



## CRWI Update March 31, 2022

### MEMBER COMPANIES

Clean Harbors Environmental Services  
Eastman Chemical Company  
Heritage Thermal Services  
INV Nylon Chemicals Americas, LLC  
Ross Incineration Services, Inc.  
The Dow Chemical Company  
Veolia ES Technical Solutions, LLC

### GENERATOR MEMBERS

Eli Lilly and Company  
Formosa Plastics Corporation, USA  
3M

### ASSOCIATE MEMBERS

AECOM  
Alliance Source Testing LLC  
B3 Systems  
Civil & Environmental Consultants, Inc.  
Coterie Environmental, LLC  
Eurofins TestAmerica  
Focus Environmental, Inc.  
Franklin Engineering Group, Inc.  
Montrose Environmental Group, Inc.  
Ramboll  
Spectrum Environmental Solutions LLC  
Strata-G, LLC  
SYA/Trinity Consultants  
TEConsulting, LLC  
TRC Environmental Corporation  
Wood, PLC

### 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

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### PFAS

When EPA developed their Toxics Release Inventory (TRI) reporting requirements for per- and polyfluoroalkyl substances (PFAS), they excluded reporting for materials that contain less than 1% PFAS. Environmental groups challenged this exclusion saying it violated the threshold requirements as passed in the FY 20 National Defense Authorization Act. On March 3, 2022, EPA announced plans to propose a rule in the summer to remove the 1% exclusion.

The Department of Defense has told the military services that they may use state drinking water standards for setting clean up levels when conducting site-cleanups. Each site will now be allowed to use either state or federal clean up levels.

Illinois Environmental Protection Agency is undertaking a statewide investigation into PFAS contamination in community drinking water systems. Illinois is sampling for 18 PFAS compounds. Of the 1,428 samples analyzed, 1,275 were below detection levels, 82 were detected but below the Illinois guidance level and 70 were greater than the guidance level. The guidance levels for some of the compounds are included on the webpage (<https://www2.illinois.gov/epa/topics/water-quality/pfas/Pages/pfas-statewide-investigation-network.aspx>).

On March 7, 2022, a judge in the U.S. District Court for the Southern District of Ohio certified a class action suit (*Kevin D. Hardwick v. 3M Company, et.al.*). The class as certified is all Ohio residents with 0.05 ppt of perfluorooctanoic acid and at least 0.05 ppt of any other PFAS in their blood serum. The plaintiff is asking for industry-funded, independent testing and health studies to determine the effects of numerous PFAS found in human blood serum. Lawyers for the plaintiff are seeking to expand the class to all Americans. On March 22, 2022, industry parties filed a motion in the U.S. Court of Appeals for the 6<sup>th</sup> Circuit arguing that the class should have never been certified because the district court failed to comply with requirements for injunctive relief cases under federal rules of civil procedure. On March 28, 2022, a number of large trade organizations filed an amicus brief with the 6<sup>th</sup> Circuit also seeking decertification of the class.

On March 18, 2022, Chemours filed a request for correction under the Information Quality Act for the final toxicity analysis of Gen-X. Chemours alleges that EPA ignored peer-reviewed research that would have led to a less stringent exposure limit, gave too much weight to animal testing data that would not apply to humans, and relied on a pathology review that they say is flawed.

On March 17, 2022, Congressman Haley Stevens (D-MI) introduced a bill (H.R. 7147) that would require EPA to list all PFAS compounds as hazardous air pollutants (HAP) under the Clean Air Act within 180 days of enactment. The bill has four co-sponsors (two Democrats and two Republicans) and has been assigned to the House Energy and Commerce Committee for consideration. This bill is unlikely to make it through the legislative process during this session but represents the continued desire by House members to add PFAS compounds to the list of HAPs.

### **Adding revised ASTM standard to AAI**

In November 2021, the American Society for Testing and Materials (ASTM) revised their standard practices for site assessment. The new practice (E1527-21) includes terminology revisions, new definitions, and a footnote that suggests including PFAS or other emerging contaminants in the assessments if states define those compounds as hazardous substances and users wish to obtain state liability defenses. It was meant to replace E1527-13. On March 14, 2022, EPA published a direct final and a proposed rule to add a reference to E1527-21 as a part of its All Appropriate Inquires (AAI) rule for site assessment under CERCLA. The direct and proposed rules did not remove the reference for the previous version of ASTM's standard practices, thus allowing the use of either in site assessment.

For actions where EPA does not anticipate controversy, it will often simultaneously publish a direct final rule and a proposed rule. Both address the same action. The direct final rule will become effective at a later date (in this case, May 14, 2022) unless adverse comment is received. The proposed rule asks for comments on the same action with a deadline for comments that is shorter than the effective date (in this case April 13, 2022). This gives EPA time to withdraw the final rule before the effective date should they receive adverse comments. The trade press is reporting that ASTM may submit adverse comments based on the direct final rule allowing the use of the new standard as well as the superseded standard. ASTM's concern is that allowing either will create confusion. Should adverse comments be submitted, EPA will likely withdraw the direct final rule and proceed with rulemaking based on comments received during the comment period. They typically do not reopen the comment period but proceed to a new final rule based on comments submitted during the original comment period.

