MEMBER COMPANIES

Clean Harbors Environmental Services
Eastman Chemical Company
Heritage Thermal Services
INVISTA S.àr.l.
3M
Ross Incineration Services, Inc.
The Dow Chemical Company
Veolia ES Technical Services, LLC

GENERATOR MEMBERS

Eli Lilly and Company
Formosa Plastics Corporation, USA

ASSOCIATE MEMBERS

AECOM
Alliance Source Testing LLC
B3 Systems
Civil & Environmental Consultants, Inc.
Coterie Environmental, LLC
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
Montrose Environmental Group, Inc.
Ramboll
Spectrum Environmental Solutions LLC
Strata-G, LLC
SYA/Trinity Consultants
TEConsulting, LLC
TestAmerica Laboratories, Inc.
TRC Environmental Corporation
W. L. Gore and Associates, Inc.
Wood, PLC

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
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CRWI Update

April 30, 2020

PFAS issues

New Mexico included per- and polyfluorinated substances (PFAS) as a hazardous waste in the 2019 RCRA permit renewal for the Cannon Air Force Base. The Air Force challenged that ruling. The state argued the case should be heard in state court rather than federal courts. On March 31, 2020, the U.S. District Court for the District of New Mexico ruled in favor of the Air Force. While this decision did not address the merits of the case, it decided that it should be heard in federal court. The litigation on the merits will continue in federal court.

New Jersey's Department of Environmental Protection (NJDEP) proposed maximum contamination levels of 14 ppt for perfluorooctanoic acid and 13 ppt for perfluorooctane sulfonic acid in drinking water on April 1, 2020. NJDEP will hold a public hearing on May 15, 2020, and accept comments until May 31, 2020.

On April 15, 2020, the Air Force announced it would steer $13.5 million in federal PFAS funds toward study and investigation at the former Wurtsmith Air Force Base instead of using it for cleanup. This has angered local officials and Congressman Dan Kildee (D-MI). Congressman Kildee is the co-chair of the bipartisan congressional task force on PFAS and the base is in his congressional district. In a letter to the Air Force, Representative Kildee stated that the congressional intent was for the money to be spent on cleanup rather than study. This and other issues have started a Congressional push to include additional PFAS requirements on the 2020 defense authorization legislation or any other "must pass" legislation (the next COVID stimulus package). These requirements include designating certain PFAS compounds as hazardous substances, requiring EPA to set drinking water standards, and additional restrictions on incineration of PFAS wastes. Most of these provisions have already been included in H.R. 535, which was passed by the House in January 2020.

In March, Senator Jeanne Shaheen (D-NH) introduced S. 3480. This bill has 19 co-sponsors, all Democrats. It has been referred to the Senate Environment and Public Works Committee. While the bill primarily authorizes money and sets up a structure to give grants to states contending with groundwater contamination, it contains a provision that gives preference to methods that use "total destruction technologies that create inert byproducts." At this time, the Senate leadership does not appear to be interested in additional PFAS legislation.

In an April 2, 2020, briefing call to EPA's Board of Scientific Counselors, the Office of Research and Development stated that air measurement methods for PFAS compounds do not exist and will need to be developed before the Agency can characterize sources, evaluate control methods, and evaluate impacts of changes in emissions. One of their highest priorities is to develop air sampling and analytical methods so the Agency can fully characterize emissions and understand the full suite of compounds being emitted to the air from manufacturing, use, and thermal destruction of wastes. On the slides for the meeting, EPA indicated that a method for air sampling and analysis would be available in the first quarter of 2020 and a method for total organic fluoride would be available in the fourth quarter of 2020. The slide set also contained the following timelines:

- Case study on the fate and transport/air dispersion (2020 Q3);
- Final toxicity assessments for PFBS (2020 Q2) and HFPO-DA (2020 Q4):
- Public review draft IRIS assessments for PFBA, PFHxA (2020 Q3), PFDA (2020 Q4), PFHxS and PFNA (2021 Q1);
- Report on bioactivity analysis of approximately 150 PFAS compounds (2020 Q4);
- PFAS fate from thermal treatment of contaminated souls (2021 Q1);
- State-of-science on thermal treatment of PFAS (2020 Q1); and
- PFAS behavior in incineration environments (2021 Q2).

