



## CRWI Update August 31, 2019

### 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.  
METCO Environmental, Inc.  
Montrose Environmental Group, Inc.  
O'Brien & Gere  
Spectrum Environmental Solutions LLC  
Strata-G, LLC  
SYA/Trinity Consultants  
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 issues

The State of New Mexico and the U.S. Air Force are in litigation over cleaning up per- and polyfluoroalkyl substances (PFAS) contamination in and around the Holloman and Cannon Air Force bases. New Mexico wants the Air Force to clean up the pollution and the Air Force is challenging the state's authority to require that action. U.S. EPA has been providing technical assistance to the state but has not gotten involved in any enforcement action. New Mexico has requested EPA enforcement assistance but that request has been denied. EPA's denial is based on the belief that it is constitutionally prohibited from becoming involved in litigation between a state and another federal agency. On August 2, 2019, the Governor of New Mexico sent a letter to the EPA Administrator pointing out times in the past where EPA got involved in such litigations and urging the Agency to uphold the commitments made to Congress to address PFAS contamination.

Even though Congress was not in session for most of August, the battles over what PFAS requirements get included in the Department of Defense continued. For example, four trade groups representing the drinking water and wastewater utilities sent a letter to the House and Senate armed services committees suggesting that if Congress requires PFAS to be added to the list of hazardous substances under CERCLA, their industry should be exempted. The letter argues that the liability for any clean up should be with the producers of the substances and not with the public utilities. This will not be the last such request. Senator Tom Carper (D-DE) has offered an amendment exempting civilian airports from liability for their use of aqueous fire-fighting foam containing PFAS. Firefighters are expected to ask for similar consideration. In the past, other industry groups have opposed exemptions from CERCLA requirements. Just how this will play out in the conference committee is still to be determined.

On August 28, 2019, the Environmental Working Group released a series of documents from 3M and Dupont on how certain PFAS compounds interact with animals, humans, and the environment. The earliest document is from 1950. A

complete list can be found at <https://www.ewg.org/pfastimeline/>. These documents may be a significant part of the third hearing by the House Oversight Committee on September 10, 2019. 3M has agreed to appear at the hearing but DuPont has declined the invitation.

California has joined other states in setting more stringent guidelines for detecting and reporting the most common PFAS compounds. On August 23, 2019, they lowered the notification levels for perfluorooctanic acid in drinking water from 14 ppt to 5.1 ppt and the level in perfluorooctane sulfonate from 13 ppt to 6.5 ppt.

### **OIG stack test audit report**

EPA's Office of the Inspector General (OIG) conducted an audit of stack test reports from the State of Washington. The audit covered reports where stack testing companies used Methods 1, 2, and 5 but primarily focused on Method 5. OIG requested a list of stack test reports conducted during calendar years 2016 and 2017 from state and local agencies. There were 66 stack reports during this time period. Fourteen reports from local agencies and 16 reports from state agencies were selected for the audit. Numerous examples of non-adherence with EPA methods and inadequate support documents to access data quality were discovered. The report was released on July 30, 2019 (<https://www.epa.gov/office-inspector-general/oig-reports>). OIG found that 17 of the 30 reports had errors in applying EPA test methods. These include probe/filter temperature outside of range, calibration errors, acetone blanks incorrectly subtracted, stack not traversed, temperature sensor calibration checks not performed, and isokinetic variation outside of range. Data or documentation were missing from 29 of the 30 reports. These included missing calibration data, probe length, process data, and post-test leak checks. Other errors identified were different test run start/stop times, different number of sample points listed, different stack diameters, and performing a 60 minute run when a 90 minute run was required. They also found that state officials rarely observe stack tests and faulted Region 10 for not properly overseeing the state and the regions.

The report makes four recommendations to the Office of Air and Radiation (OAR) and the Office of Enforcement and Compliance Assurance (OECA) and two for Region 10. The recommendations for OAR and OECA are:

1. Develop and implement a plan for improving the consistency of stack test reviews across EPA regions and delegated agencies;
2. Assess the training needs of EPA regions and state, local and tribal agencies concerning stack test plans and report reviews and EPA test methods, and develop and publish a plan to address any training shortfalls;
3. Develop stack test report checklists for EPA Method 5 and other frequently used EPA methods to assist state, local and tribal agencies in their reviews of stack test plans and report; and
4. Develop and publish on EPA regional websites a list of EPA contacts who can assist state, local and tribal agencies with stack test method issues or other stack test problems.

The recommendations for Region 10 are:

5. Develop a communication plan to make all state and local agencies within Region 10 aware of EPA requirements and guidance for conducting stack testing oversight; and
6. Develop and implement controls to assess delegated agencies' stack testing oversight activities.

OAR, OECA, and Region 10 have agreed to address the problems identified in the report. OECA will develop and implement a plan to improve the consistency of stack test reviews across EPA regions and delegated agencies. OAR will work with EPA regions and delegated agencies to review currently available stack testing materials and assess training needs with respect to approving stack test plans, reviewing stack test reports, and conducting EPA test methods. In addition, OAR will develop checklists for reviewing stack test reports for seven EPA methods. The report did not identify the seven methods.

EPA Region 10 will distribute the EPA stack testing requirements and guidance to its state and local agencies. The Region also will present this information at the quarterly meetings with state and local agencies. When OECA and OAR release new information and corrective actions, Region 10 will communicate this information to its state and local agencies in a meeting and in writing. In addition, Region 10 agreed to conduct annual meetings with its state and local agencies to discuss their stack testing oversight activities.

