

May 15, 2015

Office of Policy - Docket
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

<https://www.regulations.gov/docket?D=EPA-HQ-OA-2017-0190>

Re: Comments on Evaluation of Existing Regulations, EPA Docket No. EPA-HQ-OA-2017-0190

Dear Sir or Madam:

The Pavement Coatings Technology Council (PCTC) is pleased to respond to the Environmental Protection Agency's (Agency) request for input regarding the Agency's evaluation of existing regulations.¹ PCTC is a 501(c)(6) trade association whose members include manufacturers of pavement sealcoats. PCTC also represents these manufacturers' suppliers and their customers, who are mainly contractors engaged in sealcoat application. PCTC thanks the Agency for this opportunity to comment on two EPA programs that might be best described as relying on actions that are "pre-regulatory" or "regulation by information:" (1) the Office of Water Storm Water program, and (2) the Integrated Risk Information System (IRIS).

1. Information Quality in the Office of Water Storm Water Program

Sealcoat manufacturers, and their up- and down-stream value chain, have been and increasingly will be burdened by Agency actions that might best be described as "pre-regulatory" or "regulation by information." They have been stymied in their efforts to respond to these actions by the narrowness of existing procedures, which primarily consists of filing an Information Quality Act (IQA) Request for Correction and subsequent appeal (Request for Reconsideration.) IQA filings provide inadequate protection against unwarranted actions as the Agency is asked to review, and, on appeal, re-review its own actions. The PCTC incorporates by reference its IQA filings,² in which EPA actions that "rely in whole or in part on data, information, or methods that

¹ 82 Fed. Reg. 17793 (April 13, 2017).

² <https://www.epa.gov/quality/epa-information-quality-guidelines-requests-correction-and-requests-reconsideration#14003>; response to the appeal is pending.

are not publicly available or that are insufficiently transparent to meet the standard of reproducibility³” are described.

Representatives of local water management districts in various parts of the country have informed PCTC that the misinformation relied on by EPA concerning the role of refined coal tar-based pavement sealants (RTS) is now being used by EPA to increase pressure on MS4 permit holders to include control of sediment-born polycyclic aromatic hydrocarbons (PAHs) in permit applications, without regard to whether ecosystem or water quality impairments are present. The controls proposed by some permit holders involves banning the sale and use of RTS.

Such bans meet the criteria for review by the Agency’s Regulatory Reform Task Force because the bans:

- Result in the elimination of jobs or inhibition of job creation⁴,
- Are based on outdated scientific information⁵ about the impact of PAHs in the environment (in particular, the Storm Water program seems to rely on obsolete values known as “probably effects concentrations” rather than the ecological risk procedures recommended by the Agency’s own Office of Research & Development),
- Impose costs that exceed benefits⁶,
- Create a serious inconsistency⁷ with other Agency programs that have identified alternate methods of establishing criteria for PAHs in sediment, and, as stated above
- “rely in whole or in part on data, information, or methods that are not publicly available⁸ or that are insufficiently transparent to meet the standard of reproducibility.⁹”

As PCTC has explained in detail in its IQA filings, we believe that EPA’s reliance on the deeply flawed program of advocacy research promulgated by the US Geological Survey (USGS) to be scientifically unsupportable and to constitute a loss of scientific integrity. The Agency appears be relying on this flawed USGS research to influence local MS4 permittees to ban RTS. The Agency also appears to have relied on this same flawed USGS research in its settlement agreement¹⁰ concerning the Multi Site General Permit.

On its members’ behalf, PCTC has engaged subject area experts to review the USGS work and made those reviews public;¹¹ and has commissioned scientists to conduct studies in attempts to reproduce the USGS work and publish the results.¹² For reasons that are unclear, the Agency has

³ Presidential Executive Order on Enforcing the Regulatory Reform Agenda (Feb. 24, 2017) (EO). Sec. 3(d)(v)

⁴ EO Sec. 3(d)(i)

⁵ EO Sec. 3(d)(ii)

⁶ EO Sec. 3(d)(iii)

⁷ EO Sec. 3(d)(iv)

⁸ PCTC has filed a Freedom of Information Act lawsuit seeking to obtain data underlying US Geological Survey studies. (PCTC v. USGS, USDC DC 1:2014cv01200).

⁹ See fn. 3

¹⁰ http://waterkeeper.org/app/uploads/2016/08/Waterkeeper_Alliance_Settlement_Agreement_08162016-EPA-MSGP.pdf

¹¹ Summaries of these reviews are available at <http://www.pavementcouncil.org/post-publication-peer-reviews-now-on-pubpeer-com/>

¹² The list of science publications resulting from PCTC funding is available at <http://www.pavementcouncil.org/wp-content/uploads/2016/12/Science-Publications.pdf>

not taken scientific studies published in peer reviewed journals that are critical of the USGS studies into account in its evaluations of causal analysis or of impacts on PAHs in sediments.

2. Integrated Risk Information System (IRIS)

In 1984, in the absence of relevant, fit-for-purpose data, the Agency's IRIS program proposed an oral cancer slope factor for the PAH compound benzo(a)pyrene of 7.3 mg/kg/day. The IRIS program recommends use of benzo(a)pyrene as the index compound for the PAHs as a class of compounds. The 1984 slope factor value was made obsolete by fit-for-purpose studies conducted in the 1990s at the FDA's National Center for Toxicological Research (Culp et al., 1998) and The Netherlands National Institute for Public Health and the Environment (Kroese et al., 2001). Finally, in **January, 2017**, the Agency promulgated an updated cancer slope factor of 1.0 mg/kg/day, or about a 7-fold lower cancer risk or potency than the 1984 value. In the almost two decades between the availability of more relevant information and promulgation of a revised IRIS value, the Agency's Superfund program made clean-up decisions based on risks elevated by almost an order of magnitude. For almost 20 years, state and international government agencies that obligated themselves to use of IRIS values in remedial decision making used risk estimates that were about 7-fold too high. And advocacy researchers seeking to alarm the public used inflated risk values in furthering alarmism by mischaracterizing PAH-containing materials.¹³

The PCTC is grateful that, after almost two decades, the IRIS program has finally updated the cancer slope factor used in Agency PAH risk assessments. That said, the revised benzo(a)pyrene assessment continues to mischaracterize the hazard assessment for the PAHs in classifying benzo(a)pyrene as a "known human carcinogen." Scientific studies over the past several decades indicate that this classification is not supported. The costs associated with such a classification likely include over regulation of the fossil fuel complex, and suspect cost-benefit analyses.

The PCTC requests that the Agency's Regulatory Reform Task Force recognize that the "pre-regulatory" actions and dissemination of information by EPA often has the force of regulation without the opportunity for stakeholders to challenge or otherwise provide input to Agency actions. Additionally, dissemination of information – accurate or inaccurate - by the Agency can be used by state and local government entities to adopt unwarranted regulation.

Thank you for your consideration and attention to this matter. Please contact me at alehuray@pavementcouncil.org or at (703) 299-8470 for additional information.

Very truly yours

Anne P. LeHuray, Ph.D.
Executive Director

¹³ PAHs are naturally present in fossil fuels and are also made on combustion of organic materials such as wood, petroleum, or coal.