



## CRWI Update January 31, 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

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## Second boiler reconsideration litigation

The environmental petitioners filed their reply brief in the second boiler reconsideration litigation on January 12, 2017. In this litigation, the petitioners are challenging the 130 ppm CO threshold and the use of work practices for startup and shutdown. The reply brief did not include any new arguments but re-iterated the arguments from the opening brief. The environmental petitioners are arguing that the Agency does not have to use surrogates but when it does, it needs to follow the requirements in 112(d)(3) and set standards that are reflective of the top performers. If CO is not a good surrogate, then it needs to find alternative surrogates or regulate the organic HAPs directly. On the work practice issue, the environmental petitioners argued that the fact that the Agency used two different definitions for startup cancels the idea that it is infeasible to measure emissions during startup – removing the grounds for setting a work practice. They also argued that setting an “as expeditiously as possible” work practice is the same as the general duty clause to “minimize emissions to the greatest extent possible” which the court has already determined is not a 112 compliant standard. Final briefs are due February 6, 2017. A date for oral arguments has not yet been set. A decision is expected in mid to late summer of 2017.

## Regulatory freeze

On January 20, 2017, Reince Priebus, President Trump’s Chief of Staff, issued a memo requiring all agencies to take the following steps:

- Send no regulations to the Office of Federal Register until it is approved by a Trump appointee;
- If a regulation has been sent to the Office of Federal Register but has not yet been published, immediately withdraw that action until it can be reviewed by a Trump appointee; or
- If a regulation has been published in the *Federal Register* but is not yet effective, take immediate steps to delay the effective date for that action for 60 days from the date of the memo.

This memo does not cover actions that are subject to statutory or legal deadlines. This is a fairly routine process allowing the new administration to review recent regulatory actions made by the previous administration. On January 26, 2016, EPA published a *Federal Register* notice that officially modified the effective date for 30 regulations that fit the criteria in the Priebus memo. Since the memo set a 60 day delay from the date of the memo, the new effective date for all 30 rules is March 21, 2017. This has a larger impact on some rule than it does on others. For example, the effective date for the State of Kentucky underground injection control program approval moved from January 26, 2017 to March 21, 2017, while the effective date for the accidental release provisions changed from March 14, 2017 to March 21, 2017. The majority of these 30 rules were approvals of various state plans.

Prior to the change in administrations, EPA and the Office of Management and Budget (OMB) were very efficient in clearing all EPA rules. At the end of November 2016, EPA had 28 rules pending review at OMB. As of January 20, 2017, there were no EPA rules under OMB review. Some of these made it to publication but others did not. Most of these 28 rules will be caught up in this regulatory freeze.

## **Nominations**

The formal process of nominating a new cabinet could not begin until the new President was sworn in on January 20, 2017. However, that does not stop the new President from announcing his cabinet selections nor does it slow down the Senate from holding confirmation hearings prior to the formal nominations. In theory, the Senate would like to have as many hearings as possible completed prior to the swearing in ceremony so that confirmation votes can be held as quickly. For instance, the Democrat led Senate confirmed eight of President Obama's nominees the day he took office. The Republican led Senate was not as efficient, only confirming two of Mr. Trump's nominees on the first day in office (James Mattis – Defense and John Kelly – Homeland Security). As of January 31, 2017, the Senate has confirmed 5 of Mr. Trump's nominees (Elaine Chao – Transportation, Nikki Haley – UN Ambassador, and Mike Pompeo – CIA). A number of others have cleared committee votes and are waiting on a vote from the full Senate. Others have had hearings but the committees have not yet voted on the nominations while still others are waiting on hearings. Hearings for Scott Pruitt were held on January 18, 2017. Mr. Pruitt's nomination is considered as controversial due to his stance on climate change regulations. A vote in the Environment and Public Works Committee on Mr. Pruitt's nomination is scheduled for February 1, 2017. If Mr. Pruitt's nomination is approved by the committee, the nomination will go to the full Senate for a vote. While the Democrats are likely to try a number of procedural methods to slow the process, Mr. Pruitt is likely to be approved along party lines unless unethical behavior is uncovered. Nominations for EPA's Deputy Administrator and Assistant Administrators have not been announced.

Meanwhile, President Trump appointed Catherine McCabe to be the acting EPA Administrator. Ms. McCabe was the Deputy Administrator for Region 2. Ms. McCabe will run the Agency until Mr. Pruitt is confirmed.

