MEMBER COMPANIES

Bayer CropScience
Clean Harbors Environmental Services
Eastman Chemical Company
Formosa Plastics Corporation, USA
Heritage Thermal Services
INV Nylon Chemicals Americas, LLC
Ross Incineration Services, Inc.
The Dow Chemical Company
Veolia ES Technical Solutions, LLC
Westlake US 2, LLC

GENERATOR MEMBERS

Eli Lilly and Company
3M

ASSOCIATE MEMBERS

AECOM
ALL4 LLC
Alliance Source Testing LLC
B3 Systems
Civil & Environmental Consultants, Inc.
Coterie Environmental, LLC
Envitech, Inc.
Eurofins TestAmerica
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
Montrose Environmental Group, Inc.
Ramboll
Spectrum Environmental Solutions LLC
Strata-G, LLC
TEConsulting, LLC
Trinity Consultants
W.L. Gore and Associated, Inc.
Wood, PLC

INDIVIDUAL MEMBERS

Ronald E. Bastian, PE
Ronald O. Kagel, PhD

ACADEMIC MEMBERS
(Includes faculty from:)

Clarkson University
Colorado School of Mines
Lamar University
Louisiana State University
Mississippi State University
New Jersey Institute of Technology
University of California – Berkeley
University of Dayton
University of Kentucky
University of Maryland
University of Utah

43330 Junction Plaza, Suite 164-641
Ashburn, VA 20147

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

September 24, 2024

U. S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attn: Docket ID No. EPA-HQ-OAR-2004-0022

The Coalition for Responsible Waste Incineration (CRWI) appreciates the opportunity to submit comments on the *National Emission Standards for Hazardous Air Pollutants from Hazardous Waste Combustors Malfunction and Electronic Reporting Amendments*; Proposed rule. 89 FR 59,867 (July 24, 2024). CRWI is a trade association comprised of 30 members representing companies that own and operate hazardous waste combustors and companies that provide equipment and services to the combustion industry.

CRWI's specific comments are attached.

Thank you for the opportunity to submit these comments. If you have any questions, please contact me at (703-431-7343 or mel@crwi.org).

Sincerely yours,

Melvin E. Keener, Ph.D.
Executive Director

cc: R. Smoak, EPA

SUMMARY OF CRWI'S COMMENTS

The Coalition for Responsible Waste Incineration (CRWI) opposes the Environmental Protection Agency's (EPA) proposal to remove the malfunction provisions from 40 CFR Part 63 Subpart EEE. As discussed below, the unique automatic waste feed cutoff (AWFCO) provisions coupled with startup, shutdown, and malfunction plan (SSMP) provisions of Subpart EEE assure continuous compliance, and hence are consistent with *Sierra Club v EPA*, 551 F.3d 1019 (D.C. Cir. 2008). Moreover, a malfunction provision is required in this regulation – as EPA itself has stated on numerous occasions (including in its hazardous waste combustor (HWC) maximum achievable control technology (MACT) rulemaking), "[t]echnology is imperfect and can malfunction for reasons that are not reasonably preventable. The regulations **must** provide relief for such situations."[1] (emphasis added). Even the best performing sources will have malfunctions, and failing to allow for such occurrences makes a MACT standard unachievable and in violation of Section 112 of the Clean Air Act (CAA). Accordingly, CRWI requests that EPA withdraw this part of the proposal.

In addition, EPA notes in the preamble to the proposal that it is not proposing changes to the emission limits of the HWC MACT even though it is removing the malfunction exemption, citing the D.C. Circuit's decision in *U.S. Sugar* as supporting legal authority.[2] CRWI opposes this decision. As discussed below, *U.S. Sugar* is no longer good authority after the Supreme Court's opinion in *Loper Bright,* and, if EPA rejects our comments and withdraws the malfunction provisions of Subpart EEE, the Agency must also revise the emission limits to accommodate the incorporation of malfunctions into operating limits of Subpart EEE.

Alternatively, with certain modification set forth below, the AWFCO and SSMP provisions could satisfy the requirements for work practice standards under Section 112(h), and EPA could recharacterize them as such in order to comply with the requirement of Section 112 that the standards be achievable.

Finally, CRWI sets forth below additional comments and suggested modifications to several other proposed changes.

BACKGROUND AND RATIONALE FOR CRWI'S MALFUNCTION COMMENTS

We set forth below the background and rationale for CRWI's opposition to EPA's proposal to withdraw the malfunction provisions from the HWC MACT.

---

[1] 70 FR 59,402, 59,494, October 12, 2005
[2] 89 FR 59,870

1. September 1999 HWC MACT Rule

In its September 30, 1999 final MACT rule for HWCs,[3] EPA included startup, shutdown, and malfunction provisions. The provisions only applied, however, when hazardous waste was not in the combustion chamber. EPA argued that restricting the exemption in this manner would protect against industry "gaming the system" to avoid violations. Industry challenged this position, primarily arguing that it made the provisions non-achievable, and thus in violation of CAA Section 112(b)(3). In its brief in the D.C. Circuit on this issue, industry argued:

> Section 112 technology-based MACT standards must be "achievable." This Court has held that "achievable" means able to be achieved under the worst reasonably foreseeable circumstances. Because all technologies will fail on occasion, courts have held that technology-based standards must contain defenses to noncompliance for such failures. EPA's disallowance of the use of SSMPs when hazardous waste is in the combustion chamber, and EPA's characterization of ESV openings as evidence of violations, renders the rule "unachievable."[4]

