



CRWI Update
March 31, 2020

MEMBER COMPANIES

Clean Harbors Environmental Services
Eastman Chemical Company
Heritage Thermal Services
INVISTA S.à.r.l.
3M
Ross Incineration Services, Inc.
The Dow Chemical Company
Veolia ES Technical Services, LLC

GENERATOR MEMBERS

Eli Lilly and Company
Formosa Plastics Corporation, USA

ASSOCIATE MEMBERS

AECOM
Alliance Source Testing LLC
B3 Systems
Civil & Environmental Consultants, Inc.
Coterie Environmental, LLC
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
Montrose Environmental Group, Inc.
Ramboll
Spectrum Environmental Solutions LLC
Strata-G, LLC
SYA/Trinity Consultants
TEConsulting, LLC
TestAmerica Laboratories, Inc.
TRC Environmental Corporation
W. L. Gore and Associates, 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

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PFAS

In January, New York state released guidelines for sampling and analysis of per- and polyfluoroalkyl substances (PFAS) under their environmental remediation program. The program requires that any soil being imported as a cover be tested for PFAS compounds. A copy of the guidance can be found at http://www.dec.ny.gov/docs/remediation_hudson_pdf/pfassampanaly.pdf.

In March, the Department of Defense (DOD) issued a progress report of their PFAS task force. The report states that there is no fluorine free aqueous film forming foam that will meet military specifications but that the Department is investing \$49 million through FY 2025 to develop a substitute. DOD has provided \$30 million and will add another \$10 million to the Agency for Toxic Substances and Disease Registry to conduct exposure assessments at eight current and former military sites and to conduct a multi-site health study. Cleaning up contaminated sites at and around military bases will likely continue for up to 30 years. The goal that no one (on- or off-base) will be consuming water that has higher than 70 ppt perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) concentrations where DoD is the known source. They anticipate this will cost over \$3 billion. The task force is also evaluating whether to develop guidance on disposal methods for media containing PFAS, methods to handle discharges containing PFAS, and how to handle biosolids and sludges containing PFAS.

On March 10, 2020, EPA published a request for comments on a preliminary determination to regulate PFOA and PFOS under the Safe Drinking Water Act. In the same notice, EPA decided not to regulate 1,1-dichloroethane, acetochlor, methyl bromide, metolachlor, nitrobenzene, and Royal Demolition Explosive (RDX) under this statute. The comment period closes on May 11, 2020.

EPA enforcement discretion memo

On March 26, 2020, EPA's Office of Enforcement and Compliance Assurance released a temporary policy on enforcement activities as they relate to the COVID-19 pandemic. The effective date for the policy was retroactive to March 13, 2020, and will extend until withdrawn. This is a temporary policy intended to allow enforcement discretion should a facility not be able to meet their requirements due to the pandemic. EPA believes the revised policy is necessary because of the potential shortage of workers due to the travel and social distancing restrictions. These shortages of personnel may impact operations, contractors, and the ability of laboratories to timely analyze and report results. It may affect reporting and milestones set by settlement agreements and consent decrees. It may also impact the facility's ability to meet enforceable limits. The policy does not apply to criminal activity (willful violations), Superfund or RCRA Corrective Action enforcement instruments, or imports (specifically mentions import of pesticides).

Enforcement discretion is conditioned on the facility making every effort to comply and if they are unable to comply, they must:

- Act responsibly to minimize the effects and duration of any non-compliance;
- Identify the specific nature and dates of the non-compliance;
- Identify how COVID-19 was the cause of non-compliance, the decisions and actions taken in response, including best efforts to come back into compliance at the earlier convenience;
- Return to compliance as soon as possible; and
- Document all information, actions, and or conditions during the process.

In the memo, EPA gives a number of examples of specific activities where discretion may be used. Activities that do not require social distancing (e.g., on-line training courses) are not included. The memo suggests using force majeure provisions for administrative settlement agreements and consent decrees. Any failures of emission controls that may result in an exceedance should be reported. Entities still have the responsibility to prevent, respond to, and report accidental releases as required. Certain missed reports (frequency less than 3 months) do not need to be made up at a later date. Late semiannual and annual reports should be submitted as soon as possible.

If generators of hazardous waste are unable to transfer waste off-site within the time periods permitted under RCRA, they should continue to properly label and store each waste and document why this is occurring. If these steps are met, the facilities will remain as generators, not TSDFs. Very Small Quantity Generators and Small Quantity Generators will not be bumped up if the accumulation is due to COVID-19.

EPA IG enforcement report

On March 31, 2020, EPA's Office of Inspector General released a report on enforcement activities for years 2006 through 2018. The executive summary states that all enforcement metrics have declined for that time period. The declines range from 33% for inspections to 58% for enforcement actions with injunctive relief. While the statistics are correct, this summary is somewhat misleading. If one look at the graphs presented in the report, you get a slightly different picture. For example, the number of inspections increased from 2006 until 2010 and have steadily declined since 2010. The enforcement case initiations and conclusions have steadily declined since 2006. The amounts of injunctive relief for smaller enforcements (less than \$1 billion) have remained essentially flat during the time period. This is also true of smaller (less than \$1 million) civil penalties. It should be noted that this time period covers three administrations. A copy of the report can be found at <https://www.epa.gov/office-inspector-general/oig-reports>.

DOJ eliminates SEPs

On March 12, 2020, the Department of Justice (DOJ) issued a memo that the use of supplemental environmental projects (SEP) violates the provisions of the Miscellaneous Receipts Act. This act requires that all federal officials receiving funds on the behalf of the United States deposit those funds in the U.S. Treasury. By definition, SEPs are money spent locally as a part of a settlement agreement. DOJ has ruled that the Agency does not have the discretion to allow the use of funds from a settlement agreement to fund local projects. Those funds must be deposited into the Treasury. While this memo only applies to settlements with civil penalties, EPA is taking steps to extend this policy to administrative settlements. This memo is the culmination of a series of steps the Trump Administration has taken to limit the use of SEPs. A copy can be obtained from CRWI.

