



CRWI Update September 30, 2020

MEMBER COMPANIES

Clean Harbors Environmental Services
Eastman Chemical Company
Heritage Thermal Services
INVISTA S.à.r.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
University of Utah

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Major source reclassification final rule

The final rule that would allow facilities to reclassify from a major source to an area source was released from the Office of Management and Budget on September 21, 2020. This rule is expected to codify the 2018 guidance document. The Agency has not released a signed rule nor has it been published in the *Federal Register*. Both are expected in October.

Guidance documents final rule

On September 14, 2020, EPA Administrator Wheeler signed a final rule that implements the Executive Order 13891 requirements for issuing significant guidance documents. The rule will add a new subpart D to 40 CFR Part 2. The rule becomes effective 30 days after publication in the *Federal Register*. Once effective, a guidance document must be in the guidance portal or the Agency cannot “cite, use, or rely upon” that document. All future significant guidance documents must go through a similar procedure as does rulemaking (i.e., submittal to the Office of Management and Budget for review, be proposed in the *Federal Register* allowing for a public comment period, and a final guidance published). In addition, that guidance must be posted in the portal. The final rule sets up a petition process to allow the public to ask the Agency to modify, withdraw, or re-instate a rescinded guidance document. The regulations require a response to a petition within 90 days with the possibility of a one-time extension of an additional 90 days.

SSM guidance on SIPs

In 2015, EPA under President Obama issued a state implementation plan (SIP) call telling 36 states to revise their plans and remove startup, shutdown, and malfunction (SSM) provisions. EPA under the Trump Administration never officially rescinded that policy but has allowed certain uses of affirmative defense and SSM provisions in Texas and North Carolina SIPs. Both of these actions are currently being challenged in the courts. There is also a proposed change in Iowa’s SIP. On September 29, 2020, EPA sent a guidance document on how it plans to review SIPs for the other 33 states to the Office of Management and Budget (OMB) for review. Neither EPA nor OMB reveals the contents of document under

review so there is little information on the actual contents of the guidance. OMB is allowed 90 days to review documents but it can take longer. Once finished, this document will be used by the Agency to evaluate each SIP. Since this guidance will not be a final regulatory action, it will not be reviewable by the courts. However, any action taken under this guidance and finalized in a SIP will be reviewable.

RTR final rules

As required by court orders, EPA has published a number of risk and technology review (RTR) rules in the past couple of months. As they have done in the past, the Agency has removed startup, shutdown, and malfunction exclusions and required electronic reporting of performance test results. However, in the past three or four RTR rules, the agency has been adding work practices for startup, shutdown, and malfunctions. For example, the iron foundry RTR set work practices for volatile organic HAP emissions during startup and shutdown. These work practices include building opacity standards, starting cupola afterburner or other thermal device as soon as practicable but no later than 30 minutes after blast air is introduced, and continuing to operate the afterburner or thermal device at all times during off-blast periods. The facility is required to follow procedures as outlined in their operations and maintenance plans to minimize emissions. In the plywood and miscellaneous coatings RTR rules, the Agency has allowed safety shutdown work practices to address malfunctions.

RTR litigations

In April, the U.S. Court of Appeals for the District of Columbia Circuit ruled that the Agency erred when it did not “fill gaps” in the pollutants regulated when they finalized the pulp and paper RTR rule (*LEAN v. EPA*). In the original MACT rule, EPA set emission limits for PM and methanol. During the RTR rulemaking process, environmental groups submitted comments that the Agency missed regulating HAPs in the initial MACT rules and are required to fill those gaps in any subsequent rulemaking. The Agency did not take this suggestion and in the ensuing litigation, the court agreed with the petitioners and remanded the pulp and paper rule to the Agency to regulate the missed HAPs. At the time, observers estimated that this ruling may impact 40-50 RTR rules. Meanwhile, EPA continued to push out final RTR rules to meet the court deadlines. In September, environmental groups challenged the lime kiln, the steel mill, the taconite iron ore processing, and the site remediation RTR rules. While the initial challenges do not state which issues will be briefed, the accompanying petitions for reconsideration mention the failure of these RTRs to regulate HAPs that were missing from the initial MACT rules. In addition, the petition for reconsideration for the site remediation rule requests that the Agency revisit the exemption for RCRA and Superfund sites provision. It is too early in the process of these litigations to get a sense of how EPA will respond.

RMP litigation

In 2017, EPA under the Obama Administration added a number of requirements to risk management plans (RMP). In December 2019, EPA removed the majority of those new requirements. Several parties challenged these rules and filed petitions for reconsideration. The petitioners asked that the litigation be stayed until the Agency acts on the petitions for reconsideration and the court agreed. On September 4, 2020, EPA published a notice formally denying the three petitions. Litigation on the December 2019 final rule can now proceed.

