Message

From: Bybee, Darcy [darcy.bybee@dnr.mo.gov]
Sent: 10/30/2020 11:36:00 AM
To: rwalker@regform.org; Cozad, David [Cozad.David@epa.gov]
CC: Skelley, Dana [Skelley.Dana@epa.gov]; Hale, Kendall [kendall.hale@dnr.mo.gov]; richard.swartz [richard.swartz@dnr.mo.gov]; Wilbur, Emily [emily.wilbur@dnr.mo.gov]
Subject: Re: REGFORM : Air Seminar : Issues and Questions (November 4)

Good morning all!

Thanks Roger for the information....Emily and I do have some questions on logistics and timing--I'll send Kevin a separate note on that...

Have a great weekend all! Happy Halloween!

Take care,
Darcy

From: Roger Walker <rwalker@regform.org>
Sent: Thursday, October 29, 2020 12:48:00 PM
To: Cozad, David
Cc: Bybee, Darcy; Skelley, Dana; Hale, Kendall; Swartz, Richard; Wilbur, Emily
Subject: Re: REGFORM : Air Seminar : Issues and Questions (November 4)

Darcy Bybee
Emily Wilbur
Kendall Hale
Richard Swartz
Dana Skelley
David Cozad

Just checking in before the weekend!

Thanks for joining us!. I have attached a copy of the agenda.
Right now, I primarily want to make sure you do not have any questions and that you have received adequate information from us about this event. If not, give Kevin Perry a shout or email
kperry@regform.org - 573.680.5069

Couple of things:
1. Attendance.
   a. I have D**ana and David joining by zoom**. If you need anything more about how to join please let Kevin Perry know. I would be useless in this matter.
   b. I have all **DNR staff joining in person**.
      1. We have a "green room."
      2. Speakers are spread out over the day. The only panel (morning) is entirely zoom. We take five minute breaks in between sessions to clean and ease folks in and out of the area.
      3. The Agenda shows Darcy and Emily on at the same time but we will have a gap and allow time for Darcy to exit and Emily to join.
      4. I know Kevin has given you more detail (if not please let me know). We will get this right and follow that information.
      5. We will adhere strictly to the timeframes as we have other people scheduled and need to keep the line moving.

c. **Dana and Darcy have double duty**. I will send a separate email about "Year in Review."

2. I sent you issues and some questions. I will likely be the person moderating. Kevin or I will also be checking for questions from our virtual audience. Any questions about the substance please ask me. ...

We have a very good turnout.

All the best,

Happy Halloween!

raw

On Wed, Oct 28, 2020 at 12:08 PM Cozad, David <Cozad.David@epa.gov> wrote:

Hi Roger –

Thanks for this. It's very helpful in planning remarks. One question: Any further light you can shine on what folks are wanting on "Parent Liability"? Is there something specific driving interest in that topic?

Dave

From: Roger Walker <rwalker@regform.org>
Sent: Friday, October 23, 2020 7:35 AM
To: Darcy Bybee <darcy.bybee@dnr.mo.gov>; Skelley, Dana <Skelley.Dana@epa.gov>; Kendall Hale <kendall.hale@dnr.mo.gov>; richard.swartz <richard.swartz@dnr.mo.gov>; Wilbur, Emily <emily.wilbur@dnr.mo.gov>; Cozad, David <Cozad.David@epa.gov>
Subject: REGFORM : Air Seminar : Issues and Questions (November 4)

Darcy, Dana, Kendall, Richard, Emily, and David:

I reached out to our REGFORM members and others and these are the topics and questions that came up. No surprises really.

Thank you very much for joining us on **November 4**. Kevin Perry will be sending additional information about the mechanics of this wonky new seminar process.

[**Note**: I had hoped that the day immediately following a national election we would know the political direction of our country - but that may not be the case. That's OK. This is not a political event in the least and the typical member of REGFORM and our attendees are simply trying to understand how best to do their EHS jobs. Uncertainty and pendulum swings are the new norm (maybe it's always been the norm).

By the way, we will have a pretty sizable virtual crowd.

Roger Walker

Executive Director - REGFORM

573.415.7699

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Below is a list of topics that consistently came up. This list is NOT designed to disrupt your prepared comments and program updates. I asked what was on people's minds and this is what I have to share. After the list, I took the liberty of providing additional detail (where I felt I had anything worth adding).

