



## CRWI Update January 31, 2021

### MEMBER COMPANIES

Clean Harbors Environmental Services  
Eastman Chemical Company  
Heritage Thermal Services  
INV Nylon Chemicals Americas, LLC  
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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### Biden Administration first steps

One of the first steps of new administrations is to freeze all rulemaking efforts not already published in the *Federal Register*. Ronald Klain, President Biden's Chief of Staff, issued a memo on January 20, 2021, that, except for emergency actions, no agency is to propose or issue a rule until that action is reviewed by a Biden appointee and withdraw any signed rule sent to the Office of Federal Register. In addition, for any rule that has been published in the *Federal Register* but not yet effective, that agency should consider opening a comment period about "issues of fact, law, and policy raised by those rules, and consistent with pending petitions for reconsideration involving such rules." As a result of this memo, EPA has pulled all actions under review by the Office of Management and Budget (OMB). It is not likely that any will be resubmitted until political appointees from the Biden Administration have had a chance to review those actions.

On January 20, 2021, President Biden issued two executive orders. The first requires all agencies to immediately review and take appropriate action on all regulations, orders, guidance documents, and policies issued during the last four years. Within 30 days, each agency is expected to submit a preliminary list of reviews to be completed by December 31, 2021. Within 90 days, each agency is expected to update the list of actions to be addressed by December 31, 2025. In addition, the executive order directs the Department of Justice to ask the courts for additional time for any regulations currently being litigated. This executive order also revokes the March 2019 Keystone XL Pipeline permit. The fact sheet accompanying the executive order included a preliminary list of regulations to be reviewed. EPA's part of the list includes 48 actions. Some of those included are the science transparency rule, the cost benefit rule, the reclassification of major sources rule, the guidance document rule, the permit appeals procedure, the risk management plan revisions, and the startup, shutdown, and malfunction memo. Noticeably absent were any of the recent risk and technology review rules. It should be noted that just because the Agency is reviewing a rule does not mean it will get revised or revoked. A complete copy of the list can be obtained from CRWI.

In response to the January 20, 2021, executive order, the Acting General Counsel for EPA sent a letter to the Department of Justice with instructions to “seek and obtain abeyances or stays of proceedings in pending litigation seeking judicial review of any EPA regulations promulgated between January 20, 2017, and January 20, 2021, .... in order to provide an opportunity for new Agency leadership to review the underlying rule or matter.” This will mean that all litigation will be halted until EPA can decide whether to defend the rule or take a voluntary remand.

The reader should be reminded that all regulations promulgated in the *Federal Register* remain in place until formally withdrawn or replaced by a *Federal Register* action or vacated by the courts. While the Agency may intend to withdrawing or revising a number of these rules, they still have to go through the rulemaking process. This process may take 1-2 years to accomplish.

The second executive order instructs OMB to develop a set of recommendations to improve and modernize the regulatory review process. This would include revisions to OMB Circular A-4 to ensure that the review process policies reflect new developments in scientific and economic understanding, accounts for regulatory benefits that are difficult or impossible to quantify, and does not have harmful anti-regulatory or deregulatory effects. It also adds an environmental justice component to the review process.

Another tool the Biden Administration can use to overturn regulations is the Congressional Review Act. Under the Act, Congress could pass a resolution of disapproval that would revoke any regulation promulgated after August 21, 2020. While the Democrats control both houses of Congress, their margins are thin. In addition, should Congress pass a resolution of disapproval, it prevents an agency from promulgating a similar rule in the future. Early indications are that the current Congress will use this tool sparingly because they are not trying to prevent future regulations in an area but instead trying to revise and strengthen current regulations. At the end of January, there have been no resolutions of disapproval filed.

## **PFAS**

On January 14, 2021, EPA Administrator Wheeler signed an advanced notice of proposed rulemaking seeking information on whether the Agency should regulate perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS) as hazardous substances under CERCLA or as hazardous wastes under RCRA. The notice does not give any clues on which options EPA is favoring. It simply points out the ramifications for each and asks stakeholders to provide data to support their preferred option. For example, should EPA designate each as hazardous waste when discarded, the Agency would need to develop treatment standards and designate test methods to determine toxicity. This has not been published in the *Federal Register* and it is not known how the Biden Administration will proceed. A copy of the signed rule is available from CRWI.

On January 19, 2021, EPA Administrator Wheeler signed a notice announcing the availability of a toxicity assessment for perfluorobutane sulfonic acid (PFBS). This gives regulators and the regulated community some information on potential risks associated with human exposure to PFBS. This notice has not been published in the *Federal Register* but is available on EPA's web site (<https://www.epa.gov/pfas/toxicity-assessment-pfbs>). It is not clear what the Biden Administration will do with the notice or the assessment.

