44121 Harry Byrd Highway, Suite 225
Ashburn, VA 20147

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

CRWI Update
December 31, 2016

Boiler litigation

On December 23, 2016, the court granted EPA's petition to change the remedy for certain major source boiler standards from vacatur to remand. In addition, the court denied industry's petition to rehear the malfunction argument and the environmental group petitions to rehear the upper prediction limit decision and the work practices decision for area source boilers. Unless someone appeals any of these decisions to the Supreme Court, this litigation is completed.

There are five other issues that were remanded to the Agency for explanation in the July 29, 2016 opinion. These are:

- The use of CO as a surrogate for non-dioxin organic HAPs;
- Instructions to set standards for cyclonic burn barrels under CISWI;
- Instructions for EPA to determine whether burn-off ovens, soil treatment units, and space heaters are CISWI units, and if so, promulgate standards for these source categories;
- The decision that synthetic minor boilers were excluded from Title V permit requirements; and
- EPA's choice of GACT over MACT for non-mercury metals.

Other than the initial work on the revised standards, the Agency has not indicated when they would start working on the remanded issues.

2016 election

In the November Update, it was suggested that the Office of Management and Budget (OMB) would not be able to work its way through the 28 pending rules prior to the January 20, 2017, inauguration date. In December, OMB cleared 19 rules, leaving only nine rules under review at the end of 2016. This compares to five cleared in November. Obviously that crystal ball was not very clear. While some of these rules will not make it into the

Federal Register before January 20, 2017, some will. Two of the rules that cleared OMB in December were the hard rock mining proposed rule to require financial assurance and the final rule revising risk management plans.

By late December, President-elect Trump had announced the majority of his cabinet choices. As should be expected from Mr. Trump, they were a mixture of political insiders and outsiders. For example, Mr. Trump selected Rex Tillerson (currently the CEO of Exxon-Mobil) to be his Secretary of State and former Texas Governor Rick Perry to be his Secretary of Energy. Mr. Tillerson has no government experience but has been successful in running Exxon-Mobil. Whether that can translate into running a government bureaucracy has yet to be determined. Ironically, when Mr. Perry was still running for President, he vowed to close the Department of Energy. Perhaps he will have a change to work himself out of a job.

Mr. Trump also announced that Scott Pruitt will be his nominee to head EPA. Mr. Pruitt is currently the Attorney General for Oklahoma and is a lead attorney in the lawsuit challenging EPA's Clean Power Plan. This has led a number of observers to speculate that Mr. Trump is intent on dismantling the entire set of climate change regulations that have been developed by the Obama Administration, including the endangerment finding. A number of activists are urging the Senate Democrats to oppose Mr. Pruitt's nomination. Senate confirmation of Presidential nominations is based on a simple majority vote. However, in the past, the minority party has been successful in blocking and delaying nominations using Senate procedures and rules to keep the nomination from coming up for a vote. When the Democrats were in control of the Senate, the Republicans were successful in blocking a number of Obama nominations by using these procedures and rules. Under those rules, 60 votes were needed to stop this delaying tactic and force a vote on the actual nomination. After clearing the procedural hurdle, then a vote on the nomination itself could take place. Not having those 60 votes, the Senate Democrats changed the rules in 2013 excluding the U.S. Appeals Court and Executive Branch nominations from these requirements. This allowed a number of Obama nominations to be confirmed. Now it is the Republican's time to use this rule change to their benefit. However, one should not expect all of the nominations to be smooth sailing. Both the Republicans and Democrats are expected to take their job seriously in vetting these nominees. Barring some unusual circumstances (remember Nannygate), most of Mr. Trump's nominees should get approved but it will be a slow and deliberate process.

The House Freedom Caucus is made up of 32 conservative Republican Congressmen that support smaller government and is often aligned with the tea party movement. This group has been very influential and was partially responsible for the resignation of John Boehner as the Speaker of the House. In addition, Congressman Paul Ryan would not consider being nominated for the Speaker of the House until the House Freedom Caucus supported his nomination. Needless to say, this group has a great deal of influence on the Republican portion of House of Representatives. On December 14, 2016, they released a list of 227 regulations, executive actions, or policies they believe should be removed by the next Congress or Administration.

