



## CRWI Update November 30, 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

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### What happens between now and January 20, 2021?

While the “official” results of the November 2020 presidential election will not be finalized until December 14 when the Electoral College votes, most observers agree that Mr. Biden won the election. The current administration will work to finish as many action items as possible by January 20, 2021. In most cases, this means getting those items published in the *Federal Register*. EPA currently has 22 actions under review by the Office of Management and Budget. This includes 12 final rules. The current administration would like to get the PM National Ambient Air Quality Standards, the Clean Air Act cost/benefits, and the regulatory transparency rules published by January 20. There are also five TSCA final rules currently being reviewed. Any final rule not already at OMB is unlikely to get published.

In their “lame duck” session, Congress will attempt to pass FY 2021 appropriations legislation, develop another COVID stimulus package, and pass the FY 2021 National Defense Authorization Act. The Senate may be able to confirm pending nominations for judges and certain boards.

### What happens after January 20, 2021?

Shortly after President Biden is sworn into office, his new Chief of Staff will likely issue a memo that will halt all federal rulemaking activities that have not already been published in the *Federal Register*. This typically happens when there is a change in administrations. All political appointees from the Trump Administration will turn in their resignation. The vast majority will be accepted and civil servants will be appointed as “Acting” heads in their places. “Acting” heads can make policy decisions if needed, but most will not. While staff activity on EPA rulemakings will continue, most policy decisions will be deferred until at least some of the political appointees (Administrator, Deputy Administrator, and Assistant Administrators for each office) are confirmed. This process may take 2-6 months. Typically, Regional Administrators are not appointed until after most of the Assistant Administrators are in place. There will be significant changes on what issues EPA will work on in the new administration, but it will take some time before that process starts.

Even though they lost seats, Democrats retained control of the House. As of the end of November, Republicans hold a 50-48 lead in the Senate. On January 5, 2021, there will be run-off elections for the two Georgia seats. How Congress governs in 2021 will depend upon the outcome of the Georgia run-offs. If the Republicans can take one of these two seats, they will retain control of the Senate. The Democrats need to capture both seats to get to a 50-50 tie where the new Vice-President will break that tie in favor of the Democrats. Should the Democrats win both Georgia seats, they will have a chance to push their legislative agenda and confirming Cabinet nominations will be easier. They will also be in a position to use the Congressional Review Act to overturn recent Trump Administration regulations. If the Republican take one of the two seats, the Democrats will have a much harder time of pushing their legislative agenda and may need to pick more moderate Cabinet nominees in order to get them confirmed. Both Democrats and Republicans will be putting considerable resources into the Georgia run-off races.

### **What to expect from a Biden EPA?**

As normal, there is considerable speculation on who will be the next EPA Administrator. The trade press has mentioned Mary Nichols, currently the head of the California Air Resources Board, Heather McTeer Toney, currently national field director for Mom's Clean Air Force and a former Region 4 Administrator, Mustafa Ali, currently an environmental justice official with the National Wildlife Federation and ran EPA's environmental justice office in the Obama Administration, and Richard Revesz, a New York University law professor. As stated above, which party has control of the Senate may dictate who is nominated to be the next EPA Administrator.

The Biden Administration EPA transition team has 12 members with a number of these individuals having served in the Obama Administration and/or hold prominent positions in national environmental groups. All but one of these individuals are volunteers. This team is expected to help the Administration find and vet candidates for the 14 Senate confirmed positions in EPA, the Regional Administrators, and the other political appointees within the Agency.

While activities on specific issues are difficult to predict, most observers expect the new administration to switch focus to climate change, environmental justice, and enforcement. One should expect the new administration to relook at every rulemaking not finalized to see if climate change or environmental justice components are needed or desired. If significant changes are desired, that rulemaking will need to be re-proposed to minimize the chances for losing a subsequent litigation. There will be considerable pressure for the new administration to reverse some of the changes finalized under the Trump Administration. Some of these will show up as the new administration decides whether to defend Trump Administration rules or ask the court for a voluntary remand while they reconsider their positions. It may also include granting petitions for reconsideration where filed. The new administration is expected to increase enforcement activities (inspections, re-instating the use of supplemental environmental projects, changing the focus to enforcement from compliance, less

deference to states, etc.) and possibly push primary enforcement activities back to the regions. The new Administration may also use enforcement policies to advance their environmental justice agenda. One thing to note is that enforcement activities take a long time to come to fruition so an obvious shift may not become apparent until late in 2021 or early in 2022. The new administration may also speed up regulation of PFAS compounds.

There are limited resources and the new administration will need to decide whether to spend those resources overturning Trump Administration rules or pushing forward their own agenda. In the end, it will likely be a combination of both. One thing worth noting is that the Cabinet appointments already announced and the transition teams are relying heavily on former Obama and Clinton Administration appointees. One guess is that EPA under the Biden Administration will, in general, look and act similar to the what it did under the Obama Administration.

