



CRWI Update July 31, 2017

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Spring 2017 Unified Agenda

The Office of Management and Budget (OMB) released the Spring 2017 Unified Agenda and Regulatory Plan (<https://www.reginfo.gov/public/do/eAgendaMain>) on July 20, 2017. This is the first Unified Agenda under the new administration. Some things remain the same while others have changed. In the past, each agency listed all rules in a single list. Each rule was designated as to where it was in the process (pre-proposal, proposed rule, final rule, or long-term actions). In this agenda, the same designations are kept but OMB has created three separate lists: active actions, long-term actions, and inactive actions. The inactive actions list is new. The other two are just re-arrangements of the previous lists. The active list includes rules that the agency is working on or will be working on within the next 12 months (includes those rules in the preproposal, proposal, and final rule stages). At this time, it is not clear what criteria were used to separate the long-term and inactive lists.

Some of the actions in the active list for the Office of Land and Emergency Management (OLEM) include:

- A proposed rule on the management system for coal combustion residuals;
- A proposed rule to add aerosol cans to the universal waste regulations;
- A proposed rule to set financial responsibility requirements for the hard rock mining industry;
- A final rule setting user fees for the e-manifest system; and
- Internet posting of hazardous waste exports and imports.

Active projects for the Office of Air and Radiation (OAR) are dominated by RTR rules. It also includes:

- A proposed rule to review ambient air quality standards for nitrogen dioxide;
- A final rule on implementing the 2015 ozone national ambient air quality standards;
- A proposed rule to revise Method 23;

- A final rule to revise Procedure 2 (quality assurance requirements for PM CEMs); and
- A proposed rule to withdraw the Clean Power Plan.

The programs in the long-term list for OLEM include:

- Amendments to the current risk management plan requirements;
- Management standards for hazardous waste pharmaceuticals;
- Revisions to the ignitable liquids determinations;
- Smarter waste reporting; and
- Spill prevention requirements under the Clean Water Act.

The programs in the long term list for OAR include:

- Several additional RTR rules;
- Review of the ambient air quality standards for PM; and
- Review of various greenhouse gas emissions rules.

Some of the issues that have been placed on the inactive list include:

- Management of cement kiln dust;
- Financial responsibility requirement for the chemical, petroleum, and electric power sectors;
- General provisions amendments to revise the “once in, always in” policy;
- NESHAPs for site remediation;
- Electronic reporting and recordkeeping requirements for New Source Performance Standards and NESHAPs;
- Amendments to the General Provisions pertaining to startup, shutdown, and malfunctions;
- Standards of performance for other solid waste incinerators;
- Removal of affirmative defense provisions from state operating permits programs and federal operating permit programs; and
- The commercial and industrial solid waste incinerator federal implementation plan.

This is just the first step in EPA Administrator Pruitt’s goal to change the direction of the Agency. Additional changes will likely come when he revises the Agency’s strategic plan and the national program manager’s guidance document. For those of you keeping count, the New York Times reported that the Trump Administration has identified 860 regulatory actions that have either been withdrawn or flagged for review. This includes 42 delayed EPA rules and another 13 currently under review.

Finally, it should be noted that OMB has told all agencies that a rule must be in the Unified Agenda and Regulatory Plan before that agency can work on it. Given this, it

would appear that the agency will only be working on rules listed in the active list for the next six months (next iteration of the Unified Agenda comes out in the Fall of 2017). However, deadline suits can always change the Agency's work schedule.

Superfund reform

One of the issues EPA Administrator Pruitt has pushed from the beginning of his tenure is reforming the way the Superfund program is being handled. To address this, he set up a task force to make recommendations on how the program could be improved. On July 25, 2017, the task force released their report (<https://www.epa.gov/superfund/superfund-task-force-recommendations>) providing 42 specific recommendations to streamline and improve the program. Mr. Pruitt quickly followed up with a July 25, 2017, memo to all regions and office heads listing 11 specific actions he wanted started as soon as possible. These include:

- Prioritize and take control over any site where the risk to human exposure is not fully controlled;
- Use early or interim response actions to address immediate risks, prevent source migration, and return portions of the sites to re-use while more detailed evaluations are on-going;
- Prioritize Remedial Investigations and Feasibility Studies for the sites needing immediate action;
- Identify contaminated sediments or complex groundwater sites where Adaptive Management Strategies can be implemented;
- Track implementation and completion in real time;
- Encourage Principle Responsible Parties (PRP) to work with end-users to voluntarily perform additional clean-up or enhancements;
- Use enforcement authority on recalcitrant PRPs; and
- Maximize the deletions and partial deletions of those sites meeting National Contingency Plan requirements.

