



EARTH & WATER UPDATE

E&W Launches EHS² Roundtable

On November 29, Earth & Water Strategies held its inaugural meeting of its EHS² Roundtable at E&W headquarters in Washington, DC. EHS² was formed at the encouragement of EHS leaders to help them better address the challenges they and their companies are facing with the dramatic increase in regulations and the acceleration of public expectations involving environmental stewardship. Interviews and surveys of these EHS leaders from companies large-to-small helped to shape the founding and initial focus areas of EHS²

EHS² was created as 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. This group has been established to better equip EHS leaders by not only sharing best practices and learning from one another, but also by identifying and preparing them for what is coming down the road in this ever more challenging regulatory environment. EHS² is designed to address not just the “here and now” but also the “tomorrow” of effective EHS leadership.

The inaugural meeting of EHS² drew over 20 invited EHS professionals from more than 16 companies who helped to further articulate and shape the roundtable’s mission. The three primary objectives of the roundtable solidified at the inaugural meeting were:

Earth & Water Group

Compliance and Enforcement Newsletter

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Welcome to the Fall edition of the Earth & 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.

- ✓ Establishing a forum where EHS leaders can candidly discuss, explore and address (with each other and relevant outside experts) the linkages between current and future operational and enterprise risks, state-of-the-art systems, industry standards, and better strategies for risk mitigation and safeguarding their company's critical assets.
- ✓ Preparing the EHS management community for "GRC 2.0" – the next generation of Governance, Risk, and Compliance – including such new challenges and opportunities as data and analytics, remote sensing, and cyber security.
- ✓ Providing a platform for EHS management professionals to learn from – and provide insights back to – key state and federal regulators and policymakers, as well as experts in the areas of compliance, enforcement, and security that impact EHS leadership and their responsibilities, both domestic and international.

The EHS² Difference

In establishing EHS², Earth & Water Strategies recognized that numerous EHS-related organizations exist, providing an array of beneficial perspectives and focuses to key industries; however, the EHS² Roundtable offers several unique advantages:

- ✓ EHS² takes a holistic look at EHS performance as foundational to overall corporate performance and sustainability in companies both large and small. EHS² focuses on helping the EHS leader unlock the superficial "plan-do-act-check" cycles of many company EHS programs, and instead helps them assess and better leverage organizational behavior and human resources to address the full spectrum of their company's EHS challenges.
- ✓ EHS² uses a unique approach to dissecting and attacking EHS risks through the lens of supply chain performance. EHS² offers companies and their EHS professionals the opportunity to sit at the same table with small- and medium-size enterprises (SME) suppliers: sharing best practices and risk mitigation strategies; improving the supplier relationship; and providing these SMEs a safe haven where they can learn the value of EHS performance along with the risks of underperformance from seasoned EHS professionals.
- ✓ EHS² provides a forum for EHS professionals to come and discuss, address, and share insights on the linkages between operational and enterprise risks, as well as to develop better strategies for risk mitigation and safeguarding of critical assets. EHS² provides a cadre of legal, technical and operational resources and support to EHS professionals in learning how to successfully handle and mitigate these risks.

Going Forward

In addition to the EHS leaders who are shaping its direction as its members, EHS² has behind it the combined resources of both Earth & Water Strategies and Earth & Water Law – including their teams of seasoned experts who operate in the environmental and occupational and safety law, compliance, security, legislative, and regulatory policy and strategy sectors. For 2017, EHS² is plotting a full range of activities for its members both in Washington and regionally, including web-based and digital networking and educational offerings.

EHS² membership is open by invitation only to senior EHS professionals (non-legal and legal), including those from their various supply chains. The number of members of EHS² is being limited to ensure a free exchange of ideas and to enhance the professional relationships arising from groups with limited participation. Additional information on EHS² can be obtained by contacting Ken Maynard at the Earth & Water Group (ken.maynard@earthandwatergroup.com).

Trending

What does a President Trump mean for environmental compliance and enforcement? With the election now in the rear-view mirror, many are watching and waiting what this means for EPA and environmental regulations. The President-elect has made numerous pronouncements that suggest potentially significant changes to business as usual. While he has promised to make infrastructure, including water infrastructure, a high priority for his Administration, he has also expected to tackle controversial regulations such as the Clean Power Plan and the Waters of the United States. We will most assuredly see a focus on regulatory reform, evaluating the costs/benefits of both existing and new regulations. What that means in terms of EHS compliance remains to be seen, but for now, we'll resort to reading tea leaves as he puts into place his transition team.

Analytics and transparency are the big game changer – The advent of EPA's electronic reporting rules, the ability to unpack and review environmental data through dramatically enhanced analytical capabilities, and the continued appeal of "Next Gen" compliance means this is the big new thing in the environmental sector for years to come. How these advances will be applied, and how quickly, depends on where you are sitting, but they can't be ignored. Stay tuned to the Earth and Water Group to learn more.

