



## CRWI Update June 30, 2018

### MEMBER COMPANIES

Clean Harbors Environmental Services  
DowDuPont  
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  
Formosa Plastics Corporation, USA

### ASSOCIATE MEMBERS

AECOM  
Alliance Source Testing LLC  
Amec Foster Wheeler PLC  
B3 Systems  
Burns & McDonnell, Inc.  
Coterie Environmental, LLC  
Focus Environmental, Inc.  
Franklin Engineering Group, Inc.  
METCO Environmental, Inc.  
O'Brien & Gere  
Spectrum Environmental Solutions LLC  
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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### Boiler litigation

On June 5, 2018, both EPA and the intervenors filed an opposition to Sierra Club's request for rehearing. These submittals argued that all of the issues Sierra Club raised in the rehearing request were directly addressed in the March 16, 2018, decision. On June 12, 2018, Sierra Club asked for leave to file a reply and filed a reply. The May 14, 2018, court order had specifically stated that other than the requested responses from EPA and the intervenors, no additional filings would be considered. On June 20, 2018, EPA opposed giving Sierra Club leave to file a reply. Now we wait for the court's response.

### DSW litigation

On May 30, 2018, EPA published a final rule that implemented the U.S. Court of Appeals for the District of Columbia Circuit's decision on the Definition of Solid Waste (DSW) litigation. On June 12, 2018, environmental groups filed a petition for review of this final rule. While it is not yet clear what parts of the DSW rule are being challenged, it appears that the latest petition seeks review of the "reinstated and broadened" transfer based exclusion. This may be an attempt to re-open the challenges to both the 2008 rule and the 2018 rule. Some observers doubt that the court will grant the petition given that it has already been litigated. However, stranger things have happened.

### CWA HS proposed rule

The Clean Water Act (CWA) requires the Administrator to develop regulations to prevent discharges from onshore and offshore facilities of oil and hazardous substances (HS). EPA promulgated the rules for oils in 1974. They proposed to develop similar measures for hazardous substances in 1978 but those regulations were never finalized. In 2015, environmental groups filed a deadline suit alleging that EPA failed in a non-discretionary duty to finalize spill prevention regulations for hazardous substances. EPA and the plaintiffs agreed to deadlines to propose and finalize such a rule. On June 25, 2018, EPA proposed a rule to meet the first requirement. In the

process of writing this proposed rule, EPA did a number of outreach activities to determine the need for additional requirements.

Part of the analysis for this rulemaking was to look at the number of discharges as reported to the National Response Center. The National Response Center received reports of 285,897 releases of all kinds from 2007 – 2016. Of these, 117 were non-transportation discharges that resulted in evacuations, injuries, hospitalization, fatalities, waterway closures and/or water supply contamination.

In addition, EPA developed a list of nine elements required under the CWA for spill prevention. These are:

- Safety information;
- Hazard review;
- Mechanical integrity;
- Personnel training;
- Incident investigation;
- Compliance audits;
- Secondary containment;
- Emergency response plans; and
- Coordinating emergency response plan with state and/or local authorities.

The next part of EPA's analysis was to go through federal programs that have the same or similar requirements. These included a number of other EPA regulations (e.g., NPDES for storm water, RMP, RCRA TSD, USTs, etc.), OSHA requirements, mine safety requirements, Pipeline Hazardous Materials Safety Administration regulations, and Surface Mining Control and Reclamation Act.

Based on the low number of incidents over 10 years that required a significant response and the number of other federal programs that cover the nine elements as required by the CWA, EPA proposed to add no new requirements for hazardous substances. The comment period closes on August 24, 2018.

### **E-manifest system**

EPA launched their electronic manifest system on June 30, 2018. While paper manifests will still be accepted, the Agency is encouraging the shift to electronic manifests by their pricing structure. The fees for paper manifests that are mailed to EPA are \$15 per manifest while an electronic manifest is \$5. It should be noted that the public will have access to e-manifest data 90 days after it is entered into the system. Data on P-list and U-list RCRA wastes that are on the Department of Homeland Security's chemicals of interest list will not be available to the public.

## **Battery as BACT**

On May 29, 2018, four environmental groups filed a petition with the Science Advisory Board (SAB) challenging an air permit that allows the construction of a new natural gas power plant in Palmdale, CA. During the permitting process, the groups argued that batteries should be used to reduce the amount of natural gas burned to supply peak electrical power. In the final permit, Region 9 allowed the installation of duct burners as a way to quickly supply electrical power instead of using batteries. The petition alleges that Region 9 improperly rejected batteries as Best Available Control Technology (BACT) during permitting process. The SAB rejected a similar challenge in 2016 (Cotillo Power Plant in Tempe, AZ).

Using batteries to provide peak power or to smooth out the load is not a new idea. Tesla built a 100 megawatt battery facility in Jamestown, South Australia to store energy from a nearby windfarm. This facility began operations in December 2017. Pacific Gas & Electric Company has announced plans for four battery storage projects totaling nearly 570 megawatts. This includes a 300 megawatt facility associated with a natural gas-fired power plant owned by Vistra Energy Corporation, a 183 megawatt project that will be owned by Pacific Gas & Electric, and two other smaller projects. Arizona Public Services Company issued requests for proposals to equip an existing solar farm with batteries as part of a larger plan to develop 500 megawatts of storage over the next 15 years. In addition, NextEra Energy Inc. is developing a 30 megawatt battery to store power from a 100 megawatt solar array (owned by Tucson Electric Power). At this time, the only operating large scale battery facility is in Australia. But several more are in the planning stages.

