



CRWI Update July 31, 2018

MEMBER COMPANIES

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

GENERATOR MEMBERS

Eli Lilly and Company
Formosa Plastics Corporation, USA

ASSOCIATE MEMBERS

AECOM
Alliance Source Testing LLC
Amec Foster Wheeler PLC
B3 Systems
Burns & McDonnell, Inc.
Coterie Environmental, LLC
Focus Environmental, Inc.
Franklin Engineering Group, Inc.
METCO Environmental, Inc.
O'Brien & Gere
Spectrum Environmental Solutions LLC
Strata-G, LLC
SYA/Trinity Consultants
TestAmerica Laboratories, Inc.
TRC Environmental Corporation

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

Boiler litigation

On March 16, 2018, U.S. Court of Appeals for the District of Columbia Circuit released their decision on the second boiler reconsideration litigation. In this opinion, the court upheld EPA's use of work practices for startup and shutdown but remanded the 130 ppm CO threshold to the Agency for further explanation. Sierra Club filed a petition asking the court to rehear the work practices decision, arguing that the court made three errors. On July 5, 2018, the court denied Sierra Club's petition for rehearing. The court did not give any explanation, simply denying the request. Unless Sierra Club appeals this decision to the Supreme Court, this litigation is completed.

DSW litigation

On May 30, 2018, EPA published a final rule that implemented the U.S. Court of Appeals for the District of Columbia Circuit's decision on the Definition of Solid Waste (DSW) litigation. On June 12, 2018, environmental groups filed a petition for review of this final rule. On July 18, 2018, the groups submitted their non-binding statement of issues for this challenge. All three are on the 2008 transfer-based exclusion that was re-instated by the court decision. The three issues are:

1. Does EPA have the authority to exclude hazardous wastes from the definition of solid waste when such wastes have been discarded (generator relinquishing control and a third party paid to dispose of them)?
2. Are the conditions on which EPA relies upon to exclude the materials in the transfer-based exclusion contrary to RCRA, unreasonable, or arbitrary and capricious because they do not prevent those wastes from being discarded?
3. Is excluding hazardous wastes so that they can be managed in ways that do not meet RCRA standards protective of human health and the environment?

The Agency has yet to respond to this petition.

44121 Harry Byrd Highway, Suite 225
Ashburn, VA 20147

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

Brick MACT decision

On July 6, 2018, the U.S. Court of Appeals for the District of Columbia Circuit published their decision on the challenges to the Brick industry MACT rule. The court granted some of Sierra Club's challenges but denied others. Sierra Club made three challenges to the health based acid gas standards: EPA failed to show that acid gases do not pose a cancer risk; EPA used an inappropriate threshold for non-cancer risks; and EPA failed to provide an ample margin of safety. The court sided with Sierra Club on all three of these challenges. On the cancer risk issue, EPA explained that because there were no significant studies linking acid gas exposure to cancer, acid gases do not pose a cancer risk. The court looked at the same evidence but came to the opposite conclusion – because of the lack of significant studies, EPA did not have sufficient information to conclude that acid gases do not cause cancer. Thus, EPA did not base their decision on substantive evidence and acted unreasonably by concluding that acid gasses pose no cancer risk. On the threshold issue, the court seemed to pick up on a seemingly contradiction where the Agency used “low-confidence” reference concentrations rather than more stringent California Air Resources Board threshold. On the ample margin of safety issue, the court ruled that EPA did not adequately explain why they used numerical emission limits that could result in hazard quotients greater than one. The court did not buy EPA's argument that the conservative estimates built into the modeling effort were adequate to provide an ample margin of safety. All three of these issues were remanded to the Agency for further explanation.

On the use of the upper prediction limit methodology to develop standards with limited datasets, the court upheld EPA's process but remanded five emission limits because the Agency failed to explain the choices made when picking the top performers.

In the final rule, EPA allows facilities to normalize based on three alternatives (tons of bricks produced, pounds per hour, or concentration). The environmental groups argued that this is contrary to the language of the statute, specifically that this did not allow EPA to choose the best performers. EPA argued that it was reasonable to allow sources to select which emissions limit it should meet because sources perform differently. The court disagreed with EPA's reasoning. The court stated that while the Agency has the discretion to subcategorize based on class, type, or size, it does not have the authority to set several different types of metrics to show compliance within a subcategory.

Industry argued that synthetic minor sources should not have been included in the database used to set the emission limits; the Agency failed to properly exclude certain data; the Agency set a standard that requires raw materials substitution to meet the mercury emissions limit; and the Agency improperly including data from an upgraded source when developing standards. The last was primarily a MACT-on-MACT argument. The facility in question was constructed in 2005 to meet the standards in the 2003 rule. It included a scrubber. When the 2003 rule was vacated, the company decommissioned the scrubber and operated the kiln without it. However, the scrubber remained functional and attached. During the data collection portion for the current rule, EPA asked the company to reactivate the scrubber and test while operating the

scrubber. This unit became the top performer for the source category and drove the emission limits lower. Because the company operated the scrubber between 2005 and 2009, the court agreed that it was within EPA's discretion to use data from a re-commissioned scrubber when setting the standard. The court denied all of industry's challenges.

It is unclear at this time whether any party will ask for re-hearing or appeal the rulings. It is also unclear when EPA will address the remands.