State hazardous waste management approvals

On July 13, 2017, EPA published direct final rules and the accompanying proposed rules to grant final authorization for changes to the hazardous waste programs of Louisiana and Oklahoma. Both of these rules will go into effect on September 11, 2017, unless adverse comments are received by August 14, 2017. Additional details can be found in the *Federal Register* notices.

Delisting

On July 14, 2017, EPA proposed to grant a delisting petition to Samsung Austin Semiconductors to exclude the sludge generated from their electroplating process from being listed as a hazardous waste. This material is currently listed as F006 (wastewater treatment sludges from electroplating operations). In their petition, Samsung argued that their material does not meet the criteria and has no other constituents that would

cause the waste to be hazardous. EPA agreed and is proposing to delist this material. If approved, the material would be disposed of in an authorized solid waste landfill. The comment period is open until August 14, 2017.

E-Manifest advisory board meeting

The e-manifest advisory board will hold its next meetings on September 26-28, 2017, in Arlington, VA. This board was established to provide recommendations on operational activities, functions, policies, and regulations under the e-Manifest Act. Additional details on the meeting can be found in the July 14, 2017, *Federal Register* notice. EPA plans to have the regulations covering the fee structure finalized in December 2017 and plans to implement the system in June 2018.

Portland Cement HCl CPMS

Last month, EPA published a direct final rule indefinitely extending the modification of the HCl CEMs requirement for the Portland Cement source category to a CPMS (continuous parameter monitoring system) requirement until a NIST traceable gas becomes available. The direct final rule would have become effective on July 5, 2017, unless adverse comment was received by July 3, 2017. EarthJustice submitted comments on June 29, 2017, stating that the direct final rule should be withdrawn because of the absence of an explanation and record for the action and for not setting a definite time limit for the extension. EPA has yet to withdraw the rule so EarthJustice has informed the Agency of their intent to file suit to force its withdrawal.

Hazardous waste from off-shore drilling platforms

Off-shore oil drilling platforms within three nautical miles of the shore are generally considered to be in state territorial waters and in states authorized under RCRA, state regulations apply to those facilities. Texas and the west coast of Florida are exceptions and claim nine nautical miles as state territorial waters. Platforms beyond the state territorial waters and up to 200 nautical miles (U.S. territorial waters) are subject to the Outer Continental Shelf Lands Act which applies all federal laws to platforms attached to the seabed. In 2013, EPA determined that RCRA regulations are applicable to off-shore oil platforms but manifesting was not required if the platform was beyond state waters but within the federal territorial waters. In a May 18, 2017, memo, Barnes Johnson, Director of the Office of Resource Conservation and Recovery, revised that determination. The new determination is that each platform within 200 nautical miles and outside state territorial waters must make a hazardous waste determination for all waste materials and follow all generator regulations in Part 262. A signed manifest must accompany each shipment and transporters must follow Part 263 and DOT regulations. The on-shore receiving facility must be a TSDF or a transfer facility. A copy of the memo can be obtained from CRWI.

EPA personnel

On July 27, 2017, President Trump announced his intention to nominate Dr. Michael Doursen, to be the Assistant Administrator for EPA's Office of Chemical Safety and Pollution Prevention. Dr. Doursen is currently a professor in the Risk Science Center at the University of Cincinnati, College of Medicine. He is a toxicologist by training and was one of the EPA scientists that created the Integrated Risk Information System (IRIS). Meanwhile, the nomination process for Susan Bodine to be the next Assistant Administrator for the Office of Enforcement and Compliance Assurance continues to move forward. The Senate Environment and Public Works Committee voted along party lines to recommend that the Senate confirm Ms. Bodine. A floor vote has not been scheduled.

On July 23, 2017, the Washington Post reported that President Trump will nominate Andrew Wheeler to be the next EPA Deputy Administrator, Bill Wehrum as the next Assistant Administrator for the Office of Air and Radiation, Matt Leopold to be the next EPA General Counsel, and David Ross to be the next Assistant Administrator for the Office of Water. Mr. Wheeler currently works for Faegre Baker Daniels Consulting and was previously a top aide to Senator James Inhofe (R-OK). Mr. Wehrum is current a partner in the Hunton & Williams law firm and was previously nominated for this position by President George W. Bush. He ultimately withdrew his nomination when faced with opposition from Democrats over his plan to limit emissions from power plants. Mr. Leopold has served as the general counsel for the Florida Department of Environmental Protection and in the Department of Justice's environmental and natural resources division. Mr. Ross is currently an assistant attorney general for the state of Wisconsin responsible for environmental enforcement. No other news outlets have picked up or confirmed this story and there have been no official announcements from the White House.

