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EPA Proposes to Amend the Site Remediation NESHAP to Remove the Exemption for Site Remediation Activities Performed under CERCLA and RCRA

Summary: *On May 13, 2016, EPA proposed to amend several provisions of the National Emission Standards for Hazardous Air Pollutants (NESHAPs): Site Remediation. The Site Remediation Rule currently exempts from hazardous air pollutant standards remediation activities performed under the authority of CERCLA and those conducted under a RCRA corrective action or other required RCRA order. EPA is proposing to remove the CERCLA/RCRA exemption and to remove the applicability requirement that a site remediation must be co-located with a facility that is regulated by other NESHAPs in order to be subject to the Site Remediation Rule. Comments are due June 27, 2016.*

Overview

On May 13, 2016, the U.S. Environmental Protection Agency (“EPA” or “Agency”) proposed (“Proposed Rule”) to amend several provisions of the National Emission Standards for Hazardous Air Pollutants (“NESHAP”): Site Remediation (hereinafter “Site Remediation Rule”). 81 Fed. Reg. 29821 (May 13, 2016). The Site Remediation Rule, which was issued pursuant to EPA’s authority under Section 112 of the Clean Air Act and finalized in 2003, currently exempts from hazardous air pollutant (“HAP”) standards remediation activities performed under the authority of Comprehensive Environmental Response, Compensation, and Liability Act (“CERCLA”) and those conducted under a Resource Conservation and Recovery Act (“RCRA”) corrective action or other required RCRA order (“CERCLA/RCRA exemption”).

EPA first proposes to amend the Site Remediation Rule by removing the CERCLA/RCRA exemption for site remediation activities for both new and existing “major” sources—meaning that all site cleanups conducted under CERCLA and RCRA that meet the applicability thresholds would become subject to all applicable requirements of the Site Remediation Rule. Second, EPA is also proposing to remove the applicability requirement that a site remediation must be co-located with a facility that is regulated by other NESHAPs in order to be subject to the Site Remediation Rule. In other words, under EPA’s proposal, site remediation activities that are themselves “major” sources of HAP would be subject to the requirements of the Site Remediation Rule independent of

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whether the remediation was co-located with another facility subject to another NESHAP, such as the NESHAP for integrated iron and steel manufacturing facilities.

Proposed Changes to the Existing Site Remediation Rule

Removal of CERCLA/RCRA Exemption

Removing the CERCLA/RCRA exemption would subject “major source” sites that clean up remediation material containing 1 megagram per year or more of certain organic HAPs to the requirements of the Site Remediation Rule. A source is “major” if it emits more than 10 tons per year (“tpy”) of any one HAP or 25 tpy of any combination of HAPs. These requirements include emissions controls and/or work practice standards for three types of emission points: process vents; remediation material management units (tanks, containers, surface impoundments, oil/water separators, organic/water separators, drain systems); and equipment leaks. Sites would be required to demonstrate initial and continuous compliance with the emission limits and work practice standards, and would also be subject to monitoring, recordkeeping, and reporting requirements.

EPA provided only a sentence or two in the Proposed Rule discussing its rationale for the change. EPA claims that the CAA requires that once a source category is listed under CAA Section 112(c)(1)—as site remediation is—the Agency is required to establish emissions standards for the source category. This is a reversal of the Agency’s position in 2003, when it exempted site remediation activities performed under CERCLA/RCRA authority from the NESHAP because it determined that provisions under the CERCLA and RCRA cleanup programs were “functional equivalents” to the requirements of the NESHAP under the Clean Air Act. EPA stated that it based its determination on the fact that the same HAPs were regulated under the CERCLA and RCRA programs, which also provided a process for public involvement.

EPA received a petition for reconsideration from environmental organizations in 2003, arguing that the public lacked the opportunity to comment on the rationale for exempting site cleanups in the final Site Remediation Rule. In 2015, EPA granted reconsideration on this issue and is now proposing to remove the site remediation exemption from the Site Remediation Rule “[u]pon further consideration and re-evaluation” of these arguments. EPA reports that its settlement agreement with petitioners requires EPA to take final action by November 30, 2016.

Removal of the Co-Location Requirement

EPA is also proposing to remove the requirement that facilities are only subject to the Site Remediation Rule if they are co-located with a facility that is regulated by another NESHAP (i.e., by a separate subpart under 40 CFR part 63). This means that a site that would itself qualify as a major source of HAP will be subject to the requirements (emission limits and work practice standards, and monitoring, recordkeeping, and reporting) of the Site Remediation Rule.

Metals or Other Inorganic HAP Regulation Not Addressed

The final Site Remediation Rule did not regulate metal or other inorganic HAP because of the low potential for emissions of these chemicals from site remediation activities. In this action, EPA is not addressing whether it has a duty—as environmental petitioners argued in their 2003 petition for reconsideration—to set standards for heavy metal HAP emissions from site remediation activities. EPA reports that it signed a recent settlement agreement with the 2003 petitioners promising to act on this issue when it issues a proposed rule presenting the risk and technology review (RTR) for the Site Remediation source category.

Potential Impact of the Proposal

EPA does not anticipate any HAP emission reductions as a result of the Proposed Rule. Thus, based on EPA’s analysis, the most likely impact of the new rule will be recordkeeping and reporting obligations for regulated entities. EPA notes that the types of businesses most likely to be subject to the rule include, but are not limited to, organic liquid storage terminals, petroleum refineries, chemical manufacturing facilities, government facilities such as military operations, and manufacturing facilities using organic materials. EPA estimates that removing the CERCLA/RCRA exemption will make an additional 69 major source facilities subject to the Site Remediation Rule.

For an EPA-estimated 24 (of the 69) major source facilities, the new recordkeeping will require documentation that the Site Remediation Rule's requirements do not apply. These are facilities with less than 1 megagram per year of organic HAPs. The emissions requirements and work practice standards in the Site Remediation Rule will apply only to facilities that are 1) considered "major,"; and 2) that clean up remediation material containing 1 megagram per year or more of certain organic HAPs.

For the remaining 45 facilities (where the annual quantity of HAP in the removed material is 1 megagram or more), EPA anticipates that they will be subject only to added record-keeping and reporting, because either the facilities already meet the applicable emission control or work practice standards and therefore will not be required to install additional controls, or that the requirements will not apply because the contaminated materials are shipped offsite for treatment, in which case no controls are required. If any of EPA's factual assertions and assumptions above are wrong, industry should consider filing comments.

Proposed Compliance Dates

Under the Proposed Rule, new sources would be required to comply with the substantive requirements (i.e., the emission limits and work practice standards) for process vents, remediation material management units, and equipment leaks on the effective date of the finalization of the Proposed Rule removing the CERCLA/RCRA exemption. Existing sources would have 18 months from the effective date of the of the finalization of the Proposed Rule to comply. New sources are those that commenced construction or reconstruction after May 13 -- the date the proposed rule was published in the Federal Register. EPA is proposing to make the recordkeeping and reporting requirements for both new and existing sources apply on the effective date of the final rule removing the CERCLA/RCRA exemption.

EPA Request for Comment

EPA has requested comment only on the removal of the: 1) CERCLA/RCRA exemption; and 2) co-location applicability requirement. Comments are due on or before June 27, 2016.

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