



## CRWI Update October 31, 2016

### 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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### Boiler litigation

On September 12, 2016, four petitions for rehearing of the major and area source boiler decisions were submitted to the U. S. Court of Appeals for the District of Columbia Circuit. In these petitions, EPA asked for a change of remedy (remand only) for the vacated major source boiler standards, industry asked for a change in the decision on how malfunctions are treated, and the environmental groups asked the court to change their rulings on the use of upper predictions limits and the use of work practices instead of numerical standards for area source boilers. On November 1, 2016, the court asked other parties for their thoughts on EPA request to change the remedy. Responses to the court are due on November 16, 2016.

On the major source boiler reconsideration litigation, the environmental groups have filed their opening brief (July 20, 2016), EPA has filed their response brief (September 20, 2016), and the intervenor's brief is due on November 16, 2016. The petitioner's reply brief is due on January 12, 2017, with final briefs due on February 6, 2017. Oral arguments will be likely be scheduled in late Spring 2017 with a decision late Summer or early Fall 2017. The environmental groups are challenging the 130 ppm threshold for carbon monoxide and the use of work practices for startup and shutdown periods.

### Export/import final rule

On October 25, 2016, the EPA Administrator signed a final rule and a proposed rule on the export and import of hazardous waste. The final rule will take effect on December 31, 2016, but establishes a transition period for those electronic reporting provisions that will not be available until fully tested. The rule is designed to consolidate existing regulations from multiple sources into a single regulation and to harmonize the U. S. regulations with those of the Organization for Economic Cooperation and Development. It will also support a broader effort by the U. S. Customs and Border Protection to convert all paper-based trans-boundary shipments into an electronic approval process. In addition, the rule will require electronic reporting of all shipments and certifications of final disposal.

However, the electronic methods for reporting and tracking international shipments are not yet in place. Those provisions will not be fully implemented until the system has been built and beta tested. EPA will announce a compliance date for the electronic reporting provisions in a future *Federal Register* notice. A copy of the signed final rule can be found at <https://www.epa.gov/hwgenerators/pre-publication-version-hazardous-waste-export-import-revisions-final-rule>.

Until the electronic reporting process is completed, EPA is proposing an interim step that would require companies that import and export hazardous waste to set up and maintain a public website that will contain four documents for each shipment. These four documents are:

- Export confirmation of receipt;
- Import confirmation of receipt;
- Export confirmation of recovery or disposal; and/or
- Import confirmation of recovery or disposal.

Once published in the *Federal Register*, this proposed rule will have a 60-day comment period. A copy of the signed rule can be found at <https://www.epa.gov/hwgenerators/pre-publication-version-internet-posting-and-confidentiality-determinations-hazardous>.

Both the final rule and the proposed rule should be published in the next 2-4 weeks.

### **Revised generator final rule**

On October 28, 2016, the EPA Administrator signed the revised generator final rule. This rule makes a number of changes to the current generator regulations. According to EPA's webpage, the rule reorganizes current generator regulations into a single section, clarifies existing requirements, and increases flexibility in the regulations. The revised rule will:

- Allow very small quantity generators (VSQG – previously known as conditionally exempt small quantity generators) to send hazardous waste to a large quantity generator under the control of the same person and consolidated before being sent to a RCRA facility;
- Allow a VSQG or a small quantity generator (SQG) to retain their existing category should an episodic event temporarily push them into a more stringent category;
- Update the emergency response and contingency planning provisions for SQG and large quantity generators (LQG) to include local emergency planning committees;
- Require re-notification for SQG every four years;
- Revising the labeling and marking requirements for tanks and containers;

- Clarify existing guidance on which category applies for facilities that generate both acute and non-acute hazardous waste;
- Revise the RCRA biennial report requirements to be consistent with the instructions distributed with the form;
- Move the VSQG regulations into Part 262;
- Move a number of other generator regulations into Part 262; and
- Make a number of technical corrections.

A copy of the signed rule can be found at <https://www.epa.gov/hwgenerators/pre-publication-version-hazardous-waste-generator-improvements-final-rule>. This rule should be published in the *Federal Register* in the next 2-4 weeks.

