Subpart W Quarterly Stakeholder Conference Call
January 5, 2017

ATTENDEES

EPA: Dan Schultheisz, Tony Nesky (ORIA)
Sonja Rodman, Emily Seidman (OGC)

Environmental/Tribal Groups: Sarah Fields, Uranium Watch; Travis Stills, Energy and Conservation Law; Jennifer Thurston, INFORM; Scott Clow, Ute Mountain Ute Tribe

Industry: Janet Schlueter, Nuclear Energy Institute

Other Government: Doug Mandeville, Nuclear Regulatory Commission

UPDATE

Dan Schultheisz announced that the Administrator had signed the final Subpart W rule on Tuesday, December 20. An email was sent to the Subpart W stakeholder list on the day of signature. A pre-publication version is posted on EPA's Subpart W rulemaking website, along with some supporting documents (BID/EIA and response to comments). Other supporting documents, such as interactions during the OMB interagency review process, are in the rulemaking docket and will be available to the public for viewing when the final rule is published in the Federal Register. EPA anticipates publication shortly, most likely during the week of January 9. (Update: EPA has been informed that publication is scheduled for Tuesday, January 17.)

Signature of the final rule represents EPA's final decision, which concludes the settlement agreement. This will be the last stakeholder call held under the terms of that agreement. The rulemaking activity page will be maintained. The rulemaking is concluded. We are prepared for legal challenge to the final rule, but that is separate from the settlement agreement.

DISCUSSION

Travis Stills: I have a couple of questions. First, when does EPA anticipate posting the non-privileged records that have not yet been posted for the last six months? At this point, we would not consider records related to OMB review to be privileged and should see the complete docket. I am not going to discuss litigation on this call.

Dan: I'm glad you raised that. We have posted records through August. We are behind, which is completely my fault, and are working to have the remaining records posted very soon. December may lag a bit because of holiday schedules.

Travis: I appreciate your taking the responsibility, but this is a systemic issue that has been a continual problem. I will state that I consider EPA to be in breach of the settlement agreement and I would appreciate a phone call from your attorneys.

Sonja Rodman: This is the first that I have heard of claims that EPA is breaching the settlement agreement. The Agency takes these agreements very seriously and we have made every effort to comply with the terms of this agreement. It has been a very busy time getting the final rule out and working other issues such as the 40 CFR part 192 rulemaking.

Travis: Your response shows the problem. If you had done your research and due diligence, you would know that the Agency has consistently let this lapse unless we push back.

Sonja: I would like to discuss this in a separate call with you.

[Sonja and Travis agreed to a call on Friday, January 6. In that call, EPA explained that it planned to post all non-privileged records at least through November by Friday, January 13. EPA posted all records through December on Thursday, January 12.]

Jennifer Thurston: I don't understand how an EPA lawyer can claim to be hearing about this for the first time.

Sonja: I have been aware of concerns regarding timely posting of records. This is the first time I have heard a claim that EPA is in breach of the settlement agreement. The Agency takes these agreements very seriously.

Jennifer: I have not been on all the calls, but when I have been on, this issue has been raised. This is just symptomatic of how EPA has approached this rule and its entire radiation program. This rule has been the ugly stepchild, and the final rule is a disappointment. It has been mishandled. And the part 192 rule is off topic, but we are very disappointed.

Sarah Fields: I have heard some talk that after publication in the Federal Register, Congress can overturn the rule and it can't be re-issued. What happens if that occurs? What happens to the settlement agreement?

Dan: You are referring to the Congressional Review Act. Under the CRA, Congress has sixty working days in which it can vote to have a rule vacated. If the President approves, the rule is vacated and the issuing agency is prevented from taking an action that is "substantially similar." That term has not really been defined in case law. We don't think it likely that Subpart W will be something that the incoming Congress will focus on. If that did happen, it would be as though the rulemaking had not taken place. The 1989 rule would remain in place. I don't know how the settlement agreement would be affected. I will leave that to our general counsel.

Sonja: I would like to correct one thing. It would not be as though the rulemaking had not taken place. However, this situation has only occurred once, for an ergonomics rule. It is mostly new ground. We are hopeful it won't happen.

Jennifer: Can you address the ginormous loophole in the final rule for heap leach facilities? Also, please explain how EPA issued a permit for the Piñon Ridge mill in Colorado, which hasn't yet

been built, before the rule was final, and how EPA can ignore the continuing problems at the White Mesa mill?

