



CRWI Update April 30, 2018

MEMBER COMPANIES

Clean Harbors Environmental Services
DowDuPont
Eastman Chemical Company
Heritage Thermal Services
INVISTA S.à.r.l.
3M
Ross Incineration Services, Inc.
Veolia ES Technical Services, LLC

GENERATOR MEMBERS

Eli Lilly and Company
Formosa Plastics Corporation, USA

ASSOCIATE MEMBERS

AECOM
Alliance Source Testing LLC
Amec Foster Wheeler PLC
B3 Systems
Burns & McDonnell, Inc.
Coterie Environmental, LLC
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
METCO Environmental, Inc.
O'Brien & Gere
Spectrum Environmental Solutions LLC
Strata-G, LLC
SYA/Trinity Consultants
TestAmerica Laboratories, Inc.
TRC Environmental Corporation

INDIVIDUAL MEMBERS

Ronald E. Bastian, PE
Ronald O. Kagel, PhD

ACADEMIC MEMBERS

(Includes faculty from:)

Clarkson University
Colorado School of Mines
Lamar University
Louisiana State University
Mississippi State University
New Jersey Institute of Technology
University of California – Berkeley
University of Dayton
University of Kentucky
University of Maryland
University of Utah

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Boiler litigation

On April 30, 2018, the environmental petitioners asked for a panel rehearing of the decision to uphold the Agency's use of work practices during startup and shutdown. In the request, the petitioners stated that the court made three errors in their decision. First, they contend the court erred because the decision to exempt the entire category from numerical standards during startup exceeded their statutory authority. Second, they claim the panel erred when it failed to consider that the Agency did not identify alternative work practices when responding to comments submitted by the petitioners that a greater use of clean fuels during startup would reduce emission. And third, the decision on the use of clean fuels during shutdown was made on a rationale that the Agency did not advance. The panel will now take this request into consideration. Just how long this process will take is unknown. It is also unknown how this request will alter the timing of the next proposed rule addressing all of the remands.

RTR deadlines

On March 31, 2018, a federal district court gave EPA deadlines to develop risk and technology review (RTR) rules for an additional nine source categories. The Agency now has court ordered deadlines for 46 RTR rules. For these nine source categories, EPA must start the process by January 1, 2019 and finish all nine by October 1, 2021. These nine source categories are primary copper smelting, carbon black production, cyanide chemicals manufacturing, spandex production, flexible polyurethane foam production, refractory products manufacturing, semiconductor manufacturing, primary magnesium refining, and mercury emissions from chlori-alkali plants.

Regulatory decision making proposed rule

On April 30, 2018, EPA published a proposed rule to set out guidelines on how scientific information is used in the regulatory decision making process. The proposed rule would create a new 40 CFR Part 30. As proposed, the Agency could not use any

data for rulemaking that is not publically available “in a manner sufficient for independent validation.” While this idea sounds reasonable on the surface, a number of entities have expressed concerns. One concern is how the Agency will incorporate information covered by a confidential business information determination. Others point out that the Clean Water Act, the Safe Drinking Water Act, and other environmental statutes require the Agency to use best available science and suggest that this proposed rule would be contrary to that statutory language. The agency will accept comments until May 30, 2018.

Fiberglass mat RTR proposed rule

On April 6, 2018, EPA published a risk and technology (RTR) proposed rule for the wet-formed fiberglass mat production source category. In its analysis, the Agency determined that the current standards provide an ample margin of safety for risk and identified no cost-effective advances in technology. As such, the Agency is not proposing to modify any of the emission limitations for this source category. However, they are proposing to remove the startup, shutdown, and malfunction exemptions. This means that these sources must meet the emission limits at all times. In addition, the proposed rule would require electronic reporting of performance test results. Comments will be accepted until May 21, 2018.

Once in, always in

In January, EPA rescinded the 1995 “once in, always in” policy. Since then, the environmental groups have filed a petition for review of the new policy in the U.S. Court of Appeals for the District of Columbia Circuit. On April 25, 2018, 87 House Democrats sent a letter to EPA Administrator Pruitt warning the Agency that revising the policy would lead to dramatic increases in air toxic emissions and urged him to re-instate the 1995 policy. In addition, the Union of Concerned Scientist released a paper that argues the revisions to this policy would lead to uneven impacts between the states. EPA has shown no indication they intent to re-instate the 1995 policy.