### **EPA FY 22-26 final strategic plan**

On March 28, 2022, EPA released their final FY 22-26 strategic plan. In general, it follows the draft released in October 2021 (see the October Update for a summary). It contains the same four strategies with the same seven goals. It echoes EPA's stated

efforts centering on climate change and environmental justice. It includes a new focus on bolstering civil rights enforcement but has dropped the consideration of merging its civil rights and environmental justice programs. They also are delaying the issuance of guidance on civil rights enforcement and dropped a priority on reducing lead exposures. Some specifics include:

- Developing and issuing guidance on external civil rights compliance by September 30, 2023;
- Using the full array of policy and legal tools to ensure laws and policies are implemented to benefit all individuals and communities (e.g., advanced monitoring, audits, and third-party verifications);
- Relying on mapping and screening tools (including EJSCREEN) to help identify overburdened communities that may be disproportionately impacted by pollution;
- Conduct 55% of EPA inspections at facilities that affect potential environmental justice communities;
- Using tools in CERCLA and RCRA to require responsible parties to take early and expedited cleanup actions; and
- Promote early integration of environmental justice considerations into the regulatory process.

The final plan can be found at <https://www.epa.gov/planandbudget/strategicplan>.

### **CWA HS worst-case planning proposed rule**

On March 28, 2022, EPA published a proposed rule to require planning for worst-case discharges of Clean Water Act (CWA) hazardous substances (HS) for on-shore non-transportation related facilities that could reasonably be expected to cause substantial harm by release of HS into or on the navigable waters, adjoining shorelines, or exclusive economic zones. In the preamble, EPA states “RCRA hazardous waste regulations are comprehensive for CWA hazardous substances present as waste.” They go on to specifically exempt underground storage tanks covered under 40 CFR 280 or 281. Under the proposed rule, this action would impact facilities that:

- Have a maximum capacity on site for any HS listed in 40 CFR 116.4 that meets or exceed 10,000 times the reportable quantity as defined in 40 CFR 117.3; and
- Are located within 0.5 miles of a navigable water.

If a facility meets either of these criteria, additional considerations are if:

- It is located where a spill would create substantial harm to fish, wildlife, and sensitive environments;
- Have the potential to adversely impact public water systems;
- Have the potential to cause an impact to a public receptor as defined in proposed 40 CFR 118.2; or
- Had a reportable discharge under 40 CFR 117.21 within the last five years.

Comments are due by May 27, 2022.

### **E-manifest proposed rule**

EPA Administrator Regan signed a proposed rule to amend certain aspects of the current e-manifest program and to add provisions to change the manifest requirements for shipment of hazardous waste that are imported and exported for treatment, storage, and disposal. The proposed rule will:

- Require the waste handler that is exporting the hazardous waste out of the U.S. to submit the e-manifests reports and pay the requisite fee;
- Change the RCRA import/export movement documents to more closely match the international movement documents;
- Amend three manifest related reports (discrepancy, exception, and unmanifested waste);
- Request comments on changes to the manifest form;
- Request comments on how the Agency can begin to integrate the manifest system into the biennial reporting requirements under RCRA;
- Make conforming changes to TSCA manifest regulations for PCB wastes; and
- Propose several technical corrections to the e-manifest and movement documents.

The rule is scheduled to be published on April 1, 2022. The comment period closes on May 31, 2022.

### **Affirmative defense proposed rule**

An affirmative defense allows facilities to avoid penalties under certain circumstances that are beyond their control. The U.S. Court of Appeals for the District of Columbia Circuit decision (*NRDC v. EPA*) in 2014 stated that the right of an affirmative defense was with the court system, not EPA. In 2016, EPA proposed to remove affirmative defense provisions from state and federal air permits but this rule was never finalized. EPA will re-publish the proposed rule on April 1, 2022, asking for comments on removing all affirmative defense provisions from state and federal permits. The comment period will close on May 16, 2022.

### **OIG review of RTR rules**

Under the Clean Air Act, EPA is required to conduct risk and technology reviews (RTR) for every source category within eight years of the development of technology-based standards. The statute requires only one risk review but requires that the technology review (TR) be conducted every eight years. On March 30, 2022, EPA's Office of Inspector General (OIG) released a report on whether EPA is conducting RTR and TR rules in a timely manner. EPA has 169 source categories that require either RTRs or TRs. OIG determined that 15 of the RTRs and 79 of the TRs were overdue. The

appendices contain lists of rules where RTRs and TRs are pending. Of the 15 RTRs pending, EPA is currently working on five, four of which have court ordered deadlines. The report recommends that the Office of Air and Radiation (OAR) perform a workforce analysis to determine the resources needed to meet the statutory deadlines. OAR agrees with the recommendation and plans to develop future budget requests (FY24 and beyond) to address the need.

