funded at almost \$900,000 ... We will make sure Mr. Martin has whatever resources he needs; it's just unfortunate Mr. Kaufman will not be made available to him.

Inside EPA: Some critics, including Senator Wayne Allard [(R-CO)], have been very vocal recently, saying that EPA has acted to weaken the ombudsman office, and that Hugh Kaufman's transfer was a sign of that. Is there any validity to this argument? Do think that authorizing legislation is necessary for the ombudsman office?

Fields: ... We fully support ombudsman legislation. We support Congress enacting legislation to reauthorize the ombudsman function. The comments that have come in about the guidelines we issued, saying that those guidelines, for example, would take away the independence of the ombudsman. To the contrary, the guidelines were put in place because the current guidelines . . . are completely outdated.

Inside EPA: When it comes to Hugh Kaufman, and this is the example that continues to be brought up, there were a lot of questions as to why EPA moved him.

Fields: ... He has a memorandum that documents everything that I told him. I cannot give it to you because it's covered under the Privacy Act. If I gave it to you I would be violating the Privacy Act. Mr. Kaufman can give it to you ... So, if you want to find out the truth, not fiction, as some are trying to make up here, you ask Mr. Kaufman to give up the memo. I dare say he will not give it to you.

Inside EPA: And finally, where do you go from here, what is the next step for you?

Fields: I'm retiring from EPA after 30 years and it's been a great ride ... I will be going to an environmental information, management and technology firm to be senior vice president in about three weeks, the Marasco Newton Group. ... -- Stephen Langel & Tennille Tracy

Source: Inside EPA via InsideEPA.com

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43416

SUPERFUND REFORM BATTLES LIKELY TO CONTINUE IN 107TH CONGRESS

January 5, 2001

The 107th Congress, like the four congresses before it, is likely to face many of the same long-standing partisan divisions as it debates reforms to the Superfund program.

Sources suggest the debate is likely to focus on many of the same unresolved issues that have plagued discussions of Superfund legislation since the Clinton administration took office in 1993: extending the expired Superfund taxes, reforming the law's natural resource damage (NRD) provisions, and exempting small businesses and municipalities from Superfund liability.

Despite a host of inherent difficulties that may ultimately make it impossible, sources nevertheless suggest that the next Congress may present supporters of NRD reform with their best opportunity so far to reform those contentious provisions. In both the House and the Senate, GOP lawmakers who have long-championed NRD reforms will now be chairing committees with jurisdiction over Superfund reform.

Provisions in the law allow state, federal and tribal trustees to claim millions of dollars in damages for resource injuries resulting from hazardous substance spills. The measures have long been opposed by industry officials, who charge they allow for excessively large claims. Trustees and environmentalists say the law ensures that damaged resources can be restored to their pre-contamination condition.

In the House, Rep. Don Young (R-AK) is set to become chairman of the House Transportation & Infrastructure Committee while Rep. Billy Tauzin (R-LA) appears likely to edge Rep. Mike Oxley (R-OH) as chairman of the House Commerce Committee. In the last Congress, Tauzin narrowly failed to attach a contentious NRD amendment to a Superfund reform bill moving through the Commerce Committee.

Meanwhile in the Senate, Sen. Mike Crapo (R-ID) appears likely to become the next chairman of the Superfund subcommittee. These panels share jurisdiction over Superfund reform and support from these lawmakers suggests reform measures may have a better chance of passage than in previous congresses.

Then, the Clinton administration, congressional Democrats and environmentalists fought pitched battles over proposed GOP reforms, leading to a long-standing stalemate.

Representatives for Young and Tauzin did not deny that NRD reform is an issue both would consider in the next session. A Young spokesperson says the lawmaker would try to address the issue in the next session, attempting to pass the same changes he had tried previously. A source for Tauzin added that that NRD reform is "philosophically in line with [Tauzin's] thinking" and said the congressman would attempt to reform the law if given the chance.

But environmentalists and an EPA source say that attempts to change NRD laws would be politically risky. "They do it at their peril," one environmentalist says. "Their radical approach to environmental issues has hurt them in the past and will hurt them again." A representative for the Competitive Enterprise Institute (CEI), a conservative policy group, adds that NRD reform is unlikely because of the controversial nature of the issue.

One industry source predicts long odds in getting these changes passed into law. The source says that the controversial nature of NRD reform, along with the close division between the parties in the Senate will make such reform difficult for Crapo to accomplish. The source notes that if Crapo tries to give up too much to Democrats to get NRD reform, he will anger those in the Republican Caucus who helped him to become chairman and risk losing their support. And, the source adds, if Democrats compromise too much with Crapo on NRD in order to get brownfields legislation passed, it may cost them in the 2002 congressional elections. It may be "too close to get anything through," the source says.

Lawmakers will also likely reintroduce bills to boost brownfields funding and ease Superfund cleanup and liability rules in line with long-standing demands by states and GOP lawmakers to speed cleanups of less hazardous waste sites. Senate Environment & Public Works Committee Chairman Bob Smith (R-NH) has already promised he would reintroduce a popular bipartisan brownfields measure, S.2700, at the start of the 107th Congress.

While the bill garnered 66 co-sponsors, it never made it to the floor of the Senate, in large part because of a deal between Crapo and Senate Republican Leader Trent Lott (R-MS). While that deal kept the bill from being considered in the 106th Congress, sources now warn that Crapo's ascension as chairman of the Superfund subcommittee, and his insistence on NRD reforms, may make it difficult to move a stand-alone brownfields bill.

