



## CRWI Update February 28, 2017

### MEMBER COMPANIES

Clean Harbors Environmental Services  
Dow Chemical U.S.A.  
E. I. Du Pont de Nemours  
Eastman Chemical Company  
Heritage Thermal Services  
INVISTA S.à.r.l.  
3M  
Ross Incineration Services, Inc.  
Veolia ES Technical Services, LLC

### GENERATOR MEMBERS

Eli Lilly and Company

### ASSOCIATE MEMBERS

AECOM  
Alliance Source Testing LLC  
Amec Foster Wheeler PLC  
B3 Systems  
Coterie Environmental, LLC  
Focus Environmental, Inc.  
Franklin Engineering Group, Inc.  
METCO Environmental, Inc.  
O'Brien & Gere  
SGS North America, Inc.  
Strata-G, LLC  
SYA/Trinity Consultants  
TestAmerica Laboratories, Inc.  
TRC Environmental Corporation

### 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](mailto:mel@crwi.org)  
Web Page: <http://www.crwi.org>

## Second boiler reconsideration litigation

Final briefs for this litigation were filed on February 6, 2017. A date for oral arguments has not been set. A decision is expected mid to late 2017. Environmental groups are challenging EPA setting a 130 ppm CO threshold and the use of work practices for startup and shutdown.

## Generator rule challenged

On February 24, 2017, nine industry groups (including the American Chemistry Council, the American Forest and Paper Association, and the American Petroleum Institute) filed a petition for review of the Hazardous Waste Generator Improvements Rule. Petitioners are not required to list their challenges in the initial petition. The trade press is reporting that industry agrees with most of the provisions in the final rule but is concerned that failure to comply with the conditions of exemption would cause the generator to be viewed as a TSD operating without a permit and in violation of storage standards. Additional challenges will likely be disclosed when the petitioners file their non-binding statement of issues.

## Procedure 2 direct final rule withdrawn

On November 21, 2016, EPA published a direct final rule that modified a Procedure 2 requirement that the annual relative response audit (RRA) test results must fall within the range of data collected when developing the original calibration curve for a PM CEMs/CPMS. During the comment period, EPA received adverse comments and withdrew the rule on February 15, 2017. Sometime in the future, EPA will address the comments received and re-publish a final rule.

## OSWRO settlement agreement

On December 19, 2016, EPA published a proposed settlement agreement with Eastman and the American Chemistry Council that would set deadlines for reconsidering the monitoring requirements for pressure relief devices on portable containers in the Off-Site Waste and Recover Operations (OSWRO) final rule. EPA has previously declined to reconsider leak detection

provisions for connectors. In the agreement, EPA agreed to take initial action by July 20, 2017, and final action no later than January 18, 2018.

### **SPCC type rules**

Environmental groups sued EPA over their failure of a non-discretionary duty under the Clean Water Act to develop spill prevention, control, and countermeasures (SPCC) type regulations for hazardous substances other than oils. A consent decree was signed in 2016, requiring the Agency to sign a proposed rule within 18 months and a final rule within 14 months after the signed rule is published. The consent decree did not specify which hazardous substances or industry sectors should be covered. EPA held three listening sessions; one in West Virginia and two virtual sessions in the November – December 2016 time frame. They have posted a summary of the comments received at [https://www.epa.gov/sites/production/files/2016-12/documents/final\\_cwa\\_hssp\\_public\\_input\\_summary\\_121916.pdf](https://www.epa.gov/sites/production/files/2016-12/documents/final_cwa_hssp_public_input_summary_121916.pdf). Based on comments received, EPA has decided to gather additional data. By taking this step, the Agency will activate a provision in the settlement agreement that gives them an additional 10 months to propose the rule. They are now working on a June 2018 deadline for the proposed rule.

### **EPA Nomination**

The first step in presidential nominations is for the President to send a formal nomination to the Senate. The second step is for the committee of jurisdiction to hold a confirmation hearing. The hearing for Scott Pruitt's nomination to be the Administrator for EPA was held on January 18, 2017. The third step is for the committee of jurisdiction to approve the nomination and send it to the floor of the Senate for confirmation. On February 1, 2017, The Senate Environment and Public Works Committee tried to approve the nomination but no Democrats attended. Senate rules require that at least two members of the minority party be present before any official committee business can be conducted. By boycotting the meeting, the Democrats stopped the process. That stoppage was short lived because the chairman of the committee re-scheduled the meeting for the next day. When the Democrats failed to show up for the second meeting, the chairman suspended the rules and the committee approved the nomination based only on Republican votes. The final step in the process is for the full Senate to vote to confirm the nominee. Democrats threw up one more roadblock by insisting on using all 30 hours of debate allowed for each nominee. The Republican majority pushed on and the Senate confirmed Mr. Pruitt as the new EPA Administrator by a vote of 52-46 on February 17, 2017. He was sworn in shortly after the vote.