2. D.C. Circuit's decision in *Cement Kiln Recycling Coal. v. E.P.A.*, 255 F.3d 855 (D.C. Cir. 2001)(CKRC)

In its decision in the litigation challenging various aspects of the HWC MACT rule, the court did not make a final decision on the SSM issue, but rather held:

> Here, in contrast, we have chosen not to reach the bulk of industry petitioners' claims, and leaving the regulations in place during remand would ignore petitioners' potentially meritorious challenges. For example, industry petitioners may be correct that EPA should have exempted HWCs from regulatory limits during periods of startup, shutdown, and malfunction, permitting sources to return to compliance by following the steps of a startup, shutdown, and malfunction plan filed with the Agency. We have similar doubts about EPA's decision to require sources to comply with standards even during openings of emergency safety valves caused by events beyond the sources' control.

Id. at 872.

3. EPA's response to *CKRC* – AWFCO and SSMP Provisions in the 2005 HWC NESHAP rule

In response to the *CKRC* decision, EPA included SSM provisions in the 2005 final HWC MACT rule. In the preamble to the rule, EPA expressed agreement with commenters "who state that sources **must** be exempt from technology-based emission standards

[3] 64 FR 52,828
[4] Joint initial brief of industry petitioners at 88, *CKRC* 99-1457, submitted August 16, 2000.

and operating limits during startup, shutdown and malfunction events."[5] (emphasis added). EPA explained its rationale as follows:

> Technology is imperfect and can malfunction for reasons that are not reasonably preventable. The regulations **must** provide relief for such situations. We believe that existing case law supports this position. *See, e.g. Chemical Mfr's Assn. v, EPA*, 870 F.2d at 228-230 (daily maximum limitations established at 99th percentile reasonable because rules also provide for upset defense for unavoidable exceedances); *Marathon Oil v. EPA*, 541 F.2d qt 1272-73 (acknowledged by commenter). As commenters noted, the DC Circuit intimated in CKRC that some type of exception from compliance with standards during startup, shutdown and malfunction periods was required.

Id. (emphasis added).

In response to comments that emissions can increase during malfunctions and potentially exceed the standards, EPA agreed that any exceedances caused by malfunctions must be minimized and noted that the rule required that sources maintain compliance with the automatic waste feed cutoff system during malfunctions, as described below. *Id.*

In the preamble to the July 2024 proposed rule,[6] the Agency stated "Although no statutory language compels the EPA to set different standards for periods of malfunction, we have the discretion to do so where feasible."[7] CRWI agrees. In fact, the Agency already has a regulatory requirement in 40 CRF Part 63 Subpart EEE to minimize emissions when malfunctions occur. This is the AWFCO requirement.[8] Each facility is required to have a "functioning system that immediately and automatically cuts off the hazardous waste feed" when any operating parameter limit, any emission standard monitored by a CEMs, or the allowable combustion chamber pressure is exceeded. This also applies if the span for any continuous monitoring system is exceeded or fails or when the AWFCO system fails. There is also a requirement to investigate the cause of the AWFCO should the event cause an exceedance of any emission limit and take corrective measures to prevent future incidents.[9] In addition to semi-annual reporting of excess emissions, additional reporting is required for a facility that has more than 10 exceedances of emission limits while hazardous waste is in the chamber in a 60-day period.[10] This system has been a requirement since the first HWC MACT regulations were promulgated in 1999.[11]

---

[5] 70 FR 59,494
[6] 89 FR 59,867
[7] 89 FR 59,870
[8] 40 CFR 63.1206(c)(3)
[9] 40 CFR 63.1206(c)(3)(v)
[10] 40 CFR 63.1206(c)(3)(vi)
[11] 64 FR 52,828, September 30, 1999

An AWFCO will minimize emissions because the source of emissions from a HWC is the hazardous waste feed, and by shutting off the feed, the facility removes the source of potential emissions. A good analogy is how responders handle a leak. The first step is to stop the leak. Once the leak has been stopped, the responders can deal with cleaning up a spill. This is the same process performed by the AWFCO requirement. When an event occurs, the first thing the facility does is shut off waste feed. While it may take time for some of the waste to work its way through some units (a rotary kiln may take an hour while a liquid incinerator may only take seconds), the facility has done what it can to minimize emissions during the event. This system has been in place and been functioning properly for 25 years.

4. D.C. Circuit Opinion in *Sierra Club v EPA*

As EPA discusses in the preamble to the July 2024 proposed rule, in 2008 the D.C. Circuit decided *Sierra Club v EPA*, 551 F.3d 1019 (D.C. Cir. 2008). It is very important for purposes of the malfunction provisions of Subpart EEE to understand precisely what the D.C. Circuit decided and did not decide in this case. The court vacated two provisions of the **NESHAP general provisions** that exempted sources from compliance with certain substantive emission limits during malfunctions, holding that those general provisions violated the Clean Air Act requirement that "some Section 112 standard apply continuously." *Id.* at 1021. The court noted that it was bound to follow precedent establishing that challenges to EPA's interpretation of the Clean Air Act are governed by *Chevron v. NRDC, 467 U.S. 837* (1984). *Id.* at 1026. The court cited legislative history to support its holding that compliance with a Section 112 standard must be continuous, as opposed to "intermittent." *Id.* at 1027. The court rejected the argument that Section 112's "general duty" clause (requiring sources to operate at all times, including periods of startup, shutdown, and malfunctions (SSM), consistent with good air pollution practices for minimizing emissions) required continuous compliance:

> Because the general duty clause is the only standard that applies during SSM events – and accordingly no section 112 standard governs these events – the SSM exemption violates the CAA's requirement that **some** section 112 standard apply continuously.

