44121 Harry Byrd Highway, Suite 225
Ashburn, VA 20147

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

CRWI Update
March 31, 2018

Boiler decision

On March 16, 2018, the U.S. Court of Appeals for the District of Columbia Circuit released their decision on the challenge to the second boiler reconsideration rule. In this litigation, Sierra Club challenged two provisions of the final rule – the 130 ppm CO threshold and the use of work practices during startup and shutdown. In short, the court upheld EPA's use of work practices during startup and shutdown but remanded the 130 ppm CO threshold to the Agency for further consideration.

During the rulemaking, EPA found that it was technically infeasible to set numerical standards during startup and shutdown and thus promulgated work practices to minimize emissions during these operational periods. Sierra Club did not object to setting work practices but did object to not requiring the use of clean fuels during shutdown and giving operators two choices on when to end startup. The court rejected those arguments, stating that these work practices are consistent with the Clean Air Act because "they reasonably approximate what the best performing boilers can achieve." The court also allowed facilities to engage air pollution control devices as soon as possible considering safety factors as long as the facility has documented what they are doing and how they are doing it. This part of the decisions should allow EPA to continue using work practices during startup and shutdown.

The 130 ppm CO threshold challenge is intertwined with the challenge of CO as a surrogate for non-dioxin organic HAPs that was partially addressed in the previous boiler litigation. In *U.S. Sugar v. EPA* (July 29, 2016), the court remanded the surrogacy issue to EPA for further explanation on why they "failed to directly consider and respond to several comments that introduced evidence suggesting that other control technologies and methods could be effectively used to reduce HAP emissions without also impacting CO emissions, or vice versa." The court rejected EPA's contention that good combustion practices, which minimize both CO and non-dioxin organic HAP emissions, was sufficient to support its decision. However, the court rejected the environmental groups claim that the breakdown of a relationship below 130 ppm precluded EPA from using CO as a surrogate. In

fact, the court stated that this was "precisely the sort of scientific judgement to which we must defer, and accordingly, we do so on this point." What the court focused on in *Sugar* was the failure of the Agency to address the "substantial record evidence on the potential availability of alternate control technologies or methods…" The court remanded instead of vacating because it would have been disruptive and it is likely that EPA can adequately explain it use of CO as the only or major technology or method for controlling non-dioxin organic HAPs.

In the March 26, 2018, decision, the court explained that EPA initially used the MACT methodology to calculate emission limits for CO based on levels emitted by the top performers. During the rulemaking process, EPA decided some of these limits were too stringent and substituted a less stringent limit (130 ppm). Sierra Club contended that this switch was unjustified and contrary to the Clean Air Act. The court agreed. This decision appears to turn on the specifics of the data used to justify the decision. The only data put before the court were data showing a correlation between CO and formaldehyde emissions. Specifically, EPA claimed these data showed a general correlation between CO and formaldehyde down to about 130 ppm CO but does not show a further reduction below 130 ppm. Sierra Club argued that the data did not show a continuing decrease in formaldehyde concentration below 130 ppm CO but in fact showed an increase. EPA justified the threshold because the formaldehyde data below 130 ppm were "not sufficiently reliable to use as a basis for establishing an emission limit…"

The court interpreted EPA's position to be that organic HAP emissions are effectively non-existent or cannot be further reduced when the CO emissions fall below 130 ppm. They state that "If articulated and adequately supported in the record, such a position could well satisfy the Act." They go on to say that the record in this case does not support that conclusion. Using the formaldehyde data, the court stated the data does not show a complete destruction of formaldehyde, nor does the data show a continuation of the low levels achieved at 130 ppm. In fact, the data shows an apparent increase below 130 ppm. EPA's explanation that they are aware of no reason why this should happen and thus the data was "untrustworthy" did not sway the court. What seemed to catch the court's attention was that EPA tried to have it both ways; the data is "untrustworthy" below 130 ppm CO so they could not set a limit below 130 but the same data was good enough to argue that formaldehyde is non-existent below that level.