### **Refinery reconsideration proposed rule**

EPA received three petitions for reconsideration for their December 1, 2015, refinery final rule. On October 18, 2016, EPA granted those reconsiderations. While EPA is only making minor changes in the current regulatory language, the Agency recognized they had failed to properly take comments on five issues. These issues are:

- Work practice standards for pressure relief devices;
- Work practice standards for emergency flaring;
- The assessment of risk from the source category after the implementation of the pressure relief devices and emergency flaring work practice standards;
- Alternative work practice standards for delayed coking units using a water overflow design; and
- The frequency of fence line monitoring.

Comments will be accepted until December 2, 2016.

### **CERCLA 108(b) proposed rule**

EPA is under a court ordered deadline to propose a financial assurance rule for the hard rock mining industry under section 108(b) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) by December 1, 2016. On October 7, 2016, EPA sent a rule to the Office of Management and Budget (OMB) that would propose setting financial assurance requirement for the hard rock mining industry. In May, the Agency held a webinar where they outlined some of their ideas on what these requirements might be (<https://www.epa.gov/superfund/superfund-financial-responsibility>). While little more is known about the requirements in this proposed rule, it is expected to serve as a framework for any future financial assurance rules. In addition, the Agency is required to make a determination on whether similar financial assurance requirements are needed for the chemical, petroleum, and electric power sectors. To address the financial assurance requirements for these other three industry sectors, the Agency sent a Notice to OMB on October 13, 2016. Given the court ordered deadline, it is likely that OMB will finish their review of the hard rock mining

proposed rule before December 1, 2016. However, it is not clear whether the Notice is impacted by this same deadline.

## **PSM**

The Occupational Safety and Health Administration (OSHA) developed rules for process safety management (PSM) in 1992. From the beginning, OSHA exempted retail facilities from these requirements because “chemicals in retail facilities are in small volume packages, containers and allotments, making a large release [of toxic chemicals] unlikely.” In this context, retail facilities were defined as an establishment where more than half of the income is obtained from direct sales to end users. In 2013, an explosion occurred at a West, TX fertilizer company that killed 15 people and injured many others. This facility was exempted from the OSHA PSM requirements based on the 50% rule even though it stored a large amount of anhydrous ammonia. As a result of the explosion, President Obama issued an executive order telling OSHA to make changes in the PSM requirements for retail facilities in an attempt to prevent future major chemical accidents. In response, OSHA issued a memorandum in 2015 rescinding the 50% rule. A number of industries challenged this memorandum. On September 23, 2016, the U. S. Court of Appeals for the District of Columbia Circuit agreed with the petitioners and vacated the memorandum. The court decided that the OSHA failed to properly go through a notice and comment period in making this change in the definition of a retail facility. This means that for now, the 50% rule remains in place until OSHA goes through a formal rulemaking to change that definition.

Obviously, this will have a direct effect on retail facilities that also store large amounts of potentially hazardous chemicals. It will also have a secondary effect by slowing down EPA’s current rulemaking on risk management plans (RMP). EPA’s current work leans heavily on OSHA’s PSM rule for classifying facilities for RMP regulations. EPA is not likely to finish up that rulemaking until OSHA works through their issues created by the vacated memorandum. In the end, it probably will not make a lot of difference in how either rule is promulgated but it will slow the process for both agencies.

## **Citizen science**

EPA’s National Advisory Council for Environmental Policy and Technology (NACEPT) is working on a report on how the Agency could use data gathered by citizens in the development of regulations and in enforcement. NACEPT currently plans to submit a number of recommendations to the Agency on December 13, 2016, on how citizen science can be used for these roles. During an October 17, 2016, conference call, panel members appear to believe that citizen developed data could be useful as a screening tool allowing enforcement officials to identify problems that warrant further investigation using approved regulatory methods. NACEPT is expected to follow the December report with a second report that will focus on implementing the recommendations from the first report. The Agency is currently assessing the accuracy of some of these new sensors but believes that even inaccurate data will be useful in

helping the public get more involved in the process and to potentially identify “hot spots.”