These changes range from Securities and Exchange Commission rules to the Department of Agricultural rules. This list includes 19 rules or executive actions relating to environmental issues (e.g., the greenhouse gas endangerment findings, a number of the greenhouse gas emission rules, emission guidelines for municipal solid waste landfills, accidental release regulations, and the MACT standards for the brick industry, etc.). As stated in the November Update, Executive Orders are easy to undo by the new President. Congress can overturn recent rules using the Congressional Review Act but this has the downside of forbidding an agency from re-issuing a substantially similar rule in the future. To overturn a rule that is not subject to the Congressional Review Act will require a new rulemaking. This process normally takes several years and is subject to judicial review. For example, a number of activists have suggested undoing the original finding that greenhouse gases endanger human health and the environment. Since all of the subsequent climate change regulations have been built on this finding, this would seem like a logical place to start. However, the scientific foundation used by the Agency is fairly strong despite questions raised on the validity of some of those arguments. Undoing that finding will take a complete and thorough rulemaking that will have to discredit much of the previous scientific basis. In addition, the Supreme Court (*Massachusetts v. EPA*) has already ruled that EPA has authority under the Clean Air Act to regulate greenhouse gases. This will make it harder for a regulation that undoes the finding to survive a subsequent court challenge. Given that EPA laid a scientific foundation for the endangerment finding (may be flawed but the courts have repeatedly stated that EPA does not have to be perfect – only reasonable) and this foundation has been upheld in the Appeals Court will make withdrawing the endangerment finding a long and arduous task followed by litigation likely all the way to the Supreme Court. This is not to say that it cannot or should not be done, only that it will be difficult and expensive.

CERCLA 108(b) financial assurance

EPA met the December 1, 2016, court deadline and signed a proposed rule to add financial assurance requirements to the hard rock mining industry under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). As proposed, owners and operators would be required to:

- Determine the level of financial responsibility needed;
- Obtain a financially responsible instrument or to qualify to self-assure;
- Demonstrate evidence of financial responsibility; and
- Maintain and update their financial responsibility until released from section 108(b) regulations.

EPA has announced two webinar on this rule. The first is on January 10, 2017 at 2:00 pm EST and is an overview of the proposed rule. The second is on January 30, 2017, and covers the financial responsibility formulas. You can register for either at the link below. Once published in the *Federal Register*, interested parties will have 60 days to submit comments.

In addition, the EPA Administrator signed a Regulatory Determination Notice that the Agency plans to issue notices of proposed rulemaking for similar financial responsibility requirements for the chemical manufacturing; the electric power generation, transmission, and distribution sector; and the petroleum and coal products manufacturing sector. This notice is a not a determination that financial responsibility will be required of these three sectors but that the Agency will be going through the rulemaking process to make that determination. There is no comment period on this notice.

Pre-publication copies of both of these publications and links to the webinars can be found at https://www.epa.gov/superfund/superfund-financial-responsibility.

ADI

On December 28, 2016, EPA announced an additional 30 posting to their Applicability Determination Index (ADI) data system. While none of these show a direct application to EEE sources, they may include ideas that could be used for this source category. A discussion of each new determination can be found in the *Federal Register* notice. All ADI determinations can be found at https://cfpub.epa.gov/adi/.

In addition, on December 21, 2016, EPA published a notice of seven broadly applicable alternative test methods that have been approved in 2016. These include modifications to Performance Specifications 12A and 12B. A discussion of each of these can be found in the *Federal Register* notice. A complete list of broadly applicable alternative test methods can be found at https://www.epa.gov/emc/broadly-applicable-approved-alternative-test-methods.