These slides can be found at https://www.epa.gov/sites/production/files/2020-03/documents/bosc_pfas_rd_overview.pdf.

Construction permits proposed rule

On April 23, 2020, EPA proposed to grant a modification in Texas' state implementation plan to allow parallel processing of permits. If approved, this would allow facilities to begin construction after the state has completed the technical review and issued a draft permit. Under the proposed provisions, the company would assume all risks when commencing construction prior to issuance of the final permit. Comments will be accepted until May 26, 2020.

Phosphoric acid manufacturing proposed rule

EPA published the technology-based standards for the phosphoric acid manufacturing source category in 2015. Data for the existing source standards came from six identical calciners located at one facility. That facility conducted additional tests on these calciners in 2016 and found that three of the units would exceed the recently promulgated standards and the other three were near the limit. The facility continued their testing program through 2019 and submitted that data to the Agency. EPA was convinced by the new data and redid the MACT analysis using only the 2016-2019 data. On April 7, 2020, the Agency proposed to raise the mercury limit for this source category for existing sources from 0.14 mg/dscm to 0.23 mg/dscm. The comment period closes on May 22, 2020.

HCl production furnaces RTR final rule

On April 15, 2020, EPA published a final risk and technology (RTR) rule for the hydrochloric acid (HCl) production source category. EPA did not make any modifications to the numeric emission limitations based on either risk or technology but removed startup, shutdown, and malfunction provisions and added electronic reporting requirements for performance test results.

MATS final rule

In the 1990 Amendments to the Clean Air Act, Congress required EPA to complete an "appropriate and necessary finding" before setting technology-based standards for the electric generation source category. When EPA promulgated the initial Mercury and Air Toxics Standards (MATS) rule, they included co-benefits in the cost-benefit calculations. This was challenged and in 2015 the Supreme Court ruled that the Agency erred by including co-benefits. On April 16, 2020, EPA released the pre-publication copy of their reconsideration of the "appropriate and necessary findings." This time EPA concluded that the cost-benefit calculation did not justify developing technology standards for this source category but they did not withdraw those standards because all sources have been in compliance for more than four years. This leaves the source category in an awkward position of having to comply with standards that should not have been promulgated. No one is really sure how all of this will work but someone will challenge the technology-based standards now that the "appropriate and necessary finding" has been withdrawn.

In addition, EPA completed their risk and technology review of this source category finding no need to add requirements based on either risk or technology review. In a separate action published on April 15, 2020, EPA finalized a rule setting up a new subcategory for electric generation facilities burning eastern bituminous coal refuse. Based on a petition, EPA re-analyzed the data for the 2012 MATS rule and found a

difference in acid gas emissions based on the type of coal fuel burned. This prompted the Agency to revise the acid gas emission standards for this subcategory.

SSM rules

On April 28, 2020, EPA withdrew their state implementation plan call for North Carolina. North Carolina can now use startup, shutdown, and malfunctions (SSM) exclusions for NOx emissions from large internal combustion engines. This is the second step in the Agency's efforts to revise the SSM policy at the national level. The first step was to allow Texas to use affirmative defense provisions in certain cases. The Texas action has been challenged in both the Fifth Circuit and the District of Columbia Circuit (filed April 7, 2020). Plaintiffs want the case to be heard in the District of Columbia Circuit but EPA would like it to be heard in the Fifth Circuit. Expect similar filings over the North Carolina action. The Agency hopes to use legal wins in the Fourth and Fifth Circuits to overturn previous decisions from the District of Columbia Circuit.