Citizen suits, citizen science, and citizen action – The recent federal trial (**Dominion Energy v. Southern Environmental Law Center - Coal Ash Suit**) focusing on the utility's alleged coal ash discharges as a violation of the Clean Water Act ended in June after four days of testimony from experts on both sides of the issue. Look for more scrutiny and suits to come, and don't underestimate the Flint Water Crisis's impact as well as the election as catalysts for broader public engagement beyond

OF COUNSEL

There are significant new developments in the alignment of Environment and Health & Safety by federal prosecutors that companies must clearly understand. This past month, John Cruden, DOJ's top environmental prosecutor, said publicly,

"We have long thought that those who mistreat their employees by cutting corners on worker safety laws to maximize production and profit, may also cut corners on environmental compliance."

Cruden has also reinforced the importance of Environmental Management Systems in not only protecting the environment, but ensuring the safety and wellbeing of workers. Given the heightened focus in this area, companies would be wise to assess any gaps in their EMS and compliance programs.

traditional NGOs. A new Trump administration portends much greater NGO scrutiny and litigation as there is concern by many that EPA will no longer be the cop on the environmental beat.

The worker safety initiative is real...so pay attention – The KTX criminal case outlined below signals that DOJ's clear focus on this initiative is more than just a policy statement. Look for OSHA and EPA to more aggressively cross reference inspection data and DOJ to focus prosecutorial resources on these cases. This initiative has legs and looks to be here to stay.

KEY ENFORCEMENT CASES

Civil Enforcement

[Detroit Diesel](#) – **Certificate of Conformity Violations.** DOJ and EPA's focus on Clean Air Act compliance in the auto sector is not just limited to Volkswagen. It was announced that Detroit Diesel will pay \$14.5 million to resolve violations of the Clean Air Act for selling heavy-duty diesel engines that were not certified by EPA and did not meet applicable emission standards. Under the settlement, Detroit Diesel will apply the money largely on projects to reduce nitrogen oxide and other pollutants, including replacing high-polluting diesel school buses and locomotive engines with models that meet current emissions standards. Detroit Diesel will also pay a \$14 million civil penalty.

[Southern Coal Corporation](#) – **System-Wide Clean Water Act Violations.** SCC and 26 affiliated mining companies settled with DOJ for Clean Water Act violations that require the companies to make comprehensive upgrades to their coal mining and processing operations to prevent discharges of polluted wastewater from their mines in Appalachia. The estimated cost of these measures is \$5 million. The settlement also requires the establishment of a \$4.5 million letter of credit and a standby trust that will guarantee sufficient funding for and a mechanism to accomplish, compliance with the Clean Water Act. Lastly, the companies will pay a \$900,000 civil penalty, divided among the federal government and the four state co-plaintiffs, Alabama, Kentucky, Tennessee and Virginia.

[Sears Home Improvement Products Inc](#) – **Lead Repair Violations.** This Sears subsidiary resolved alleged violations of the federal Lead Renovation, Repair and Painting (RRP) Rule for work performed by Sears' contractors during home renovation projects across the country. Under the settlement, Sears will implement a comprehensive, corporate-wide program to ensure that the contractors it hires to perform work are properly certified and follow required procedures to prevent exposure to lead dust from home renovation activities. Sears will also pay a \$400,000 civil penalty. Under the settlement, Sears will implement a company-wide program to ensure that the contractors it hires to perform work for its customers comply with the RRP Rule during renovations of any child-occupied facilities, such as day-care centers and pre-schools and any housing that was built before 1978.

[Kirby Inland Marine L.P.](#) – **Civil Penalty from Houston Oil Spill.** The shipping company has agreed to pay \$4.9 million in Clean Water Act civil penalties and to implement fleet-wide operational improvements to settle claims stemming from a 4,000-barrel (168,000-gallon) oil spill in the Houston Ship Channel in March 2014. The spill occurred when a Kirby tow boat was pushing two 300-foot oil barges in the “Texas City Y” area of the Houston Ship Channel in fog conditions. Despite detecting the nearby presence of a 585-foot bulk cargo ship traveling up the Houston Ship Channel, Kirby’s tow boat and barges tried to cross the channel in front of the cargo ship. Approximately 160 miles of shoreline were oiled, including sensitive marsh habitat and a national wildlife refuge. A full assessment of the injuries caused by the spill to marine and terrestrial natural resources is ongoing and will be addressed

[ExxonMobil](#) – **\$12million Natural Resource Damage Settlement from 2011 pipeline spill.** This settlement is related to the 2011 pipeline rupture and spill into the Yellowstone River that resulted in the discharge of crude oil into the river and floodplain. The discharge is estimated to have been approximately 63,000 gallons (about 1,500 barrels) and occurred during a high-flow event, affecting approximately 85 river miles and associated floodplain. Oil from the spill, along with the cleanup activities, harmed natural resources including fish and other aquatic life, birds (including migratory birds), wildlife, aquatic habitat, terrestrial habitat, and recreational uses.