Exceptional events decision

In 2016, EPA revised their rules making it easier for states to discount air quality data gathered during "exceptional events" when determining compliance with National Ambient Air Quality Standards (NAAQS) standards. While the rule allows exemptions for natural events, it is not restricted to those events. For example, EPA considers man-made dust on roads as qualifying if that dust is whipped up by a windstorm, as long as the regulators made a reasonable attempt to control that dust. The environmental groups challenged this rule, stating that the wide latitude of the current policy would allow for industrial emissions to qualify for exemptions. On July 20, 2018, the U. S. Court of Appeals for the District of Columbia Circuit sided with EPA and denied the petition. While it is clear that EPA can continue to allow states to exclude certain data when making NAAQS compliance determinations, it is not clear how far this can be used in other "exceptional events."

Portland Cement RTR final rule

EPA published the Portland cement risk and technology review (RTR) final rule on July 25, 2018. This final rule follows the patterns that have been set in recent RTR rules – no additional limitations based on either risk or technology.

RMP comment period extended

On July 24, 2018, EPA extended the comment period on the risk management plan (RMP) proposed rule to August 23, 2018. In addition, the Agency placed the November 2017 version of the RMP database in the docket.

SW-846 update

On July 12, 2018, EPA's Office of Resource Conservation and Recovery announced that Update IV, Phase II of SW-846 was finalized. This update contains two methods (8260D and 8270E) for the analysis of volatile and semi-volatile organic compounds in solid waste and other media. Complete information can be found at <https://www.epa.gov/hw-sw846/sw-846-update-vi-announcements>.

FY 2019 EPA funding

On July 19, 2018, the House of Representatives approved legislation that would reduce EPA's fiscal year (FY) 2019 funding by \$117 million. In addition, the House approved a number of amendments restricting EPA's actions in certain areas. Some of these are:

- Prohibiting the payment of attorney's fees as a part of settlements under the Clean Water Act, the Clean Air Act, and the Endangered Species Act;
- Blocking the enforcement of the methane rule on oil and gas facilities;
- Preventing the use of the social cost of carbon as part of the cost-benefit calculations for any rulemaking; and
- Barring the use of funds to regulate truck trailers.

In June, the Senate approves 2019 funding for EPA that is essentially at the same level as 2018. Now the House and Senate need to develop a compromise funding bill. The Trump Administration criticized both bills for not making deeper cuts in EPA's funding.

Pruitt resigns

EPA Administrator Scott Pruitt resigned on July 5, 2018. President Trump immediately announced that Deputy Administrator Andrew Wheeler would become the acting administrator on July 9, 2018. A number of personnel changes happened rather quickly. Several Pruitt loyalists resigned and Mr. Wheeler hired two pending nominees (Peter Wright, nominee to be the Assistant Administrator for the Office of Land, and Emergency Management and Charles McIntosh, nominee to be the Assistant Administrator for International and Tribal Affairs) to special counsel positions. While federal laws prevent these two from actively overseeing the offices for which they have been nominated, they can advise Mr. Wheeler on specific projects and may work in the offices where they have been nominated. Mr. Wheeler also quickly reached out to EPA career staff by stating that he intends "to defend your work and seek the facts from you before drawing conclusions." He also praised EPA's staff as some of the most dedicated in the federal government. While Mr. Wheeler is expected to continue with the current de-regulatory push, one should expect some changes in both the direction and style. For example, Mr. Wheeler has announced that the Agency would reverse the policy waiving enforcement on glider truck kits (putting old diesel engines in new truck bodies) and has indicated possible changes in the renewable fuels requirements. On the other hand, he has indicated he wants to continue implementing the reforms to the Superfund program and reversing climate change policies of the Obama Administration.

Because Mr. Wheeler has extensive knowledge of the Agency and how it works, many have speculated that his deregulatory efforts will be more carefully developed. This may give them a better chance to survive any future challenges. It is also anticipated that there will be fewer scandals and he will be more adept at navigating the "ins and outs" of the Agency as well as Congress. For example, on July 30, 2018, Mr. Wheeler issued his "fishbowl memo" outlining the principles for transparency in the Agency's contact with the public. This includes rulemakings, litigation, response to oversight requests,

document releases, consent decrees, and settlement agreement where practical. With the exception of Mr. Pruitt, all EPA Administrators since 1983 have been issuing “fishbowl memos.”

As a Senate-confirmed Deputy, Mr. Wheeler can serve as Acting Administrator for most of the rest of Mr. Trump’s first term. Mr. Wheeler has not indicated an interest in becoming the Administrator. It is unlikely that Mr. Trump will announce his nominee to fill the position until after the mid-term elections.

Delaying tactics

One of the time-honored tactics in the political world is that if you do not have a sympathetic administration, delay as many actions as possible until the next administration. Another tactic is to attack the messenger. A recent article in Slate (dated July 20, 2018, <https://slate.com/technology/2018/07/scott-pruitt-how-the-sierra-club-declared-war-on-the-epa-head-and-won.html>) went into the details of Sierra Club’s campaign to make public damaging information on then EPA Administrator Scott Pruitt. This was accomplished through a series of Freedom of Information Act requests. Sierra Club used these requests to fill in information on Mr. Pruitt’s activities and then make them public. These revelations were not the only source of Mr. Pruitt’s problems but they were part of an orchestrated plan to force his resignation. Of course, if Mr. Pruitt had not crossed any lines, this campaign would have been more difficult and may not have succeeded. The other tool Sierra Club is using is to file lawsuits attempting to delay actions, hoping that any rulemaking will be delayed until after the 2020 elections. However, that strategy will only work if Mr. Trump does not get re-elected for a second term. While some observers suspected this, the Slate article confirmed the activity.

CRWI meeting

The next CRWI meeting will be held in August 14-15, 2018, in Minneapolis, MN. It will feature a tour of 3M’s incineration facilities and a discussion on citizen science. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).