



## CRWI Update November 30, 2017

### 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  
Coterie Environmental, LLC  
Focus Environmental, Inc.  
Franklin Engineering Group, Inc.  
METCO Environmental, Inc.  
O'Brien & Gere  
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

### Brick MACT litigation

EPA promulgated the most recent brick MACT final rule in 2015. Both industry and the environmental groups challenged the rule. The environmental groups are challenging the health-based emission limits for hydrogen chloride and the use of the upper prediction limit methodology to set floor standards. Industry challenged the standards as being too restrictive and asked for reconsideration of several provisions. Under the Obama Administration, the requests for reconsideration were denied and litigation proceeded. Under the Trump Administration, the Agency decided to grant reconsideration for a number of industry issues and asked the court (October 13, 2017) to hold the entire case in abeyance while working through these reconsideration issues. This was done after final briefs were submitted but before oral arguments. The court denied this request. On November 3, 2017, EPA asked that only the issues the Agency was reconsidering be severed and placed in abeyance. Oral arguments were held on November 9, 2017. Part of the discussion at oral arguments was whether the court should grant the revised motion to sever and stay the reconsideration issues. The judges did not appear sympathetic to EPA's arguments noting that the standards are more than two decades overdue and the Agency did not need a stay to revise the rules. The majority of the discussion on the environmental group's challenges focused on the health-based emissions limits. The judges appeared divided on whether the Agency must prove that a substance is non-carcinogenic before determining if there is a safe threshold. There also seemed to be some confusion on whether the "ample margin of safety" requirement in the Clean Air Act had been met in this particular rule. There was a brief discussion on the use of the upper prediction limit method to set floor values. One should be reminded that the discussion during oral arguments is not always a good predictor of how the judges will rule. Look for the decision to be released in early 2018.

### Sue and settle test

In 2016, the Environmental Integrity Project sued EPA over their failure to review existing rules for oil and gas waste every three years. The parties reached a settlement agreement where EPA would decide by March 15, 2019, whether revisions are needed

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and a 2021 deadline for a final rule if needed. North Dakota and industry groups moved to intervene in the settlement agreement but the U. S. District Court rejected that request because the suit only involved timing and not the substance of the rule. North Dakota appealed this decision. Shortly before oral arguments, EPA Administrator Pruitt released his new “sue and settle” policy that includes a role for any interested party (including states) in any deadline suit. North Dakota brought this new policy before the court arguing that they should have had a place at the table when these deadline decisions were made. EPA responded that the primary question before the court was whether North Dakota had standing to intervene and the new policy did not give the State standing. Oral arguments were held on November 7, 2017. On November 28, 2017, the court issued a two-page ruling (not a published opinion) that the district court acted properly in rejecting North Dakota’s claim. There was no mention of the new “sue and settle” policy in the ruling. It is likely that additional tests for this new policy will be forthcoming.

### **Co-benefits**

In a number of Clean Air Act rules, the Obama Administration relied on co-benefits in their cost-benefit analyses to justify setting specific standards. In the October 2017 proposed repeal of the Clean Power Plan, the Trump Administration issued a revised analysis that modified both the benefits and co-benefits of the original rule. In the new regulatory impact analysis, the Agency set two thresholds for fine particulate matter below which it assumes no health co-benefits occur. The original regulatory impact analysis assumed there was no threshold and counted all co-benefits. By making this modification (and others), the overall cost-benefit analysis for the Clean Power Plan has been changed to reflect less benefits. At the heart of this issue is that restrictions to carbon dioxide emissions have the co-benefit of removing particulate matter. If you only consider the benefits of carbon dioxide restrictions, the costs of the regulation outweigh the benefits, making it difficult to justify the rulemaking. However, when the co-benefits of reducing fine particulate matter (not directly regulated in the Clean Power Plan rule) are included, the benefits outweigh the costs. Thus, most of the estimated benefits are coming from the reductions in fine particulate, not carbon dioxide. Since this is the first rulemaking where the Trump Administration has addressed the co-benefits issue, it is difficult to predict whether this is a trend or a one-time event.

### **EPA personnel**

William Wehrum was confirmed by the Senate to be the next Assistant Administrator for the Office of Air and Radiation on November 9, 2017. Mr. Wehrum was sworn in on November 13, 2017. To date, the only political appointees who have been confirmed by the Senate are Mr. Pruitt and Mr. Wehrum.

The Senate Environment and Public Works Committee recommended confirmation for Susan Bodine to be the next Assistant Administrator for the Office of Enforcement and Compliance Assurance on July 12, 2017. The Committee recommended confirmation for Dr. Michael Doursen to be the next Assistant Administrator for the Office of Chemical

Safety and Pollution Prevention, Matt Leopold to be the next General Counsel, and David Ross to be the next Assistant Administrator for the Office of Water on October 25, 2017. Andrew Wheeler has been nominated to be the next Deputy Administrator. His hearing was held on November 8, 2017. The Committee recommended confirmation for Mr. Wheeler on November 29, 2017. These five nominations are waiting on a vote by the full Senate and are part of about 100 nominees who have cleared committee but are waiting on a floor vote. There are no indications on when a vote for these nominees will be held.

