



CRWI Update October 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

44121 Harry Byrd Highway, Suite 225
Ashburn, VA 20147

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

PFAS issues

In July, the Citizens for Safe Water Around Badger and the Volunteers for Environmental Health and Justice submitted a petition to Region 4 asking the Region to halt all open burning/open detonation or any other thermal treatment of PFAS (per- and polyfluoroalkyl substances) contaminated materials at the Holston Army Ammunition Plant in Kingsport, TN. In October, EPA Region 4 rejected that petition deferring to the state as the lead agency in this matter. In the rejection, Region 4 said they would share the petition with Tennessee and the Army and all parties would work to find alternatives to open burn/open detonation of all wastes at the plant.

EPA announced that the draft IRIS (Integrated Risk Information System) evaluations for five PFAS compounds would be delayed by approximately three months. The five PFAS compounds subject to this delay are perfluorononanoate (PFNA), perfluorobutyrate (PFBA), perfluorohexanoic acid (PFHxA), perfluorohexane sulfonic acid (PFHxS), and perfluorodecanoate (PFDA). The public review drafts are expected for PFBA, PFHxA and PFDA by the fourth quarter of FY 20 with the external review drafts being available by the first quarter of FY 21. The public review drafts for the other two are scheduled to be available by the first quarter of FY 21 with the external review drafts available in the fourth quarter of FY 21. It should be noted that the federal fiscal year starts on October 1 and ends on September 30.

On September 19, 2019, the Public Employees for Environmental Responsibility filed a petition asking EPA to classify all forms of waste contaminated by PFAS compounds as RCRA hazardous waste. The Office of Resource Conservation and Recovery is currently considering that petition.

Conferees continue to work on resolving the differences in the House (H.R. 2500) and Senate (S. 1790) versions of the defense authorization legislation for FY 20. Conferees have been appointed and started meeting in September. There are a number of differences in the two bills relating to PFAS issues including language that would make it difficult to use combustion as a treatment method. These were reported in the July Update. While conference committees do not release internal negotiations, there is

reason to believe the conferees are having problems resolving differences. One of the hints is an October 22, 2019, letter from 69 Congressmen to the conferees threatening to withhold support for the bill if it “fails to significantly address ongoing and legacy contamination from PFAS chemicals.” This is a large enough group to potentially prevent passage of a compromise bill. The second hint is that Senator James Inhofe (R-OK) is considering introducing a slimmed down version of the defense authorization legislation that would take out all of the controversial provisions from either the House or Senate passed versions. The same group of 69 House members stated they are unwilling to support a slimmed down version. Negotiations continue.

Executive Orders

On October 9, 2019, President Trump released two executive orders on guidance. The first (E.O. 13891) is the on “Promoting the Rule of Law Through Improved Agency Guidance Documents.” The second (E.O. 13892) is on “Promoting the Rule of Law Through Transparency and Fairness in Civil Administrative Enforcement and Adjudication.” While both build on previous executive orders, they go even further in instructing federal agencies how to develop and use guidance. Both define guidance documents as “an agency statement of general applicability, intended to have future effect on the behavior of regulated parties, that sets forth a policy on a statutory, regulatory, or technical issue, or an interpretation of a statute or regulation.” Both require the development by each agency of a “single, searchable, indexed database of all guidance documents in effect.” On October 31, 2019, the Office of Management and Budget (OMB) released a memorandum instructing all federal agencies on how to comply with E.O. 13891. This started the time clock to implement this order.

Both Executive Orders will have significant impacts on how agencies use guidance. Some of the important provisions of E.O. 13891 are as follows:

- The term “significant guidance document” is defined in the same way as a major rule (annual effect on the economy of \$100 million, etc.);
- All future significant guidance documents must be reviewed by OMB;
- All future significant guidance documents must have a notice and comment period;
- Each agency shall review their guidance documents and include all that remain in force on a single, searchable, and indexed website by February 28, 2020;
- No further guidance can be issued without including it in the website database; and
- All guidance must clearly state that it lacks the force of law, except as authorized by statute.

Some of the important provisions of E.O. 13892 are as follows:

- Guidance documents may not be used to impose new standards of conduct;
- All administrative enforcement actions must be based on applying statutes or regulations not guidance;

- When guidance is used, it can do no more than articulate the agency's understanding of how the statute or regulation applies to the particular circumstance;
- Agencies can cite guidance to convey an understanding only if that guidance has been publicly noticed;
- Agencies must avoid unfair surprise when imposing penalties or violations;
- Any new or expanded claim of jurisdiction must be published either in the Federal Register or on that agency's website;
- Before issuing a no-action letter, notice of noncompliance, or other similar notice, the agency must give the party an opportunity to be heard regarding the proposed action;
- Each agency must publish a rule governing agency inspections within 120 days; Once published, the agency must follow those rules; and
- Any agency requesting data must provide an OMB control number or inform the entity that no response is legally required.