Id at 1028 (emphasis added). It is critical for our purposes to note what the court did not address in this case – **it did not address SSM provisions under any particular NESHAP such as the HWC MACT**. The opinion is not, therefore, determinative in any way of whether SSM provisions **of Subpart EEE** violate the requirement that "some" Section 112 standard apply continuously. CRWI does not dispute the court's legal conclusion that some limits must apply at all times under Section 112. As discussed above, the AWFCO and SSMP provisions of Subpart EEE **are provisions that apply continuously**, and therefore they are perfectly consistent with the *Sierra Club* opinion.

The court noted that the original 1994 SSM regulations contained four key provisions that, working together, were sufficient to prevent the SSM exemption from becoming a "blanket" exemption":

> To avoid creating a "blanket exemption from emission limits," EPA's 1994 rule required that (1) sources comply with their SSM plans during periods of SSM; (2) SSM plans be reviewed and approved by permitting authorities like any other applicable requirement; (3) SSM plans be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; and (4) SSM plan provisions be directly enforceable requirements. 59 Fed. Reg. at 12423 []. In the rulemakings challenged here, however, EPA has eliminated all of these safeguards. SSM plans are no longer enforceable requirements, and EPA has expressly retracted the requirement that sources comply with them. 71 Fed. Reg. at 20447 []. EPA also has eliminated any requirement that SSM plans be vetted for adequacy and any opportunity for citizens to see or object to them.

Id. at 1025.

The problem, the court held, is that EPA had over the years, eliminated these four "cornerstones." *Id.* But, it is clear that EPA believed that if the SSMP provisions contained these cornerstones, it would satisfy the Clean Air Act requirement of continuous compliance. Quoting EPA, the court stated:

> The EPA believes, as it did at proposal, that the requirement for a[n] [SSM] plan is a reasonable bridge between the difficulty associated with determining compliance with an emission standard during these events and a blanket exemption from emission limits. The purpose of the plan is for the source to demonstrate how it will do its reasonable best to maintain compliance with standards, even during [SSMs]."

Id. at 1026.

Finally, the *Sierra Club* court noted that EPA had not purported to defend the general duty provision under Section 112(h), which provides that EPA can promulgate alternative "work practice" standards in lieu of numerical emission limits if it was not feasible in the Administrator's judgment to issue such numerical standards. *Id.* So, the court demonstrated that it was comfortable with the principle that work practices are acceptable as long as they demonstrate continuous compliance with Section 112. The AWFCO is not a work practice. It is an independent regulatory requirement of Subpart EEE. But the AWFCO serves the same purpose as a work practice – it restricts emissions of HAPs through a requirement that is not a number. But it nonetheless restricts emissions continuously, and, therefore, it is consistent with *Sierra Club.*

5. EPA's July 24, 2024 Proposal to Remove the Malfunction Provisions from Subpart EEE

In the proposal under review here, EPA made it clear that it was removing the malfunction provision from Subpart EEE solely on the basis of its legal interpretation that the *Sierra Club* opinion required it to do so. That interpretation is wrong for the following reasons.

- The malfunction provisions of Subpart EEE – the AWFCO and SSMP – require continuous compliance, and therefore they are lawful under *Sierra Club.*
- *Sierra Club* only addressed the general provisions of Part 63. It did not address the specific provisions of Subpart EEE, so it is not on point.
- The fact that the malfunction provisions of Subpart EEE are not numerical emission limits but rather operational requirements does not disqualify them. They are lawful as long as they require continuous compliance with the standard, which they do.
- If EPA disagrees with our analysis and remains inclined to interpret *Sierra Club* as requiring the vacatur of Subpart EEE's malfunction provisions after the Supreme Court's recent opinion in *Loper Bright*, it is now decidedly a court that must determine whether that legal conclusion is arbitrary and capricious. *Sierra Club* specifically relied on *Chevron* for its analysis, and *Chevron* is no longer good law.

EPA states in the preamble to the proposed rule that it has interpreted Section 112 as not requiring emissions that occur during periods of malfunction to be factored into development of Section 112 standards. EPA claims that that interpretation has been upheld by the D.C. Circuit in *U.S. Sugar v EPA*, 831 F.3d 579, 606-610 (D.C. Cir. 2016). That was indeed the holding of the *U.S. Sugar* case, but the D.C. Circuit in that case specifically relied on deference to EPA under *Chevron*, holding that its only responsibility was to determine whether EPA's legal theory was a "permissible" one. The Supreme Court has now overruled *Chevron*, and hence it is now a court's responsibility to determine whether it is a lawful interpretation of Section 112 for EPA to exclude malfunctions in determining whether a Section 112 standards is "achievable." 112(d)(3). We submit that it is not, and that, if EPA removes the malfunction exemption, it must revise the HWC MACT standards accordingly. To be clear, CRWI is not challenging the principle from the *Sierra Club* opinion that some limit must apply at all times. Rather, as set forth below, CRWI is simply demonstrating that the SSMP/AWFCO provisions of Subpart EEE meet the cornerstones that EPA has itself said provide for effective continuous compliance with Section 112, and hence they are lawful.

