



CRWI Update January 31, 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
Coterie Environmental, LLC
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
METCO Environmental, Inc.
O'Brien & Gere
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

44121 Harry Byrd Highway, Suite 225
Ashburn, VA 20147

Phone: 703-431-7343
E-mail: mel@crwi.org
Web Page: <http://www.crwi.org>

OSWRO final rule

On January 29, 2018, EPA published the Off-Site Waste and Recovery Operations (OSWRO) reconsideration final rule. This rule removes the pressure relief device (PRD) monitoring requirements for containers, makes one clerical correction, and clarifies the information needed to meet the reporting requirement in the event that a PRD on a container releases a hazardous air pollutant to the atmosphere. EPA concluded that the PRD inspection and monitoring requirements already included in the OSWRO NESHAP are effective and sufficient.

One commenter opposed removing the monitoring provision, likening it to an unlawful malfunction exemption from the standards. This commenter stated that EPA has not shown evidence that visual inspections will detect problems with PRDs on containers. They also stated that EPA has not shown it is impossible to design a monitoring system for container PRDs and suggest that some other continuous monitoring provisions (e.g., fence line monitoring) could be used in lieu of individual PRD monitors. EPA responded with the same reasons used to remove the requirement in the proposed rule. They also responded to the unlawful malfunction exemption accusation by saying that the change in monitoring does not alter the prohibition on a PRD release, so it is not an exception.

On the request for comments on more frequent monitoring, EPA did not add any additional inspection or monitoring requirements for containers. The effective date for these modifications is the publication date. The compliance date for all PRD monitoring requirements for this source category is March 20, 2018.

Once in, always in” policy rescinded

In May 1995, John Sietz, Director of EPA’s Office of Air Quality, Planning and Standards, released a guidance memo setting Agency policy that a source could switch from a major source to an area source at any time up to the first compliance date for that source category. After that point in time, if a source was a major source, it was required to stay as a major source even though it reduced its potential-to-emit below the levels that make

it a major source (10 tons per year of any one hazardous air pollutant or 25 tons per year of all hazardous air pollutants). The logic behind this memo was to prevent major sources from “backsliding” should they reduce their potential-to-emit below the threshold. To understand this policy, one needs to go back to the instructions Congress gave EPA in sections 112(d)(3) and (5) of the Clean Air Act. In section 112(d)(3), Congress told EPA to set standards for new sources at the levels achievable by the best controlled similar source. Existing source standards may be less stringent than new source standards but no less stringent than the average of the best performing 12% of the existing sources. This requirement was termed “maximum achievable control technology” or MACT. For area sources, section 112(d)(5) allowed the Agency to set standards based on “generally available control technologies or management practices” or GACT. Congress did not define the criteria for GACT. In most cases, standards developed for area sources are less stringent than those developed for major sources. In addition, federal permits are not required for some area sources. However, it should be noted that several states require permits for area sources.

Industry opposed this policy from the beginning, arguing that it created a disincentive to voluntarily reduce emissions and to pursue innovations that would reduce emissions. In 2007, EPA issued a proposed rule to replace the “once in, always in” policy but that rule was never finalized. The current administration released a memo on January 25, 2018, that rescinded the “once in, always in” policy. In the memo, William Wehrum, Assistant Administrator for the Office of Air and Radiation, stated that the Agency re-examined the statutory basis for 1995 memo and concluded that the original logic was contrary to the plain language of the Clean Air Act. Specifically, Congress did not put any time limits on when a facility could reduce its emissions to become an area source. The new interpretation is that if a major source takes on enforceable limits to keep its potential-to-emit below the major source thresholds, that source can become an area source as long as it maintains emissions below the threshold. Finally, the memo states that the Agency anticipates publishing a *Federal Register* notice to take comments on adding regulatory text to reflect the current reading of the statutory language. However, no timetable for this action was included.

Environmental groups have widely condemned this action, stating that this will roll back longstanding protections and will allow hundreds of industrial facilities to dramatically increase emissions. One should expect this decision to be challenged.

On the face of it, this memo is a 180 degree change in Agency policy on how major sources can become area sources. Each of the delegated states now has to figure out how this impacts their program. It will take some time for this to work its way through the systems and to determine what this means to individual facilities. A copy of the memo can be found at https://www.epa.gov/sites/production/files/2018-01/documents/reclassification_of_major_sources_as_area_sources_under_section_112_of_the_clean_air_act.pdf.

Air policies

William Wehrum, EPA's Assistant Administrator for the Office of Air and Radiation, was interviewed by Inside EPA, a trade publication, on January 11, 2018. As a part of this interview, Mr. Wehrum listed six issues he plans to address in 2018. These are:

- The Clean Power Plan rule;
- The Mercury and Air Toxics standards;
- The 2015 ozone standards;
- The current methane rulemaking;
- New Source Performance (NSR) reform; and
- Greenhouse gas standards for cars and trucks.

He declined to put any priorities on these six, indicating that all were equal and that he hopes to address all in 2018.

Texas delegation updated

On January 12, 2018, EPA published a direct final rule (and the accompanying proposed rule) updating the list of National Emission Standards for Hazardous Air Pollutants rules delegated to Texas. A complete list of the delegated rules can be found in the *Federal Register* notice or in 40 CFR 63.99(a)(44). These changes will become final on March 13, 2018 unless adverse comment is received by February 12, 2018.

Civil penalty adjustment

In 2015, Congress amended the Federal Civil Penalties Inflation Adjustment Act to require all agencies to adjust statutory civil penalties to reflect inflation by January 15 of each year. On January 10, 2018, EPA increased each penalty by 2.041 percent to adjust for inflation that occurred in 2017. The potential penalties for each environmental statute can be found in the *Federal Register* notice or in Table 2 of 40 CFR 19.4.