### **Major source reclassification final rule**

The major source reclassification final rule was published in the *Federal Register* on November 19, 2020. This rule allows a major source to become an area source by taking enforceable limit on their HAP potential-to-emit that would guarantee the annual mass emissions would be below the major source threshold. This rule was vigorously opposed by the environmental groups during the comment period. One would expect these groups to file petitions for reconsideration and petitions for review. The new administration may decide to grant the reconsideration and restart the rulemaking process to modify or withdraw it. Agencies are allowed to change their mind on issues but must do so based on a logical process. This creates a higher hurdle than is presented in an original rulemaking to avoid a successful “arbitrary and capricious” challenge. Another way this rule could be voided would be by Congress voting for a resolution of disapproval. This would only work if the Democrats control the Senate.

There are several other Trump Administration rules that fit into this category. Some include the Risk Management Plan final rule, the Texas and North Carolina state implementation approval final rules, and the plywood and miscellaneous organic NESHAP risk and technology review rules. Only time will tell which of these final rules the Biden Administration will continue to defend.

### **PFAS**

On November 30, 2020, EPA made two announcements on per- and polyfluoroalkyl substances (PFAS) compounds. The first was an interim National Pollutant Discharge Elimination System (NPDES) discharge permit strategy for wastewaters and stormwater discharge systems. The interim strategy would include phased in monitoring requirements and best management practices to control discharges while the Agency decides whether to set emission limitation guidelines. This guidance only applies to three states (Massachusetts, New Hampshire, and New Mexico), the District of Columbia, and the territories. All other states have been delegated NPDES permitting

authority. The second announcement released a list of 40 additional PFAS chemicals where EPA and the Department of Defense are developing analytical methods for wastewater, surface water, groundwater, leachate, soil, sediment, biosolids, and fish tissue. The list can be found at <https://www.epa.gov/cwa-methods/cwa-analytical-methods-and-polyfluorinated-alkyl-substances-pfas>.

The states that are delegated for NPDES permitting continue to work towards guidelines that are stricter than EPA's current recommendation of 70 ppt for perfluorooctanoic acid (PFOA) and perfluorooctanesulfonic acid (PFOS). The Department of Health Services for Wisconsin recently recommended 20 ppt combined concentration for PFOA and PFOS. This recommendation is for contaminated site cleanup, regulation of solid waste landfills, and bottled water.

CERCLA and the Oil Pollution Act require that natural resources be restored to the state they were in prior to contamination. If restoration does not occur, entities are allowed to sue the parties responsible for the release of those contaminants to recover the costs for the harm done. In 2019, New Jersey filed Natural Resource Damage lawsuits against DuPont, Chemours, 3M, and companies that sold firefighting foam containing PFAS. On November 10, 2020, New Jersey added suits against Solvay and Honeywell. Both of these companies used PFAS compounds in their manufacturing processes.

On November 24, 2020, New York Governor Cuomo signed a bill that bans the burning of aqueous film forming foam (AFFF) containing PFAS compounds in cities designated as environmental justice areas. This legislation was crafted specifically to prevent Norlite's Cohoes facility from burning AFFF. The company released a statement that it ceased burning AFFF in December 2019 and were not interested in burning it in the future.

### **EPA FY 2021 funding**

Congress has until December 11, 2020, to pass either another continuing resolution or to allocate funding for FY 2021 for EPA. The first part of this process is the House and Senate agreeing on an overall spending limit for all federal departments. They reached that agreement on November 24. This clears the way for a decision on the allocation for each department or agency. The Senate has floated a proposal to fund EPA at the same level as FY 2020 (\$9.085 billion). The House approved \$9.38 billion in July. There do not appear to be any large hurdles to reaching a compromise for EPA's funding and the White House not signaled any opposition. It appears likely that compromises will be reached and there will be little drama on FY 2021 appropriations legislation. However, one should not expect this to be completed until December 10 or 11.

### **EPA re-opening offices**

On November 19, 2020, EPA's Associate Deputy Administrator sent a memo to all staff telling them that the Agency has decided to pause the office re-opening efforts based on

the current upsurge in COVID infections. The next review of the situation is scheduled for December 17, 2020. Most of EPA's offices are currently in Phase 2 – some staff working from the office but telework is allowed.

### **Baltimore ordinance**

In 2019, the City of Baltimore passed an ordinance requiring stricter emission standards on the two waste incinerators (one municipal waste and the other medical waste) that operate within the city limits. The ordinance also required that these two facilities install, calibrate, maintain, and operate a multi-metals CEMs on their stacks. The two facilities sued in federal district court and won a summary judgement against the City. Baltimore appealed the decision to the 4<sup>th</sup> Circuit. The suit was stayed pending negotiations between industry and the City. On November 4, 2020, Baltimore dropped the appeal in exchange for extending the operating agreement with the municipal incinerator for 10 years and the municipal incinerator agreeing to upgrade their pollution control equipment (cost of approximately \$40 million) to meet more stringent standards. Under the agreement, neither facility will be required to install a multi-metals CEMs.

### **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.