



## CRWI Update January 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.  
METCO Environmental, Inc.  
Montrose Environmental Group, Inc.  
Ramboll  
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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### DOD incineration of PFAS wastes

The National Defense Authorization Act (NDAA) was signed on December 20, 2019. A summary of the provisions as related to EPA and the Department of Defense (DOD) PFAS waste is in the December 2019 Update. On January 10, 2020, ten environmental groups sent a letter to the Secretary of Defense informing him that the Department was in violation of the requirements in the NDAA and must cease all incineration of per- and polyfluoroalkyl substances (PFAS) until it has come into compliance with the requirements of the act. The first requirement is that “all incineration is conducted at a temperature adequate to break down PFAS chemicals.” The letter states that DOD is not complying with this provision because the contracts to incinerate do not include a temperature requirement. In addition, DOD has not required any demonstration that the incineration facilities are capable of destroying the PFAS materials much less to demonstrate reducing PFAS emissions to the “maximum extent possible.”

The second requirement is that all incineration be conducted in accordance with the requirements of the Clean Air Act. The letter interprets this provision to mean that any incinerator that destroys DOD PFAS materials must not have any recent violations of the Clean Air Act or RCRA. In the letter, the environmental groups point out that several of the facilities destroying DOD PFAS compounds have violations of both the Clean Air Act and RCRA over the past 3 years and opine that this disqualifies them from being used.

The third requirement is that all DOD PFAS waste are to be handled under 40 CFR 264. The letter stated that 40 CFR 264 requires detailed waste analysis, restricts the locations where waste can be stored, and requires tracking through the hazardous waste manifest system. The letter accuses DOD of failing to comply with these requirements.

The fourth provision in NDAA is to require destruction at a facility that has a RCRA Part B permit. This is not mentioned in the letter.

The letter concludes with the request that DOD test any soils, water treatment filters, or other materials destined for incineration to determine if any PFAS materials are present. If found, the material is to be handled as a hazardous waste and not be sent to an incinerator for destruction until the provision in the NDAA are met. Finally, the letter requests a response within 14 days that incineration of DOD PFAS wastes has ceased. DOD has not released a formal response.

### **Additional PFAS legislation**

The incineration provision of the 2019 NDAA only applied to Department of Defense PFAS wastes. On January 10, 2020, the House of Representatives passed H.R. 535, the PFAS Action Act of 2019. This act would require EPA to list perfluorooctanoic acid (PFOA) and perfluorooctane sulfonic acid (PFOS) as hazardous substances within one year and list them as hazardous air pollutants within 180 days. It would also require the Agency to determine within five years whether any other PFAS compounds should be included in the list of hazardous substances and as hazardous air pollutants. The bill would also extend the restrictions in NDAA to the destruction of all aqueous film forming foam. The legislation would require that EPA determine the toxicity of all PFAS materials under TSCA, set up drinking water standards for PFAS compounds, and set up revolving state funds for community water systems that have PFAS contamination. H.R. 535 has been received in the Senate and was referred to the Environment and Public Works Committee. The chairman of this committee does not appear to be in any hurry to take up on this legislation.

### **TRI listing of PFAS**

The NDAA requires that EPA add a number of PFAS compounds in the list of chemicals whose releases are reported under the Toxic Release Inventory (TRI). On January 16, 2020, EPA released a list of 160 PFAS compounds that must be reported for the 2020 calendar year. The reporting threshold is 100 pounds. Reports for 2020 are due on July 1, 2021. A complete list of the compounds can be found at <https://www.epa.gov/toxics-release-inventory-tri-program/addition-certain-pfas-tri-national-defense-authorization-act>.

### **PFAS RCRA petition**

On January 15, 2020, the University of California-Berkeley Law Clinic petitioned EPA to list discarded PFOA, PFOS, a subclass of long-chain perfluoroalkyl carboxylates, a subclass of long-chain perfluoroalkane sulfonates, and Gen X compounds as hazardous wastes under RCRA. The petition states there is “ample evidence” that these compounds are toxic and should be regulated under RCRA. This petition is narrower than the September 2019 petition from Public Employees for Environmental Responsibility that asks EPA to list all discarded PFAS compounds as hazardous waste. The Agency has not publicly responded to either petition.

## Other PFAS news

In 2019, New Hampshire set state maximum contaminant levels of PFOA and PFOS at 12 and 15 ppt, respectively. The Plymouth Valley Water & Sewer District challenged this rule arguing that the state failed to complete an adequate cost-benefit analysis during the rulemaking. In November 2019, the Merrimack County Superior Court issued a preliminary injunction to block enforcement of the rule. The state has appealed this ruling.

Two families in the Philadelphia, PA area filed a citizen's suit in 2018 alleging that the Navy's improper disposal of PFOA and PFOS has damaged their health. Tests showed that the drinking water from their private wells were above EPA's health advisory levels of 70 ppt. They ask the court to require the Navy to conduct a health assessment on themselves and the community and to pay for medical monitoring. The Navy argued that the two substances are not considered as hazardous substances under current law. On January 16, 2020, a federal judge agreed with the Navy and dismissed the suit.