Finally, EPA has argued that generic operational or work practice standards for malfunction are not feasible because they would have to apply in a wide range of circumstances that cannot be determined in advance. The *US Sugar* court stated:

> Second, the Petitioners have not demonstrated and the EPA does not concede that setting work-practice or GACT management-practice standards would even be feasible for periods of malfunction. As for work-practice standards, the EPA would have to conceive of a standard that could apply equally to the wide range of possible boiler malfunctions, ranging from an explosion to minor mechanical defects. Any possible standard is likely to be hopelessly generic to govern such a wide array of circumstances. Similar problems exist for setting GACT management practices. These management practices would also need to apply to the wide range of possible malfunctions, and the EPA would need to determine that the standard would "reduce emissions of hazardous air pollutants," an evidence-based standard that is difficult (perhaps impossible) to apply to the unpredictable circumstances of malfunctions. 42 U.S.C. § 7412(d)(5). Thus, we reject the Industry Petitioners' argument that the EPA was required to set a work-practice or GACT management-practice standard for malfunction periods.

U.S. Sugar v EPA, 831 F.3d 579, 608-09 (D.C. Cir. 2016).

The "hopelessly generic" problem does not apply to the AWFCO provision of the HWC MACT. As described above, that provision is a generic response to all malfunctions for HWCs. It is continuous and meets the CAA requirements to minimize emissions.

6. <u>The current SSMP/AWFCO requirements meet Clean Air Act requirements that some standards apply at all times.</u>

Hazardous waste combustors conduct a comprehensive performance test every five years to show they are in compliance with the applicable regulations. During that test, they set operational limits that must be complied with at all time when hazardous waste is in the combustion chamber. If any operating parameter or directly measured emission limit is exceeded, the unit must shut off waste feed and is not allowed to restart waste feed until those operating parameters are back into their allowable range. Should a unit decide to continue to operate outside their operating parameter limits (OPL) as established during their latest comprehensive performance test, this would be a violation subject to enforcement.

To reiterate, according to the *Sierra Club* opinion, SSM plans, as promulgated in 1994, had four "cornerstones:"

- Sources must comply with their SSM plans during periods of SSM;
- SSM plans must be reviewed and approved by permitting authorities like any other applicable requirement;
- SSM plans must be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; and
- SSM plan provisions must be contain enforceable requirements.

Subpart EEE sources already have provisions that meet all of these cornerstones with one exception. We discuss each in turn and offer a solution to resolve the exception.

The underlying concept is that HWCs cannot operate outside their permit limits. Anytime a permit limit is exceeded under any circumstances, the unit is required to automatically shut off hazardous waste feed. This system is integrated into the operating system.[12] Continuing to feed hazardous waste when outside of the facility's permit conditions is a violation.

The SSMP provisions in EEE are at 40 CFR 63.1206(c)(2)

- Sources must comply with their SSM plans during periods of SSM. An exceedance of an emission standard monitored by a CEMS or COMS or operating limit specified under § 63.1209 is not a violation of this subpart if you take the corrective measures as prescribed in the startup, shutdown, and malfunction plan.[13] If you do not follow your SSMP and an exceedance occurs, it is a violation subject to enforcement. In addition, EEE sources are required to follow the SSMP provisions in 63.6(e)(3).[14] The General Provisions allow a facility to deviate from their SSMP under certain circumstances but must correct the plan after the event. The automatic waste feed cutoff requirements continue to apply during a malfunction.[15]

- SSM plans must be reviewed and approved by permitting authorities like any other applicable requirement. SSMPs are required to be included in the operating record.[16] These are available for review and inspection by the permitting authority. A facility is only required to submit the SSMP if the facility wishes to remove the air provisions from their RCRA permit.[17] In most cases, these plans are submitted because the facility has elected to remove the air provisions from their RCRA permit. Even if the facility has not submitted the SSMP, CRWI does not object to a provision to submit.

- SSM plans must be unconditionally available to the public, which could participate in evaluating their adequacy in the permit approval process; Right now, this is not directly included in EEE. However, if the SSMP has been submitted to the permitting authority, it becomes a public document and the public can request a copy. In some cases, there are CBI in the SSMPs. It is the

[12] 40 CFR 63.1206(c)(3)(i)
[13] 40 CFR 63.1206(c)(2)(v)(A)(*2*)
[14] 40 CFR 63.1206(c)(2)(i)
[15] 40 CFR 63.1206(c)(2)(v)(A)(1)
[16] 40 CFR 63.1206(c)(2)(iv)
[17] 40 CFR 63.1206(c)(2)(ii)(B)

responsibility of the facility to designate CBI. Every permitting authority already has procedures in place for dealing with CBI.

- SSM plan provisions must contain enforceable requirements. Under EEE, the unit must automatically shut off hazardous waste feed when any event that causes an exceedance of a OPL or a CEMs requirement occurs.[18] This is an enforceable regulatory requirement.