### **Two-for-one executive order**

In 2017, President Trump signed an executive order that required all federal agencies to identify two regulations for repeal for every one new regulation promulgated. On August 9, 2019, EPA's Office of Inspector General (OIG) released a report (<https://www.epa.gov/office-inspector-general/oig-reports>) on how the Agency is implementing that executive order. The report found that EPA failed to develop their own guidance to implement the order but exceed the two-for-one goal. In FY 2017, EPA completed 16 deregulatory actions and one regulatory action for a \$21.5 million cost savings. In FY 2018, the Agency completed 10 deregulatory actions and three regulatory actions resulting in \$75.1 million in savings. Since the report contains several unresolved recommendations on "transparency," it is not considered a final report.

### **RTR rules**

On August 16, 2019, EPA proposed amendments to the integrated iron and steel manufacturing facilities NESHAP rule based on a risk and technology review (RTR). In this proposed rule, EPA found the risk due to emissions from the technology-based standards are acceptable. They also found no developments in practices, processes, or control technologies that warrant additional requirements. The Agency is proposing to remove the startup, shutdown, and malfunction provisions in the rule and add the requirement to electronically report the results from all performance tests. In addition,

the Agency is requesting comments on work practices to address unmeasured fugitive emissions and intermittent emissions from the source category. Proposed RTRs for the organic liquids distribution (OLD) and miscellaneous organic chemical manufacturing (MON) source categories are currently under review by the Office of Management and Budget.

### **DSW ruling**

On July 2, 2019, the U.S. Court of Appeals for the District of Columbia denied environmental petitioner's challenges to the 2018 amendments to the Definition of Solid Waste (DSW). The details of that decision can be found in the July Update. On August 16, 2019, the petitioners asked the same panel to reconsider this decision. The newest petition argues that the court erred in their logic that hazardous secondary materials were not discarded when transferred to a third party for recycling. In the decision, the court stated there are no prior court decisions on how the term discard could be modified based on whether the third party received payment. The August petition argued that the 1987 *American Mining Congress v. EPA* decision leaves ample room to decide that hazardous materials are discarded when a company pays to get rid of them. Convincing a panel to change their decision is often a long shot, especially when the decision is unanimous (as the July decision was).

### **OIAI memo upheld**

In 1995, EPA released a policy memo that major sources could reclassify to area sources prior to the compliance date. After the compliance date, the source would remain a major source regardless of whether its emissions were below the thresholds (10 tons per year for any one pollutant and 25 tons per year for all pollutants). This memo was called the "once in, always in" (OIAI) policy. Early in 2018, EPA withdrew that memo and replaced it with a policy allowing sources to reclassify from a major source to an area source if they took federally enforceable limits to keep emissions below the thresholds. Environmental groups challenged the 2018 memo. EPA argued that the courts did not have jurisdiction in this matter because this was not a rulemaking but a guidance memo and as such was not a final action subject to judicial review. On August 20, 2019, the U.S. Court of Appeals for the District of Columbia Circuit agreed with EPA and denied the petition. This was a split decision with two judges ruling it was not a final action while the third thought it was a final action.

### **EPA personnel**

On August 5, 2019, EPA announce the appointment of Ken McQueen as the Region 6 Administrator. Previously, Mr. McQueen was New Mexico's Secretary for Energy, Minerals, and Natural Resources. On August 22, 2019, EPA announced the appointment of Dennis Deziel as the Region 1 Administrator. Previously, Mr. Deziel was director for federal affairs at Dow Chemical. The trade press is reporting that Doug Benevento will soon be named as the Acting Deputy Administrator, a position currently held by Henry Darwin. Mr. Benevento is currently serving as the top liaison between EPA and the states.

## **CSB reporting rule**

The Chemical Safety Board (CSB) was created in the Clean Air Act Amendments of 1990. The 1990 amendments also required the CSB to promulgate a rule requiring facilities to report accidental releases to the ambient air to the Board. In 2009, CSB published an advanced notice of proposed rulemaking to develop the reporting system required by law. They received several comments but ultimately did not follow through with a proposed rule. Several environmental groups filed a deadline suit alleging that CSB had failed in their duty to promulgate such a rule. The court agreed and on February 4, 2019, ordered CSB to finalize such a rule within one year. CSB appealed the ruling to the U.S. Court of Appeals for the District of Columbia Circuit. However, on August 8, 2019, CSB submitted an unopposed motion to withdraw the appeal. Based on the Spring 2019 Unified Agenda, one should expect a proposed rule in September 2019 with a final rule in February 2020.

## **H.R. 4050**

Representative Ilhan Omar (D-MI) introduced H.R. 4050 on July 25, 2019. This legislation would create an EPA grant program to fund innovative zero waste projects. In this legislation, zero waste is defined as “the conservation of all resources by means of responsible production, consumption, reuse, and recovery of products, packaging, and materials without burning or otherwise destroying embodied energy, with no discharges to land, water, or air that threatens the environment or human health.” It currently has 10 co-sponsors and has been assigned to the House Energy and Commerce Committee. This legislation is not likely to be enacted as a stand-alone bill but some of its ideas may get incorporated into other legislation.

## **Baltimore ordinance**

In March 2019, the City of Baltimore passed an ordinance that required every solid waste incinerator in the city limits to install CEMs to measure metals and added restrictions to the national emission limitations. In April, a group of industries and trade organizations challenged that ordinance in the United States District Court for the District of Maryland. Both sides have filed motions for summary judgement (asking the judge to rule for their position without going to a jury trial). The judge could grant one of the petitions and deny the other based on the merits of the case. Often these rulings are made when the judge believes the merits are strongly in favor of one side and sees no need for a jury trial. Should the judge believe that neither side has an overwhelming argument for dismissal, he will deny both petition and the case will proceed to trial. It is not known how long the judge will take to make this decision.