On January 29, 2021, 125 Democrats and seven Republicans House members sent a letter to President Biden urging him to take action on several per- and polyfluoroalkyl substances (PFAS) issues. These include:

- Finalize national drinking water standards for PFOA and PFOS;
- Expanding the reporting requirements under the Toxic Release Inventory;
- Directing EPA to designate PFOA and PFAS as hazardous substances under CERCLA; and
- Directing FDA and EPA to phase out non-essential use of PFAS in food packaging, cosmetics, sunscreens, and other household products.

House Democrats are expected to re-introduce comprehensive PFAS legislation that is similar to legislation introduced in the last session. Given that the Democrats now control the Senate, the likelihood of a stand-alone bill being considered in the Senate is much higher than last year. However, the margins are thin and it will likely take bipartisan support in the Senate before this legislation gets passed. EPA probably does not need additional authority to regulate PFAS compounds and the current Administration is expected to be more receptive to using that authority. But it will take time before the political appointees get in place to make the decisions on how to proceed on PFAS regulations.

On January 13, 2021, New York State Department of Environmental Conservation (NYSDEC) proposed an allowable concentration in ambient air for PFOA. If approved, New York would join Michigan as one of the few states with established air quality restrictions on PFAS. NYSDEC will accept comments on the proposed action until February 12, 2021.

### **EPA personnel**

Right before leaving office, President Trump altered the normal secession of EPA leadership so that Charlotte Bertrand would be the acting EPA Administrator during the transition period. Previously, Ms. Bertrand was in the Office of Water. Other career staff were designated as acting assistant administrators. This included Barry Breen for the Office of Land and Emergency Management and Sarah Dunham for the Office of Air and Radiation. Shortly after sworn into office, President Biden replaced Ms. Bertrand with Jane Nishida. Ms. Nishida had been the principal deputy assistant administrator in the international office. She will serve as the acting Administrator until the Senate confirms her replacement. President Biden has nominated Michael Regan to be the

next EPA Administrator and Janet McCabe to be the next Deputy Administrator. Mr. Regan is currently serving as the head of North Carolina's Department of Environmental Quality. Ms. McCabe is currently a law professor at Indiana University and was previously the Assistant Administrator for the Office of Air and Radiation under President Obama. The Senate Environment and Public Works Committee has scheduled a hearing on Mr. Regan's nomination for February 3, 2021. While nominations for assistant administrators may lag until Mr. Regan and Ms. McCabe are confirmed, the Biden Administration has moved quickly to install deputy assistant administrators in most of the offices. These positions are political appointees that do not require Senate confirmation. Even though career staff are in the acting role, the political appointees will be making most of the policy decisions. The deputy for the Office of Air and Radiation is Joseph Goffman. Mr. Goffman previous was the Executive Director of the Environmental and Energy Law Program at Harvard University. Prior to that, he was the Associate Assistant Administrator for the Office of Air and Radiation under the Obama Administration. Carleton Waterhouse is scheduled to join the Office of Land and Emergency Management on February 1, 2021 as the deputy assistant administrator. Mr. Waterhouse is currently a professor in the Howard University Law School.

### **RTR proposed rules**

In the last days of the Trump Administration, EPA published six risk and technology review (RTR) proposed rules. In all six proposed rules, the Agency is removing the startup, shutdown, and malfunction provisions and adding electronic reporting requirements. EPA determined that no additional requirements were needed for all six based on the risk review. For the carbon black proposed rule, there were no added provisions based on a technology review but they are proposing to broaden the scope of the rule by adding certain process vents to the source category (gap filling). For primary magnesium refining, they are proposing to add continuous pH monitoring under the technology review provisions, adding a previous unregulated source for chlorine emissions (chlorine bypass stack), and adding a work practice for malfunctions associated with the chlorine reduction burner. For the mercury cell chlor-alkyl source category, they are proposing to add a work practice requirement for cell room fugitive mercury emissions under the technology review and add fugitive chlorine emission requirements. For the cyanide chemicals manufacturing source category, they are proposing to add an emissions requirement for process wastewater for existing sources. For the polyurethane foam source category, they are proposing to add numerical limits (gap filling) and require periodic performance tests. For the refractory source category, they are proposing to add non-mercury metal standards for existing clay refractory sources (gap filling) and a work practice (using natural gas) for existing non-clay refractory sources. None of the six proposed rules contain regulatory language. Any changes to the regulatory language are included as a separate document in the docket.