In addition, EEE requires that

> If, after any AWFCO, there is an exceedance of an emission standard or operating requirement, irrespective of whether the exceedance occurred while hazardous waste remained in the combustion chamber (i.e., whether the hazardous waste residence time has transpired since the hazardous waste feed cutoff system was activated), you must investigate the cause of the AWFCO, take appropriate corrective measures to minimize future AWFCOs, and record the findings and corrective measures in the operating record.[19]

Excess emissions are reported semiannually.

In addition, there are two different reporting requirements around excess emissions. The first pertains to operating under the SSMP. Here the requirement pertains to excess emissions during malfunctions.

> Excessive exceedances during malfunctions. For each set of 10 exceedances of an emission standard or operating requirement while hazardous waste remains in the combustion chamber (i.e., when the hazardous waste residence time has not transpired since the hazardous waste feed was cutoff) during a 60-day block period, you must:
> (i) Within 45 days of the 10th exceedance, complete an investigation of the cause of each exceedance and evaluation of approaches to minimize the frequency, duration, and severity of each exceedance, and revise the startup, shutdown, and malfunction plan as warranted by the evaluation to minimize the frequency, duration, and severity of each exceedance; and
> (ii) Record the results of the investigation and evaluation in the operating record, and include a summary of the investigation and evaluation, and any changes to the startup, shutdown, and malfunction plan, in the excess emissions report required under § 63.10(e)(3).[20]

[18] 40 CFR 63.1206(c)(3)
[19] 40 CFR 63.1206(c)(3)(v)
[20] 40 CFR 63.1206(c)(2)(v)(A)(3)

The second pertains to the requirements for the automatic waste feed cutoff provisions.

> For each set of 10 exceedances of an emission standard or operating requirement while hazardous waste remains in the combustion chamber (i.e., when the hazardous waste residence time has not transpired since the hazardous waste feed was cutoff) during a 60-day block period, you must submit to the Administrator a written report within 5 calendar days of the 10th exceedance documenting the exceedances and results of the investigation and corrective measures taken.[21]

In sum, current Subpart EEE requirements meet all of the cornerstones for effective assurance of continuous compliance with Section 112 that EPA laid out in its original SSMP regulations in 1994 with one exception – a universal requirement to submit an SSMP to the permitting authority. CRWI does not oppose adding such a provision.

7. AWFCO as a work practice

While an AWFCO is currently a regulatory requirement, it could also meet the key requirement for a work practice standard – that it is not feasible to prescribe a numerical emission limit. Section 112(h)(2) of the Clean Air Act defines "not feasible" to mean any situation in which the Administrator determines that hazardous air pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or when the application of measurement methodology to a particular class of sources is not practical due to technological and economic limitations. EPA and industry do not have data on emissions during transitory periods. 40 CFR 63.1207(g)(1)(iii) requires facilities to be in steady state during testing. This eliminates any reason to start a test during any transitory period. If an upset (malfunction) occurs during testing, that test run is aborted and restarted when the unit is returned to steady state. Not only are there no data available during non-steady state conditions, it is virtually impossible to meet the requirements of four of the test methods (5, 23, 26A, and 29) required under the rule because they require isokinetic sampling. Isokinetic sampling ensures the method does not produce a biased result. Sub-isokinetic sampling would bias results low. Super-isokinetic sampling would bias the results high. Under constantly changing conditions, it would be virtually impossible to meet the isokinetic sampling criterion. If that criterion is not met, the sampling run cannot be used.

Even if it could be met, it would be impossible to interpret the data and use that data to set numeric emission limits. An infinite set of possible scenarios would be needed to get a "representative" sample. Said differently, although it may be possible to get a number during transitory periods, it would be impossible to interpret what that number

[21] 40 CFR 63.1206(c)(3)(vi)(A)

means. Thus, it is technologically infeasible as defined in the statute to develop data during startup, shutdown, and malfunctions. For hazardous waste combustors, it is not possible to test emissions during malfunction periods as the testing requires steady state operations, and, due to certain isokinetic requirements it is virtually impossible to meet the requirements of any of the test methods that could be used here. Hence, it is not feasible to prescribe a numerical emission limit during malfunctions and the prerequisites for issuing a work practice standard are met.

As stated earlier, CRWI believes that removing the current malfunction provisions without replacing it with a work practice would create a regulation that is unachievable. As the Agency has stated on numerous occasions – all technologies fail. Should EPA reject our comments and withdraw the malfunction provisions of Part 63 Subpart EEE, CRWI urges the Agency to recognize the current regulatory requirements governing malfunctions (including AWFCOs) as a work practice.

TECHNICAL COMMENTS

A malfunction that does not result in an exceedance of an emission limit is not a violation

The Agency is proposing to remove paragraph 40 CFR 63.1206(c)(2)(v)(A)(2) in its entirety. Should the Agency do this in the final rule, CRWI is concerned that it might lead to confusion on whether all malfunctions are considered as violations. To alleviate this potential confusion, CRWI suggests that the strikeout language in the redline/strikeout document in the docket for 40 CFR 63.1206(c)(2)(v)(A)(2) be replaced by the following language

> *(2) Although the automatic waste feed cutoff requirements continue to apply during a malfunction, an AWFCO not resulting in an exceedance of an emission standard monitored by a CEMS or COMS is not a violation of this subpart.*

Definition of postmark

CRWI supports the proposed modification to the definition of “postmark,” but suggests that it be expanded to include commercial delivery services. While the majority of reports will be filed electronically, some may still be mailed or sent to the permitting agency using a commercial delivery service. The definition should also include the date when the commercial delivery service accepts the package. This is analogous to a postmark from the U.S. Post Office.