There are several things to note in these two Executive Orders. First, they will govern how guidance documents will be used for the rest of the Trump Presidency. Since they are Executive Orders and not rulemakings, they may be rescinded by the next president. Second, these orders do not eliminate guidance but simply tries to make them and the process more transparent. Third, every federal agency will be required to have all applicable guidance on a single, searchable website. This should make finding guidance documents much easier. Fourth, all new significant guidance must be reviewed by OMB and made available for notice and comment. Thus, all stakeholders are allowed to participate in any new significant guidance documents. Fifth, guidance cannot be used as a reason for enforcement. Conversely, it also cannot be used as a safe harbor. Finally, if an agency wants to collect data for enforcement, they must have an OMB control number or inform the entity that they have no legal requirement to respond.

E-Manifest

Under the 2018 user fee rule, EPA is required to set fees every two years. On October 1, 2019, EPA raised the prices for manifests. Mail-in forms will now cost \$25 per manifest, scanned-image uploads will cost \$20 per manifest, data-plus-image uploads will cost \$14 per manifest, and electronic manifests will cost \$8. Congressional appropriations were used to set up the program, but its continued operations are to be supported by user fees. EPA justified the rate increases based on lower than expected use of the electronic part of the manifest system in its first year. EPA informed users of the impending fee increase in July. The Environmental Technology Council has sued the Agency asking the U.S. Court of Appeals for the District of Columbia Circuit to set aside the new fee schedule and order refunds to the users.

RTR rules

EPA continues to publish risk and technology review proposed rule with four additional proposed rules in October: ethylene production (October 9, 2019); iron and steel foundries (October 9, 2019); organic liquids distribution (October 21, 2019); and rubber tire manufacturing (October 30, 2019). All four propose to remove any startup, shutdown and malfunction requirements and add electronic reporting requirements for performance tests. None of the four add new requirements based on residual risk. EPA is not proposing to add requirements to the rubber tire and iron and steel foundry source categories based on technology review. However, for the ethylene production source category, EPA is proposing to add requirements to storage vessels and heat exchange systems under the technology review. For the organic liquid distribution source category, EPA is proposing to give sources the option to add fence line monitoring or to lower the threshold for requiring emission controls on tanks, add inspections requirements for tanks with fixed roofs, and LDAR monitoring of connectors. Each has a 45 day comment period.

In addition, Our Children's Earth Foundation filed suit in U.S. District Court for the Northern District of California alleging EPA has missed deadlines to review New Source Performance Standards for four source categories (industrial surface coatings, automobile surface coatings, lead-acid battery plants, and secondary lead smelters) and to review NESHAPs for three additional source categories (paint stripping and miscellaneous surface coating area sources, lead acid battery manufacturing area sources, and dry cleaning). The suit was filed on October 29, 2019.

Waste handbook

EPA has released an updated version of its handbook entitled "Managing Hazardous Waste: A Guide for Small Businesses." This version includes recent changes in generator requirements, wastes added to the universal waste program, changes applying to academic laboratories, the pharmaceutical rule, and electronic reporting/e-manifests. A copy can be found at <https://www.epa.gov/hwgenerators/managing-your-hazardous-waste-guide-small-businesses>.

Photovoltaic waste

On October 18, 2019, EPA proposed to allow California to regulate the disposal of photovoltaic panels under their universal waste program. The proposed rule will also allow California to adopt more stringent requirements for small quantity handler notifications, stricter standards for mercury-added lamps, and the addition of aerosol cans, cathode ray tubes (CRT), CRT glass, and electronic devices to the California-only waste streams. Comments will be accepted until November 18, 2019.

PCB incineration guidance

On October 18, 2019, EPA released an update to their guidance on using incineration and other treatment methods for the treatment and disposal of PCB wastes. The guidance updates the 1986 policies on permit applications and performance test plans as well as incorporating changes in practices, policies and regulatory changes made since 1986. A copy can be found at <https://www.epa.gov/pcbs/policy-and-guidance-polychlorinated-biphenyl-pcbs>.

