

ENVIRONMENTAL NOTES

August 2016

TIME TO PAY MORE: EPA INCREASES MAXIMUM CIVIL PENALTIES

BY: CHANNING J. MARTIN

Remember the days when the maximum civil penalty EPA could assess for a violation of environmental law was \$25,000 per day? Those days disappeared 26 years ago due to the Federal Civil Penalties Inflation Adjustment Act of 1990. The 1990 Act applied to all federal agencies with civil penalty authority, not just EPA, and it required agencies to review their penalties and, as appropriate, adjust them upward for inflation every four years. Thus, over the course of 26 years, EPA raised the maximum per day penalty under most environmental laws from \$25,000 to \$37,500.

Enter Congress in 2015. The Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015 requires federal agencies such as EPA to adjust for inflation annually. But wait, there's more. It also includes a catch-up provision requiring agencies to increase their penalties up to 150% of their maximum amount on November 2, 2015, i.e., up to 150% of \$37,500 for EPA, to account for inflation not fully taken into account since the penalty was first enacted. The 2015 Act requires that the increases be calculated based on a comparison of the 1990 Consumer Price Index – Urban (CPI-U) to the October 2015 CPI-U.

Who knew inflation was so out of control? In an interim final rule that was effective on August 1, 2016, EPA increased dramatically the amounts that may be assessed for violations that occurred after November 2, 2015. The increases affect 65 different EPA penalties, and their amounts vary by the specific statute under which they are assessed. For example, the maximum per day per violation penalty under most provisions of the Clean Air Act increased from \$37,500 to \$44,539 for penalties that can be assessed by EPA, and to a whopping \$93,750 for penalties that can be assessed by a court. Similarly, the maximum per day per violation penalty under most provisions of the Clean Water Act increased from \$37,500 to either \$44,539 or \$51,570.

The rule was proposed as an “interim final rule” which went into effect a little more than one month after it was promulgated. There was no opportunity for public comment. EPA issued guidance to its regional offices on July 27, 2016 concerning how the increases in penalties are to be implemented. Regulated parties should review revised Table 2 in 40 C.F.R. § 19.4 and the guidance carefully to better understand how the new increases will be implemented.

Civil Monetary Penalty Inflation Adjustment Rule, 81 Fed. Reg. 42,983 (July 1, 2016) (amending 40 C.F.R. Part 19). Amendments to EPA's Civil Penalty Policies (EPA OECA July 27, 2016).

COURT TO CONSIDER EPA RULE ELIMINATING EXEMPTION FOR EXCESS EMISSIONS DURING SSM

BY: RYAN W. TRAIL

A 2015 EPA rulemaking required 36 states to revise their State Implementation Plans (“SIPs”) to eliminate provisions exempting air emission exceedances during periods of startup, shutdown, or malfunction (the “SSM SIP Call rule”). The SSM SIP Call rule gives states a deadline of November 22, 2016 to submit revised SIPs to EPA. Exemptions in existing Title V permits will



remain effective despite the SSM SIP Call rule, but will be removed from those permits when the permits are renewed.

Eight trade associations, 12 companies, and 19 states have filed petitions for review of the SSM SIP Call rule in the U.S. Court of Appeals for the D.C. Circuit. The cases have been consolidated, with the lead case being *Walter Coke, Inc. v. EPA*. All briefs in the case will be filed by August 26, 2016, and the Court will hear oral argument thereafter.

The primary arguments against the SSM SIP Call rule are:

- States have broad discretion to choose methods to meet air quality goals; for the SSM SIP call to be justified, EPA must find state SSM provisions render each SIP as a whole “substantially inadequate,” not just inconsistent with EPA’s preferred approach;
- The “general duty” provisions of state SIPs create a continuous work practice standard, and sources have a general duty to keep air emissions to a minimum, even during SSM periods; and
- SIP provisions granting an “affirmative defense” for exceedances during SSM periods were upheld by the 5th Circuit in 2013. EPA cites a 2014 D.C. Circuit Court decision as authority for removal of “affirmative defense” provisions from SIPs. However, the 2014 decision was specific to EPA’s National Emission Standard for Hazardous Air Pollutants for Portland Cement Plants and does not apply to SIPs.

Although petitions for review have been filed, the SSM SIP Call rule has not been stayed by the Court, meaning the November 22, 2016 deadline remains in place. As states begin to comply with the rule by submitting revised SIPs, it remains to be seen whether EPA will allow site-specific alternative emission limitations (including work practices) for startup and shutdown as Title V operating permit revisions and/or for malfunctions (e.g. SSM plan). Another issue for states revising their SIP is whether to include a provision automatically rescinding

the changes EPA has required them to make if the SSM SIP Call rule is vacated by the Court or rescinded by the new administration.