Criminal Enforcement

[Volkswagen](#) – **First Individual Charged.** James Liang, a Volkswagen engineer, pleaded guilty for his role in a nearly 10-year conspiracy to defraud U.S. regulators and U.S. Volkswagen customers by implementing software specifically designed to cheat U.S. emissions tests in hundreds of thousands of Volkswagen “clean diesel” vehicles. Liang’s plea agreement provides that he will cooperate with the government in its ongoing investigation. He pleaded guilty to one count of conspiracy to defraud the United States, to commit wire fraud and to violate the Clean Air Act. According to the plea agreement, from 1983 until May 2008, Liang was an employee of Volkswagen AG (VW), working in its diesel development department in Wolfsburg, Germany. Liang admitted that beginning in about 2006, he and his co-conspirators started to design a new “EA 189” diesel engine for sale in the United States. According to Liang’s admissions, when he and his co-conspirators realized that they could not design a diesel engine that would meet the stricter U.S. emissions standards, they designed and implemented software to recognize whether a vehicle was undergoing standard U.S. emissions testing on a dynamometer or being driven on the road under normal driving conditions in order to cheat the emissions tests.

[KTX](#) – **Worker Safety Conviction.** KTX Limited and KTX Properties Inc., were charged in the Eastern District of Texas with negligently releasing hazardous air pollutants after a tank explosion at their chemical and petroleum processing facility located in Port Arthur, Texas on March 31, 2011. The explosion killed one worker at the plant and severely injured two others. According to the factual basis of the plea agreement, KTX Limited and KTX Properties Inc, authorized two contract workers to perform welding or “hot work” on piping connected to a tank at their Port Arthur, Texas, facility. A third worker was killed when the rails and ladder from the collapsing tank fell on his head. The plea agreement requires the companies to pay a

total of \$3.3 million in criminal fines. In addition, the companies will make a \$200,000 community service payment.

Chem-Solv – Hazardous Waste Violations. A Virginia chemical distributing company, which previously pleaded guilty to illegally storing hazardous waste and to transporting hazardous waste from its facility in Roanoke to another facility, was sentenced for violations of the Resource Conservation and Recovery Act. The company in its felony guilty pleas agreed to pay a \$1million criminal fine for these violations, as well as an additional \$250,000 to fund environmental community service projects. Chem-Solv will also serve five years' probation, during which time it must develop and implement an environmental compliance plan and be subjected to yearly independent environmental audit.

E&W INSIGHTS

Big Data and Cyber - Risk or Opportunity in the EHS sector? Yes ...

By Lindene Patton

One need look only at the recent election to see the perils of ineffective cyber security practices. The EHS sector is not immune from these growing threats, and the benefit of advances in data systems that can improve process safety and efficiency can also create access points, as well as large caches of data, that can be negatively exploited. The key to success in this area is executing and embedding an effective cyber risk management strategy in concert with your existing EHS strategy.

So, who needs to worry?

Manufacturers and utilities often incorporate widely-available, low-cost internet protocol devices into their industrial control systems creating an increased risk for cyber-attacks. Exposed industries and infrastructure include:

- Electric utilities
- Water and wastewater
- Oil and natural gas
- Transportation
- Chemical
- Pharmaceutical
- Pulp and paper
- Food and beverage
- Discrete manufacturing, e.g. automotive, aerospace and durable goods

So how can an organization prepare for and manage this risk? Start by ensuring a simple risk management framework as part of your business process. Don't reinvent the wheel. Take advantage of the critical thinking of others and transparency.

To help meet this evolving series of challenges, President Obama issued Executive Order (EO)13636, entitled “Improving Critical Infrastructure Cyber Security.” As part of this EO, the National Institute of Standards and Technology (NIST) developed a Cybersecurity Framework. The framework leverages and integrates cybersecurity practices developed by NIST and the International Standardization Organization (ISO); creating a compilation of practices known as the “Core.” This Core is composed of five concurrent and continuous functions—**Identify, Protect, Detect, Respond, and Recover**—that provide a strategic view of the lifecycle of an organization’s management of cybersecurity risk. Learn more about this through President Obama’s 2013 E.O., [Improving Critical Infrastructure Cybersecurity](#).

Reviewing this E.O. is a first step, but scenario planning and vigilance are obviously key to the implementation of a successful cyber risk management program. Look clearly at potential vulnerabilities and stand in the shoes of the bad guys to determine how to best thwart adverse use of your systems. Moving forward, cyber risk will take up increasingly more space on your list of EHS responsibilities – ignoring it is simply not an option.