Dan: We proposed to regulate heap leach piles under Subpart W from the beginning of processing. We also discussed the alternate view that heap leach piles should not be regulated while they are being processed to extract uranium. We got quite a few comments from industry supporting that view. We also got quite a few comments supporting the proposed approach, including some from Sarah and others that wanted to regulate piles even before they begin processing. After considering these comments, we concluded that a heap leach pile that is being processed is like a conventional mill in the sense that Subpart W has not been applied to the milling activity itself, even though byproduct material is being generated that emits radon. Subpart W also does not apply to heap leach piles that are in closure. A number of comments from industry stated that heap leach piles enter into closure immediately after processing concludes. One of the things we wanted to accomplish with this rule was to clarify the issue of closure. The final rule requires a licensee to notify EPA and NRC that the impoundment or pile is being operated in accordance with an approved reclamation plan. So if a heap leach pile is to enter closure, it must have an approved reclamation plan. If it does not enter closure immediately after processing concludes, the pile will be subject to Subpart W. We believe this will encourage timely closure of piles. Regarding the Piñon Ridge project, EPA Region 8 provided approvals related to NESHAPs and the information we have indicates that the facility will meet the requirements of the final rule, which are now designated as GACT management practices. We understand there have been issues with the White Mesa mill and the number of operating impoundments. This is an enforcement issue. The Ute Mountain Ute and other groups have had meetings with Region 8 and the State of Utah that have not been entirely satisfying. With this final rule, we are clarifying the status of conventional and non-conventional impoundments in a way that should resolve that question.

Jennifer: Are you going to begin stronger enforcement of these facilities? For example, the Sweetwater mill has been in standby for 35 years and its impoundment is out of compliance.

Dan: I'm not sure what you mean when you say it is out of compliance. It is being monitored and is meeting the standard, based on the information we have.

Jennifer: The actual size of the impoundment is not consistent with what is in the permit. Shootaring is also not up to snuff.

Dan: Thank you. We will look into that to find out more.

Jennifer: I appreciate that you will look into it. But the larger concern is that with this final rule nothing is changing and enforcement is not being taken seriously. The final rule is disappointing and shocking. You have spent 7 or 8 years on this rule and nothing is better.

Dan: I understand your feeling that way. We think the final rule does improve the situation by clarifying the status of non-conventional impoundments and when closure begins. But I think this process has highlighted enforcement issues and it will be important to ensure that the rule is enforced in the future. We do not like hearing that EPA's rules are not being enforced.

Sarah: I agree with Jennifer about the final rule. We submitted data to show that the radon emissions from liquid impoundments were above the standard and EPA has not addressed this in the final rule. EPA's contractor, SC&A, came up with a liquid impoundment emissions formula, based on radium content in the liquid, that could be used for White Mesa, using site-specific factors. EPA issued Section 114 letters to White Mesa requesting information on radium in the liquid impoundments and the facility did not respond. EPA should go back to get that information and cite them for not providing the information. But there is plenty of evidence that the radon emissions are much higher than 20 pCi/m^2-sec, and EPA just seems to have let the issue go flat. EPA did not consider high radon emissions because of high radium content. Another issue is the lack of monitoring for new impoundments, like at Piñon Ridge or in the future at Shootaring Canyon. This is an abomination. You can't rely on a size restriction of 40 acres to limit radon emissions. What happens when they start drying out? Is there no requirement for monitoring during drying out? Without a requirement for monitoring, they will never put clean material on the surface to control radon emissions.

Dan: Let me first address the emissions from liquid impoundments. We considered these comments and the data that was provided, and included an extensive response to these comments in the preamble to the final rule. If you look at the pre-publication version posted on our website, this discussion begins on page 85. I won't go into the details here, but ask you to read that to see how it addresses your concerns. Regarding the new impoundments, we evaluated the work practices that were established in the 1989 rule for conventional impoundments constructed after that time, and we concluded that they are effective in limiting radon emissions. The size limitation was not tied to the radon flux standard that applies to older impoundments. The size limitation reduces the overall radon emissions by limiting the exposed area. We recognize that radon emissions will increase when the impoundments are drying out in preparation for installing a cover. Subpart W does not apply to impoundments during the closure process. One purpose of this rulemaking was to clarify when closure begins, and Subpart W no longer applies. When the impoundment is in the closure process, NRC requirements apply, pursuant to the MOU between NRC and EPA.

Sarah: Well, I hope you get a big pat on the back from the new administration, based on your general ability to give industry the benefit of the doubt, instead of giving the public the benefit of the doubt.

Travis: How many deaths will this rule be responsible for? How many incidents of cancer will be caused? Both the 1986 and 1989 rules included estimates of deaths. I didn't see any in this rule. You should take this personally. This is something that you ignored in your abstract and technical explanation. There are decent people who respond to those estimates of deaths.