As if the uncertainty associated with the SSM SIP Call rule litigation wasn’t enough for states and industry to deal with, EPA proposed a new rulemaking on June 14, 2016 that would remove the affirmative defense states are now authorized to include in Title V permits for excess emissions during an “emergency.” To prove the defense and avoid liability, the source must demonstrate the emissions are the result of an “emergency,” as that term is defined in the Title V regulations, and make a number of other required showings. EPA says this provision is inconsistent with its current interpretation of how the Clean Air Act must be enforced and with “recent court decisions from the U.S. Court of Appeals for the D.C. Circuit.” Once the rule is promulgated as a final rule, states will be required to revise their Part 70 operating permit program to remove the defense. Naturally, litigation will be filed to challenge this final rule, too. Comments on the proposed rule will be accepted by EPA until August 15, 2016.

““ The SSM SIP Call rule gives states a deadline of November 22, 2016 to submit revised SIPs to EPA. ””

Proposed Rule to Remove Title V Affirmative Defense, 81 Fed. Reg. 38,645 (June 14, 2016).
Final SSM SIP Call Rule, 80 Fed. Reg. 33,840 (June 12, 2015).

OVERLAPPING LABELS CAN LEAD TO LIABILITY

BY: KEITH “KIP” MCALISTER, JR.

Multiple regulatory agencies worldwide exercise jurisdiction over how hazards associated with chemicals in the workplace are communicated to employees and others. This creates a complex web of requirements and compliance-related confusion in domestic and international commerce. To relieve this regulatory burden, the United States (principally by and through OSHA and DOT) and the international community came together to develop and establish the United Nations Globally Harmonized System of Classification and Labeling of Chemicals (GHS). In 2011 and 2012, DOT revised its hazardous materials regulations (HMRs), and OSHA modified its hazard communication standard

(HCS), to conform to the GHS. By adopting the GHS, the United States believes it will result in a clearer, more effective methodology for conveying information on hazardous chemicals to employers, distributors or shippers, and to downstream users. Although OSHA and DOT continue to implement and enforce their distinct regulatory programs, the HCS and HMRs have been harmonized as much as practicable to minimize overlap. Such harmonization is not without problems, however.

Under OSHA's HCS, manufacturers and distributors must ensure each container leaving the workplace is labeled, tagged, or marked, no matter if they are shipping products directly to end-user employers or to other distributors who in turn ship to end-users. OSHA requires that labels be affixed to or printed on the "immediate container," but does not require that labels be placed on the outer packaging. For example, OSHA labels attached to the container housing the chemical product (i.e., inner bottles) need not also be placed on the outer packaging or box, although it is permissible to do so. Labeling on the outer packaging falls within DOT's control.

There are times, however, where the OSHA labels must appear on the outer surface of the packaging along with any applicable DOT labeling. Typically, this involves a 55-gallon drum that serves as the "immediate container" and "shipped container" (and sometimes workplace container). OSHA's regulations preclude manufacturers and distributors from using or placing labels in such a way that conflict or interfere with DOT labels. In such circumstances, a manufacturer or distributor must refer to Appendix C of 29 C.F.R. 1910.1200 to determine precedence of pictograms and proper display of labels. Where a pictogram required

by DOT appears on a shipped container, the pictogram specified in Appendix C.4 for the same hazard must not appear.

Although the regulatory programs were harmonized under the GHS, careful consideration must be given to the placement of labels on packaging and containers before placing chemicals into commerce. Overlapping labels may lead to liability for manufacturers and distributors that could have been avoided by a better understanding of applicable regulatory requirements.

[29 C.F.R. § 1910.1200](#) and [49 C.F.R. §§ 171 to 180](#)

EPA ISSUES FINAL RULES TO REDUCE METHANE EMISSIONS FROM MSW LANDFILLS

BY: JESSICA J.O. KING

Section 111 of the Clean Air Act (CAA) requires EPA to issue New Source Performance Standards (NSPSs) for certain source categories of air pollutants. These NSPSs set threshold limits on emissions of certain pollutants achievable through the "best system of emission reduction" (BSER). Once EPA issues an NSPS for a source category and its pollutants, the agency is further required to review the standard at least every eight years to determine if the level of control previously established remains appropriate.