E-manifests

The E-manifest advisory board held a meeting on April 14-16, 2020. During the meeting, EPA reported that between June 30, 2018 and February 29, 2020, the agency received approximately three million manifests. Of these, approximately 8000 were completely electronic – that is, originated in the e-manifest system and electronically signed at every step. Approximately 80 percent were submitted through the system as "data plus image" documents. These are paper manifests submitted by uploading a data file plus a scanned image of the final, signed manifest. Less than five percent were paper manifests that are mailed to the Agency. The Agency reported the costs for the program are much higher than anticipated due to the need to manually input data. The current electronic system requires electronic signatures for every person in the generator and transporter chain. The Agency presented three options to address the problems identified over the past two and a half years. One is to have the generator and transporter designate a single individual (site manager) to use the system to request and capture electronic signatures from additional individuals signing on loading docks or transport vehicles. The second method would require a site manager (as in method 1) but would allow others to electronically sign for specific steps in the process. The third method would allow third-party digital signatures. EPA believes that all three options can be used. A copy of the paper presented to the committee can be found at https://www.regulations.gov/document?D=EPA-HQ-OLEM-2020-0075-0003.

Pulp and paper decision

When EPA published the initial pulp and paper MACT rule (2001), it included PM and methanol emission standards. When the Agency proposed to revise the standards under the risk and technology review (2016), they included other hazardous air

pollutants (HAP) in the risk and technology review (RTR) process even though they had not set MACT standards for those pollutants. Environmental groups submitted comments suggesting that the Agency use this rulemaking as a venue to "fill the gaps" of HAPs that were not regulated in the 2001 rule. They specifically suggested adding standards for mercury, dioxins, polycyclic organic matter, hydrogen chloride, and hydrogen fluoride. In the final RTR rule (2017), EPA did not include standards for any additional HAPs. The environmental groups sued. On April 21, 2020, the U.S. Court of Appeals for the District of Columbia Circuit granted their petition and remanded the rule to the Agency "to set limits on the remaining hazardous air pollutants emitted by pulp mill combustion sources." While the opinion does not specify which hazardous air pollutants are to be added, EPA will likely start with the five pollutants listed above. EPA will now be required to initiate rulemaking to develop additional technology-based standards for this source category. The court decision did not set a timetable for that rulemaking. It is estimated that this decision may impact 30-50 other MACT rules.

CISWI and OSWI FIP decision

EPA published emission guidelines for the Other Solid Waste Incineration (OSWI) source category in 2005. They published emission guidelines for the Commercial and Industrial Solid Waste Incinerators (CISWI) in 2013. Under Section 129 of the Clean Air Act, EPA is required to set federal implementation plans (FIP) for those states that do not develop their own plans within two years of promulgating the guidelines. EPA did not meet the FIP deadline for either of these two rules. Environmental groups sued in district court. EPA argued that there is no clear mandate in the statute and the two year deadline in the statutory language could apply to the state's requirement to submit their implementation plans. The district court agreed with EPA. The environmental groups appealed the decision. On April 17, 2020, the U.S. Court of Appeals for the District of Columbia Circuit upheld the district court ruling. While EPA won this battle, they may have lost the war. The opinion gives the environmental groups a clear road map for the next challenge – EPA's failure to ensure an implementation mechanism (either state or federal) within five years of the promulgation of those guidelines. The opinion is so strongly worded that it is likely the environmental groups and EPA will negotiate a timeline to develop FIPs for both of these rules.

OB/OD

When EPA released their open burn/open detonation (OB/OD) guidance report in December 2019, they reported that several alternative technologies have been developed, tested, and used. These include closed detonation, static detonation chambers, vacuum chambers, and reducing the size of materials to be detonated so traditional combustion methods can be used. According to the report, there are 60 OB/OD sites (both commercial and captive) operating in 2018. On March 20, 2020, Louisiana Department of Environmental Quality ended their comment period on a

decision to deny a permit to continue OB/OD at Clean Harbor's Colfax, LA site. While EPA is currently supporting Louisiana's decision on the Colfax permit denial, they appear to be supporting continued OB/OD where safe alternatives do not exist.