Civil inspection final rule

On March 2, 2020, EPA codified on-site civil inspection procedures. These are found in 40 CFR Part 31.1. This rule is in response to E.O. 13892 which requires transparency and fairness in enforcement. It puts into regulations the process EPA will use in conducting on-site civil inspections. It does not apply to the investigation of environmental crimes. Inspections now have the following provisions:

- Inspections should generally take place during normal business hours;
- EPA inspectors must hold valid credentials to perform an inspection;
- Upon arrival at the facility, the inspector must present their credentials and request permission to enter;

- Inspectors should not sign any statement limiting EPA's use of the information gathered during the inspection;
- The inspection should begin with an opening conference (objectives of the inspection, request records, etc.) where practicable;
- Inspectors will generally document their observations with photos and notes;
- Inspectors shall handle all confidential business information per 40 CFR part 2, subpart B;
- If interviews of company personnel are conducted, the inspector should document names, dates, and times these interviews were conducted;
- The inspector may request copies (physical or electronic) of records relevant to the inspection;
- The inspector may take samples where appropriate; if samples are taken, the inspector shall offer the facility the opportunity to obtain split samples or take duplicate samples; and
- The inspector shall offer a closing conference if appropriate.

After the inspection, the Agency will share the report with the facility. These requirements became effective on March 2, 2020.

RTR final rules

EPA had court-ordered deadlines to finalize a number of risk and technology (RTR) rules in March. They made most of them. They asked for and received an extension of the deadlines for the Miscellaneous Organic NESHAP (MON) and the iron and steel final rules. Both are expected to be released in late May. The majority of those completed were published with no changes in the numeric standards due to either risk or technology reviews. All removed startup, shutdown, and malfunction (SSM) provisions and added electronic reporting of performance test results. Below is a list of the final rules and when they were published in the *Federal Register*.

<u>Rule</u>	<u>Date</u>
Combustion turbines	March 9
Asphalt roofing	March 12
Vegetable oils	March 18
Plastic composites	March 20
Municipal solid waste landfills	March 26

In addition, the organic liquid distribution final rule was signed on March 12. It follows the same pattern in not changing numeric standards due to either risk or technology, removing SSM provision, and adding electronic reporting. However, in the proposed rule under the technology review, EPA considered adding flare requirements, fence line

monitoring requirements, and leak and detection repair provisions for connectors. In the final rule, none of these were added.

MATS reconsideration petition decision

In the 2014 Mercury and Air Toxic Standards (MATS) rule, EPA finalized two options for startup periods. Environmental groups filed petitions for reconsideration arguing that they did not have an opportunity to comment on one of the two options finalized since it was introduced between proposal and final. EPA denied the petition in 2016, stating that the second option was a logical outgrowth of the proposed rule and adding the option was not of “central relevance to the outcome of the rule.” The petitioners challenge both the decision to deny the petition and the addition of the second startup option. On March 13, 2020, the U.S. Court of Appeals for the District of Columbia Circuit vacated the rule denying the reconsideration petition (*CCAN v. EPA*). The court agreed with the petitioners that the Agency did not allow stakeholders adequate opportunity to comment on the second startup option. However, they did not rule on the merits of the challenge to the second option. Based on the ruling, EPA will now have to grant the petition and re-open the rulemaking process for the second startup option. They are not required to make any changes but will have to go through the process of proposing to add the option and taking comments on that option. The court did not set a timetable for EPA’s response.

RMP litigation

EPA published the amendments to the risk management plan (RMP) rule in December 2019. On the same day it was published, 13 environmental groups challenged the rule. In January, several trade groups filed a petition to intervene on behalf of EPA. Also in January, 14 states, the District of Columbia, and the City of Philadelphia added their challenge to this rule. In February, environmental groups filed three petitions for reconsideration alleging that the Agency substantially modified their rationale for the amendments after the comment period closed. As such, they did not have an opportunity to submit comments on the revised rationale. On March 13, 2020, the petitioners filed a motion with the court asking for a six month stay of the litigation to give the Agency time to act on the petitions for reconsideration. EPA and industry interveners are opposed to this motion.

EPA personnel

Mandy Gunasekara has rejoined EPA as the Chief of Staff for Administrator Wheeler. Ms. Gunasekara left the Agency in 2019 to start an advocacy group. She replaces Ryan Jackson who left to work for the National Mining Association.

On March 11, 2020, the Senate Environment and Public Works Committee held a hearing on the nomination of Doug Benevento to be the next EPA Deputy Administrator. Mr. Benevento is a former Hill staffer who has also served as EPA's Associate Deputy Administrator and the Regional Administrator for Region 8. None of the committee members appeared to oppose the nomination. A date for the committee vote has not been set.

AWMA PFAS conference

The Air and Waste Management Association has announced a PFAS conference for September 15-17, 2020. The conference will be held in Durham, NC. EPA is expected to have a strong presence at the conference. Details can be found at <https://www.awma.org/pfas>.

IT3 conference

The next IT3 conference will be held in West Palm Beach, FL on January 27-28, 2021. Expect a call for papers to come out in the next month. Detail can be found at <https://www.awma.org/conferences>.

CRWI meeting

The next CRWI meeting will be held on May 20-21, 2020, in Fayetteville, NC. It will feature a tour of Chemours' thermal oxidizer. Due to the COVID-19 pandemic, please check with CRWI (703-431-7343 or mel@crwi.org) before making plans to attend.