



### News

Earth & Water Group welcomes Doug Parker who joins as the President of E&W Strategies. Until March, Doug served as EPA's Director of the Criminal Investigation Division. Doug will be working closely with E&W's clients to help them assess and manage their compliance risks.

### Trending

**The Return of Water** – The Flint water crisis as well as the large case against Duke Energy in North Carolina and EPA's recent decision to add a third water enforcement priority to its suite of enforcement initiatives ("Keeping Industrial Pollution out of our Nation's Waters") has put the oversight and enforcement focus squarely back on the water sector. The Michigan Attorney General's recent criminal charges are the latest evidence of this focus (and can be found [here](#)). Look for the EPA, DOJ, and state agencies to aggressively re-focus on that area in the coming months through increased oversight, inspections, civil and criminal investigations, *and compliance outreach*. Also look for Congress to continue holding EPA and the states feet to the fire on water oversight while citizen groups and traditional NGOs ramp up their own scrutiny of public and private water interests.

### **A Government-Wide Focus on Worker Safety** –

Deputy Attorney General Sally Yates recently announced the Department of Justice's renewed efforts to address illegal conduct in the industrial sector that places workers' health and safety at risk. Much of this effort will be centered in the Department's Environment and Natural Resources Division (ENRD) which has taken on an expanded role to include taking the lead on mine safety violations and OSHA worker safety investigations. The data and enforcement silos between OSHA, DOJ, and the EPA are continuing to

### Earth & Water Group

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Newsletter

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Welcome to the inaugural Earth and Water Group Newsletter. Our goal is to identify the key issues and signature events that are driving the enforcement and compliance 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 compliance program.

Learn more about E&W, and the perspective we bring, by visiting our firm at [www.earthandwatergroup.com](http://www.earthandwatergroup.com).

diminish, so look for greater information sharing on worker injuries and serious environmental violations as DOJ puts this priority into aggressive practice. This Yates memo titled Prosecutions of Worker Safety Violations can be found [here](#).

**Enhanced Scrutiny of Market Based Regulatory Programs** – The Renewable Fuels Standard (RFS) is the most high-profile and controversial of the market based environmental trading programs that the EPA is tasked with implementing and overseeing. The RFS program sprang from legislation signed by President George W. Bush in 2005 and 2007 that mandated the use of increasing volumes of renewable fuel be included in the nation’s fuel supply. This was established through a trading system where renewable fuels producers did not just sell directly to end users (“obligated parties”), but under the regulatory framework also generated a tradable credit for each unit which could be purchased to meet the obligated parties’ volume based requirements for use of renewable fuel. This has been a controversial program from the start due to systemic fraud in the market (see below) as well as concern about market distortions and environmental impacts of the program. In an effort to bring greater expertise to managing such markets, EPA recently announced a partnership with the Commodities Futures Trading Corporation (CFTC) to enhance oversight in this area which can be found [here](#). In the interim, look for intensive action on the Hill from multiple interests to preserve, alter, or end the RFS program while EPA and DOJ go full speed on major fraud investigations.

### Regulatory Watch

**CERCLA – 108(b) – Financial Assurance Rulemaking** - The decades long process for EPA to promulgate financial-responsibility regulations for the owners and operators of certain classes of facilities that produce, transport, treat, store and dispose of hazardous substances is gathering steam after many decades of inaction. Although CERCLA does not set a date by which the financial-responsibility rules must be promulgated, it requires EPA to identify "classes for which requirements will be first developed" within three years of the enactment of CERCLA, which would have been by the end of 1983. EPA missed this deadline by a long shot. With pressure in 2005 from GAO and later NGO suits against the agency in 2008, the District Court for the Northern District of California ordered EPA to comply with this CERCLA mandate in 2009. Fast forward to 2016 where the agency is set to send the rule over to OMB this summer and is anticipating the release of a draft rule in December. **Key Takeaway: hard rock mining may be “first up,” but EPA previously announced it will be reviewing classes of facilities in the chemical, coal, and petroleum manufacturing industries as well as electric power, transmission and distribution industries. Financial pressure in the coal industry in particular, may accelerate the agency’s focus on this rulemaking.**

### Hill Watch

**Budget Update** - Congress traditionally relies on a House Budget Resolution to kick off the annual appropriations spending frenzy. However, this year's effort, which was released on March 16, was resisted both by Democrats (for its cuts) and the conservative Freedom Caucus (for its failure to cut deeper). Rather than postponing the process and risking running out of time for a "regular order" consideration of the twelve Subcommittee bills which fund all aspects of the Government, Congress decided to begin its work by accepting the \$1.07 trillion discretionary spending level for FY 2017 (which sets defense spending at \$551 billion and allocates \$519 billion for non-defense programs) that was set in last year's bipartisan budget agreement. With that as a springboard, last week the House acted on Energy and Water, Agriculture and Military Construction and Veteran's Affairs, and the two Chambers have scheduled more than a dozen hearings **for this month. Within the environmental space, look for the Flint water crisis and the coming election to serve as the springboard for preliminary legislative action on infrastructure and compliance in the water sector.**

### Key Enforcement Cases:

#### **Volkswagen –Civil Clean Air Act Complaint**

In January DOJ filed its civil complaint in federal court against Volkswagen AG, Audi AG, Volkswagen Group of America Inc., Volkswagen Group of America Chattanooga Operations LLC, Porsche AG and Porsche Cars North America Inc. (collectively “Volkswagen”). This is the result of the ongoing civil investigation into the well-publicized “defeat device” case where nearly 600,000 diesel engines had illegal equipment installed in violation of the Clean Air Act. The timing of this filing was essentially a tactical move by DOJ to ensure that its ability to proceed civilly was not limited in light of the consolidation of the class action litigation in which former FBI Director Robert Mueller is serving as the “settlement master.”