On January 14, 2020, the State of Michigan filed suit against 3M, DuPont, and 15 other companies alleging the defendants deliberately concealed the dangers of PFAS and knowingly disposed of PFAS material in an unsafe manner. Some of these companies are already being sued by New Hampshire, New Jersey, New York, and Vermont.

Vermont's Department of Environmental Conservation and Department of Public Safety have collected 2500 gallons of Type B aqueous film forming foam from fire departments around the state. After researching the best methods for disposal, the director of the Waste Management Division concluded that incineration was a better option than placing the material in a landfilling or in a deep well. Vermont's Conservation Law Foundation raised concerns about sending the material to incinerators stating there have not been enough studies on whether the PFAS materials are completely destroyed during incineration. Based on this concern, Vermont is delaying shipment and is looking for alternative disposal methods.

On January 22, 2020, the Environmental Working Group released new data on the levels of PFAS from 44 locations in 31 states. PFAS compounds were not detected at one location (Meridian, MS) and two locations (Brunswick County, NC and Quad cities, IA) had levels above the EPA 70 ppt health advisory level. All other samples had values below 70 ppt. The report can be found at <https://www.ewg.org/research/national-pfas-testing/>.

Two Democrat presidential candidates (Bernie Sanders and Pete Buttigieg) have included PFAS cleanup in their campaigns. Senator Sanders has introduced legislation (S. 3227) in the Senate that would require regulation of PFAS compounds under CERCLA and the Clean Air Act and bar incineration of aqueous film forming foam. Mr. Buttigieg has pledged to boost funding for water infrastructures to prevent and address contamination of PFAS compounds in drinking water.

## **Affirmative defense**

On January 7, 2020, EPA Region 6 Administrator Ken McQueen signed a final rule withdrawing the findings of substantial inadequacy for Texas' state implementation plan (SIP). The previous administration made the finding because the Texas plan contained affirmative defense provisions for certain types of excess emissions. The current administration determined that the affirmative defense provisions applicable to excess emissions that occur during certain upset events and unplanned maintenance, startup, and shutdown are consistent with Clean Air Act requirements. Based on the new determination, EPA is withdrawing the 2015 SIP call. This decision will take effect 30 days after publication in the *Federal Register*. Publication is scheduled for February 7, 2020.

## **Alternative test methods**

On January 29, 2020, EPA published three "broadly applicable alternative test methods." One is for sources that use Methods 6, 8, 15A, and 16A. The second is for sources that use Method 28 (wood stoves). The third would allow the use of toluene in lieu of methylene chloride for field recovery rinses for Method 23 sampling trains. Detail for each are in the *Federal Register* notice.

## **Method 23 proposed rule**

On January 14, 2020, EPA proposed to completely revise Method 23. The newly proposed method will incorporate the use of isotope dilution for all targeted compounds, change the quality control from the current prescriptive format to a performance-based approach with specific performance criteria, expand the list of target compounds to include PAH and PCBs, and add flexibility for stack testers and labs measuring semi-volatile organic compounds. In addition, the proposed rule would remove the requirement in Subpart EEE that administrator approval is necessary before Method 23 can be used and would add the use of Method 23 to 40 CFR 266.104. The preamble contains a crosswalk of where sections have been moved. Comments are due on March 16, 2020.

## **Enforcement reform**

As a part of Executive Order 13892 ("Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication"), the Office of Management and Budget (OMB) is soliciting comments on 11 potential areas that could limit federal agency's ability to impose fines, set remediation targets, or set other civil fines. Some of the questions asked include:

- Should the investigated party have the opportunity to require an agency to show cause before continuing an investigation;
- Would the principle of res judicata (a cause of an action cannot be relitigated once it has been judged on its merits) reduce duplicative proceedings;

- Should the burden be on the individual to show innocence or the agency to show guilt;
- Would the application of Federal Rules of Evidence create a fairer framework;
- Should the agency be forced to produce evidence favorable to the respondent;
- What reforms would be necessary to guarantee enforcement independence;
- What reforms are needed to improve transparency regarding regulatory penalties;
- What safeguards are needed to prevent coercion into settlement agreements; and
- Are agencies accountable to the public in enforcement matters?

Comments on these questions will be accepted until March 16, 2020.

### **Region 5 Administrator**

On January 7, 2020, EPA Region 5 Administrator Cathy Stepp left the agency for a professional opportunity in Missouri. On January 8, 2020, President Trump appointed Kurt Theide to be the new Region 5 Administrator. Previously, Mr. Theide was the Chief of Staff for Ms. Stepp. Prior to joining EPA, Mr. Theide was the deputy secretary of the Wisconsin Department of Natural Resources.

### **EPA Chief of Staff to leave**

The trade press is reporting that Ryan Jackson, EPA's Chief of Staff, will be leaving the Agency in February to take a job with the National Mining Association. Prior to working at EPA, Mr. Jackson worked for Senator James Inhofe (R-OK) for 20 years. Under the current ethics rules, he will not be allowed to lobby the administration for five years but is allowed to work on congressional advocacy.