### **Environmental justice**

On October 5, 2016, EPA announced cooperative agreements with 10 community based organizations working to address environmental justice issues. Each recipient will receive up to \$120,000 to support two-year projects. These projects will address a range of activities from development of green infrastructure to storm water management to recycling. The organizations receiving the funds are:

- The Environmental Justice League of Rhode Island;
- People United for Sustainable Housing, Inc. (New York);
- CASA de Maryland, Inc.;
- Cape Fear River Watch, Inc. (North Carolina);
- Metropolitan Tenants Organization (Illinois);
- Mary Queen of Viet Nam Community Development Corporation (Louisiana);
- Dutchtown South Community Corporation (Missouri);
- Conejos County Clean Water, Inc. (Colorado);
- Asian Health Services (California); and
- El Centro de la Raza (Washington state).

Late in September, the U. S. Civil Rights Commission released a report (<http://www.usccr.gov/>) on whether EPA has met its environmental justice obligations under Executive Order 12,898. The report stated that EPA has a long history of being unable to meet its regulatory deadlines and experienced extensive delays in responding to environmental justice complaints; the Office of Civil Rights has never made a formal finding of discrimination, has never denied or withheld financial assistance, nor does it have a mandate to demand accountability within the Agency; and EPA failed to properly consider minorities and low income families when developing their coal ash final rule. The report recommends that:

- EPA should add staff to the Office of Civil Rights to meet current and future needs;
- The Office of Civil Rights should be empowered to hold the program offices accountable for failure to consider environmental justice concerns in rulemakings;
- Coal ash should be classified as a “special waste” and federal funding should be provided to determine the health impacts of exposure;
- The Agency should provide assistance to affected communities to enforce the coal ash regulations; and
- EPA should prohibit states from allowing facilities to operate without permits.

Shortly after this report was released, a number of senior EPA officials reported on how well the Agency was doing in meeting environmental justice goals at the October

meeting of EPA's National Environmental Justice Advisory Council. EPA successes mentioned were the increased amount of fence line monitoring (fence line communities are often low-income or minority communities); the use of supplemental environmental projects to help communities where violations have occurred; rules protecting farm workers from exposure to pesticides; and rules reducing risk from formaldehyde exposure from composite wood products.

On October 27, 2016, EPA released their environmental justice strategic plan for 2016-2020 (EJ 2020 Action Agenda). The goals for the next five years are:

- Deepen environmental justice practice within EPA programs to improve the health and environment of overburdened communities;
- Work with partners to expand our positive impact within overburdened communities; and
- Demonstrate progress on significant national environmental justice challenges.

Additional details can be found at <https://www.epa.gov/environmentaljustice/ej-2020-action-agenda-epas-environmental-justice-strategy>.

### **OSHA enforcement**

On October 11, 2016, OSHA issued citations to PPG Industries in Westlake, LA. Based on an employee complaint, OSHA inspectors found that PPG exposed workers to corrosive materials, a leaking 30,000 gallon hot water tank, failing to inspect lockout/tag out procedures, failure to inspect safety relief valves, allowing the use of deteriorating stair rails, for lacking a hazardous assessment for confined space entry, failure to illuminate exit signs, and not having a protective cover on a junction box. The proposed fine is \$92,642.

### **EPA enforcement**

On September 30, 2016, EPA Region 5 and Tradebe Treatment and Recycling entered into an expedited settlement agreement and final order. The order lists 11 counts. These counts fall into two categories: failure to report or underreporting hazardous wastes in annual reports for 2011, 2013, and 2014; and failure to report the federal or state waste codes on eight export waste manifests. Tradebe agreed to fix the problems, prevent them from happening in the future, and will pay an \$11,000 civil penalty.

### **Gold King Mine spill**

On August 5, 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. An internal EPA report found that the contractors underestimated the water pressure

behind the debris pile. The internal EPA report does not explicitly determine that the clean-up team acted improperly and found no specific fault with how the clean-up was approached, pointing out that other authorities reviewed their plans and procedures. An EPA Office of Inspector General report found evidence that the Agency employees involved may have violated the Clean Water Act and gave false statements. In October 2016, the U. S. Attorney's Office in Colorado declined to prosecute EPA employees but instead sent the case to EPA senior management for review. Republican Congressmen for the area expressed their concern in a letter to U. S. Attorney General Loretta Lynch, suggesting that by not taking up the case, the Department of Justice appears to have one set of rules for private citizens and another for federal employees. The Attorney General has not yet responded.