## **Regulatory transparency rule**

On January 6, 2021, EPA published their regulatory transparency rule. This rule will require that all scientific data used in EPA decision making must be made available to the public. The idea behind this is to make the regulatory process more transparent. The effect will be that certain studies where the underlying data is not made public can no longer be used in the decision process. This may exclude certain medical studies where confidentiality does not allow for the release in individual medical records. The Agency promulgated this rule under its general housekeeping authority and made it effective on the day of publication. The Environmental Defense Fund and the Montana Environmental Information Center challenged this regulation in the U.S. District Court for the District of Montana alleging that the rule was substantive rather than procedural and should not be effective immediately. On January 27, 2021, the judge ruled that the rule was substantive and the Agency lacked good cause to waive the 30-day effective date required under the Administrative Procedures Act. A vacate order is expected in early February.

## **2019 TRI data released**

On January 12, 2021, EPA released their 2019 Toxic Release Inventory (TRI) data. It showed a reduction of 9 percent from 2018 data. The report can be found at <https://www.epa.gov/toxics-release-inventory-tri-program>.

## **2019 biennial report**

EPA has released the 2019 biennial report data. It can be found at <https://rcrapublic.epa.gov/rcrainfoweb/action/modules/br/summary/view>.

## **Climate change executive order**

On January 27, 2021, President Biden released his climate change executive order. Among other things, this order:

- Affirms a commitment to meet greenhouse emission goals set forth in the Paris accord;
- Establishes the White House Office of Domestic Climate Policy (headed by Gina McCarthy) to coordinate the domestic climate agenda;
- Establishes the National Climate Task Force (includes 21 departments and agencies) to combat the climate crisis;
- Directs federal agencies to procure carbon-free electricity and zero-emission vehicles;
- Directs federal agencies to develop plans to increase resiliency of facilities and operations to the impacts of climate change;
- Pauses any new oil or natural gas leasing on federal property;
- Eliminate fossil fuel subsidies where possible;
- Sets a goal of conserving at least 30 percent of our lands and oceans;

- Creates a Civilian Climate Corps Initiative to put Americans to work conserving and restoring public lands, increasing reforestation, increasing carbon sequestration, protecting biodiversity, and improving access to recreation;
- Establishes a White House Environmental Justice Interagency Council; and
- Initiated the development of a Climate and Environmental Justice Screening Tool.

Additional details can be found at <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/executive-order-on-tackling-the-climate-crisis-at-home-and-abroad/>.

### **EPA review of the past four years**

On January 14, 2021, EPA Administrator Wheeler released a list of accomplishments made by the Agency over the last four years. These include:

- Finalizing 78 deregulatory actions;
- Reducing air emissions by 7 percent even as the economy continues to grow;
- Redesignating 58 non-attainment areas to attainment;
- Approving over 1200 state implementation plans;
- Fully or partially delisting 82 sites from the National Priorities List; and
- Enforcement or compliance actions resulting in \$5.7 billion in civil penalties, criminal fines, and restitution, and the investment of \$32.2 billion in actions and equipment to achieve compliance.

The complete news release can be found at <https://www.epa.gov/newsreleases/epa-releases-2020-year-review-highlighting-agency-accomplishments-and-environmental>.

### **FY 2020 enforcement results**

On January 13, 2021, EPA released a report on their enforcement activities for FY 2020. Some of the items highlighted include:

- Commitments to reduce, treat, or eliminate over 426 million pounds of pollution;
- Treatment, minimization, or disposal of 1.6 billion pounds of hazardous and non-hazardous waste;
- Prevention of 18.2 million pounds of air pollution; and
- 247 new criminal cases opened.

A copy of the full report can be found at <https://epa.maps.arcgis.com/apps/Cascade/index.html?appid=9dfe57199392498f872bac6bf2e4867c>.

### **DuPont and former employee charged**

In 2014, an incident at DuPont's La Porte facility released 24,000 pounds of methyl mercaptan. It resulted in the death of four employees and injured others. At the time, Kenneth Sandel was in charge of the operating unit. On January 19, 2021, a Houston federal grand jury indicted Mr. Sandel and DuPont for knowingly violating federal safety regulations and negligently releasing an extremely hazardous substance. The indictment alleges that Mr. Sandel and DuPont engineers diverted the methyl mercaptan into a waste gas pipe system without implementing proper procedures to evaluate the safety aspects of the plan and then prohibited employees from venting the pipes to the atmosphere. If convicted, Mr. Sandel faces up to five years in federal prison and a \$250,000 fine. DuPont could face a \$500,000 fine.

### **CRWI meetings**

Our February 17-18, 2021, meeting will be virtual. Please contact CRWI ([mel@crwi.org](mailto:mel@crwi.org) or 703-431-7343) if you have interest in attending.