

E&W Law Opens Oklahoma City Office

We are pleased to announce the recent opening of Earth & Water Law's Oklahoma City office and addition of Mary Ellen Ternes to our team. The following story appeared in [Greenwire](#) in February.

Former EPA staffers expand firm, open Okla. Office

The environmental law and consulting firm is opening a new office in Oklahoma City. In addition, Mary Ellen Ternes, once a shareholder with Crowe & Dunlevy, has joined the management team as a partner of Earth & Water Law LLC.

Ternes is a prominent environmental lawyer and serves on several bodies, including the Vanderbilt University external advisory committee to the Department of Chemical and Biomolecular Engineering and as secretary for the American College of Environmental Lawyers. She earned her law degree from the University of Arkansas, Little Rock, and her bachelor's degree in chemical engineering from Vanderbilt University.

Earth & Water is staffed by several former U.S. EPA officials that provide legal and strategic counseling to clients on environmental issues. The firm was founded last year ([Greenwire](#), Jan. 19). Brent Fewell, Earth & Water's chairman and a former deputy EPA water chief during the George W. Bush administration, said Ternes' hire would be a great addition to the firm.

"We are thrilled to have Mary Ellen join our team to continue the growth of Earth & Water Law's environmental and corporate practice areas, as well as having the opportunity through her to expand our practice into the Southwest," Fewell said.

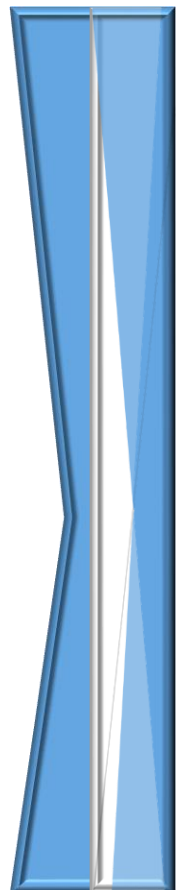
Earth & Water Group

Compliance and Enforcement
Newsletter

April 2017, Issue No. 4

Welcome to the Spring edition of the Earth & Water Group Newsletter. Our goal is to identify the key issues and signature events that are driving the enforcement and regulatory landscape so that organizations can prepare and position themselves for the challenges in this sector. The best defense is an informed offense. And this newsletter is designed to provide you with the latest developments and key takeaways for updating your company and its EHS compliance program.

Learn more about E&W, and the perspective we bring, by visiting our firm at www.earthandwatergroup.com.



Ternes said she is happy to come aboard. "I am excited to be joining the Earth & Water Group now, at the beginning of the new Trump administration, where there is promise of regulatory relief if we navigate carefully," Ternes said. "Earth & Water is unique in bringing together the most critical skill sets in science, engineering, cybertechnology, law and finance for responding to the upcoming needs of clients most efficiently in these complicated times."

The EHS² Difference



"Sharing and Shaping the Future of Effective EHS² Compliance" was the theme of Earth & Water Group's EHS² Spring Roundtable attended by EHS leaders from over 15 organizations on April 18 in Washington.

Recognizing that 2017 is shaping up to be a year of many changes and opportunities, the April 18 Roundtable focused on bringing EHS² members up to speed on the new Administration's enforcement and compliance directions. Attendees also had the chance to learn about the increasing role of States in the federal regulatory processes affecting EHS programs, as well as hearing about various environmentalist-focused plans to challenge emerging aspects of Trump Administration EPA activities.

Guided discussion leaders and presenters at the April 18 EHS² Roundtable featured Alexandra Dunn, Executive Director & General Counsel of the Environmental Council of States; Susan Bodine, Chief Counsel of the Senate Committee on Environment and Public Works; Jeff Kupfer, Co-Founder of Starling Trust; and Eric Schaeffer, Executive Director of the Environmental Integrity Project.

Jeet Radia, Chair of EHS² and Senior Vice President for Environment, Health and Human Resources of McWane Industries facilitated a lunch-time discussion with members on future programs and outreach activities of EHS². The next planned roundtable for EHS² is September.

EHS² is a forum for senior EHS leaders to come together to address current and emerging legal, technical and operational risks and challenges they face across all regulated sectors and their supply chains. EHS² is designed to address not just the "here and now" of EHS issues, but also the "tomorrow" of effective EHS leadership. Additional information on EHS² can be found on the Earth & Water Group homepage, www.earthandwatergroup.com, or by contacting Ken Maynard at ken.maynard@earthandwatergroup.com.