Scott Clow: I have a comment and a question. These are related to Cell 2 and Cell 3 at White Mesa. Cell 2 was not declared to be in closure for a decade or more after it stopped receiving material. It had minimal cover and was dewatering until the radon flux exceeded 20 pCi/m^2-sec. The facility blamed that on Utah for speeding up the dewatering. We are watching this from the other side of the fence and thinking the facility and state know how this works, but this goes on for some time and then the state just says oh, by the way, it's in closure. It needs to be very clear

about closure. And with the Cell 3 violations, the faith in the industry is inappropriate. How are two 40-acre impoundments that are not managed any better than an 80-acre impoundment?

Dan: As I said earlier, one of the important things to accomplish with this rulemaking was to clearly establish when closure begins and Subpart W no longer applies. We agree with your concern about that. We received one comment from Energy Fuels to the effect that one of the impoundments "could" be considered to be in closure. We don't think there should be any question about whether the impoundment is in closure.

Scott: Did EPA assess what state regulators are doing about radon flux exceedances?

Dan: No, that was not considered in this rulemaking. We are aware of the meetings involving Region 8, the State of Utah, and the Tribe regarding enforcement at White Mesa, though.

Scott: I have another question. Did EPA have a consultation with industry while the rule was being developed?

Dan: We met with industry during the summer, I believe it was July 27. In the docket for this rulemaking, there is a summary of the meeting and the handout that was provided. It was a couple of people from Energy Fuels, along with Tony Thompson and Chris Pugsley. They requested a meeting and essentially went over the comments they had provided on the proposed rule. We listened and asked some clarifying questions. This is the type of meeting that can be requested by any stakeholder.

Scott: This is of concern to us because we have been denied a second consultation by EPA. We have communicated with the Administrator and Janet McCabe, and spoken to a number of people at EPA, including the Office of Tribal Affairs, and been denied. One of the Tribal attorneys was at EPA headquarters meeting with the General Counsel and was not able to have a discussion about Subpart W. You know we were not happy with the first consultation. We had provided a number of detailed questions and had a conference call in advance of the consultation, then found that our questions were not going to be answered. There were things said to the Chairman that have not been borne out. So we were not happy to hear that EPA is consulting with industry.

Dan: I have to take issue with your characterization. EPA has not denied the Tribe additional consultation. What we have said, what Janet McCabe has said, in response to both requests for a second consultation, is that we would be unable to respond in detail to the Tribe's questions until the rule is final, because up to that point, things are subject to change. So if the Tribe's purpose is to get answers to those questions, a second consultation that takes place after the rule is final will be the most productive. I know that sounds counterintuitive, to have consultation on a rule that has already been issued. But we have always taken the position that the Agency is open to a second consultation. I understand that you were not satisfied by the first consultation meeting. I was on a conference call with you earlier in the year, before Reid [Rosnick] retired, after EPA responded to the Tribe's second request for additional consultation, where this position was stated. My recollection is that you understood that, and we have not heard an additional request since then. I can't comment on meetings that Tribal attorneys had with our General Counsel's

office. But if the Chairman believes that EPA made commitments or representations that have not been met, I would encourage you to follow up on those. We take Tribal consultation very seriously and would not want the Tribe to believe it has been denied that opportunity. I will also say that Tribal consultation is a much more formal, high-level interaction than was the meeting we had with industry, and I would not compare the two.

Travis: Did the approach to heap leach piles in the final rule come from this industry meeting? The piles at Maybell and Durita sat for years. Did you consider performance of those earlier heap leach operations?

Dan: No. Our conclusion on heap leach piles grew from internal discussions, not from meetings with industry. As I said earlier, we concluded that heap leach piles should not be subject to Subpart W while they are being processed, and Subpart W does not apply if the pile is in closure. If the pile goes directly into closure after processing, then it should never be subject to Subpart W. Then we asked, what if it doesn't go directly into closure, as industry represents? We don't want to have heap leach piles not doing anything besides emitting radon. So the final rule contains provisions to address heap leach piles after processing and before entering closure. This is not the most elegant construction, but it should encourage timely closure and provides at least some prospect of exercising Subpart W oversight if need be. We did not examine the earlier heap leach operations in detail, but are aware of them.

Travis: No, instead you relied on your least-trained staffer, Phil Egidi, to get information from people in Colorado.

Dan: Yes, Phil asked some questions about the earlier activities. At one point, Cotter proposed a heap leach operation, but that is not going to happen.

Travis: That's a CYA for Phil, since he has some responsibility for those earlier failures.

No Further Comments

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