## Executive Orders

President Trump has issued a number of Executive Orders to fulfill some of his campaign promises. Some have gotten a great deal of attention (e.g., restrictions on travel from seven countries) but others have gone mostly unnoticed. An example of the second is a January 30, 2017, order that puts a regulatory and budget cap on all new regulations. Specifically, this order (E.O. 13771) requires that unless prohibited by law, for each new proposed or final rule, the agency must identify at least two existing regulations that will be repealed. In addition, the agency is directed to total the costs of new regulations and the ones to be repealed for the rest of fiscal year 2017. That budgetary cost must not be greater than zero. Fiscal year 2017 started on October 1, 2016 and ends on September 30, 2017. In addition, this Executive Order appears to amend a Clinton era Executive Order (12866) and now requires that a regulation cannot be issued unless it is included in the most recent Unified Regulatory Agenda. The Office of Management and Budget will send out guidance on how to implement this order.

There are a number of questions on how this Executive Order will be implemented. Because it includes the phrase “unless prohibited by law,” lawyers from both industry and the environmental groups are not sure what happens next. One could interpret this to mean that mandatory rulemakings can proceed but an agency must find offsets for any discretionary activities. In addition, it may change the way EPA does their cost benefit analyses. At least for now, there is more confusion on what this order means than there is clarity – except that the agencies are going to have to find cost and rule offsets for any new rulemakings.

In addition, President Trump has temporarily imposed a hiring and contracts freeze on EPA as well as restrictions on outside communications. This coupled with a statement from the head of the EPA transition team that the Agency should cut staff from the current levels of approximately 15,000 employees to 5,000 employees in the next four years has created a certain amount of anxiety within the Agency. While the head of the transition team is no longer a part of the new administration, his statement certainly hit a nerve with an already anxious staff. The restrictions on communications may also make it more difficult to get information.

When speaking to the automobile industry on January 24, 2017, Mr. Trump pledged to remove environmental regulatory hurdles that slow down projects and hinder job growth. To this end, Mr. Trump signed documents (January 24, 2017) inviting TransCanada to re-submit their application for the Keystone pipeline, advancing consideration of the Dakota access pipeline, expediting the environmental review process for certain infrastructure projects, and initiating a process to solicit potential permitting reforms.

## **CRA**

As of January 31, 2017, 20 resolutions for disapproval of various rules from the Obama Administration had been introduced in the House of Representatives under the Congressional Review Act (CRA). Some were duplicates (meaning they apply to the same rule). H. J. Res. 38 is scheduled for a vote on the House floor on February 1, 2017. It is expected to pass the House and be sent to the Senate. Should it pass the Senate, it will be submitted to the President for his signature. H. J. Res. 38 would disapprove the Stream Protection Rule promulgated by the Office of Surface Mining and Enforcement of the Department of the Interior (published in the *Federal Register* on December 20, 2016). Should this joint resolution be signed into law, it would remove this rule from the Code of Federal Regulations and would prohibit the Office of Surface Mining and Enforcement from promulgating a similar rule in the future. The House is scheduled to vote on three additional resolutions of disapproval the first week in February. So far, no joint resolution to repeal EPA rules has been introduced. However, on January 25, 2017, 21 trade organizations sent a letter to congressional leaders asking that the risk management plan rule (published on January 13, 2017) be repealed using CRA.

## **CERCLA 108(b) financial assurance**

On January 11, 2017, EPA published a proposed rule to establish financial assurances under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). A summary of the proposed requirements were in the December 2016 Update. Comments are due on or before March 13, 2017. Since this is a proposed rule, it is not impacted by the Priebus memo. However, it may see significant changes once the new leadership at EPA is installed. The notice of intent to proceed with rulemakings setting financial assurance requirements for the chemical manufacturing sector; the petroleum and coal products manufacturing sector; and the electric power generation, transmission, and distribution industry was published on the same day. The notice of intent is not a rulemaking in itself but a statement that the Agency intends to start the rulemaking process for these three sectors.

## **n-Propyl bromide proposed as a HAP**

The Halogen Solvents Industry Alliance and the State of New York submitted a petition asking the Agency to add n-propyl bromide to the list of hazardous air pollutant (HAP) under section 112(b)(3) of the Clean Air Act. On January 9, 2017, EPA granted that petition and published a rule proposing to add the chemical as a HAP. Comments are due on March 10, 2017.

## **Civil penalty adjustment**

In 2015 Congress passed legislation requiring agencies to annually adjust their civil penalties for inflation. For 2017, civil penalties will increase by 1.636%. EPA published their adjustment rule on January 13, 2017 with the increases going into effect on

January 15, 2017. For example, under the Clean Air Act, the civil penalty went from \$44,539 per event per day in 2016 to \$45,268 per event per day in 2017. The Department of Labor published their increases on January 18, 2017. The exact increases for each statute can be found in the *Federal Register* notices.