OF COUNSEL

The Department of Justice's fraud division recently published a new guidance document titled, [Evaluation of Corporate Compliance Programs](#). It is a great resource that offers valuable insight to the thinking of federal prosecutors and whether to pursue criminal enforcement or simply pursue civil charges. It offers a helpful benchmarking exercise for your EHS program.

How do you mitigate underlying misconduct? Do you look at root causes? Was there prior indication, such as repeat violations? What is the commitment and action of top leadership? What resources have your EHS team been provided – is the program being financially starved, does it have autonomy? Do you have EHS training – is it effective?

These are a few of the questions you can expect when that next environmental mishap occurs. Be ready.

TRENDING

Uncertainty and regulatory reform continue to dominate the discussions in Washington, DC. Toward this end, President Trump's promise for regulatory reform is beginning to take shape under [Executive Order 13777](#) (Enforcing the Regulatory Reform Agenda) signed on Feb. 24.

The EPA has made some moves on the Reg Reform effort. The EO requires a report by mid-May from each government department or agency proposing the roll back of unduly burdensome federal regulations. This EO operates in concert with [EO 13771](#) (Reducing Regulation and Controlling Regulatory Costs, a/k/a the Two-For-One EO), which directs all agencies to repeal two existing regulations for each new regulation issued in FY 2017 and thereafter.

Pruitt has tapped the acting leader of the Policy Office, Samantha Dravis, to serve as the Regulatory Reform Officer and to lead, in tandem with Chief of Staff, Ryan Jackson, the EPA Regulatory Reform Task Force.

On April 11, 2017, EPA announced that it would be soliciting public comments on its evaluation of existing regulations per the EO (see News Release, EPA Regulatory Reform Under Way), and on April 13, 2017, EPA issued the Federal Register notice: "[Evaluation of Existing Regulations](#)." EPA will accept public comments until May 15.

KEY ENFORCEMENT CASES

Civil Enforcement

[Meadowvale Dairy LLC](#) – Clean Water Act/CAFO Settlement

Meadowvale Dairy LLC of Iowa has agreed with DOJ and EPA to pay a civil penalty and take corrective actions to prevent illegal discharges into waterways near its operations. The company operates a series of large, concentrated animal feeding operations and has been the subject of enforcement scrutiny due to multiple alleged violations of its Clean Water Act permits including two large fish kills that took place in 2004 and 2009. According to DOJ, the company will be required to pay a civil penalty of \$160,000, invest in significant structural improvements, and hire a third-party monitor to assess its compliance.

Takeaway: Repetitive violations and damage such as fish kills in the CAFO sector will continue to invite enforcement

[Magellan Pipeline Company, L.P.](#) – Clean Water Act/ Pipeline Settlement

DOJ, the EPA, and Magellan reached a civil settlement related to a series of alleged Clean Water Act violations associated with gasoline, diesel and jet fuel spills in Texas, Nebraska and Kansas. As part of the settlement, Magellan will spend some \$16 million toward injunctive relief across its pipeline system and pay a \$2 million civil penalty. According to the complaint and consent decree, the conduct involved releases of over 5,000 barrels of petroleum in 3 distinct events. **Takeaway: Pipeline releases are very "public" environmental events and get regulators attention.**

[Slawson Exploration Company, Inc.](#) – Clean Air Act Settlement

DOJ and EPA announced a settlement with Slawson related to alleged Clean Air Act violations from the company's production activities in North Dakota. Specifically, the settlement contends that the company failed to adequately design, operate, and maintain vapor control systems on its storage tanks

at approximately 170 oil and natural gas well pads in the state which resulted in emissions of volatile organic compounds (VOCs). As part of the proposed settlement, Slawson will be spending some \$4.1 million on equipment upgrades, monitoring, and inspections to reduce VOC emissions. The company will spend another \$2 million on environmental mitigation projects and pay a \$2.1 million civil penalty.

Takeaway: The enforcement focus in the energy sector may pull back at the federal level moving forward, but look for NGOs and certain states to ramp up their focus on this sector and don't assume the federal cop is totally leaving the beat.