Nevertheless, a CEI source believes that brownfields reform is the most likely of the Superfund reforms to succeed in the next Congress. A CEI source noted that Bush supported brownfields reform during his campaign, making it one of his platforms. CEI, in a position paper coming out early this month, will urge Bush to act to reform the brownfields program.

Members of Congress have also attempted to provide exemptions from Superfund liability for small businesses. In the last session, House Speaker Dennis Hastert (R-IL) worked to gain support for H.R. 5175, a bill that would have provided Superfund liability relief for small businesses. But Hastert faced opposition from Republicans opposed to any more narrow "carveouts" under Superfund in lieu of comprehensive reform, and his bill ultimately died.

A source for the National Federation of Independent Business (NFIB) says the group will push a small business exemption in the 107th Congress. The group has just sent documents to new members of Congress and the new administration explaining its position on small business liability exemptions. NFIB will also be meeting with incoming EPA Administrator Christie Todd Whitman (R-NJ) to get her support for such reforms.

But, the American Enterprise Institute, a conservative policy group, says that a small business exemption is not likely for this session because it does not have the backing of large business groups, like the Business Roundtable and the U.S. Chamber of Commerce. However, one source adds that if the likely economic downswing continues, it may provide an argument to lawmakers to limit small business liability and boost their profits.

Finally, environmentalists will again press lawmakers to reauthorize the long-expired Superfund taxes, charging that failure to act means American taxpayers are effectively funding industry cleanups. However, activists acknowledge that both the incoming Bush administration's support for cutting taxes, and the views of the next chairman of the House Ways & Means Committee, suggests that such a step is unlikely. -- Stephen Langel

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FEARING CUTS, STATES THREATEN TO PLACE MORE SITES ON SUPERFUND LIST

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SCOTTSDALE, Arizona -- State cleanup officials are threatening to list more sites on the Superfund National Priorities List (NPL) in an attempt to secure federal funding for their cleanup projects and prevent EPA from allocating cleanup funds based on the number of Superfund sites located in individual states.

The officials are making the threat because they fear that the funding they depend on for running their core cleanup programs will be cut by EPA in fiscal year 2002. They say that unlike previous years, agency officials have not yet provided adequate assurances that the funds will not be cut.

Some state officials from Midwestern states suggested that their fears were being driven by a recent EPA Region V proposal that would direct cleanup funds to states based on the number of Superfund sites in each state. Sources say the Region V proposal has not yet been finalized.

But states also fear that cuts in EPA's annual appropriations may further limit the funds EPA will have available to distribute to them for their core funds. The risk of these funds being cut may have increased lately because Senate appropriators have raided EPA's funding bill for money to pay for other spending measures. This has prompted the chairman of the Senate VA-HUD Appropriations Subcommittee, Sen. Kit Bond (R-MO), to delay action on EPA's funding bill until early fall (Inside EPA, July 28, p.3)

While state officials this week publicly asked EPA's acting deputy waste chief Steve Luftig to assure them the funds would not be cut in FY02, Luftig said the agency could not yet provide the assurances states were seeking. Speaking at a conference of state waste officials meeting here, Luftig agreed that states have a valid concern about future cuts to core funding, especially if Congress cuts EPA's annual appropriations.

EPA officials say they are waiting to see what Congress decides before seeking to assure states on future funding levels. Luftig and other EPA officials told state officials here that if Congress maintains current Superfund spending levels of \$1.4 billion, the agency will likely be able to maintain states' core funds.

One state source believes that EPA will delay making any commitment about core funding to the states, even after Congress has decided what to appropriate them, because the agency wants to keep their flexibility over how to spend their appropriations and where to apply funding cuts. "We won't hear anything soon," this source said.

The agency is also waiting for the outcome of a 10-year projection of cleanup costs to be completed by Resources for the Future, an environmental think tank. Bill Muno, head of Region V's cleanup program, called this study, "one of the most important in the history of Superfund," because of its probable effect on Superfund funding over the next 10 years. Agency officials hope that the results of this study will help convince Congress that the Superfund program is not ramping down, and that continued funding is necessary.

States say that EPA waste chief Tim Fields has promised that core funding would not be cut for FY01, but the agency has yet to repeat that pledge for FY02. EPA officials expect to issue a memorandum outlining their FY02 core funding in late-September, after Congress decides how much funding EPA will receive in appropriations.

At issue are funds that EPA distributes to states to run their core cleanup programs. These funds are drawn from EPA's so-called "pipeline operations budget," which the agency uses for a broad variety of tasks, including state support, community involvement and oversight costs. In turn, states use this funding to hire personnel, purchase equipment, develop rules, regulations and standards and build data systems.

Over the last two fiscal years, EPA has provided between \$18 million and \$19.5 million in funds for state core programs.

Kent Gray, chief of Utah's cleanup program, said the core funds are used to pay cleanup staff and any cuts would lead to personnel cuts in his state. Other states, including Missouri and Illinois, are also concerned that cuts to core funding would require them to lay off employees. Last year, EPA core funding provided between \$550,000 and \$650,000 to Missouri and between \$675,000 and \$725,000 to Illinois for base costs.

Myron Knudson, chief of Region VI's Superfund division, blamed Congress, the Clinton administration and state agencies for personnel cuts. He said that whenever Region VI hires a contractor, state agencies are forced to cut an employee. But Knudson said that even with full EPA funding, states were still cutting back on their programs. "States are cutting Superfund because it's not a cash cow ... [Superfund] does not help states do any wheeling and dealing as to their legislature because they are not making money on Superfund," Knudson said. -- Stephen Langel

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