Meanwhile, EPA is moving forward with programs to offer early retirement incentives. The current plan will allow incentives to a maximum of 1,227 employees with 655 available for headquarters staff. These limits are divided up among the program offices and the regions as follows.

Administrator	65
Air and Radiation	20
Administration and Resource Management	98
Chief Financial Officer	27
Chemical Safety and Pollution Prevention	50
Enforcement and Compliance Assurance	51
Environmental Information	30
General Counsel	2
International and Tribal Affairs	5
Land and Emergency Management	94
Research and Development	183
Water	30

Region 1	36
Region 2	30
Region 3	159
Region 4	26
Region 5	79
Region 6	147
Region 7	45
Region 8	8
Region 9	23
Region 10	19

While the currently scheduled incentive program will significantly reduce EPA staff, it is not as large as what was called for in the President's budget proposal (3,200 FTEs).

EPA budget

On July 19, 2017, the House Appropriations Committee approved EPA's FY 2018 funding. The vote was 30-21, along party lines. The bill approved by committee funds EPA at \$7.5 billion. This is a \$0.5 billion reduction from FY 2017 but much less of a reduction than requested in the President's budget (\$2 billion cut). The details of where this money is to be spent can be found in the report generated by the Committee. The Office of Air and Radiation would receive \$227 million, the Office of Land and Emergency Management would receive \$100 million (\$4 million less than FY 2017), and compliance would receive \$97 million. The e-manifest program would be funded at \$3.7 million but fees were expected to offset the entire amount. In addition, the geographic programs (Great Lakes Cleanup, Chesapeake Bay, Cleanup, and the Puget Sound cleanup) would be funded at levels similar to FY 2017. It should be noted that this is the first step in the appropriations process. This bill has to be approved by the full House, modified in the Senate, reconciled, passed again by both houses of Congress and signed by the President before the Agency is actually funded for FY 2018. For now, it appears that Congress is ignoring the Administration's budget request for this agency and instead has made small reductions based on the current funding levels.

RMP litigation

In June, EPA published a rule that extended the effective date of the risk management plan (RMP) rule until February 19, 2019, to allow the Agency time to reconsider various aspects of the final rule. Several environmental groups promptly challenged this extension and June Update opined that it would likely take longer to complete the challenge than it would to re-write the rule. Perhaps that opinion should be reconsidered. On June 5, 2017, EPA published a *Federal Register* notice giving the oil and gas sector a 90 day stay of the methane emission standards. Environmental groups challenged this stay and on July 3, 2017, the U. S. Court of Appeals for the District of Columbia Circuit vacated that stay. Here the court agreed with the challenge, stating that EPA improperly used the provisions in section 307 of the Clean Air Act to allow for the 90-day stay. While there are similarities between the methane rule and the RMP

rule (both use section 307 as a basis for extending the effective date), there are also differences. In the RMP rule, the Agency went through a notice and comment period before extending the effective date while they did not do so for the methane rule. While it is not clear how the court will rule in this case, it is possible that the challenge to the RMP rule will be decided fairly quickly.

DSW ruling

On July 7, 2017, the U.S. Court of Appeals for the District of Columbia Circuit overturned parts of the 2015 amendments to the definition of solid waste (DSW) rule. The court vacated the fourth legitimacy factor and the verified recycler exclusion. The court found that EPA failed to support its conclusions that the fourth legitimacy factor (the recycler must show the product from recycled hazardous secondary material has comparable levels of hazardous constituents to a product from virgin materials) was needed to ensure that hazardous secondary materials were not being discarded. The court also found that EPA did not have a sufficient basis to conclude that hazardous secondary materials being sent off-site for recycling were being discarded. There are some uncertainties about what this ruling means. Some of these uncertainties may not be cleared up until EPA issues revised rules to implement the court's decision. Until then, it appears that a facility will not have to meet the fourth legitimacy factor to recycle hazardous secondary materials, the first three legitimacy factors will still have to be met, and the 'verified recycler' provisions will revert to the recycler provisions in the 2008 rule. A number of states have already adapted or been authorized for the 2015 rule. Just how the court ruling will impact the requirements in those states is not clear.

Enforcement

Regions have traditionally had wide authority to request information from regulated entities for the purposes of enforcement (114 letters). The trade press is reporting that EPA Administrator Pruitt has changed that authority and will now require regional enforcement personnel to get headquarters approval before sending any type of request for information from a company. This memo has not been released to the public so it is difficult to determine the extent of this change in policy.

CRWI meeting

The next CRWI meeting will be held on August 15-16, 2017, in Indianapolis, IN. It will feature a tour of Covanta's waste-to-energy facility. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).