State PFAS actions

A number of states are not waiting on the federal government to take action on per- and polyfluoroalkyl substances (PFAS) contamination. Massachusetts recently (September 24, 2020) announced a state enforceable drinking water standard of 20 ppt for the sum of six PFAS compounds. These compounds are perfluorooctanoic acid (PFOA), perfluorooctane sulfonate (PFOS), perfluorohexanesulfonic acid (PFHxS), perfluorononanoic acid (PFNA), perfluoroheptanoic acid (PFHpA), and perfluorodecanoic acid (PFDA). In addition, the State of Michigan sent a letter (September 18, 2020) to the Air Force urging them to comply with state standards when cleaning up PFAS contamination at the former Wurtsmith Air Force Base. In August, Michigan lowered their drinking water standards for PFOA and PFOS to 8 and 16 ppt, respectively. They also lowered the cleanup standards to match the drinking water standards. The Department of Defense's current position is to follow federal standards, not individual state standards.

Continuing resolution

On September 30, 2020, the Senate passed and the President signed a continuing resolution that will fund the government at FY 2020 levels until December 11, 2020. This averted a government shutdown on October 1, 2020, the first day of the 2021 fiscal year. The House passed 10 of the 12 FY 2021 appropriations bills in July. None of the 12 appropriations bills have gotten out of subcommittee in the Senate. Congress will be in recess most of October. They are not expected to conduct any substantial business until after the November elections. Once they return, they will have about a month to finish FY 2021 appropriation bills.

EPA returning to the office

The federal government has three phases for returning personnel to the office. EPA Regions 7 and 9 are in Phase 1 (the majority of personnel will telework). On September 17, 2020, the regional administrator sent an email to all Region 5 personnel that the office would be moving to Phase 2 (more are required to return to the office but telework is still allowed). The rest of the regions and headquarters are already in Phase 2. In Phase 3, each office is to resume unrestricted staffing with the exception that vulnerable individuals will be allowed to telework. The union that represents a large portion of EPA

employees is protesting this move, arguing that the management is requiring personnel to return without proper protection from COVID and that employees have demonstrated a high level of productivity while teleworking.

EPA personnel

Carolyn Hoskinson has been named as the new director for the Office of Resource Conservation and Recovery. She replaces Barnes Johnson who retired in January. Previously, Ms. Hoskinson was the director for the Office of Underground Storage Tanks.

Wheeler priorities during second term

In a September 22, 2020, interview with InsideEPA, EPA Administrator Wheeler said he hopes to continue in his current position should President Trump be re-elected. He also laid out five second-term priorities for the Agency. These are: creating community-driven environmentalism; meeting the demand for clean water; designing a results-driven Superfund program; reforming the permitting process to give states more control; and creating a holistic pesticide program.

Citizen science

During a September 23, 2020, presentation to the Environmental Council of States, Jay Benforado, chief innovation officer for EPA's Office of Research and Development, stated that the Agency plans to release a "best practices of successful programs" for citizen science in October. He stated that this report will show that monitoring by citizen groups and individuals is becoming more valuable to state regulators. He suggested there is potential for use of citizen gathered data in future regulatory decisions.

Remote compliance monitoring

During the COVID pandemic, permitting authorities have been using video technologies available in phones and laptops to help during inspections. The process follows the same general scheme as an on-site inspection (i.e., opening conference, on-site inspection, and a closing conference). The beginning and end conferences would be virtual. Instead of an actual walk through by the inspector, facility personnel would be asked to walk through the facility with a video link to the inspector. The facility personnel would point the camera at whatever the inspector wished. Any issues of interest by the inspector would be flagged for future on-site inspections. EPA is apparently piloting this in several states and plans to release guidance and standards operating procedures for the use of these tools in FY 2021.

Enforcement

On September 4, 2020, the Department of Justice published a proposed settlement agreement with Clean Harbors Kimball. Under the proposed decree, Clean Harbors will

pay a civil penalty of \$790,000 and will perform injunctive relief on waste handling practices, secondary containment, inspections, and its risk management program. The facility will also conduct an audit under RCRA and the Clean Air Act to address any compliance issues under those statutes. Additional details can be found in the *Federal Register* notice.

RCRA corrective action

During a meeting with state waste managers, Peter Wright, Assistant Administrator for the Office of Land and Emergency Management, reported on the Agency's progress at meeting 2004 cleanup goals. For the approximately 4,000 high priority facilities, he stated that human exposure was under control for 96% of the facilities, migration of contaminated groundwater was under control for 91% of the facilities, and remediation construction had been completed at 79% of the facilities. He also shared five goals for the corrective action program for the next ten years. These are:

- Ensure cleanups are initiated and completed expeditiously;
- Eliminate or controlling adverse impacts beyond the facility borders;
- Ensure the land within the facility borders are safe for continued use or reasonably foreseeable new uses;
- Identifying and implementing elements of an effective long-term stewardship; and
- Regularly adjusting the universe of facilities in the cleanup pipeline.

CRWI meetings

Our November 18-19, 2020, meeting will be virtual. Please contact CRWI (mel@crwi.org or 703-431-7343) if you have interest in attending.