In 1996, EPA added Municipal Solid Waste (MSW) landfills to the list of source categories subject to NSPS and then issued standards and guidelines for methane emissions from new and existing sources (the "1996 NSPS/Guidelines"). In 2002 and again in 2006, EPA proposed amendments to the 1996 NSPS/Guidelines that were never finalized. In 2011, the Environmental Defense Fund sued EPA alleging that it had not met its mandatory duty under the CAA to review and, if appropriate, revise the 1996 NSPS/Guidelines. EPA settled the lawsuit in 2012, and agreed to meet certain deadlines to perform one or a combination of the following: (a) propose a rule revising the 1996 NSPS/Guidelines; (b) propose a determination not to revise the 1996 NSPS/Guidelines; or (c) determine that review is not appropriate. Since then, President Obama issued his 2013 Climate Action Plan. The plan notes methane is a greenhouse gas, and it calls for a reduction of methane emissions to reduce global warming. Thus, the President's Climate Action Plan



increased the pressure on EPA not only to review the 1996 NSPS/Guidelines, but also to revise them.

On July 14, 2016, EPA took two final actions: (1) it promulgated a revised NSPS aimed at further reducing emissions of methane from MSW landfills constructed, modified or reconstructed after July 17, 2014; and (2) it updated its Emission Guidelines applicable through EPA-approved State Plans for MSW landfills constructed on or before July 17, 2014.

Who will the NSPS and Emissions Guidelines affect?

EPA estimates that 128 new, modified or reconstructed landfills will be subject to the revised NSPS, and that all but 13 will exceed the new threshold and must install controls by 2025. Regarding existing landfills, EPA estimates 1,014 active MSW landfills will be subject to the updated Emission Guidelines. Of these, EPA believes 731 will require control equipment by 2025 -- 93 more than under the 1996 Guidelines -- and that 77 will be required only to monitor and report. The remaining 206 existing landfills are either closed or are expected to close within 13 months of publication of the revised Emission Guidelines in the Federal Register.

What Do the New NSPS and Emissions Guidelines Require?

The following are a few of the most important requirements for MSW landfills:

- They apply only to landfills with a design capacity of at least 2.5 million metric tons and 2.5 million cubic meters of waste;
- The threshold triggering use of an emission reduction control system has been lowered for new and existing landfills from 50 metric tons of non-methane organic compounds (NMOCs)

per year to 34 metric tons of NMOCs per year;

- Options to reduce emissions include enclosed combustion for energy generation, a treatment system that processes the collected gas for sale or beneficial reuse, and flares;
- BSER is a "landfill gas collection and control system";
- Existing landfills that close prior to 13 months after the guidelines are published will remain subject to the limit of 50 metric tons of NMOCs per year;
- Monitoring of surface emission of methane is required quarterly;
- Landfills with modeled NMOC emissions between 34-50 tons may avoid controls if surface emissions of methane are below 500 parts per million;
- Temperature and pressure monitoring at wellheads is required on a monthly basis, and corrective action is required if results are elevated;
- Landfill gas collection-and-control systems may be capped and removed from some or part of an already closed landfill that produces only low States have nine months after the guidelines are published in the Federal Register to submit revisions to their State Plans.



Do the Benefits Outweigh the Costs?

EPA has touted the revised NSPS and Emissions Guidelines as important steps to reduce methane and, thus, greenhouse gases. In the two final rules, it states that 20 percent of methane emissions in the United States come from landfills and that, by 2025, the combined revised NSPS and Emissions Guidelines will reduce methane emissions by an estimated 334,000 metric tons, reduce carbon dioxide emissions by 303,000 metric tons, and reduce NMOC emissions

““ The revised NSPS and Emissions Guidelines will affect the majority of new and existing landfills, requiring them to spend millions of dollars on gas collection systems. ””

by 2,000 metric tons. In its cost/benefit analysis, the agency states that the estimated climate benefits of the reductions significantly outweigh the costs. Specifically, it estimates the economic benefits of the changes to total \$512 million in 2025, compared to estimated combined costs to comply of \$60 million. As always, a lot of assumptions are used in the cost/benefit analysis, including the assumption that many landfills will choose to use their methane gas to sell electricity, rather than simply combusting it, thereby offsetting their costs.

Conclusion

The revised NSPS and Emissions Guidelines will affect the majority of new and existing landfills, requiring them to spend millions of dollars on gas collection systems. The benefits are based on the assumption that methane and other greenhouse gases are causing significant adverse effects to the environment – including global warming. While methane, unlike carbon dioxide, is not a listed Hazardous Air Pollutant or a criteria pollutant subject to regulation under the CAA, its potency as a greenhouse gas has been cited by both federal and state regulators as significantly contributing to climate change. Regardless of whether one agrees with that assessment, the day of reckoning for methane emissions from landfills has arrived.

