



CRWI Update October 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
B3 Systems
Civil & Environmental Consultants, Inc.
Coterie Environmental, LLC
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
METCO Environmental, Inc.
Montrose Environmental Group, Inc.
O'Brien & Gere
Spectrum Environmental Solutions LLC
Strata-G, LLC
SYA/Trinity Consultants
TestAmerica Laboratories, Inc.
TRC Environmental Corporation
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
University of Utah

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Once in, always in litigation

In 1995, EPA set a policy (Seitz memo) that a facility had until the compliance date to switch from being a major source to an area source. After that, those units would remain as a major source, no matter what was done to reduce emissions below the 10/25 ton threshold. Industry expressed concern about this policy, arguing that it removed incentives for facilities to lower emissions. EPA responded to those concerns and proposed a rule in 2007 to replace the memo. The proposed rule was never finalized nor was it withdrawn. On January 25, 2018, EPA's Assistant Administrator for the Office of Air (William Wehrum) released a memo withdrawing the Seitz memo and replacing it with a policy that is similar to what was proposed in 2007 – if a major source would take enforceable limits to restrict its potential-to-emit, it could obtain area source designation at any time. In the Wehrum memo, EPA concluded that the Seitz interpretation “was contrary to the plain language” of the Clean Air Act and must be withdrawn. The logic outlined in the Wehrum memo was based on two factors: the definitions of major source and area source did not include any mention of time; and the definition of major source includes the phrase “considering controls.”

A number environmental groups and the state of California filed a petition for review. Four industry groups (Air Permitting Group, Auto Industry Forum, National Environmental Development Association Clean Air Project, and Utility Air Regulatory Group) intervened supporting EPA. The opening brief was submitted on October 1, 2018.

In their opening brief, petitioners asked the court to vacate the Wehrum memo because:

- The Agency violated the Administrative Procedures Act by failing to provide a notice and comment period;
- The statutory language in the Clean Air Act prevents EPA from allowing a source to switch from a major source to an area source after the compliance date; and
- The memo fails to take into account the impact the revised policy will have on air pollution and public health.

EPA's response brief is due on December 21, 2018. Intervenor's brief is due on January 14, 2019. Petitioner's reply brief is due on February 8, 2019. Final briefs are due on February 22, 2019. The panel for this litigation includes Judges Henderson, Srinivasan, and Katsas.

Resin RTR reconsideration

In 2000, EPA set the technology based (MACT) standards for the amino-phenolic resin source category. In 2014, the Agency set more strict emission standards during their risk and technology review (RTR) process. Industry filed a petition for reconsideration. The Agency accepted that petition and on October 15, 2018, published a final reconsideration rule that changed the subcategories, modified the compliance date, and set work practice standards for certain operations. In the 2014 final rule, the Agency set a limit of 1.9 pounds of HAPs per ton of resin produced for all continuous process vents (CPV). In the reconsideration final rule, the category was divided into three subcategories and different limits were set for each. For back-end CPVs, a limit of 8.6 pounds per ton of resin produced was set. The front-end CPVs were divided into reactor CPVs (limit of 0.61 pounds per ton of resin) and non-reactor CPVs (0.022 pounds per ton of resin). According to the preambles of the two final RTR rules, the 2014 rule would reduce emissions by 271 tons per year while the 2018 rule would reduce emissions by 207 tons per year. EPA also removed the numeric emission limits during storage tank maintenance, substituting a work practice that requires the tanks to be empty before performing maintenance. Finally, the compliance date was extended from October 9, 2017 to October 15, 2019.

Oklahoma proposed authorization

On October 3, 2018, EPA proposed to grant Oklahoma's application for authorization of the latest modifications to their hazardous waste program. Comments will be accepted until November 2, 2018. Additional details can be found in the *Federal Register* notice.

E-manifest advisory board

On October 17, 2018, EPA requested nominations for candidates to serve on their Hazardous Waste Electronic Manifest System Advisory Board. They are specifically looking to add an expert in information technology, a representative from industry with experience using the e-manifest system, and a representative from a state responsible for processing manifests. Nominations should be received before November 16, 2018. See the *Federal Register* notice for additional details.

Federal facilities hazardous waste compliance docket

Twice a year, EPA is required to update their docket containing information on federal facilities that manage waste or from which a reportable quantity had been released. The latest update was published on October 29, 2018. Nine facilities were added to the

docket, six facilities were removed from the docket, and a number of corrections were made.

EAB rejects batteries as BACT

Environmental groups requested that Region 9 require batteries instead of duct burners to provide peak power for a California combined cycle gas-fired power plant. When Region 9 rejected that request, the group appealed the decision to the Environmental Appeals Board (EAB). On October 24, 2018, the EAB rejected that challenge stating that the petitioners failed to demonstrate that the region's decision was erroneous or warrants review. They also cited the lack of any battery design that is currently being applied to a similar source and that none of the facilities currently using batteries planned to use them in the manner advocated by the petitioners. Interestingly, the Board also concluded that even if batteries exist that could supply power for the length of time needed, that may not be sufficient to replace duct burners because the functions of duct burners are not restricted to peak loading. Observers have opined that this ruling creates a relatively high hurdle for future claims on the use of batteries as Best Available Control Technology (BACT) for power production facilities.

Enforcement

On October 24, 2018, the Department of Justice lodged a proposed consent decree with Heritage Thermal Services that requires the company to address Clean Air Act violations, pay a civil fine of \$288,000, and implement a lead abatement project in East Liverpool, OH. Comments on the proposed decree will be accepted until November 23, 2018. A copy of the complaint and decree can be found at <https://www.justice.gov/enrd/consent-decree/us-v-heritage-thermal-services>.

EPA strategic plans

EPA released their strategic plan for FY 2018-2022 in February. This plan contained specific metrics for meeting the goals of the plan (see the February 2018 Update for more details). On October 5, 2018, EPA's Office of Inspector General (OIG) released its plan to track the Agency's progress toward meeting those goals. OIG will track the progress on:

- Decreasing the number of areas in non-attainment of national ambient air quality standards from 166 to 138;
- Increasing the amount of non-federal money in the water infrastructure financing program by \$16 billion;
- Certifying that 102 Superfund and 1,368 brownfield sites are ready for new use;
- Meeting all Toxic Substances Control Act statutory deadlines;
- Reducing the proportion of non-compliance with Clean Water Act discharge permits from 24% to 21%; and
- Reducing the number of permit related decision that take longer than 6 months by 50%.

EPA personnel

President Trump has appointed David Dunlap as the Deputy Assistant Administrator for EPA's Office of Research and Development. Mr. Dunlap previously worked for Koch Industries where his title was Director of Environmental Affairs. This position does not require Senate confirmation. Meanwhile, there has been no action on Peter Wright's nomination to the next Assistant Administrator for the Office of Land and Emergency Management. His nomination was approved by the Senate Environment and Public Works Committee on August 1, 2018.

At the October 23, 2018, White House State Leadership Day Conference, President Trump asked Acting EPA Administrator Wheeler to join him on stage. He then praised Mr. Wheeler and suggested he may not be Acting for much longer. However, there have been no formal announcements that Mr. Wheeler would be nominated for the Administrator position.

CRWI meeting

The next CRWI meeting will be on November 7-8, 2018, in the Channelview, TX area. It will feature a tour of Lyondell's hazardous waste combustion units. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).