2016 TRI data released

On January 30, 2018, EPA released the Toxics Release Inventory (TRI) data for 2016. For 2016, TRI facilities reported 3.4 billion pounds of releases to the air, land, and water. This was a slight increase from 2015 reported emissions. While the air emissions decreased, the land disposal amounts increased primarily due to changes in waste quantities reported by the metal mining sector. A copy of the report can be found at <https://www.epa.gov/trinationalanalysis>.

EPA personnel

President Trump re-submitted Andrew Wheeler's nomination to be EPA's Deputy Administrator on January 8, 2018. Senator Tom Carper (D-DE) blocked Mr. Wheeler's nomination in the previous session not because he opposed his nomination but

because he opposed the nomination of Kathleen Hartnett White to be head the White House Council on Environmental Quality. In fact, few Senators have voiced opposition to Mr. Wheeler's nomination. Senator Carper is expected to continue his opposition to both while offering to speedily confirm Mr. Wheeler if Ms. White's nomination is withdrawn.

While no names have been released, the trade press is reporting that the Trump Administration is close to submitting a nominee for the Assistant Administrator for the Office of Solid Waste and Emergency Response (OSWER). OSWER is currently being led by career officials in an acting capacity.

Region 9 remains the only region without a Regional Administrator. The trade press is reporting that several potential candidates have declined to take the job. The speculation is that trying to push a deregulatory agenda in the San Francisco area might be challenging.

In 2017, approximately 700 career staffers left EPA. This reduces EPA's work force by about 4%, putting it among the executive departments and agencies with the biggest decline. The Agency has 14,142 employees as of January 3, 2018. EPA Administrator Pruitt continues to push for his goal to reduce staff below 8,000 FTEs. According to the trade press, 23% of the current employees can retire by the end of 2018 and an additional 20% can retire in the next five years. Should the Administrator simply choose not to refill positions vacated by retirement, he could come close to reaching that goal within the next few years.

During his testimony on January 30, 2018, before the Senate Environment and Public Works Committee, Mr. Pruitt was asked about his plan to replace the regional offices with offices in every state. He responded that the Agency had just started internal discussions on whether it makes sense to put an operational unit in each state. He gave no indication on the timing of any decisions on this idea.

Enforcement

On January 19, 2018, EPA published a proposed consent decree with Naugatuck Environmental Technologies LLC over alleged violations of the sewage sludge incineration standards (Part 60, Subpart LLL). In the complaint, the Department of Justice alleged the company failed to perform initial testing to show compliance, failed to submit a final control plan, failed to file site-specific monitoring plans, and other allegations. The agreement requires the company to bring the facility into compliance and pay a civil penalty of \$100,000. Additional information can be found in the *Federal Register* notice.

A group of citizens have filed a Clean Air Act citizen suit against the Pasadena Refining System, Inc., alleging that the facility has released emissions in excess of their permitted limits. The group is seeking injunctive relief and penalties for what they claim are years of permit violations. The defendant claimed that the citizen group cannot

prove injury thus lack standing to sue. On January 11, 2018, a U.S. District Court for the Southern District of Texas judge dismissed the defendant's claim, allowing the lawsuit to continue.

In June 2017, the Department of Justice (DOJ) released a memo banning third-party payments as a part of settlement agreements. The intent of this ban was to stop parties that were not a part of the litigations from receiving financial benefits from a settlement agreement. An example of this was DOJ removing a \$3 million payment that Harley Davidson agreed to pay the American Lung Association to swap older wood stoves for newer, more efficient models. DOJ released two memos in January that gives more guidance on when this ban should and should not be used. On January 9, DOJ released a memo allowing projects that comply with the EPA's supplemental environmental projects program and payments that directly remedy the harm created. On January 25, a second memo restricts the practice to those requirements already included in statute or regulation. Said differently, payments cannot go to projects that are above and beyond what is required by statute or regulation.

On January 22, 2018, Susan Bodine, EPA Assistant Administrator for the Office of Enforcement and Compliance Assurance, sent an interim guidance memo to the regional administrators detailing plans to defer to states on enforcement of environmental regulations. The memo suggests that the policy will be modified in FY 2019 based on feedback from the regions and the states. The memo requires each region to meet in person with the senior state environmental officials within their region to discuss specific inspections and enforcement actions likely to occur in the near future. This is to include a list of facilities where inspections are planned, if/when the facility is to be informed of the inspection, an explanation of why a particular facility has been chosen, and how combined resources will be used to ensure compliance. The memo states that EPA will generally defer to the states except in certain circumstances. Some of the reasons why EPA would not defer are:

- State program audits indicate a need for EPA to fill the gap until those deficiencies are addressed;
- Emergency situations where there is a significant risk to human health and the environment;
- Significant non-compliance that has not been timely or appropriately addressed by the state;
- Actions requiring specialized equipment (e.g., infrared cameras) or expertise;
- Actions that cross state or tribal boundaries; or
- Serious violations that need to be investigated by EPA's criminal enforcement division.

The regions are required to submit a report by September 28, 2018, on progress meeting these goals. In addition, Ms. Bodine announced at the EPA National Executive Leadership Development Conference (January 30, 2018) that the Agency plans to launch pilot projects using informal methods to achieve compliance without going through the formal enforcement process. Under this approach, the inspector would let

the facility know there is a problem and work with the facility to get it resolved without going through the process of submitting an inspection report, sending a notice of violation, etc. There were no details of how this might work in practice.

CRWI meeting

The next CRWI meeting will be held on February 21-22, 2018, in Deer Park, TX. It will feature a tour of Clean Harbors Deer Park facility. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).