Criminal Enforcement

Wood Group PSN Inc. – Worker Endangerment – Criminal Resolution

Wood Group PSN of Houston was directed to pay nearly \$10 million related to two criminal cases in the Gulf of Mexico. According to DOJ, the fines were the result of falsely reporting that workers had performed required safety inspections of off shore equipment to the Department of Interior and for the company's role in violations of the Clean Water Act stemming from the fatal explosion at the Black Elk platform in 2012. According to the factual basis of the company's plea agreement in the false reporting case, from April of 2011 to July of 2014, employees at Wood Group PSN, failed to inspect and maintain facilities they had contracts with on the Outer Continental Shelf's Creole Loop, and also falsely indicated that the facilities had been properly inspected and maintained according to federal safety and environmental regulations. ***Takeaway: The government-wide effort to address worker safety violations - in concert with environmental violations - does not seem to be lessening with the change of administrations.***

Sheffield Pharmaceuticals LLC – Clean Water Act Violations – Deferred Prosecution

The New London, Connecticut based manufacturing company has been ordered to pay \$1 Million for violating the Clean Water Act—money which will fund a series of coastal environmental projects. The federal government filed a criminal information charging Sheffield with violating the Clean Water Act as part of a deferred prosecution agreement. The information and deferred prosecution agreement relate to the conduct of Sheffield's former president, Thomas Faria, who pleaded guilty to a felony violation of the Clean Water Act in July 2014. Under Faria's leadership, Sheffield discharged polluted industrial wastewater from its New London factory into the municipal sewage system without the required permit and a wastewater treatment system. ***Takeaway: Companies that operate outside of the regulatory system (i.e. without permits or the ability to appropriately control their pollution) are always ripe targets for criminal enforcement.***

International Petroleum Corporation of Delaware (IPC) – Clean Water Act and RCRA

IPC was fined \$1.3 million and directed to pay \$2.2 million in restitution to the City of Wilmington, Delaware for environmental crimes, including a conspiracy to violate the Clean Water Act. IPC operated a facility in Wilmington, Delaware which processed used oil and hydrocarbon-containing waste water and then sold the reprocessed petroleum to various companies for reuse. The company's pretreatment permit required IPC to take representative samples of its waste water on a monthly basis, but the company admitted that its monthly samples were not representative, had been tampered with, and rendered inaccurate. IPC further admitted to violating the Resource Conservation and Recovery Act by transporting hazardous waste without a hazardous waste manifest when it trucked hazardous disposal sludge from its storage tanks to South Carolina for disposal. ***Takeaway: Those whose businesses involve waste processing may face an extra layer of scrutiny as their core business revolves around environmental compliance.***

REGULATORY WATCH

EPA Administrator Pruitt Priorities

EPA's Scott Pruitt has established his "Back-to-Basis" agenda, which reinforces the White House's and Pruitt's commitment to refocusing EPA on its intended mission, returning power to the states, and creating an environment where jobs can grow. Signs which can be seen around the halls of EPA identify three core goals (1) protecting the environment by (2) engaging with state, local and tribal partners, and (3) creating sensible regulations that enhance economic growth.

More immediately, the following regulations and reforms remain at the top of Pruitt's priority list.

- Rescind the Clean Power Plan
- Rescind and rewrite Waters of the United States Rule
- Rescind the Stream Protection Rule (sought by coal industry)
- Roll back the methane capture rule
- Cut EPA's budget by at least 30% (currently at about \$8 billion- much of it "pass through" to states)
- Cut EPA staff by 20+%
- Eliminate/slash funding on climate change, environmental justice, and regional environmental systems (i.e. Puget Sound, Chesapeake Bay funding)
- Push for far greater state autonomy on environmental regulation and enforcement.

Trump Administration: Emerging Key Players in the Energy and Environmental Areas

With the first 100 days almost behind them, some key players in the Trump Administration's energy and environmental policy team have emerged. As these teams continue to evolve, we'll try to keep you updated on those individuals.

To date, the following individuals have stepped into "key staff" positions at the White House and EPA. (Washington rumor mills continue to predict that it could be mid-summer (or later) before Assistant Administrator level personnel at EPA and DOE will be named.)

- Chief of Staff to EPA Administrator Pruitt: Ryan Jackson
- Deputy Chief of Staff to EPA Administrator Pruitt: Byron Brown
- EPA Office of Policy Head: Samantha Dravis
- Liaison to Water Office: Sarah Greenwalt
- Advance and Scheduling: Millan Hupp
- Special Assistant to the President for Domestic Energy and Environment: Mike Catanzaro
- Special Assistant to the President for International Energy and Environment: David Banks
- Chief of Staff, White House Counsel on Environmental Quality: Mary Neumayr
- Chief of Staff to DOE Secretary Perry: Brian McCormack

New Acting Assistant Attorney General for DOJ ENRD

Jeff Wood began serving as Acting Assistant Attorney General of the Environment and Natural Resources Division (ENRD) on January 20, 2017. He previously served as environmental counsel for U.S. Senator Jeff Sessions and as the Republican staff director for the U.S. Senate Subcommittees on Clean Air & Nuclear Safety and Water & Wildlife. In addition to his government service, Jeff's career has included time as a partner in the environmental and energy practice groups of a private law firm and as in-house counsel for a transportation company. He earned his undergraduate and law degrees from Florida State University.

