



CRWI Update October 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

44121 Harry Byrd Highway, Suite 225
Ashburn, VA 20147

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

Test methods final rule

On October 7, 2020, EPA published a final rule correcting and updating a number of regulations associated with source testing. The final rule also contains a number of clarifications on which methods are to be used for compliance. For example, the rule clarifies that the initial and annual performance testing for waste burning kilns and energy recover units under CISWI must be conducted using Method 5 or 29 while continuous compliance must be demonstrated using a PM continuous emissions monitoring system. The final rule makes corrections to Methods 4, 26, and 26A, and Performance Specification 18 as well as for several others. Details can be found in the *Federal Register* notice. This rule becomes effective on December 7, 2020.

Administrative procedure for issuing EPA guidance

On October 19, 2020, EPA published a final rule that implemented Executive Order 13891 requiring agencies to develop regulations on processes and procedures for issuing guidance documents. It creates a new 40 CFR Part 2 Subpart D which defines the processes governing all future significant guidance documents. Guidance documents that are considered to be routine or ministerial or are of limited importance to the public are exempted from these procedures. The rule becomes effective on November 18, 2020. After this date, the Agency can only “cite, use, or rely upon” guidance documents that are in the Portal (<https://www.epa.gov/guidance>). All other guidance documents are considered as rescinded and can only be used to establish historical fact. After November 18, all new significant guidance documents will be posted on the website, a *Federal Register* notice will be published that the document is available, and the public will be given at least 30 days to submit comments. It also sets up a petition process to withdraw, modify, or reinstate a significant guidance document. The Agency is required to respond to a petition within 90 days (with the possibility of a one-time extension of an additional 90 days). If the petition is granted, the revision process will be the same as for a new guidance document. Readers are encouraged to examine the Portal for guidance documents commonly used in the past. If those documents are not included, it may be worthwhile to ask the Agency to reinstate those documents

Major source reclassification final rule

The major source reclassification final rule was signed on October 1, 2020. This rule codifies the 2018 memo that superseded the 1995 “once in, always in” policy. It is not clear why this rule has not yet been published in the *Federal Register*. A copy of the signed version can be found at <https://www.epa.gov/stationary-sources-air-pollution/documentation-reclassification-major-sources-area-sources-under>.

Phosphoric acid production NESHAP

The initial rule setting standards for the phosphoric acid source category was promulgated in 2015. The data used to set the standards came from six units operating at one location. These are the only operational units in the source category. After the rule was promulgated, the operator of the facility submitted additional data showing that the “MACT floor did not accurately reflect the average emission limitations achieved by the units used to set the standards.” On October 29, 2020, EPA Administrator Wheeler signed a final rule modifying the mercury standards based on this information. This final rule should be published in the November 3, 2020, *Federal Register*.

SSM SIP memo

In 2008, the U.S. Court of Appeals for the District of Columbia Circuit ruled (*Sierra Club*) that “the SSM exemption violates the CAA’s requirement that some section 112 standard apply continuously.” In 2015, EPA decided this ruling also applied to state implementation plans (SIP). Based on this interpretation, EPA issued a policy document that did not allow exemptions due to startup, shutdown, or malfunction (SSM) or an affirmative defense in SIPs. Following that policy, the Agency issued findings that the SIPs from 36 states were substantially inadequate to meet the provision of the Clean Air Act and issued a call for the states to revise those plans. This action was challenged in court. In 2017, EPA requested a stay to allow the Agency to review the 2015 policy.

On October 9, 2020, EPA Administrator Wheeler sent a memo to the Regional Administrators on whether and when it is appropriate to include certain types of provisions for SSM events and affirmative defense provisions in SIPs. This replaced the 2015 guidance. EPA has already approved a Texas SIP with affirmative defense provisions and a North Carolina SIP with SSM provisions. They are also proposing to approve an Iowa SIP with SSM provisions. The Agency has decided that each of the remaining 33 SIPs also need to be reviewed in light of the revised guidance memo. The guidance memo is not a final action so it cannot be challenged. The Texas and North Carolina approvals are final actions and are currently being challenged. Should the current administration be re-elected, the Agency will likely defend these positions. Should a new administration be elected, the new policy could be rescinded.