Citizen science

EPA has a number of projects with states and tribal partners where they try novel uses of technology to solve environmental issues. Regions 3, 5, and 8 are co-sponsoring surface water monitoring projects while Regions 4 and 9 have pilot projects to use low-cost air sensors. One of the problems associated with low-cost sensors is the question of the quality of the data gathered. To address this, Region 4 has deployed six “air sensor shelters” close to sites already subject to mandatory monitoring. They hope this will give them a baseline for comparing the accuracy of low-cost air sensors to traditional air monitoring systems. Region 9 is putting together a best practices guide for lending low-cost air sensors to communities. Lending programs are already operating but there is a lack of publicly available material on how to use these sensors and understand what the readings mean.

EPA personnel

Kelly Raymond has been appointed as the Deputy Assistant Administrator for the Office of Air and Radiation. Previously, Raymond was the Director of Government Relations for the Air-Conditioning, Heating and Refrigeration Institute. Raymond will start on November 4, 2019. Anne Isdal continues to serve as Acting Assistant Administrator for the Office of Air and Radiation. The Administration has not given any indications of who will be nominated to fill that position.

EPA funding

EPA’s funding for FY 19 was \$8.9 billion. The House passed their version of funding legislation for FY 20 (\$9.5 billion) on June 25, 2019. The Senate passed their version (\$9.0 billion) on October 31, 2019. It should be noted that the Administration asked for \$6.1 billion. EPA and all federal agencies are currently operating under a continuing resolution that funds them at FY 19 levels until November 21, 2019. While it would appear there is time to resolve the difference between the two versions, negotiations will not begin until both Houses of Congress agree on the overall funding level for all 12 appropriations bills. In addition, the House is on recess for the first week of November. An additional continuing resolution may be necessary. While it seems that no one wants another government shutdown, anything is possible in the current political climate.

Advisory committees

Under Executive Order 13875, all federal agencies are required to reduce the number of their advisory committees by a third. On October 24, 2019, EPA announced the Environmental Laboratory Advisory Board (ELAB) and the National Advisory Council for Environmental Policy and Technology (NACEPT) would be disbanded. In their announcement, EPA stated that the NACEPT's work has slowed and the work from ELAB has been mostly replaced by the National Environmental Laboratory Accreditation Program. In the announcement, EPA stated the Agency is not reviewing any other committee under this Executive Order.

DSW ruling

On October 3, 2019, the U.S. Court of Appeals for the District of Columbia Circuit rejected petitioner's request for rehearing of their decision upholding the Agency's most recent changes to the Definition of Solid Waste (DSW) rule. In this litigation, petitioners had argued that paying a third party to recycle hazardous secondary materials constituted disposal and the Agency failed to explain why the same material was handled differently depending upon whether it was to be disposed of or recycled. The court rejected these claims in July and rejected the motion for rehearing in October. This should end the litigation on the DSW rule.

OIAI litigation

In August, the U.S. Court of Appeals for the District of Columbia Circuit ruled in a split decision that the 2019 memo rescinding the 1995 "once in, always in" (OIAI) policy was not a final action and is not subject to judicial review. On October 4, 2019, petitioners asked for rehearing and a rehearing en banc. The court asked EPA and the intervenors supporting the Agency for a response. Those responses are due on November 15, 2019.

RCRA citizen suits

The number of citizen suits under RCRA have been increasing and attempting to expand the reach of this statute. For example, in Ohio, the Little Hocking Water Association sued DuPont alleging that air emissions could constitute solid waste disposal as the particulate matter emitted fell to the ground and water. The court rejected the human health endangerment claim but allowed the environmental endangerment portion of the suit to proceed. Parties later settled this litigation. In Oklahoma, plaintiffs alleged RCRA endangerment from the disposal of production water from oil and gas activities because it was contributing to earthquakes. The court dismissed this claim saying that earthquake regulation should be left to the states. In California, a plaintiff alleged that future vapor intrusion from a groundwater plume constituted imminent and substantial endangerment. The courts also rejected that case saying it must be actual endangerment and not potential endangerment. There are other cases where plaintiffs have alleged that companies are endangering human

health and the environment by not adequately planning for climate change. Some of these cases have been dismissed but in a Massachusetts case, a district judge agreed with petitioners that climate change effects pose an imminent risk to an Exxon terminal and has allowed the suit to continue.

Drones

The Atlantic Coast Pipeline currently under construction in West Virginia, Virginia, and North Carolina has gathered a great deal of attention from public interest groups. Virginia regulators are prohibited by statute from using drones. However, that does not stop the interest groups from using them. These groups routinely fly the access routes and report the results of these “inspections” to state regulators. The state responds by sending their inspectors to the site in question to verify any results reported.