HILL WATCH

FY2017 Federal Budget: EPA, DOE, DOI - Cuts, Riders ... Uncertainty

As appropriation bodies in both the House and Senate work towards (hopefully) an agreement to keep the federal government open when current funding expires April 28, disputes over funding levels and riders could hamper funding for EPA and new monies for both DOE and DOI operations. Latest word from the Hill is that lawmakers are working to unveil final FY2017 spending legislation when they return from their current two-week recess on April 24. Whatever they reveal will have to pass quickly to meet the 4/28 deadline – or face having to put a CR in place.

A reported sticking point is where to set funding levels for EPA: both House and Senate holding to spending proposals moved earlier this year. Currently, House-backed measures would cut EA funding by approximately \$164 million to \$7.98 billion; the Senate version would only cut to approximately \$8.1 billion.

Potential policy riders remain on both sides of the Congress. Current House efforts contain policy provisions to block several environmental rules and take aim at climate policy; Senate efforts reportedly leave out most of these contentious riders.

Spending bills on the environment, DOE, and DOI are part of the remaining measures for FY2017 that do not have completed bipartisan deals. It will be up to senior House and Senate leaders to either bridge differences and move the measures forward, or opt to cover these agencies and departments with level funding for the rest of FY2017.

(Agencies have been working under an interim CR since the start of FY2017 last October, with funding frozen at FY2016 levels and no new monies.)

The Congressional Review Act: Back in Business

In the arsenal of weapons that Congress can use to undo changes made to regulations by the Obama Administration, the Congressional Review Act (CRA) is quite possibly the most powerful. Enacted in 1996, Congress has used the CRA so far in 2017 to overturn more agency rule makings than in any previous Congress before it. And in line with the reported intentions of both the Trump Administration and leaders of the Republican held Congress, many more regulations are in line for the "CRA Treatment." Chief among them: those which address\ environmental, energy, and natural resources issues.

By way of background, the CRA requires federal agencies to submit many of the rules they promulgate to Congress for the rule to take effect. Congress then has 60 days to review the rule to determine whether to issue a Joint Resolution (JR) disapproving the rule. The CRA also provides a fast lane of legislative procedures to promote the passage of JRs which overturn agency rules. These fast lane procedures include such nifty tools as limiting debate so that the JR doesn't "die" in Committee. And once Congress disapproves a rule with the CRA, no rule that is similar to the one disapproved can be reissued except via authorized subsequent legislation.

- *Interesting note: prior to 2017, the CRA was very rarely used: Congressional historians note that between 1996 and 2016 some 72,000 final rules were submitted to Congress under CRA review – only one was disapproved.*

As of March 30, the current Congress has reportedly proposed approximately 50 JRs for disapproval under the CRA, with three rules having been already overturned. Among the three rules of interest to readers may be the Interior Department's (DOI's) "Stream Protection Rule," 81 Fed. Reg. 93066 (Dec. 20, 2016). As cited by the Federal Register, some of these 50 JRs slated for the CRA chopping block that may be of specific interest to readers include:

- EPA: Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources (81 FR 35823) (June 3, 2016) - H.J. Res. 22 (Introduced)
- EPA: Cross-State Air Pollution Rule Update for the 2008 Ozone NAAQS (81 FR 74504) (Oct. 26, 2016) - S.J. Res. 21 (Introduced)
- EPA: Accidental Release Prevention Requirements: Risk Management Programs Under the Clean Air Act (82 FR 4594 (Jan. 13, 2017)) - H.J. Res. 59; S.J. Res. 28 (Both Introduced)
- EPA: Approval, Disapproval and Promulgation of Air Quality Implementation Plans; Partial Approval and Partial Disapproval of Air Quality Implementation Plans and Federal Implementation Plan; Utah; Revisions to Regional Haze State Implementation Plan; Federal Implementation Plan for Regional Haze (81 FR 43893) (July 5, 2016) - S.J. Res. 38; H.J. Res. 87 (Both Introduced)

Congress is also reviewing other possible mechanisms to enhance CRA's power to overturn administrative rules. While the current firepower of the CRA allows only for JRs to disapprove rules one at a time, the ["Midnight Rules Relief Act of 2017"](#) would amend the CRA so that multiple rules could be targeted at once if they were passed in the last year of a President's term. The ["Regulations From the Executive in Need of Scrutiny Act of 2017,"](#) would go even further: as proposed, it would amend the CRA to require that major rules receive a JR of approval from Congress, and require federal agencies to either repeal or amend old rules to offset the costs of a new rule before it may take effect. (Both bills have passed the House.)