While this is an important step, EPA has 14 additional positions that require Senate confirmation. But EPA is only one of many agencies that have slots to fill. Overall, there are approximately 1200 positions within the Executive Branch that require Senate confirmation. Should the Democrats continue to use the delaying tactics mentioned above, some of the slots may never be filled. In some ways this could work to the

current administration's advantage. They may be able to accomplish part of their goal to reduce the number of federal workers by not filling all of these slots. In addition, there are several other positions yet to be filled that are appointed by the President but do not require Senate confirmation (e.g., regional administrators). However, the new administration will need at least a central core of these positions filled before they can effectively carry out their agenda.

### **EPA priorities**

Mr. Pruitt has only been in office since February 17, 2017, so it is difficult to get a feel for where he wants to lead the Agency. He may not have his senior staff in place for several more months due to stalling tactics from the minority and the trade press is reporting that the career staff is highly skeptical of Mr. Pruitt goals. Prior to his confirmation, Mr. Pruitt suggested turning away from climate change rules and focusing more on clean air, land, and water. He has mentioned working on Superfund sites, attaining air quality standards, and improving water infrastructure. He has specifically mentioned cleaning up the Hanford, WA nuclear site and the Hudson River. He has also suggested reducing the role of the regions and pushing more work to the states. The trade press is reporting that Mr. Pruitt will also try to deliver on campaign promises to roll back or eliminate the Clean Power Plan and the Waters of the U.S. rules. Should efforts to pass a resolution of disapproval under the Congressional Review Act for the risk management plan rule fail, industry may ask EPA to use administrative processes to roll back or eliminate this rule also. If the Agency tries to rescind any promulgated rule, they will have to re-start the rulemaking process and justify why the conclusions in the previous rulemakings were wrong. This will be a difficult process and will be subject to litigation once completed. In addition, the same career staff that wrote the original rules will now be asked to find ways to justify eliminating them. While the career staff will do what they are told, they often have ingenious methods for slowing work they do not believe in. Before making too many judgements, one should go back to the opening statement of this paragraph and remember that Mr. Pruitt has been on the job for less than two weeks. Both he and the career staff need some time to get to know one another before work on any new directions will be efficient.

Some readers may have noticed that EPA's section of the *Federal Register* has been noticeably bare for the past month. This is because the Obama Administration was successful in getting a large number of rules completed before January 20, 2017. Since most major rules must go through the Office of Management and Budget (OMB) before being signed and published, the number of rules currently under review is a good predictor of future publications. As of February 28, 2017, there were no rules at OMB for review from any agency. Since OMB typically takes 60 to 90 days to review a rule, one should not expect to see any major EPA rules published anytime soon. The exceptions to this are the rules that have been caught up in the Priebus memo and were withdrawn from the Office of Federal Register or were never sent. These rules will not move forward until a Trump appointee reviews and approves them for publication.

## Executive Orders

President Trump has issued two executive orders in February that will have an impact on environmental regulations. In addition, the Office of Management and Budget published guidelines (February 3, 2017) on how agencies should implement the two for one executive order published in January. This document gives the agencies further instructions on what regulations are covered and how to measure the costs for the new regulations and the ones to be repealed. The guidance also discussed how offsets can be “traded” between agencies.

On February 24, 2017, Mr. Trump signed a new executive order (13777) that requires agencies to designate regulatory reform officers and establish a regulatory reform task force with the goal of identifying existing rules for repeal or modification. According to the order, each task force shall attempt to identify regulations that eliminate jobs or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; are inconsistent with data transparency provisions of the General Government Appropriations Act of 2001 and its guidance; or have been derived from executive orders that have been rescinded or substantially modified.