Regulatory Watch

Midnight Regulations - At the end of every administration there’s a rush to complete unfinished business and take actions that will continue to affect government policy after it leaves office. The George Washington University’s Regulatory Studies Center recently issued a report investigating so-called ‘midnight regulations’ and, based on their quantitative models, predicts the likely number of ‘economically significant’ regulations (rules with an annual effect exceeding \$100 million) issued by the outgoing Obama administration will triple during its last months in office. Additional information and the report are available at: <https://regulatorystudies.columbian.gwu.edu/final-countdown-projecting-midnight-regulations>

Hill Watch

Water Resources Development Act (WRDA) – WRDA is a foundational piece of water law that has its roots in legislation that goes back to the early days of the United States when the Congress saw the need to improve navigation on the Ohio and Mississippi Rivers. It was traditionally passed every two years to authorize U.S. Army Corps of Engineers activities, typically flood control and navigation projects, though more recently the Corp’s program in ecosystem restoration work has grown considerably. Over time it has become more difficult to pass as other provisions were loaded onto the bill and the Corps was accused of “mission drift”. Congress has also wrestled with the application of so called “cross-cutting” requirements like Davis-Bacon Act wage rules to Corps projects. Regardless, WRDA bills have continued to expand and without other available authorizing vehicles the bill has become a means to move important Clean Water Act and Safe Drinking Water Act reforms and priorities.

This year’s iteration of WRDA is particularly important to the water community. Title VII of the Senate Bill (S.2848) includes provisions addressing affordability, integrated planning, green infrastructure for stormwater management, municipal engagement with USEPA and more, adjustments which water utilities have sought for years. The House bill (H.R. 5303) includes important language to improve

collaboration between local governments and the COE on flood control and stormwater management. On October 31 a group of leading water, local government and infrastructure sector leaders wrote the senior Members of the House Transportation and Infrastructure Committee urging them to accept Title VII, but so far the House seems to prefer a leaner WRDA package.

House and Senate conferees met extensively over their conflicting versions of the bill during the summer break and are intense negotiations now that Washington has reconvened in a post-election “Lame Duck” session. That Session is expected to last no more than four weeks (into mid-December) and, after the resolution of the critical funding and appropriations issues, WRDA is on a very short list of two or three other bills slated for action. However, it’s possible, a full vote won’t occur until after President-Elect Trump takes office.

Capitol Hill Roundtable on P3s - E&W and the Reason Foundation sponsored its second Capitol Hill roundtable on the role of public-private partnerships (P3s) in the water sector on September 26, 2016. Congressman Bob Gibbs, Chairman of the House Transportation & Infrastructure Committee, hosted the lunch time event in the Committee’s hearing room which drew 30+ congressional staff and water professionals.

The roundtable’s facilitated discussion was co- led by Dr. Adrian Moore – VP of the Reason Foundation, and Brent Fewell, E&W Group Chairman, and focused on how P3s can (and do) help increase local investment, leverage more innovation and offer greater flexibility in addressing critical water infrastructure and facility needs, as well as financing innovative water technologies. Participants also discussed how S.2848 - - the Water Resources Development Act (WRDA) of 2016 - - and how WRDA can help to encourage private sector participation in new and developing water technologies (such as desalination, water reuse and water recycling) as well as helping to address other serious water resource challenges related to aging infrastructure and drought.

In addition to Moore and Fewell, roundtable discussion leaders included: Rich Anderson, Senior Advisor – U.S. Conference of Mayors; Tracy Mehan, Executive Director of Government Affairs – American Water Works Association; and Michael Deane, Executive Director – National Association of Water Companies.

E&W Articles/Press Mentions

Brent Fewell, Trump Pledge Means Cuts Ahead on Environmental Regulation, Bloomberg BNA, Nov. 10, 2016.

Brent Fewell, [A Call for Change](#): WRDA 2016 offers a glimmer of hope to communities with failing water systems, Water & Waste Digest Magazine, Nov. 3, 2016. <http://www.wwdmag.com/call-change>

Michael Curley, [Fundamentals of Water Finance](#), CRC Press, Oct. 2016 (available on Amazon).

Doug Parker, Interview on E&E TV, [Former EPA Investigator Parker says RIN fraud ongoing](#), becoming more sophisticated, Oct. 5, 2016.

Doug Parker, Murky Biofuel Market Vulnerable to Fraud Former EPA Cop Warns, Bloomberg BNA, Sep. 19, 2016.

Doug Parker, [From Icahn's lips to Trumps' economic policy plan](#) (at least the first version), Washington Post, Sep. 16, 2016.

Lindene Patton, [Emergence of Aggressive Climate Litigation Changing the Landscape for Voluntary Disclosure Programs](#), Bloomberg BNA, Sep. 8, 2016

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