E&W INSIGHTS

Things that Go Boom

By Mary Ellen Ternes

Many hundreds of years ago before I became an environmental lawyer, I was a chemical engineer working for the EPA in emergency response, where not everything went boom, but sometimes things

did. Joining EPA Region 6 as a Superfund Emergency Response On-Scene Coordinator in early 1985, the new Administrator Lee Thomas had just taken over for Bill Ruckelshaus, continuing efforts to right the EPA ship after Anne Gorsuch. EPA's Superfund program and our field response section were struggling to authorize funds to respond to uncontrolled hazardous waste sites. While projects eventually became funded, for some time we had hazards and not enough funds to address them adequately. Consider the immediate post-RCRA implementation "chemical broker" speculative accumulation scenario: abandoned methyl methacrylate, stored in a beaten-up milk truck, lying in a pasture between a broken-down tanker of acrylonitrile and a bin of lead acid batteries. Fences don't keep kids out when they want to play, and sometimes PCB capacitors and battery casings, abandoned trucks and chemical tanks look like toys, space ships and forts. Without a doubt, abandoned waste and chemical processes needed to be removed, not fenced, to keep incredibly hazardous scenarios from hurting someone.

The nation became even more aware of chemical hazards after the Bhopal, India methyl isocyanate release, and the aldicarb release in Institute, West Virginia, the scenarios creating the most acute concern included operations involving bulk quantities of explosive or toxic chemicals. To address these risks, under the Chemical Accident Prevention (CAP) program, EPA's Office of Solid Waste and Emergency Response, developed the National Chemical Safety Audit Program. The CAP program's purpose was to identify the causes of accidental releases of hazardous substances and the means to prevent them from occurring. Pursuant to CERCLA, as amended by SARA in 1986, and EPCRA authority, EPA worked with OSHA and the state and local emergency response commissions and planning committees respectively. Between 1989 and 1997, EPA's CAP program chemical safety audit teams completed approximately 350 safety audits and audit reports at facilities that had already experienced a release or where the probability of a release was high.

However, some felt that EPA's safety audits did not necessarily result in sufficiently independent post-incident root cause investigations, analyses and recommendations. With the CAA Amendments of 1990, Congress had created authority for an independent safety board, the U.S. Chemical Safety and Hazard Investigation Board (CSB), modelled after the U.S. National Transportation Safety Board. Its purpose: "to investigate accidents to determine the conditions and circumstances which lead up to the event and to identify the cause or causes so that similar events might be prevented." In 1998, Congress funded the CSB, and it went forward with its mission, identifying the root causes of chemical incidents, independently, and transparently, sharing these findings and making recommendations.

While having CSB knock on your door after an event is certainly not a good day, being able to review the final root cause analyses and recommendations from these events is critical for US chemical plant operators. There is no other independent entity that provides this review, with the authority to investigate and distribute these findings.

The CSB's budget has been about \$11 million for a while, not a lot of money, with a staff of 40, not a lot of folks. Yet, CSB has investigated over 130 major chemical incidents and issued 788 safety recommendations. CSB's safety videos and other products are widely viewed and relied on for safety training. And while CSB may have had a few bumps in its past, it's made progress in resolving 34 of the 37 inspector general recommendations. And CSB's critical role is recognized by the American Institute of Chemical Engineers Center for Chemical Process Safety, the American Chemistry Council (which implements its Responsible Care Program), and the American Chemical Society, to name just a few heavy hitters.

Despite its important role in US chemical plant safety, and its modest budget, President Trump's proposed budget would zero out the CSB. And then no more CSB safety products, or independent CSB

root cause analysis or recommendations the next time something goes boom. Theoretically EPA may have authority to reinstitute its chemical safety audit program. But, would EPA still have the budget to pursue this work and fill in the void? How useful would individual state audits or investigations be, where methods vary and distribution of findings may not occur?

While Congress has the last word on the President's budget, it's hard to see how industry would get this information without the CSB.

Disclaimer: The content of this newsletter is for informational purposes only and not for the purpose of providing legal advice. You should contact your attorney to obtain advice with respect to any particular issue or problem you have. Use of any information contained herein does not create an attorney-client relationship between E&W and the user. The opinions expressed herein are those of individuals and may not reflect opinions of Earth & Water Group.