In 2006, the Supreme Court heard a case (*Rapanos v. United States*) on defining the waters of the United States for the purpose of deciding which waters are covered under the Clean Water Act. In this decision, two different definitions of what constitutes waters of the U.S. were developed. The late Justice Antonin Scalia wrote that “continuous surface connection” was required for a body of water to fall within the jurisdiction of EPA and the Corp of Engineers. Justice Anthony Kennedy’s test required a “significant nexus” with navigable waters to allow jurisdiction under the Clean Water Act. Because the decision was split 4-4-1, neither test received support for the majority of the Justices. As such, neither became a binding precedent. Since the ruling, regulators have generally followed the Kennedy approach which included intermittent bodies of water under the jurisdiction of the Clean Water Act. On February 28, 2017, Mr. Trump signed an executive order telling EPA and the Corp of Engineers to review the 2015 Waters of the United States rule and to interpret the *Rapanos* decision using the Scalia test rather than the Kennedy test. On the same day, EPA Administrator Scott Pruitt signed a *Federal Register* notice of intent to review and rescind or revise this rule. This has drawn praise from industry groups and farm groups but strong criticism from environmental groups and former EPA Administrator Gina McCarthy. As stated earlier, withdrawal of rules is a difficult and time consuming process. However, it does not appear that the Trump Administration is going to dilly dally in fulfilling their campaign promises.

## CRAs

The Congressional Review Act (CRA) allows Congress to repeal any rulemaking by the Executive Branch. It became a public law in 1996 and has rarely been used until recently. Under this law, a member of Congress can introduce a “resolution of

disapproval” within 60 legislative days of any regulation being promulgated. This law is not subject to the filibuster rules in the Senate so it can be passed on a simple majority of both Houses. If passed by both the House and the Senate and signed by the President, that regulation is repealed and the agency cannot re-promulgate a substantially similar regulation in the future. Until Mr. Trump was sworn into office, this law has been used successfully only once.

Since the Republicans control Congress and the White House, they see this law as a method to repeal a number of regulations promulgated late in the Obama Administration. There have been a total of 42 joint resolutions of disapproval under CRA introduced in the House and the Senate at the end of February. There are duplications so this does not represent attempts to repeal 42 different rules. Of these resolutions, 11 have been passed by the House and three have been passed by both the House and the Senate. Of the three passed by both houses, President Trump has signed two of them into law, overturning an SEC rule and an Office of Surface Mining rule on stream protection rule. Of the 42 introduced, three target EPA rules. These three rules are the Cross-State Pollution Rule, the oil and gas sector standards for new and reconstructed sources, and the risk management plan rule. None of the three resolutions targeting EPA rules have been acted upon by either house.

### **2018 EPA budget**

The official Office of Management and Budget (OMB) recommended budget for fiscal 2018 will not be released until mid-March. However, drafts have been obtained by the media. According to these sources, OMB is recommending that EPA’s budget be cut by approximately 25%. This included cutting state grants by 30%, reducing the work force by 20%, and eliminating funds for several programs. The staff cuts are to be accomplished using buyouts and reductions in force processes. Some of the programs where funding is to be eliminated include funds to implement the Clean Power Plan; diesel emissions grants; certain brownfield projects; Energy Star grants; geographical programs for Lake Champlain, Long Island Sound, San Francisco Bay, and South Florida; Global Change Research; the electronic waste e-manifest system; all 14 Climate Voluntary partnership programs; and the Office of Public Engagement. EPA Administrator Pruitt has indicated interest in trying to restore funding to some of these programs. But it is Congress that actually appropriates funds and some of the funding for certain projects will likely get restored during the appropriations process. Fiscal year 2018 starts on October 1, 2017.

### **Inventory of GHG emissions**

On February 15, 2017, EPA published a notice of the availability of the 1990-2015 draft inventory of U.S. greenhouse gas (GHG) emissions and sinks. This is the latest in a series of annual submissions to the United Nations Framework Convention on Climate Change. Comments on the draft report will be accepted until March 17, 2017.

## **Gold King spill**

In 2015, an EPA contractor was working to minimize seepage from the Gold King Mine when the containment for the mine broke, spilling about 3 million gallons of wastewater into nearby rivers. This resulted in closing the Animus and San Juan rivers in Colorado and New Mexico to recreational use and as a source of drinking water. New Mexico and the Navajo Nation sued EPA, the companies that previously owned the mine, and the contractors working on the cleanup effort under the Clean Water Act and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) for damages created by the spill. Mine owners and the contractors argued that they could not be held responsible because EPA was the “operator” of the site at the time of the spill. In a February 13, 2017, brief filed by EPA, the Agency responded that it could not be held responsible for its role in the spill because they were trying to clean up pre-existing conditions. Given the costs and the provisions in CERCLA, it is understandable why no one wants to take responsibility.