President Trump appointed Alexandra Dunn to be the next Regional Administrator for Region 1. Ms. Dunn was previously the Executive Director for the Environmental Council of States. Regional Administrators are now in place for Regions 1, 2, 3, 4, 7, 8, and 10.

### **EPA advisory boards**

On October 31, 2017, EPA Administrator Pruitt announced a new policy that restricts members of EPA advisory boards to individuals who do not receive Agency grants. The policy will force certain members to either give up their grants or resign from the advisory panels. In addition, Mr. Pruitt is not renewing the appointment for any individual whose term has expired. These two changes have left a large number of vacancies on the Science Advisory Board, the Board of Scientific Counselors, the Clean Air Scientific Advisory Committee, and other advisory committees. To fill these positions, more than 430 applied for a position on the Board of Scientific Counselors, over 130 applied for positions on the Science Advisory Board, and 42 applied for the seven vacant positions on the Clean Air Scientific Advisory Committee. Mr. Pruitt appointed Michael Honeycutt (Texas Commission of Environmental Quality toxicology division) to be the chair of the Science Advisory Board, Terry Cox (consultant in quantitative risk) as the chair of the Clean Air Scientific Advisory Committee, and Paul Gilman (Covanta Energy) as the chair of the Board of Scientific Counselors. Mr. Pruitt chose 18 new members of the Science Advisory Board with representatives from industry and state governments. Appointments for the Board of Scientific Counselors included a number of scientists from national laboratories. Details on the makeup of each of these advisory groups can be found on their respective websites.

### **Enforcement**

On November 8, 2017, EPA announced a proposed settlement agreement with PDC Energy over alleged failure to adequately design, operate, and maintain vapor control systems at their tank system in the Denver-Julesburg Basin, CO. The proposed agreement will require PDC to conduct an engineering evaluation of the vapor control system for each tank and complete any necessary corrective action to ensure that the system is properly sized. PDC must complete two supplemental environmental projects at a cost of \$1.7 million and pay a civil penalty of \$2.5 million.

In June 2017, Attorney General Sessions issued a memo barring Department of Justice attorneys from entering into settlement agreements that require payments to environmental and other non-governmental organizations. This apparently came into play in the recent ExxonMobil settlement agreement. Apparently, this agreement originally had several supplemental environmental projects but all except the tree planting project were dropped in the final agreement. Since the tree planting project was with a city government, it was kept in the deal. Just how this will play out in future settlement agreements is not yet clear.

At a November 16, 2017, American Bar Association event, Patrick Traylor, the current top political official at the Office of Enforcement and Compliance Assurance, told the audience that the national enforcement initiatives still exist but need updating. The current initiatives were released in 2016 and set to expire in 2019. Mr. Traylor did not provide specific details on which initiatives would be re-evaluated but suggested some have run their course and need to be removed from the list but indicated others (like drinking water standards) should be added. He emphasized that any changes would be done in consultation with the states. So far, the Agency has held a kick-off meeting and developed four “workflows” to improve using cooperative federalism principles. In addition, Mr. Traylor mentioned that the Agency is looking to refresh its current self-audit policies.

### **EPA budget**

In September, Congress passed a continuing resolution that funded the government until December 8, 2017. Since then, the House passed legislation (September 14, 2017) allocating \$7.4 billion for EPA for FY 2018. This legislation was sent to the Senate on September 27, 2017. On November 20, 2017, the Senate Appropriations Committee released a draft spending bill that allocates \$7.91 billion for EPA. This is roughly \$150 million below the FY 2017 funding. Both are significantly above the \$5.7 billion requested by President Trump. The Senate Committee does not plan to actually introduce this legislation given the short amount of time left on the current continuing resolution. Instead, the Senate sees this as a marker for any negotiations with the House on an omnibus spending package combining the funding for several agencies. This draft includes language that allows the Agency to allocate an additional \$68 million in cuts, eliminates the Integrated Risk Information System and transfers its workload into the TSCA program, allows the Agency to cut 25% of staff, and endorses the elimination of nearly all of the climate change program. The House and the Senate have until December 8, 2017, to work out these differences or another continuing resolution will be needed.

### **Legislation to modify air rules**

In addition to the regulatory reform effort within EPA, Congress is considering a number of bills to modify current EPA air regulations. On November 14, 2017, the Senate Environment and Public Works Committee held hearings on four bills that would ease compliance with Obama Administration regulations. These four were: S. 839 to delay

the implementation of the brick MACT rule; S. 1857 to delay the compliance date for new wood stoves until 2023; S. 203 to clarify that modifications to road vehicle's emissions controls is allowed if the vehicle is used solely for competition; and S. 1094 to ease the compliance for operators of remote generators in Alaska. The House Subcommittee on the Environment approved companion bills for three of the four (H.R. 1917 – brick MACT, H.R. 453 – wood stoves, and H.R. 350 – competition vehicles) along party lines. These three bills now go to the full Energy and Commerce Committee for consideration. Given that Republicans control both Houses, it is possible that one or all of these could be enacted.

### **CRWI meeting**

The next CRWI meeting will be held on February 21-22, 2018, in Deer Park, TX. It will feature a tour of Clean Harbors Deer Park facility. For additional information, contact CRWI (mel@crwi.org or 703-431-7343).