A. List of topics.

Overview topic (which intrigues folks for some reason): Interaction between the APCP and Region VII. How you communicate on a day-to-day basis on permitting and enforcement items in particular. The frequency and depth of the communications and maybe a few real examples. Fly on the wall sort of thing to the extent you can.

1. SSM: EPA's new rule and impact

2. Criminal Prosecutions: Are they down at EPA? DNR?

3. SEPs

4. Effective use of Guidance documents: Executive Orders, EPA's new policy, MDNR policy, and why this continues to be a lightning rod issue.

5. Affordable Clean Energy Act Update

6. National Compliance Initiatives in Air Update

    a. HAPs

    b. VOCs

    c. Attainment Areas

    d. Use of ECHO data

    e. Lead

    f. Defeat devices

7. Permit backlog in APCP and how to address

8. SIP backlog

9. NSR Update

    Begin actual construction

    projected emissions calculation

10. SO2 issues

11. Ozone exceedances and process for review

12. Regional Haze

13. Covid 19 Update

    a. inspections, permitting, enforcement impacts

    b. return to office, working in a virtual world

    c. technology

    d. lessons learned

14. Air Fees and federal funding

15. Parent Corporation

16. Using attorneys to lead programs (Meant for David and Dana I guess)

a. Is this a trend?

b. Has your understanding of issues changed?

c. How is the relationship with the I's legal counsel office different?

17. Fugitive emissions. Kendall: I think this was written for you. (see below).

B. Additional Background:

1. SSM

EPA Releases New Guidance on Startup, Shutdown, and Malfunction Provisions in State Regulations

https://www.epa.gov/air-quality-implementation-plans/emissions-during-periods-startup-shutdown-malfunction-ssm (EPA Guidance) (USEPA website (October 9))

https://www.environmentallawandpolicy.com/2020/10/epa-releases-new-guidance-on-startup-shutdown-and-malfunction-provisions-in-state-regulations/#page=1 (Troutman Pepper legal blog)(October 20)

[**Note**: EPA's new SSM guidance, released on October 9, 2020, is the agency's latest effort to resolve a highly contentious issue. The new guidance reverses EPA's 2015 SSM policy, and indicates that SSM exemptions and affirmative defenses may now be permissible in SIPs under certain circumstances. EPA plans to conduct individual notice-and-comment rulemakings for each affected state and anticipates completing its review of all remaining SIPs under the 2015 SIP call by December 31, 2023. While those state-specific rulemakings will constitute final agency action reviewable in the courts, EPA indicates that its new SSM policy is not final agency action and therefore unreviewable.

The practical implications of the new SSM policy will depend on the results of the upcoming election. If the current administration retains office, EPA will stay the course, reevaluating the remaining states on a case-by-case basis. At the end of this effort, it will have effectively dismantled the 2015 SSM SIP call. However, the Agency would still need to defend its state-specific actions, either in the D.C. Circuit or in local circuits if the D.C. Circuit decides to transfer them there, which remains a possibility. If, on the other hand, a Biden administration takes office, the new SSM guidance will presumably be dead on arrival, since the policy it replaces was issued under the Obama administration. If a newly-elected Biden administration wishes to rescind or modify EPA's new guidance, it will have to contend with a recently signed rule imposing a public notice-and-comment process on the issuance, rescission, or reinstatement of agency guidance, which will continue to leave the fate of the remaining SSM provisions highly uncertain for years to come.

2. Criminal Prosecutions.

New Environmental Crimes Project Data Shows That Pollution Prosecutions Plummeted During the First Two Years of the Trump Administration | Environmental Crimes Project Report (October 1)

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3710109 (ECPR Abstract)

https://www.nytimes.com/2020/10/13/climate/pollution-lawsuits-trump-environment.html (New York Times)(October 13)

[**Note**: A University of Michigan School of Law professor who says criminal prosecutions plummeted during President Trump's first two years in office. The October 1st paper was written by the University of Michigan Law School Environmental Law and Policy Program Director David M. Uhlmann and includes 14 years of cases from 2005-2018 which he says shows a 70 percent decrease in Clean Water Act prosecutions under President Trump, as well as a more than 50 percent decrease in Clean Air Act prosecutions. According to an article in "Inside EPA," EPA enforcement chief Susan Bodine says there will be "significant increases" in several agency statistics including criminal cases and Superfund cost recovery, defending the Trump administration's environmental enforcement efforts. "We have completely turned that around -- we increased new cases opened in 2018, we increased them in 2019 . . . and I can tell you that we increased them again in 2020" based on mid-year numbers alone."