Removing requirement for administrator’s approval for Method 23

EPA is proposing to remove paragraph (63.1207(f)(1)(xv) that requires Administrator approval for using Method 23. CRWI supports this proposed change. As the preamble notes, this requirement was inadvertently left in the regulations.

Electronic reporting requirements

CRWI does not oppose the overall concept of requiring electronic reporting of performance test results. However, we are concerned that the currently proposed language for 40 CFR 63.1211(f) could be interpreted to require every relative accuracy test audit (RATA) to be submitted electronically. The Appendix of EEE requires that a RATA be conducted at least annually. There is no regulatory requirement to report annual RATAs. However, paragraph 40 CFR 63.1210(d) requires facilities to follow 40 CFR 63.9(h) when completing a Notification of Compliance. Paragraph 40 CFR 63.9(h)(2)(i)(B) requires that such a notice include "The results of any performance tests, opacity or visible emission observations, continuous monitoring system (CMS) performance evaluations, and/or other monitoring procedures or methods that were conducted;…" This would include a RATA. CRWI's believes that it was the Agency's intent to require the submittal of the RATA as a part of any performance test in the proposed language for 40 CFR 63.1211(f) but is concerned that it could be read to include the submittal of all RATAs. We see the need to include RATAs associated with performance test as a part of the reporting package but see no need for annual RATA's not associated with performance testing to be reported. Those RATAs are currently included in the operating record and are available for inspection by the permitting authority. This has worked for 25 years and we see no reason for it to change. CRWI suggests that the Agency revise the propose language in 40 CFR 63.1211(f) to make it clear that this provision only applies to RATAs completed in association with performance testing.

Normally, the electronic reporting system works and reports can be submitted within the timeframe allowed. However, there are times when the system malfunctions and reports cannot be submitted on time. EPA has made provisions for this in 40 CFR 63.9(k) and the Agency is proposing that all of 63.9(k) apply to EEE sources. This includes outages of the electronic system and force majeure. CRWI supports this modification.

CRWI members have experienced issues with the Compliance and Emissions Data Reporting Interface (CEDRI) not allowing files to be uploaded. It is our understanding that currently CEDRI only allows one attachment. Some files created by HWCs get massive and present difficulties when uploading unless broken into smaller sets. For example, one member's most recent comprehensive performance test report was 4,052 pages and as almost 77 megabytes as a PDF. If separated, it was a main report (1 megabyte as PDF) and eight appendices ranging from 192 kilobytes to 24 megabytes (as PDF). CRWI suggests that CEDRI be modified to allow for multiple files if that is not already allowed.

In addition, the current regulations[22] allow a facility to request an extension of the 90 day reporting requirement for performance tests. Proposed paragraph 40 CFR 63.1211(f) does not explicitly allow for any extensions. CRWI suggests the Agency further modify this paragraph (f) to allow for extensions using the same criteria as in 40 CFR 63.1207(j)(4).

Finally, EPA is proposing to allow 180 days from the date of the final rule for compliance with the electronic reporting requirements other than performance test and performance evaluation through the EPA's Central Data Exchange (CDX) using the CEDRI. Due to the complexity of the Periodic Report and the time needed to properly train personnel on the use of the new report forms and reporting system, CRWI requests EPA to allow one year or once the reporting template for the subpart has been available on the CEDRI website for 1-year, whichever date is later.

Time to come into compliance with malfunctions removal

Should the Agency remove the malfunction provisions as proposed, CRWI believes that facilities will require at least a year to be able to come into compliance. The removal of the malfunction exemption from the requirements to meet the standard during those periods and the addition of electronic reporting will necessitate reading and understanding these new requirements, evaluation of operations to ensure the new provisions are met, and to make necessary adjustments to standard operating procedures and other adjustments, as necessary. Facilities will need to modify their operation and maintenance plans, operator training programs, and others to create new Standard Operating Procedures. Operators and personnel will need to be trained on these new plans This will take time. Section 40 CFR 63.1206(c)(6)(vi) requires every operator to complete an annual review or refresher courses. The facility will need at least a year just in case that operator refresher course has just been completed.

Considering the timeframe needed to come into compliance with the removed malfunction exemptions in this final rule, CRWI requests EPA to allow one year instead of 180 days as proposed after the effective date of the final rule to be the most expeditious compliance period practicable.

Should a facility decide that additional equipment is required to meet the revised requirements, this timetable will be stretched even further. In the 1999 and 2005 rules, facilities were allowed three years to come into compliance. Since malfunctions, by definition, are not reasonably preventable, facilities may choose to take extraordinary measures to prevent malfunctions. For example, some malfunctions are caused by loss of utilities. This can include water, natural gas, and/or electrical power. Resolving these issues require a much longer time frame. CRWI suggest that if the Agency removes the malfunction provisions, they create a process where the facility can submit a site-specific plan that is approved by the permitting authority to add or modify existing

[22] 40 CFR 63.1207(j)(4)

equipment. This request should include the justification for the modifications and/or equipment added and a proposed timetable to complete the work. If no plan is submitted, the facility would be expected to come into compliance within a year.