COVID issues

EPA's temporary enforcement policy during the COVID pandemic has drawn criticism from environmental groups and Democrat lawmakers and praise from industry. The opponents have accused the Agency of letting companies use the pandemic as an excuse for self-monitoring with little or no oversight. Sierra Club and the Environmental Defense Fund have filed Freedom of Information Act requests asking for information on anyone who uses the temporary enforcement discretion provisions. In addition, these groups filed an emergency petition on April 1, 2020, asking the Agency to quickly issue rules requiring companies to publicly disclose when they stop monitoring or reporting. On April 16, 2020, these groups filed suit in the U.S. District Court for the Southern District of New York charging that the policy gives industry a "free pass" to stop monitoring and reporting without notifying the public.

Representative Frank Pallone (D-NJ), the chairman of the House Energy and Commerce Committee sent a letter (April 21, 2020) to the Agency expressing concern that the temporary policy fails to achieve the environmental protection goals as required by statute. He asked for a response by May 5, 2020. Senator Tom Carper (D-DE) and several other Democrat Senators sent a similar letter to EPA on April 1, 2020. On April 2, 2020, Susan Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance, sent a response to Senator Dianne Feinstein (D-CA) trying to clarify that this is a temporary policy that attempts to prioritize resources so that the Agency can respond to acute risks and imminent threats. Ms. Bodine further explains that the temporary policy does not excuse exceedances of pollution limits in permits, regulations, or statutes and the Agency expects facilities to comply with their regulatory requirements. During an Environmental Law Institute webinar, Rosemarie Kelley, Director of the EPA's Office of Civil Enforcement, stated that companies that use the policy will need to document any violations and explain how this was linked to the pandemic. There are no guidelines on how to create this documentation nor any way of ensuring the Agency will accept the explanation should a violation occur. That will be determined on a case-by-case basis after the fact.

State policies on enforcement and compliance during the pandemic vary considerably. California and Massachusetts have announced they expect continued compliance. Other states (Texas and Ohio) have posted policies on their websites temporarily easing requirements during the pandemic. Environmental groups have announced they plan to fill what they see as an enforcement gap using civil suits.

To help mitigate the financial impacts of the pandemic, the Department of Justice told BP (April 14, 2020) they would suspend its collection of stipulated penalties owed in accordance with a specified consent decree. The suspension is voluntary and will last through May 31, 2020, unless extended. While this letter is specific to one company and one consent decree, it appears to be a model for a blanket suspension of the collections of penalties from all consent decrees through May and possible longer.

On April 10, 2020, Peter Wright, EPA Assistant Administrator for EPA's Office of Land and Emergency Management, and Ms. Bodine release an interim guidance memo to the Regions on site field work decisions being made during the pandemic. This guidance is for those RCRA and CERCLA sites where EPA has the lead, direct oversight of, or responsibility for the work being performed. While the guidance leaves the majority of the decisions to the Regions, it gives a broad outline of the issues to be considered when making those decisions. A copy of the memo can be found at https://www.epa.gov/sites/production/files/2020-04/documents/interim_guidance_on_site_field_work_decisions_due_to_impacts_of_covid.pdf.

On April 22, 2020, EPA published an interim final rule modifying the reporting programs under Acid Rain, the Cross-State Air Pollution Rule and/or the NOx SIP call. Should an affected unit under these rules fail to complete a required quality assurance, certification, or recertification, fuel analysis, or emissions rate test by the deadline because of travel, plant access, or other safety restriction resulting from the current pandemic and if the actual monitoring data would be considered as valid if not for the delayed test, that facility can continue to report the actual monitored data. The facility must maintain documentation, notify EPA when a test is delayed, and complete any delayed tests as soon as practicable after the emergency restrictions no longer apply. The rule was effective on the date it was published and will expire in 180 days. EPA will consider comments received by May 22, 2020.