3. SEPs

Lawsuit Challenging DOJ Policy on SEPs

https://environblog.jenner.com/corporate_environmental_l/2020/10/lawsuit-filed-challenging-dojs-policy-on-supplemental-environmental-projects.html#page=1 (Jenner & Block legal blog)(October 11)

https://www.gtlaw-environmentalandenergy.com/2020/10/articles/compliance/new-lawsuit-challenges-doj-policy-prohibiting-seps/#page=1 (Greenberg Traurig)(October 14)

[**Note**: Two weeks ago, the Conservation Law Foundation filed a lawsuit challenging a DOJ policy that barred the use of supplemental environmental projects (SEPs) in federal enforcement settlements with private parties. SEPs have been used since the 1980s and typically involve a project intended to provide some tangible environmental or public health benefit that could not necessarily be compelled by the U.S. EPA. You may recall that on March 20 of this year, the DOJ, via Memorandum, announced that it was terminating its policy of allowing companies to agree to perform SEPs in exchange for reductions in civil penalties in environmental enforcement settlements. According to DOJ, the practice of using SEPs in lieu of civil penalties violates the Miscellaneous Receipts Act, a statute that prevents cash from legal settlements being diverted from the Treasury to third parties. As further described in the March 2020 DOJ memorandum, DOJ claims that the SEPs basically substitute payments to third parties for payments to the Treasury, circumventing Congress' Constitutional power of the purse.]

4. Guidance Documents

EPA Rule Establishing Requirements and Procedures for Guidance Documents Will Be Effective November 18

https://www.federalregister.gov/documents/2020/10/19/2020-20519/epa-guidance-administrative-procedures-for-issuance-and-public-petitions (EPA Guidance Document)

https://www.federalregister.gov/documents/2019/10/15/2019-22623/promoting-the-rule-of-law-through-improved-agency-guidance-documents (EO 13891)

https://sidleyenergyblog.sidley.com/epa-rule-establishing-requirements-and-procedures-for-guidance-documents-will-be-effective-november-18/ (Sidley legal blog)

[**Note**: The US Environmental Protection Agency (EPA) has published in the Federal Register a final rule establishing the agency's management of guidance documents consistent with the Executive Order 13891, "Promoting the Rule of Law Through Improved Agency Guidance Documents," which will become effective on November 18. The rule provides a definition of guidance document, establishes general requirements and procedures for guidance documents issued by the agency, and incorporates additional requirements for "significant" guidance. Specifically, the rule establishes a formal process for the public to petition to modify, withdraw, or reinstate a guidance document. EPA must respond to a petition no later than 90 calendar days after receipt of the petition. The public may also participate, in the form of a 30-day comment period, in developing "significant" guidance documents, except in cases of emergency, a statutory requirement, or a court order requiring immediate issuance or for "good cause." Starting on November 18, all "active" guidance documents must appear on the Guidance Portal that EPA opened this past July. The rule provides that a guidance is "active" or "in effect" when EPA "expects to cite, use, or rely upon" the guidance.]

5. Affordable Clean Energy Act Update

David Cozad gave a nice overview at the Gateway Society of Hazardous Waste Materials Managers (GSHMM).

6. National Compliance Initiatives in Air Update.

David Cozad gave a nice overview at the Gateway Society of Hazardous Waste Materials Managers (GSHMM).

7. Permit backlog in APCP and how to address

8. SIP backlog

9. NSR Update

Begin actual construction

projected emissions calculation

Other actions

10. SO2 issues

[**Note**: Looking for highlights here not program overview]

1. Labadie. The MACC unanimously approved the recommendation that the Labadie SO2 area be redesignated as Attainment for 2010 SO2 standard. The area includes portions of Franklin and St. Charles counties in the area surrounding the Ameren Labadie Energy Center. Certified ambient monitoring data for 2017-2019 shows the area is in compliance with the standard, which supports a redesignation to attainment.

2. Round 4 (monitoring).
a. EPA approved MDNR's SO2 Monitoring Plan for Jackson County which is a key step toward redesignation to attainment. The Public Comment period will be open soon.
b. New Madrid area. EPA disapproved in part of the nonattainment recommendation of the APCP and is seeking to expand the SO2 nonattainment boundaries to include the area around the M7M aluminum smelter. EPA Region 7 is required to finalize designations for both areas by December 31, 2020.