Removal of ESV opening exemptions

EPA is proposing to modify the emergency safety vent (ESV) provisions in 40 CFR 63.1206(c)(4)(i) to make all openings while hazardous waste is still in the system as a violation if the facility cannot show that it maintained compliance with numerical emission limits. This has always been the case if that opening was due to a non-malfunction event. This proposed change would remove the protection for the facility if an event beyond their control occurs (e.g., loss of power to an ID fan, etc.) that results in excess emissions. CRWI opposes this modification. CRWI would also like to point out that the court in *CKRC* also addressed ESV openings where it said:

> We have similar doubts about EPA's decision to require sources to comply with standards even during openings of emergency safety valves caused by events beyond the sources' control.[23]

This was the reason the Agency wrote the requirements in 40 CFR 63.1206(c)(4)(i) the way they did in the 2005 rule.

CRWI would like to remind the Agency that ESV openings are a safety issue. Failure to open ESVs during certain events could result in catastrophic failure that would risk human lives and extensive equipment damage. Any ESV opening that is caused by an operator error or poor maintenance should be addressed as an enforcement issue. However, when that event is due to something beyond the control of the facility (e.g., power failures, failure of equipment even though it is properly maintained, etc.) results in an ESV opening, it does not seem fair to penalize the facility for preventing a potentially larger impact on the environment. CRWI would like to point out that like other malfunctions, a hazardous waste combustor source is required to shut off waste any time an ESV opening occurs. Even though untreated air is released into the environment, the facility has done what it can to minimize emissions during this event.

While CRWI opposes the modification of the provisions in 40 CFR 63.1206(c)(4)(i), should the Agency choose to proceed as proposed, we would like to point out that in two recently promulgated rules, EPA has allowed for site-specific work practices for certain safety-related shutdowns. For example, in the 2020 plywood RTR final rule,[24] EPA makes the following statement.

> The EPA has determined that work practices are appropriate during safety-related shutdowns in the PCWP industry because facilities cannot capture and convey HAP

[23] *CKRC* at 872
[24] 85 FR 49,434, August 13, 2020

> emissions to a control device during these periods for safety reasons. The control device could serve as an ignition source if there is an upset in the oxygen concentration or buildup of other combustibles in the PCWP process or exhaust gas collection system (e.g., combustible gas, condensed pitch on ductwork if moisture-laden gases in the system are allowed to cool, or wood dust) due to various conditions (e.g., if PCWP process equipment or pneumatic conveying systems become plugged). If there are sparks or fire in the PCWP process unit, conveyance, or the control device, the equipment could be damaged if exhaust continues to be routed from the PCWP process unit to the control device. A PCWP dryer or control device may experience an overtemperature condition indicative of a fire and triggering rapid equipment isolation. Thus, conveying emissions from the PCWP process unit to the control device is not technically feasible during safety-related shutdowns.[25]

The rule goes on to set up a definition of a safety-related shutdown and sets up a site-specific work practice to cover this type of event.

> The final work practice requires facilities to follow documented site-specific procedures such as use of automated controls or other measures developed to protect workers and equipment to ensure that the flow of raw materials (such as furnish or resin) and fuel or process heat (as applicable) ceases and that material is removed from the process unit(s) as expeditiously as possible given the system design to reduce air emissions.[26]

The work practice for safety-related events is shown in Table 8.

> Follow documented site-specific procedures to ensure the flow of raw materials and fuel or process heat ceases and that material is removed from the process unit(s) as expeditiously as possible given the system design to reduce air emissions.[27]

A second example of work practices for safety-related by-pass of air pollution devices can be found in the Miscellaneous Coating Manufacturing risk and technology review rule.[28] Here the Agency explains.

> Because we are finalizing the revisions to remove the SSM provisions and require compliance at all times, we are also finalizing the revisions to 40 CFR 63.8000(b)(2) so that opening of a safety device to avoid unsafe conditions is considered a deviation, unless it is a bypass of a control for a process vessel and accounted for as specified in 40 CFR 63.8005(h). We are also finalizing the proposed revisions to revise 40 CFR 63.8080(c), which is the provision requiring a record of each time a safety device is opened, to add additional recordkeeping provisions consistent with

[25] 85 FR 49,442
[26] 85 FR 49,443
[27] 85 FR 49,465
[28] 85 FR 49,724, August 14, 2020

those for other deviations. In the event a safety device is opened, the owners or operators will be required to comply with the general duty provision in 40 CFR 63.8000(a) to minimize emissions at all times, and to report and record information related to deviations as specified in 40 CFR 63.8075 and 63.8080, respectively, unless it is a bypass of a control for a process vessel and accounted for as specified in 40 CFR 63.8005(h). [29]

The provisions in 40 CFR 8005(h) are as follows

Bypass. Beginning no later than the compliance date specified in § 63.7995(e), when determining compliance with the percent emission reduction requirements in Table 1 to this subpart, you must account for the time that the control device was bypassed. You must use Equation 1 to this section to determine the allowable total hours of bypass for each semi-annual compliance period. To demonstrate compliance, the actual total hours of bypass must not exceed the allowable total hours of bypass calculated by Equation 1 to this section.