Litigations

As reported earlier, the Agency has completed a number of risk and technology review (RTR) rules in the past three months. Most have been challenged in the courts and the Agency has received petitions for reconsideration. For the steel mill and ethylene production RTR rule challenges, the court has granted motions from EPA to hold these two cases in abeyance while the Agency considers the petitions for reconsideration. Petitions for review and petitions for reconsideration have also been filed for the miscellaneous organic chemicals manufacturing and the lime kiln RTR rules. Petitions for reconsideration suggest that the legal challenges for these two rules will be on the failure to set more stringent standards under the risk review provisions and the failure to set standards for hazardous air pollutants missed in the initial MACT regulations (so called “gap filling”). In other actions, environmental groups have sued EPA for denying their petition for reconsideration of the risk management plan rule and filed a deadline suit to force the Agency to revise rules governing flares. How the Agency responds to these actions will depend upon the election. If Trump is re-elected, the Agency will likely continue to defend these rules. However, if Biden is elected, the Agency may take voluntary remands while they decide how to revise any or all of these rules.

House Energy and Commerce report

On October 28, 2020, the House of Representatives Committee on Energy and Commerce released a report on the Trump Administration’s environmental record. The report outlines steps taken to “roll back nearly 100 critical protections.” Some of these include:

- Repealing the clean power plan;
- Dismantling vehicle fuel efficiency standards;
- Rolling back methane emission requirements;
- Withdrawing from the Paris Climate Accord;
- Modifying the cost-benefit procedures for rulemaking;
- Failing to enforce current environmental rules;
- Reducing EPA staff;
- Suspending environmental justice training;
- Failing to protect communities from ethylene oxide emissions;
- Withdrawing the “once in, always in” policy;
- Failing to protect the water supply from PFAS chemical; and
- Failure to set drinking water standards for perchlorate.

The report can be found at <https://energycommerce.house.gov/newsroom/press-releases/energy-commerce-committee-releases-report-detailing-trump-administration>.

PFAS

The state of North Carolina has filed suit against DuPont and Chemours seeking to recover natural resources and other damages caused by the manufacturing of per- and polyfluoroalkyl substances (PFAS).

The House of Representatives Committee on Oversight and Reform sent a letter (October 21, 2020) to DuPont and Chemours asking for information on the “scope and source of continued PFAS pollution” at the Parkersburg, WV and Circleville, OH facilities. The committee asked for all documents and information related to the current use of perfluorooctanoic acid (PFOA) at the two facilities, use of precursors to PFOA at the two facilities, and the use of PFOA and its precursors at any DuPont or Chemours facility in the United States. In addition, the letter requested answers on how the facilities account for ongoing detection of PFOA at the plants if that compound is no longer used, do the two companies have any legacy stocks of PFOA at either locations, and if they do, how do they plan to dispose of these stocks. The Committee requested a response by November 6, 2020.

Both the House and Senate have passed versions of the FY 2021 National Defense Authorization Act (NDAA) that contain PFAS provisions. Most of the PFAS provisions in the two bills do not overlap. Multiple letters have been sent to the Chairs of the House and Senate Committees suggesting compromises they would like to see in the final legislation. A Senate letter suggested boosting the funding for a five year study on the health effects of PFAS compounds in drinking water, modification of the authority for clean-up projects conducted by the National Guard, conducting market research into suitable aqueous film forming foam (AFFF) substitutes, blood testing for service members stationed at bases contaminated by PFAS compounds, and a study on the effectiveness of personal protective equipment worn by firefighters when using AFFF. A second letter from the state Attorney Generals urged the conferees to include regulation of certain PFAS compounds under CERCLA. A September letter from House members urged the conferees to include a ban on incineration until the Department of Defense fulfills the requirements in the FY 2020 NDAA and a bar on procurement of non-essential items that contain PFAS compounds. The negotiations to rectify the two versions will not begin until after the elections.

EPA office re-opening

Pressure continues from a number of sources to slow down or halt EPA’s efforts to re-open offices. On October 5, 2020, the American Federation of Government Employees sent a letter to EPA Administrator Wheeler detailing concerns over plans to return staff to offices during the COVID pandemic. On October 7, 2020, 44 Democratic House members sent a letter to Administrator Wheeler urging him to halt plans to re-open Region 9 offices. On October 14, 2020, Michigan’s two Senators (both Democrats) sent a letter to Kurt Thiede, the Region 5 Administrator, expressing concerns over re-opening that office. Most EPA’s offices remain in Phase 2 (some staff in the office but telework is allowed).

CRWI meetings

Our November 18-19, 2020, meeting will be virtual. Please contact CRWI (mel@crwi.org or 703-431-7343) if you have interest in attending.