11. Ozone exceedances and process for review

Potential "Bump Up" for St. Louis nonattainment area for the 2015 Ozone standard.
a. Two monitors in the St. Louis nonattainment area (West Alton and Maryland Heights) this summer had preliminary exceedances of the design value for the 2015 ozone standard for years 2018-2020. Unless the data points are wrong, it looks like the area will see a "bump up" from Marginal nonattainment to Moderate as early as August of 2021. The QC/QA should be completed in the spring of 2021. We asked the obvious question which the APCP will look into: "How did this happen when air quality across the country has been significantly better during COVID-19 and reduced vehicle travel.
b. This will impact required control technology (RACT v. BACT), add an offset requirement for new projects of 1:15 to 1.0, and likely put the brakes on eliminating the I/M program. Early July saw five days with exceedances at 11 different monitors including a fourth highest exceedance of the 2015 standard at Maryland Heights. A few weeks later, the state added one additional exceedance at the West Alton monitor when had a tentative exceedance of the fourth highest exceedance of the 2015 violation.
c. The APCP does NOT expect any impact to boundary determinations as a result of "bump up."
St. Louis Ozone Boundary determinations (2015 Ozone) subject to legal review.
a. While the APCP in a post-MACC conversation indicated to me that they do NOT anticipate a boundary change due to the anticipated "bump up" next year, they are in the process of reviewing and defending ozone boundary determinations for Jefferson and Franklin County as a result of a July D.C. Circuit Court of Appeals decision (*Clean Wisconsin v. EPA*) which issued a ruling against EPA on various ozone boundary determinations including the St. Louis nonattainment boundaries.

b. The court granted petitions for review of several designations including Jefferson County, Missouri, where the petition seeks data supporting EPA's disparate treatment of Boles Township in Franklin County from Jefferson County which the court identifies as similarly situated.

12. Regional Haze

Only impacts a couple of companies in Missouri but some general overview of its purpose and what it might mean in the future as the visibility requirements become increasingly more stringent until 2064 would be good -- especially for the non-EGUs in the audience. It's an odd duck regulatory issue. Someone might explain why some companies spent so much time on this when Missouri (and I assume many states) were well below the glide path for this phase.

13. Covid 19 Update

[**Note 1**: You all have given great updates at other events.]

a. inspections, permitting, enforcement impacts

b. return to office, working in a virtual world

c. technology

d. lessons learned

[**Note 2**: How is MDNR and EPA conducting inspections in the COVID-19 era? How do the agencies plan to conduct inspections going forward? During a recent inspection (in another state) the inspector was on-site for a quick tour and then he later provided us with a list of documents we were to email him. He issued a final inspection report after the brief inspection and review of emailed documents. Is the new normal even post-COVID?]

14. Air Fees and federal funding

[Note: REGFORM continues to support the recommended fee structure ($53/ton for 2021 - based on 2020 emissions) and $55/ton thereafter. We have concerns about continuing federal funding. We recommended a "Base Fee" and excluding exempt sources. We recognize the continuing threat to funding and see this also as a threat to managing a successful program. We have not been shy about saying so. I doubt you want to get into that hornet's nest but a summary of where we are and the timeline would be helpful.

15. Parent Corporation.

[**Note**: I don't know how many this impacts, but a quick overview of the issue and potential resolution would be helpful.

16. Using attorneys to lead programs (meant for David and Dana I guess) .

[**Note**: Is this a trend to use attorneys in management? Has your understanding of issues changed? How is the relationship with the I's legal counsel office different?]

17. Fugitive emissions. Kendall question

[Note: Has there been any relaxation on counting fugitive emissions in the Operating Permit or Construction Permit Programs?

Do fugitive PM emissions count toward determination as to whether or not new construction needs a Construction Permit? Essentially is there a de minimis standard or exception?

Does it depend on the industry being permitted?

Does it matter if the installation is installing a piece of portable equipment such as conveyors or crushers? .

If the only emissions from these units are fugitive emissions, and they are mobile in use, if the PM is counted it means that a company needs a 15 month lead time in order to allow for a permit process before it can use the equipment. Opportunities often come and go in very quickly. Equipment can be obtained from brokers very quickly and may be needed far faster than the permitting process allows. While there is the option within the program to have a "preconstruction prohibition waiver" it helps to know how to count the emissions prior to applying for this waiver.

All the best. Don't hesitate to call or email.

Roger Walker

573/415/7699