Unless one of the parties files a petition for re-hearing or elevates this to the Supreme Court, EPA can continue to use work practices for startup and shutdown periods but will now have to address the two issues relating to CO sometime in the future. One will require the Agency to address potential availability of alternate control technologies or methods to reduce emissions of non-dioxin organic HAPs. The other is to explain why organic HAP emissions are effectively non-existent or cannot be further reduced when the CO emissions fall below 130 ppm. The Agency has not given any indication of when they will take up either of these two issues.

DSW revised decision

In 2008, EPA revised the definition of solid waste to exclude certain hazardous secondary materials that were recycled using two mechanisms: the generator-controlled exclusion and the transfer-based exclusion. To qualify, both exclusions had to be legitimately recycled based on four factors. These four factors were:

- The secondary material must provide a useful contribution to the recycling process or to the product or intermediary of the recycling process;
- The recycling process must produce a valuable product that is sold to a third party or used by the recycler or generator as an effective substitute for a commercial product or as an ingredient or intermediate in an industrial process;
- The secondary material must be managed as a valuable commodity; and
- The secondary material must not contain significant concentrations of hazardous constituents (toxics along for the ride) that are not found in analogous products.

In the 2008 rule, the first two factors were required but the second two only had to be considered when making the decision on whether a hazardous secondary material qualified for the exclusion.

In 2015, EPA revised the rule to make all four factors mandatory, added more stringent containment requirements, allowed spent petroleum refinery catalysts to qualify for the exclusion, and replaced the transfer-based exclusion with a verified recycler exclusion.

Several parties sued and the court released their initial decision on the 2015 rule on July 7, 2017. In this ruling, the court vacated the fourth legitimacy factor and the verified recycler exclusion. The court found that EPA failed to support its conclusions that the fourth legitimacy factor was needed to ensure that hazardous secondary materials were not being discarded. The court also found that EPA did not have a sufficient basis to conclude that hazardous secondary materials being sent off-site for recycling were being discarded.

There were uncertainties about what this ruling meant so each of the parties asked the court for clarification. EPA did not question the merits of the ruling but asked whether factor 4 was vacated for all parts of the rule or only for certain sections of the rule and whether the 2008 version of factor 4 now takes its place. Environmental groups asked for rehearing to change the remedy from vacatur to remand. The American Petroleum Institute asked the court to reverse its ruling and allow catalysts to be eligible for a transfer-based exclusion. The American Chemistry Council and Freeport-McMoRan asked for clarification that factor 4 was completely vacated.

The court accepted these requests and released their revised opinion on March 6, 2018. In the revised opinion, the court responded to three issues raised in the motions for rehearing and denied all other petitions. The net effects of both decisions are:

- Petroleum refinery catalysts can be excluded as long as the containment and emergency response requirements in 40 CFR 260.10 are met;
- Legitimacy factors 1-3 are mandatory to determine whether the exclusion applies;
- Legitimacy factor 4 is not mandatory but must be considered; and
- The 2008 transfer-based exclusion has been reinstated.

"Once in, always in" reversal litigation

In January, EPA reversed their "once in, always in" policy. On March 26, 2018, several environmental groups filed a petition for review of this decision with the U.S. Court of Appeals for the District of Columbia Circuit. This petition is unusual because it is challenging a guidance memo. In the past, this court has generally found that guidance memos do not constitute final agency action and as such are not judicially reviewable. The petitioners claim that revoking the policy will result in increased air pollution which is contrary to the intent of the Clean Air Act. EPA is likely to oppose this action and urge the court to dismiss the petition.

Aerosol can proposed rule

On March 16, 2018, EPA proposed to add aerosol cans to the universal waste program. If finalized as proposed, the Agency expects this rulemaking to provide a clear and protective system for managing discarded aerosol cans, promote recycling, and to encourage the reduction of quantities of aerosol cans that go into landfills and combustors. This proposed rule will impact those who generate, transport, treat, recycle, or dispose of hazardous waste aerosol cans unless those persons are households or very small quantity generators. The majority of the sources impacted are manufacturing and retail trade. As proposed, a used aerosol can becomes a waste on the date it is discarded and an unused can becomes a waste the date the handler decides to discard it.