The Final Rules are not yet published in the Federal Register, but may be found at <https://www3.epa.gov/ttn/atw/landfill/landflpg.html>; 40 CFR Part 60, Subpart XXX and Subpart Cc.

VIRGINIA DEQ TO REVISE RISK ASSESSMENT PROTOCOLS

BY: HENRY R. “SPEAKER” POLLARD, V

The Virginia Department of Environmental Quality (“DEQ”) is preparing to implement revised risk assessment protocols for many of its site cleanup programs. DEQ’s new approach is called the Virginia Unified Risk Assessment Model (“VURAM”), and affected programs

include the Voluntary Remediation Program, the RCRA Corrective Action Program (for hazardous waste sites), and solid waste cleanup programs.

Those who have conducted cleanups in Virginia (and most other places) have encountered the often complex and, in some cases, rather subjective process necessary to determine risks to human health and the environment posed by hazardous substances. These risks regularly drive key aspects of site cleanup remedies, including where and to what extent cleanup must occur. While risk assessments can present substantial hurdles for cleanup and redevelopment of property, they can also be used to demonstrate that significant and expensive remediation is unnecessary if institutional and engineering controls are used. Control measures can include such things as site design, constructed and installed measures, and restrictive covenants. Commonly used restrictive covenants limit construction and utility worker exposure as well as use of groundwater or use of the property for residential purposes. Of course, the cost to implement these control measures will affect the budget of any redevelopment project, but the investment made is often far less than the cost to perform a full cleanup.

VURAM is a risk assessment calculation tool that will replace the Voluntary Remediation Program calculation tables, as well as replace the risk assessment portion of DEQ’s long-used REAMS software. As with DEQ’s current risk assessment practices, VURAM will evaluate both carcinogenic and noncarcinogenic risks and account for factors such as applicable regulatory program requirements, relevant contaminants of concern, affected or threatened environmental media (i.e., soil, groundwater, surface water or indoor air), and potential human and ecological receptors. DEQ believes VURAM will help streamline the risk assessment process while providing risk assessment outputs for specific pollutants, impacted media, and site-wide conditions. VURAM will be accompanied by a User Guide that must be consulted when installing and using the tool.

DEQ plans to launch VURAM and the User Guide in September 2016. The agency also has indicated that it is likely to offer training sessions at that time on how to use the new software. Unfortunately, the initial version of VURAM will not include a site screening level risk assessment module; incorporation of that module into VURAM is planned for the spring of 2017. Technical questions about VURAM should be directed to April Ni'Mary at DEQ at 804-698-4534.

D.C. CIRCUIT UPHOLDS BOILER MACT

BY: CHANNING J. MARTIN

If there's any good news for industry in the recent 162-page decision issued by the United States Court of Appeals for the D.C. Circuit on the Boiler MACT, we can't find it. The court rejected all challenges by industry groups and handed environmental groups a major victory. At issue were approximately 30 challenges to what is commonly-known as the Boiler MACT, EPA's maximum achievable control technology standards for emissions of hazardous air pollutants ("HAPs") from large industrial "major source" boilers. The Boiler MACT applies to approximately 14,000 boilers nationwide. In addition to the major source standards, the court also considered challenges to the standards for smaller "area source" boilers and to standards applicable to commercial and industrial solid waste incinerators.

The "smack down" for industry includes the following:

- The court rejected the argument that malfunctions must be taken into account in setting emissions standards that apply continuously and agreed with environmental groups that EPA may address excess emissions resulting from malfunctions only through enforcement discretion.
- The court vacated the emissions standards for all subcategories of major source boilers where EPA decided that certain unusually high performing boilers did not have to be considered in calculating the so-called MACT floor, i.e., the minimum emission standards for a subcategory based on its best-performing sources.
- The court remanded to EPA for further explanation its selection of carbon monoxide as a surrogate for non-dioxin/furan organic HAPs, and questioned EPA's reasoning that good combustion would minimize emissions of both.

We could go on and on, but what's clear is that environmental groups are pleased with the decision, and industry groups are not. Industry groups believe they worked with EPA over many years to fashion pragmatic and achievable rules that protect the environment, yet the court held either that EPA was wrong or failed to justify its conclusions. Much of the court's decision remanded portions of the rules to EPA for further consideration or explanation, which means that there is still room for more litigation by both sides. Stay tuned.

United States Sugar Corp. v. EPA, No. 11-1108 (D.C. Cir. July 29, 2016).



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