### **Senate passes plastic waste reduction bill**

On January 9, 2020, the Senate passed S. 1982 by unanimous consent. This legislation would set up a dedicated state revolving fund for plastics management, a trust fund for marine debris removal, and a new foundation under the National Oceanic and Atmospheric Administration to support federal, state, tribal, and local debris programs. A companion bill in the House of Representatives (H.R. 3969) has 25 Democrat and five Republican co-sponsors. However, passing H.R. 3969 in this session will be a challenge because it has to clear seven different committees. Even though H.R. 3969 has not been the subject of any hearings in the House, Democrat aides are hoping to advance the bill this session.

### **OIAI litigation**

In 2018, EPA reversed the 1995 "once in, always in" (OIAI) policy. This was challenged and the U.S. Court of Appeals for the District of Columbia Circuit upheld EPA position that this policy was set using a memo and could be revised using a memo. This

decision was released in August 2019. The plaintiffs asked for rehearing. On January 22, 2020, the court denied that motion. Unless appealed to the Supreme Court, this litigation is completed.

### **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. On January 17, 2020, the American Chemistry Council, American Fuel & Petrochemical Manufacturers, American Petroleum Institute, and the U.S. Chamber of Commerce filed a petition to intervene on behalf of EPA. On January 29, 2020, 14 states (Illinois, Maine, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin), the District of Columbia, and the City of Philadelphia also challenged this rule. On January 30, 2020, the court consolidated all under *Air Alliance Houston, et al. v. EPA*.

### **Baltimore ordinance**

In March 2019, the City of Baltimore passed ordinance 18-0306 setting standards for waste incinerators and requiring continuous emissions monitors for certain metals. This ordinance impacted Wheelabrator's waste-to-energy plant and Curtis Bay Energy's medical waste incinerator. These two companies plus others sued the City in Federal District Court. Both the plaintiffs and the City asked the court for summary judgement (find for their side and dismiss the case). In January, the plaintiffs submitted documents to the court showing that the two facilities could not meet the 2020 and 2022 deadlines for installing nitrogen oxide controls and the monitoring equipment, respectively. The plaintiffs asked the court to set a date for oral arguments on the pending motions and a preliminary injunction briefing schedule. The plaintiffs also indicated they would shortly be asking for a stay of the ordinance because without the stay, the Wheelabrator facility would be forced to cease operations by September 7, 2020.

### **Enforcement**

On January 28, 2020, the Department of Justice published a proposed consent decree with Gulfport Energy Corporation over failure to control emissions from tanks at crude oil and natural gas production well pads in Ohio. Under the decree, Gulfport will be required to pay a \$1.7 million civil penalty and install devices to control emissions from these tanks. The initial leaks were discovered in 2013 using a FLIR camera.

### **Civil penalty adjustments**

In January, every federal agency is required to adjust their civil penalties based on the increase in the cost-of-living from the previous year. For 2020, this adjustment is 1.01764. Thus the 2019 EPA and OSHA civil penalties are multiplied by this number and rounded to the nearest dollar to obtain the 2020 civil penalties. EPA's penalties are

shown in Table 1 of 40 CFR 19.4 (January 13, 2020, *Federal Register* notice) and OSHA's penalties are in 29 CFR 1903.15 (January 15, 2020, *Federal Register* notice).

### **Plastics recycling**

Nexus Fuels LLC operates a 50 ton per day pyrolysis plant in Atlanta, GA. In January, they delivered their first cargo of pyrolysis liquid to the Shell facility in Norco, LA where it was successfully used to make "high end" chemicals. The Norco facility manufactures ethylene, propylene, and butadiene. Shell plans to reuse one million tons of plastic waste in its global operations by 2025. Nexus states that the 50 ton per day facility is scalable.

### **Berkeley natural gas ordinance**

In July 2019, the City of Berkeley passed an ordinance banning the use of natural gas in any new or remodeled buildings within their jurisdiction. The ordinance is seen as an attempt to put into practice the Green New Deal principle of turning away from lower greenhouse gas emitting fossil fuels in an effort to prevent climate change. In November 2019, the California Restaurant Association filed suit in the U.S. District Court for the Northern District of California to block this ordinance as a violation of state and local law. On January 13, 2020, the City filed a motion to dismiss the suit. Meanwhile the California Energy Commission has approved applications from five additional cities and Marin County to enact similar laws.

### **California solar panel requirement**

In 2019, California enacted legislation that requires all new single-family homes to include rooftop solar panels. The new law took effect on January 1, 2020. It is designed to reduce the energy use of these homes by 50%. The median price for a single-family home in California is just under \$600,000. This about double the national average. It is projected that the requirement will add \$9,500 per house.

### **CRWI meetings**

The next CRWI meeting will be held on February 19-20, 2020, in Sterling, VA. Please contact CRWI ([mel@crwi.org](mailto:mel@crwi.org) or 703-431-7343) for additional information.