These work practices are defined in 40 CFR 63.8080(c)

(c) Before the compliance date specified in § 63.7995(e), a record of each time a safety device is opened to avoid unsafe conditions in accordance with § 63.8000(b)(2). On and after the compliance date specified in § 63.7995(e), a record of the information in paragraphs (c)(1) through (3) of this section.
(1) The source, nature, and cause of the opening.
(2) The date, time, and duration of the opening.
(3) An estimate of the quantity of total HAP emitted during the opening and the method used for determining this quantity.

For this source category, facilities are allowed to calculate a site-specific work practice to determine when a bypass of the air pollution control system becomes a deviation.

In both of the final rules mentioned above, the Agency set up a work practice for safety-related events. CRWI urges the Agency to do the same for ESV openings should they promulgate this provision as proposed. Given that no work practice standards are proposed in this rulemaking and to add them at this time would not be considered as a logical outgrowth of comments, CRWI suggests that the Agency re-open the rulemaking to gather information to allow them to set work practices for ESV openings.

<u>Reporting requirements</u>

The Agency is proposing to add § 63.1211(a)(1) and § 63.1211(e) which, among other things, would require a facility to estimate the “quantity of each regulated pollutant

[29] 85 FR 49,728

emitted over any emission limit." CRWI is not sure how to make this estimate but if the Agency finalizes this rule with this provision, we suggest adding the following provision.

In order to include "an estimate of the quantity of each regulated pollutant emitted over any emission limit", one must calculate that quantity emitted. Once a facility has made that calculation, the Agency should allow the facility to present these results to show that while an operating parameter limit was exceeded, the pollutants emitted did not exceed the numerical emission limits for that pollutant. CRWI suggests that, in this case, the "exceedance" of the operating parameter limit should not be counted as a an "exceedance" of a numerical emission limit. Some examples of where this could be the case are as follows.

- A minimum pressure drop for a high energy wet scrubber is exceeded (i.e. below the minimum) for 10 minutes before the hazardous waste clears the combustion chamber. After calculations estimating the impact of metals system removal efficiency due to the scrubber problem, and the actual metals being fed during the event, the source may be able to show that no metals emission limits were exceeded.
- Any instrument failure that causes an AWFCO due to "bad value" or integrating bad values into an hourly rolling average (HRA).
- An AWFCO due to scrubber flowrate liquid-gas ratio dipping below the HRA OPL for a few minutes while a plugged nozzle is cleaned, when:
    - The system's chlorine feed rate is much lower than the max comprehensive performance test (CPT) chlorine feed rate; and
    - The measured CPT chlorine emissions at high chlorine feeds were less than 5% of the emissions standard.
- An AWFCO due to stack flow jumping up above the hourly rolling average for a few minutes due to an airlock door stuck open, when:
    - System feeds of ash, chlorine, metals, etc. are much less than the max feeds demonstrated in a CPT; and
    - There are no carbon monoxide/total hydrocarbon spikes, or other any indicators of poor combustion.

To accomplish this, the Agency would need to modify 40 CFR 63.1206(c)(1)(iii) to allow for this calculation to show that a numerical emission limit was not exceeded.

<u>Possible typographical errors</u>

EPA is proposing to modify the requirements related to 40 CFR 63.10 in Table 1. The proposed modification in the redline/strikeout version of the regulations contains a reference to § 63.20(b)(2)(i). § 63.20 does not exist. CRWI believes this is a typo and suggests that it be corrected.

EPA is proposing to add paragraph (4) to 40 CFR 63.1209(f). The redline/strikeout version of the regulation simply adds paragraph (4). It should remove the "and" at the end of paragraph (3), remove the "." at the end of paragraph (3), and insert "; and"

Periodic reporting under 40 CFR 63.10(e)(3)(v)

Based on the redline/strikeout version of the regulatory language as provided in the docket, EEE sources are required to comply with the provisions of 40 CFR 63.10(e) except for § 63.20(b)(2)(i) and (ii) and § 63.10(b)(2)(iv)(B). The provisions in § 63.10(e)(3)(v) require that "Written reports of excess emissions or exceedances of process or control system parameters shall include all the information required in paragraphs (c)(5) through (c)(13) of this section…" Paragraph (c)(7) requires the specific identification of each period of excess emission that occurs during periods of malfunctions. Should the Agency remove the malfunction provisions, there would be no reason to report malfunctions separately from any other deviation. CRWI suggests the Agency revise these provisions and other reporting requirements to remove the requirement to distinguish excess emissions during malfunction.

If the malfunction provisions are removed, the Agency should also remove the 10 in 60 reporting requirement for malfunctions.

If the Agency removes the malfunction provisions in the final rule, they also need to remove 40 CFR 63.1206(c)(2)(v)(3). This paragraph requires reporting of excess exceedances during malfunctions. If the malfunction provisions are removed from 40 CFR Part 63, Subpart EEE, there is no need for these provisions. Any exceedances during malfunctions will be counted as a regular exceedance, and those already have a 10 in 60 day reporting requirement under 63.1206(c)(3)(vi). CRWI suggests that if the malfunction provisions are removed, paragraph 40 CFR 63.1206(c)(2)(v)(3) also be removed.