E-manifest advisory board meeting

The initial meeting of the e-manifest advisory board will be January 10-12, 2017 in Arlington, VA (*Federal Register* notice on December 7, 2016). This meeting is designed to address policy and system development issues that need resolution prior to the launching of the e-manifest system. Additional information can be found in the notice or at https://www.epa.gov/hwgenerators/hazardous-waste-electronic-manifest-system-e-manifest.

RMP final rule

On December 21, 2016, EPA announced that the amendments to the risk management program (RMP) final rules had been signed. These regulations are written under section 112(r) of the Clean Air Act and are designed to require covered facilities to develop and implement a risk management program. These amendments were prompted by the explosion in West, Texas that resulted in 15 deaths. The provisions of this final rule were hotly contested with environmental groups calling for more public disclosure and state officials and industry arguing that additional information is a security concern for the facility and the local population. The final rule

dropped the requirement that certain facility data must be posted on a public website but that information still needs to be made known to the local emergency planners. The final rule also requires independent audits following incidents or near misses but removes the requirement for certification of the auditors. In addition, facilities will be required to assess whether inherently safer technologies would reduce risk but declined to require their use where feasible. This rule will go into effect 60 days after publication in the *Federal Register*. It is possible that the Trump Administration will delay publication or implementation of this rule to give the new administration time to review it. Other observers say this rule is a good candidate for a resolution of disapproval under the Congressional Review Act.

Enforcement

On December 1, 2016, EPA announced a settlement agreement with Slawson Exploration Company to resolve Clean Air Act violations. The agreement resolves claims that the company failed to adequately design, operate, and maintain vapor control systems for its storage tanks on 170 oil and natural gas well pads on the Fort Berthold Indian Reservation in North Dakota. Slawson will be required to use infrared cameras and electronic pressure monitors to better detect and respond to emissions and will be required to replace all pit flares with control devices with greater destruction efficiency. In addition, they will be required to spend an estimated $2 million on supplemental environmental projects and pay a $2.1 million civil penalty.

In a December 15, 2016, *Federal Register* notice, EPA announced a proposed settlement agreement with DuPont relating to mercury discharges from a former acetate fiber manufacturing plant in Waynesboro, VA. Under the proposed agreement, DuPont will pay certain un-reimbursed government assessment costs, pay a total of $42 million for natural resource restoration projects, and implement a fish hatchery project.

On December 16, 2016, EPA announced a settlement agreement with the S. H. Bell Company that will require the company to install four PM10 air monitors at its facility in Chicago. The monitors must be operational and reporting data by March 1, 2017. In addition, the company will pay a $100,000 civil penalty. The company handles and stores metals, limestone, and fertilizers on the site.

On December 20, 2016 (*Federal Register* notice on December 29, 2016), EPA announced a second agreement with Volkswagen over the use of “defeat devices” in their diesel engine automobiles. The first agreement covered cars with a 2.0 liter diesel engine. This agreement covers cars with a 3.0 liter diesel engine. Because the older 3.0 liter engines cannot be upgraded to meet the EPA-certified exhaust emissions standards, Volkswagen will be required to offer to buy back these cars. For the newer engines, Volkswagen will be required to recall and repair these engines. In addition, Volkswagen will be required to fund $225 million in NOx restoration projects where these engines operated.

On December 19, 2016, EPA released their FY 2016 annual enforcement statistics. Both the total fines and the amounts of hazardous waste treated as a result of EPA enforcement actions were significantly higher than in the previous years. These increases were dominated by a few actions (e.g., a $5.6 billion civil penalty for the Deepwater Horizon oil spill, the $14.7 billion Volkswagen civil penalty, and a requirement for IMI Phosphates to treat 62 billion pounds of hazardous waste) rather than an overall increase in inspections or enforcement actions. In fact, the number of investigations opened per year has steadily declined from over 300 opened in 2012 to less than 200 in 2016. In addition, the number of inspections has declined from near 20,000 in 2012 to less than 15,000 in 2016. It is anticipated that these downward trends will continue in the next administration. Additional information can be found at https://www.epa.gov/enforcement/enforcement-annual-results-fiscal-year-2016.