### **Civil penalty procedures**

The procedures for assessing civil penalties, issuing compliance orders, and to terminate or suspend certain permits are codified in 40 CFR 22. On January 9, 2017, EPA published a final rule to remove inconsistencies, codify electronic filing and service procedures, and streamline the procedures in cases filed at EPA Headquarters. It corrects typographic errors and revises the procedure governing decision making in permit appeals. The preamble states that the changes do not substantively change the administrative enforcement actions or the review of permits. Details of the changes can be found in the *Federal Register* notice.

### **CISWI FIP proposed rule**

On January 11, 2017, EPA proposed their federal implementation plan (FIP) to regulate emissions for commercial and industrial waste incinerator (CISWI) units where states have not incorporated the emission guidelines into their state regulations. Under section 129 of the Clean Air Act, EPA develops emission guidelines for units burning solid waste. States that have these units are supposed to pick up these guidelines and incorporate them into their state plans. For those states that do not pick up the rule and have a CISWI unit, EPA develops a FIP. In the notice, the Agency states that Alabama, Florida, South Carolina, North Dakota and Oregon have submitted final state implementation plans. West Virginia and Virginia have submitted draft plans. Connecticut, New Hampshire, Vermont, Rhode Island, the Virgin Islands, District of Columbia, New Mexico, City of Albuquerque, and Montana have all submitted notice that they do not have a CISWI unit within their jurisdiction. All CISWI units must be in compliance with either a state plan or the federal plan by February 7, 2018. EPA hopes to finalize this rule this year. Comments are due on February 27, 2017.

### **Export/import CBI request**

On January 19, 2017, EPA published a request for comments on a Freedom of Information Act (FOIA) request for information on the export and import of cathode ray tubes and spent lead acid batteries. The notice specifically asks if exporters or importers wish to make additional confidential business information (CBI) claims on any of the transactions. Comments are due on February 21, 2017.

### **DCOT required**

In 2015, EPA published a risk and technology review final rule for the ferroalloy manufacturers industry that required the use of a digital camera optical technique (DCOT) as a method for measuring opacity of fugitive emissions from furnace buildings.

Industry requested this decision be reconsidered citing the failure to properly notice the requirement and raising the issue that there is only one supplier of the technology. EPA granted that request and took additional comments on those issues and others. On January 18, 2017, EPA published a final rule confirming their decision to require the use of DCOT as a method to measure opacity. While this requirement only impacts two manufacturers, it has been cited in a recent final permit as an example of where the Agency can require a technology that has only one supplier.

### **RCRA post-closure guidance**

On December 15, 2016, EPA released their guidelines for post-closure care period for hazardous waste disposal facilities in a memo from Barnes Johnson (Director of the Office of Resource Conservation and Recovery) to the Regions. The purpose of these guidelines is to assist regulators in evaluating the conditions at hazardous waste disposal facilities that are approaching the end of their original 30-year post-closure care period. The guidance is designed to help both regulators and operators determine if additional post-closure care is needed to protect human health and the environment. A copy can be found at <https://www.epa.gov/hwpermitting/guidelines-evaluating-and-adjusting-post-closure-care-period-hazardous-waste-disposal>.

### **2015 TRI data released**

On January 12, 2017, EPA released the Toxics Release Inventory (TRI) data for 2015. This data shows an 8% decrease in releases from 2014 to 2015. Hydrochloric acid and sulfuric acid releases to the air fell by 566 million pounds. Toluene releases to the air also fell by 32 million pounds and mercury emissions to the air dropped by 76,000 pounds. Coal and oil-fired electric utilities accounted for more than 90% of the air releases for hydrochloric acid, sulfuric acid, and mercury from 2005 to 2015. In addition, approximately 93% of the 26 billion pounds of total chemical waste generated was not released to the environment due to recycling, energy recovery, or treatment. A copy of the report can be found at <https://www.epa.gov/toxics-release-inventory-tri-program>.

### **Occupational exposure to beryllium**

On January 9, 2017, OSHA published a final rule amending the existing standards for occupational exposure to beryllium and beryllium compounds. The new permissible air exposure limits are 0.2  $\mu\text{g}/\text{m}^3$  as a 8-hour weighted average and 2  $\mu\text{g}/\text{m}^3$  as a short-term exposure (15 minutes). This standard applies to general industry, shipyards, and construction. The effective date of the rule is March 10, 2017, but this will likely get extended to March 21, 2017, based on the Priebus memo.