EPA personnel

On April 12, 2018, the Senate confirmed Andrew Wheeler to be the next Deputy Administrator of EPA by a vote of 53-45. Mr. Wheeler started work on April 13, 2018. A date for hearings on the nomination of Peter Wright to be the next Assistant Administrator for the Office of Land and Emergency Management has not been scheduled. Opponents of this nomination are arguing that Mr. Wright has too many conflicts of interest to be in this position.

As a part of the hearings for FY 2019 appropriations, EPA Administrator Pruitt was questioned about continued downsizing of the Agency. In response to questions from Representative Marcy Kaptur (D-OH), Mr. Pruitt cited bureaucratic inefficiencies rather than policy decisions as the reason that more than 90 positions in Region 5 have not been filled. He stated that the Office of Management and Budget had lifted its hiring

freeze for Region 5 but gave no explanation on why those positions remain vacant. In response to questions from Representative Derek Kilmer (D-WA), Mr. Pruitt seemed to back away from the announced decision to close EPA's laboratory in Las Vegas. Mr. Pruitt responded that the closure order was initiated under the Obama Administration and was under review. It should be noted that the FY 2018 appropriations legislation contained language that requires agencies to submit any closure plans to Congress before implementing those plans.

Enforcement

Under the Obama Administration, Cynthia Giles, then Assistant Administrator for the Office of Enforcement and Compliance Assurance (OECA), developed an enforcement policy they called Next Generation Enforcement. This policy was designed to encourage the use of advanced monitoring techniques and third party verification in settlement agreements. In an April 3, 2018, memo, the current Assistant Administrator for OECA, Susan Bodine, withdrew that policy. In the future, these tools will be used on a case-by-case basis. It remains unclear whether this is a real world shift in policy or simply a symbolic change.

Citizen science

EPA's National Advisory Council for Environmental Policy and Technology has been charged with developing procedures to incorporate citizen gathered data (citizen science) into the Agency's regulatory work. However, the new administration is not as receptive to this concept as was the previous administration. One example cited was the rejection of a civil rights petition from the citizens of Uniontown, AL over the disposal in a nearby landfill of coal ash from a Tennessee Valley Authority spill. EPA identified a number of deficiencies in how the modeling work was conducted, including uncontrolled sample collection techniques, improper collection protocols, and inadequate quality control on documentation of sample locations and collection and handling methods. Environmental groups expressed concern that the Agency misunderstood the intent of the information presented. It was not intended to be a rigorous information collection but was intended to show potential harm to a disadvantaged group who hoped that it would prompt the Agency to collect additional data using established methods. Environmental groups appear to be turning to the states hoping to get a more sympathetic audience for this type of information.

Tax deductions for environmental payments

The 2017 modifications to the tax code prohibited deducting payments related to a violation of the law. However, there were certain exclusions to that prohibition in Section 162 where if a company meets a series of conditions, they can deduct those payments. Some of these conditions are restitution or remediation of property damage or harm caused by the violation and whether the money was paid to come into compliance with current regulations. On April 9, 2018, the Internal Revenue Service

published Bulletin No. 2018-15 that contains guidance on whether these deductions are allowed.

CRA

In April, the Senate passed Senate Joint Resolution 57, a congressional disapproval of 2013 guidance document related to auto lending practices using the Congressional Review Act (CRA). This resolution is unusual in two aspects. First, if passed, it would repeal a guidance document, not a rulemaking. The sponsor of the resolution asked the General Accountability Office (GAO) if the CRA covers guidance documents as well as rulemakings. The GAO determined that if the document was a general statement of policy, then it could be considered as a rule under the CRA. Second, this guidance document was released in 2013. However, it was not sent to Congress until December 2017, putting it within the 60 legislative day window contained in the law. It is yet to be determined whether the House will take up this resolution. Should it do so, it could expand the use of CRA to guidance documents.

CRWI meeting

The next CRWI meeting will be held in mid-August in Minneapolis, MN. It will feature a tour of 3M's incineration facilities and a discussion on citizen science. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).