## **Regional consistency**

Applying regulations consistently across EPA regions has always been a difficult task. This is often made more difficult by regional court decisions. For example, in 2012 the U.S. Court of Appeals for the 6<sup>th</sup> Circuit took a narrower view of how to aggregate emission points when determining when a source was a major source. EPA under the Obama Administration then issued a memo that allowed the regions outside the 6<sup>th</sup> Circuit to disregard that court ruling. Industry challenged and in 2014, the District of Columbia Circuit found that the memo violated EPA's prior policy of regional consistency. But that court never reached the arguments that the memo also violated the requirements of the Clean Air Act. In response, EPA modified the memo in 2016. This prompted a second challenge from industry saying that the memo undermines regulatory certainty and risks creating disparate air policies across the regions. On June 8, 2018, the U.S. Court of Appeals for the District of Columbia Circuit rejected those arguments and upheld EPA's position. The opinion states that the Clean Air Act requirements encouraging uniformity in the actions of officials under the authority of the Administrator but do not restrict the actions the Agency must take to comply with regional court rulings. In writing for the court, Judge Harry Edwards said "The simple point here is that the statute clearly contemplates some splits in the regional circuits. There is nothing in the statute to indicate that EPA is bound to change its rules

nationwide each time a regional circuit court issues a decision that is at odds with an EPA rule.” While it is likely that EPA will continue to strive for consistency across the regions, this ruling will allow them to have different requirements in different areas if those requirements are based on regional court rulings.

### **Executive Branch re-organization**

Last year, President Trump directed the Office of Management and Budget (OMB) to develop a strategy for making the Executive Branch more efficient. On June 21, 2018, OMB released the initial plan. While this plan has some large sweeping goals (e.g., consolidating food assistance programs into a single agency, merging the Departments of Education and Labor, etc.), there are only minor changes in this draft for EPA. The plan proposed to move portions of the mine cleanup programs under the Department of Interior (DOI) and U.S. Department of Agriculture (USDA) into EPA’s Superfund program. If implemented, approximately \$10 million and eight full-time employees would transfer from the DOI to EPA and \$3.5 million and six full-time employees would transfer from USDA. DOI and USDA would retain responsibility for existing mines on federal property. This move would require Congressional approval.

The plan also calls for a number of agency specific reforms. For EPA, the plan contains three goals:

- Streamline, reduce, and tailor its oversight activities to focus on national consistency and technical assistance as needed;
- Determine the best locations to provide services to the states; and
- Review its laboratories to have them operate in a more “strategic, corporate, and efficient manner...”

These goals seem to be consistent with moving more responsibilities to the states, deciding whether to keep all ten regions, and reviewing EPA laboratories. The one thing to remember is that the Executive Branch can propose these changes but Congress will have to appropriate the funds to make those changes happen. Given the current budget discussions, Congress does not appear to be open to significant changes to the Executive Branch.

### **FY 2019 EPA budget**

On June 14, 2018, the Senate Appropriations Committee approved an \$8.058 billion allocation for EPA for fiscal year (FY) 2019. While there are some small changes, this is essentially the same as was allocated for FY 2018. The Senate appropriations bill excludes any new controversial riders modifying EPA policy. This bill now goes to the full Senate for consideration. Meanwhile the House Appropriations Committee approved an appropriations bill for EPA that would reduce their funding by \$100 million. The House version reduces funding for a number of research and regulatory program. Once each is passed by the House and Senate, negotiators will need to develop a compromise bill. While the Democrats do not have the votes in committee to stop riders

in committee, they do have enough votes to keep most of the controversial riders out of the compromise bill. It should be noted that both the House and Senate bills would fund EPA well above the \$6.1 billion level requested by the President.

### **Justice Kennedy retires**

On June 27, 2018, Justice Anthony Kennedy announced that he would retire at the end of the current Supreme Court session (July 31, 2018). Justice Kennedy was often the swing vote between the four reliably conservative and the four reliably liberal justices. As such, he plays a pivotal role in a number of Supreme Court decisions. For example, he provided the more liberal interpretation of what constituted the waters of the U.S. that has been used for years to determine where Clean Water Act regulations apply. The current administration is crafting a new rule that would rely on a more restrictive interpretation of what constitutes the waters of the U.S. President Trump has moved quickly to interview potential replacements and states he will announce his nominee on July 9, 2018. Senate Majority Leader Mitch McConnell has indicated he will bring up the nominee for a vote before the November 2018 mid-term elections. Under the current rules, only 50 votes are needed to confirm a Supreme Court nominee. While the Republicans hold 51 seats in the Senate, Senator McCain (R-AZ) will unlikely be available to vote due to illness. Thus the defections of one senator could put the nomination in danger. The Senators to watch in this debate will be Susan Collins of Maine and Lisa Murkowski of Alaska. Should President Trump be successful in naming another conservative to the Court, it would have significant ramifications for the next 10 to 20 years.

### **CRWI meeting**

The next CRWI meeting will be held in August 14-15, 2018, in Minneapolis, MN. It will feature a tour of 3M's incineration facilities and a discussion on citizen science. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).