### **NACEPT report on citizen science**

On December 13, 2016, the National Advisory Council for Environmental Policy and Technology (NACEPT) submitted their report on the how citizen science can and should

be used in EPA's policy, enforcement, and rulemaking activities. The report recommends that EPA:

- Embrace citizen science as a core tenet of environmental protection;
- Invest in citizen science for communities, partners and the Agency;
- Enable the use of citizen science data; and
- Integrate citizen science into all work at the Agency.

The report also recommends that the new administrator appoint a high-level individual to lead the Agency's citizen science efforts. Just how this will be implemented under the new administration is not yet known. A copy of the report can be found at <https://www.epa.gov/faca/naccept>.

## **Enforcement**

In 2010, a number of environmental groups filed petitions asking EPA to reconsider its determination that oil and gas drilling wastes should not be regulated under Subtitle C of RCRA. The Agency did not act on the petition and the petitioners filed suit in district court arguing that EPA had violated the statutory mandate to review these rules every three years. In a settlement announced on December 28, 2016, EPA agreed to set a March 15, 2019, deadline to revise the RCRA Subtitle D regulations and guidelines for solid waste generated by the oil and gas drilling sector or to sign a regulatory determination that no revisions to the current rule are necessary. The settlement agreement also has a deadline of July 15, 2021, for the Agency to sign a final rule.

On January 12, 2017 (*Federal Register* notice on January 23, 2017), EPA and Louisiana Department of Environmental Quality announced a settlement agreement with Innophos resolving alleged violations under RCRA. Innophos manufactures purified phosphoric acid from merchant-grade acid at its Geismar, LA facility. The company was sending two hazardous waste streams to a neighboring facility that produced acid from phosphate ore. That facility was not authorized to accept hazardous waste. Under the settlement agreement, the company will stop sending the waste to the facility and either treat the waste or send it to a facility that is authorized to receive it. The company has already come into compliance by modifying its filter process and by pursuing a underground injection control well permit. In addition, the company will pay a \$1.4 million civil penalty.

Apparently Volkswagen was not the only automobile manufacturer to use defeat software. On January 12, 2017, EPA and California announced notices of violations against Fiat Chrysler Automobiles for similar engine management software for 104,000 model year 2014-6 Jeep Grand Cherokees and Dodge Ram trucks with 3.0 liter diesel engines. Apparently, EPA's investigation discovered at least eight undisclosed pieces of software that alter emissions. The press release did not discuss potential fines.

## **Multi-metals CEMs**

On January 18, 2017, EPA Region 5 issued a Title V operating permit renewal for Veolia Sauget's facilities. Among other things, this permit requires Veolia to install, calibrate, maintain, and operate three multi-metals CEMs, one on each stack of their three units. The facility is required to use OTM (other test method) 16, Performance Specification YY, OTM 20, and Procedure Z. These instruments are to be operating within 12 months of the effective date (February 17, 2017). The facility can ask for an additional year if there are circumstances beyond their control.

The facility is required to take complete data for 12 months. Data is to be collected at all times except when the monitor is down due to calibration, QA checks, or scheduled maintenance. At all times means at least one measurement every 15 minutes. To get a valid 1 hour reading, the facility must have a valid reading for at least 3 of the 4 15-minute periods. The facility must have at least 95% valid data capture based on operating time for each calendar month. Only the months meeting the 95% minimum data capture are counted toward the 12 month data gathering requirement. The months do not have to be consecutive. However, the facility must report each month on data capture and explain why it was not at the 95% level.

The facility must calculate and record one hour block averages. They must use these values to calculate six and 12 hour rolling averages. They must retain this data for five years. They must report any six or 12 hourly rolling average that exceed the standards. They also must continuously monitor and record feed rates. Any one hour block average above the standard is an excursion. For any excursion, the facility needs to examine the feed stream to determine why the excursion occurred and submit a report within 30 days. In addition, they must take steps to reduce metals emissions by reducing feed rate. If the data from the multi-metals CEMs shows that the feed rates need to be reduced, EPA may re-open the permit and modify these limits. If the data shows that the feed rates are too restrictive, the facility can petition to re-open the permit to modify those limits.

Despite these requirements, Region 5 states that these instruments are not used for compliance but as a way to develop a correlation between the amounts of metals fed and the concentrations released through the stack. A copy of the final permit and the response to comment documents can be found at <https://www.epa.gov/caa-permitting/veolia-sauget-air-permitting>.

## **CRWI meetings**

The next CRWI meeting will be held on February 22-23, 2017, in Freeport, TX. For additional information on any of the topics above, contact CRWI (mel@crwi.org or 703-431-7343).