EPA is also proposing specific management standard for puncturing and draining of aerosol cans. The requirements are similar to existing programs in California, Colorado, Utah, and New Mexico. Puncturing and draining must be conducted by a commercial device specifically designed to safely puncture and effectively contain the residual contents. Operators will be required to follow manufacturer's instructions. However, EPA studies found that manufacturer's specifications do not necessarily prevent breakthrough. Thus, EPA is proposing that handlers develop written procedures detailing how to safely puncture and drain cans. This must include operation and maintenance of the puncture and drain unit, segregation of incompatible wastes, and proper waste management (e.g., making sure ignitable liquids are stored away from heat of open flames).

EPA is proposing to add new sections to the waste management requirements for small (§273.13(e)) and large (§273.33(e)) quantity handlers. EPA is requesting comments on additional limitations on puncturing and draining cans similar to those found in certain

state programs based on contents of the cans (e.g., ethers, chlorinated compounds, pesticides, herbicides, freons, foamers, corrosive cleaners, etc.). EPA is also asking for comments on whether additional regulatory requirements for the puncture and drainage devices are needed. Comment period closes on May 15, 2018.

Leather finishing operations RTR

On March 14, 2018, EPA proposed their risk and technology review (RTR) for leather finishing operations. The Agency is not proposing any additional restrictions due to either risk or technology. However, they are proposing to remove startup, shutdown, and malfunction provisions and to add electronic reporting requirements for test results. Comments on this proposed rule are due on April 30, 2018.

Alternative methods

On March 5, 2018, EPA published three "broadly applicable alternative test methods." One is an alternate procedure for above span mercury calibrations required in Part 63 Subpart LLL. The second is an alternative to Method 3. The third allows alternate procedures when using Method 325. Additional details can be found in the *Federal Register* notice.

EPA personnel

President Trump has nominated Peter Wright to be the next Assistant Administrator for the Office of Land and Emergency Response. Mr. Wright has been an in-house counsel for Dow Chemical Company for a number of years. This nomination was received in the Senate on March 6, 2018, and was referred to the Environment and Public Works Committee. The Committee has not yet set a hearing date. Environmental groups are opposing this nomination, saying he is too closely tied to industry.

Meanwhile, Andrew Wheeler's nomination to be the next Deputy Administrator for EPA continued to move forward. On March 23, 2018, the Senate waived the mandatory quorum requirements for a vote on his nomination. This should clear the way for an actual vote once the Senate comes back into session in April.

EPA budgets

When President Trump signed the omnibus appropriations bill on March 23, 2018, it included $8 billion in funding for EPA for the rest of this fiscal year. This is essentially the same amount of funding that EPA received last fiscal year. This included increased funding for water infrastructure and Superfund cleanups. It did not include funding to support "workforce restructuring." The support language notes that Congress does not support reductions in EPA unless explicitly noted. It also notes that it does not support consolidation or closing of any regional offices. Some of the more controversial riders were excluded (e.g., barring EPA from enforcing a methane rule for oil and gas facilities,

denying funds for the social cost of carbon) but some less controversial ones from precious years were included (e.g., prodding EPA to treat biomass as carbon-neutral, a prohibition on the use of funds to regulate lead ammunition).

Enforcement

On March 23, 2018, Susan Bodine, Assistant Administrator for the Office of Enforcement and Compliance Assurance, sent a memo to Regional Administrators setting up interim procedures for sharing information on high impact cases that are going to be referred to the Department of Justice (DOJ). In the memo, Ms. Bodine asks that when the case team develops a recommendation to refer a case to the DOJ, the appropriate manager will brief the Regional Administrator for Region-led cases and the Assistant Administrator for headquarters-led cases. In addition, copies of the briefing material and the referral for Regional-led cases are to be sent to the Assistant Administrator. The stated purpose of this process is to meet the goal of reducing the "averaging time from violation identification to correction." A copy of the memo is available from CRWI.

CRWI meeting

The next CRWI meeting will be held on May 2-3, 2018, in Indianapolis, IN. It will feature a tour of Citizens Energy Group's sewage sludge incineration facilities. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).