***Where does this investigation end up? Look for aggressive civil negotiations to come to a head in the coming weeks with a massive mitigation package (to compensate for past Nox pollution by VW) as a central element, but a more drawn out timetable for the companion criminal investigation.***

#### **Lockheed Martin Corporation – Civil RCRA**

Both the parent company and subsidiaries Lockheed Martin Energy Systems and Lockheed Martin Utility Services (collectively, Lockheed Martin) agreed to pay the United States \$5 million to resolve allegations that they violated the Resource Conservation and Recovery Act (RCRA) and, in misrepresenting their compliance with RCRA to the Department of Energy (DOE), knowingly submitted false claims for payment under their contracts with DOE to operate the Paducah Gaseous Diffusion Plant in Paducah, Kentucky.

***Takeaway: compliance on large DOE and DOD clean-up work will continue to be a focus of DOJ.***

#### **Terminix – Criminal Pesticide Violations**

In March the pest control corporation Terminix International Company LP (TERMINIX LP) and its U.S. Virgin Islands operation Terminix International USVI LLC (TERMINIX, USVI), were charged with multiple violations of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA”) for illegally applying fumigants containing methyl bromide in multiple residential locations in the U.S. Virgin Islands, including the condominium resort complex in St. John where a family of four fell seriously ill last year after the unit below them was fumigated. TERMINIX LP and TERMINIX, USVI agreed to pay a total of \$10 million in criminal fines, community service and restitution payments. ***Takeaway: Expect an aggressive focus on both corporate and individual conduct by DOJ when serious public health impacts occur related to alleged environmental misconduct.***

#### **E-Bio Fuels/Green Diesel – Renewable Fuels Fraud**

The twenty-year prison sentence handed down in January by the District Court in Indiana against Joseph Furnado (“E-Bio Fuel”) as well as the ten-year sentence of Philip Rivkin (“Green Diessel”) in March by the District Court in the Southern District of Texas are further example of the government’s ambitious pursuit of fraudsters in the renewable fuels market. In both cases the defendants led criminal schemes where they generated fraudulent credits and sold them with no legitimate fuel behind them. In Furando’s case (where additional defendants have and will be sentenced) he re-sold bio fuel that had previously been made by other companies and tax credits had already been issued. Rivkin generated almost no renewable fuel but simply sold fraudulent credits on the open market before his scheme came to an end. Both criminal enterprises reaped tens of millions of dollars in illegal profits along the way. ***Near Term Prognosis: Look for even larger fraud cases to be made – with numbers moving into the hundreds of millions***

*in fraud loss and illegal tax credits. Longer Term: Look very closely at the emerging Clean Power Plan and possible opportunities for misconduct within elements of its proposed credit and trading approaches.*

#### **Berkshire Power/Power Plant Management Services (PPMS) – Criminal/Civil Clean Air Act violations**

Berkshire and PPMS (along with two previous individuals) agreed to plead guilty in the District of Massachusetts and pay a total of \$4.25 million related to a criminal scheme where the Western Massachusetts power plant's continuous emissions monitor (CEMs) was tampered with for years to falsely characterize the facility's emissions. Between them, BPC, PPMS, and the Plant's former operation and maintenance company, EthosEnergy Power Plant Services, LLC (formerly Wood Group Power Plant Services, LLC), will also pay over \$4 million in civil penalties. EthosEnergy agreed to resolve allegations that it violated sections of the state of Massachusetts' Public Health Law dealing with air pollution stemming from its employees' involvement with the air pollution monitoring equipment tampering at the Plant. Under the terms of the state Consent Judgment, EthosEnergy will pay a \$1.1 million civil penalty, and make a \$200,000 payment to fund the installation of electric vehicle charging stations. **Takeaway: In addition to the criminal fines outlined above, BPC and PPMS have agreed to pay \$3,042,563 plus interest to the Federal Energy Regulatory Commission (FERC) in civil penalties and disgorgement for their misrepresentations to ISO-New England regarding the Plant's availability to produce power. Look for this pattern of coordination across enforcement agencies to accelerate.**

#### **DSD Shipping – Ocean Pollution**

A Norwegian shipping company, DSD Shipping, was recently sentenced in Alabama to pay \$2.5 million in criminal penalties, of which \$500,000 was paid to the Dauphin Island Sea Lab Foundation as part of a supplemental environmental project (SEP). The violations involved DSD's operating a crude oil tanker without an oil-water separator, illegally discharging oil and garbage in violation of the Act to Prevent Pollution from Ships (APPS), falsifying record books maintained on the ship, and obstructing justice. The case turned on an internal corporate memo written in 2010, identifying problems with the pollution control equipment. However, the company failed to address the issue until discovered during a routine inspection by the U.S. Coast Guard. This case follows on the heels of a similar criminal prosecution of a German Shipping Company in Florida who was fined \$1.5 million for violations associated with failing to maintain accurate oil record book. **Takeaway: Maintaining pollution control equipment and logbook data are fundamental to all environmental regulations. When problems with pollution control equipment are identified, prompt corrective action is critical to resolving the violation and, more importantly, avoiding a criminal prosecution.**

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