### **Memo banning “sue and settle” revoked**

When an EPA action is overdue, stakeholder groups will often sue asking the court to set a deadline to complete that action. In the past, these actions may or may not have been announced by either party. These actions often result in negotiations between the parties to set the deadline. The regulated community has tried to become a party to these negotiations but a court ruling during the Obama Administration found that the regulated community did not have standing to intervene in these negotiations because setting a schedule for a rule does not harm their interests. This resulted in a memo from then EPA Administrator Pruitt that listed a 10-step process for the Agency to follow when faced with these suits. At the time, it was advertised as ending the “sue and settle” practice. The Pruitt memo was immediately criticized as making it virtually impossible to come to a settlement even when the Agency had a clear statutory duty to act. On March 18, 2022, EPA Administrator Regan issued a memo that withdrew the Pruitt memo and laid out “simple yet effective steps to enhance public awareness of such claims against the agency and to provide an opportunity for public review and comment on proposed settlement of them.” The steps include posting of all new Notice of Intent to sue, petitions for review, complaints and proposed settlements, and consent decrees on OGC’s website (<https://www.epa.gov/aboutepa/about-office-general-counsel-ogc>). These items can be found in the dialog box on the right-hand side of the webpage.

### **EPA archive website**

For a number of years, EPA has maintained an archive of documents (<https://archive.epa.gov/>). Recently, EPA included a banner on the website stating the archive will be retired in July 2022. When asked about retiring these archives, EPA stated that they would abide by the federal rules for records management and that not all webpages qualify as official records. If you rely on the archives for certain EPA documents, it might be wise to download a copy before the website goes dark.

### **Audit samples**

Since 2019, ERA has been the only provider of stationary source audit samples. As of March 31, 2022, ERA will no longer manufacture or sell audit samples. Without a provider, audit samples are no longer available to be used during testing. It is unclear how and when EPA will respond.

## **EJSCREEN training**

For those interested in learning more about EJSCREEN, the Agency has set up a website (<https://www.epa.gov/ejscreen/learn-use-ejscreen>) to help you through the process. In addition, the Agency periodically sets up “office hours” and additional training modules. One can find these dates, times, and links at <https://www.epa.gov/ejscreen/ejscreen-office-hours>.

## **EPA personnel**

On March 8, 2022, President Biden nominated Joe Goffman to be the next Assistant Administrator for the Office of Air and Radiation. Mr. Goffman has been leading the office in either an acting capacity or as the deputy assistant administrator since the beginning of the Biden Administration. Mr. Goffman worked in the Obama EPA as a legal advisor on air issues. Several Republicans have voiced their opposition to the nomination primarily because of his role in using Clean Air authority to develop climate change regulations. The path to clearing his nomination from committee may be narrow. Meanwhile, the Senate has not acted on any of the other pending EPA Assistant Administrator nominees.

The largest employee union and EPA reached an agreement that workers could be headed back into the office after May 2, 2022. The agreement will allow employees to carry hand-held carbon dioxide monitors as a way of measuring whether their office space has adequate ventilation. The agreement will allow for full-time telework and “Requests for telework are not to be unreasonably denied.”

## **EPA budgets**

Congress passed a \$1.5 trillion omnibus appropriations bill funding the federal government for FY22. Congress increased EPA’s funding to \$9.56 billion, a \$343 million boost from FY21 funding levels. But they did not fund the development and staffing of a new national environmental justice program office. Congress did not reject the idea completely stating they wanted a comprehensive proposal on the plan before making a decision on funding. Some of the big winners for FY22 are the underground injection program (considered as critical for carbon capture and sequestration), environmental justice, and enforcement.

President Biden released his requests for funding for FY23 on March 28, 2022. The White House is asking for \$11.9 billion for EPA. This is a \$2.34 billion increase from the amount actually funded in FY22. It would add 1,900 more employees, add \$1.9 billion for environmental justice efforts, \$4 billion for water structures, \$1.2 billion for the Superfund program, and \$126 million to address PFAS issues. It should be noted that the Presidential request for FY22 was in the same range as this request.

## **Authority to agree to consent decrees**

Deciding who has authority to approve consent decrees withing the Department of Justice is governed by the regulations in 28 CFR 0.160. Under these regulations, Assistant Attorneys General are authorized to accept compromises to address alleged violations as long as the difference between the gross amount of the original claim and the proposed settlement does not exceed \$10 million or the total claim does not exceed \$4 million. Any agreement that did not meet these criteria must be referred to the Deputy Attorney General or the Associate Attorney General. This allowed certain agreement to be resolved at a lower level within the Department. Under the Trump Administration, the Department of Justice modified the regulations to add a requirement that when the proposed settlement would place a court in a position of monitoring compliance for 24 months or longer, the settlement must be elevated to senior management. On March 4, 2022, the Department of Justice published a notice that removed the provisions put into place by the Trump Administration. Since this is a procedural change, it does not modify the consent decree process except to allow decisions on some to be made at a lower levels within the Department. However, it may mean that certain consent decrees can finish more quickly since they have fewer steps to complete. It also indicates that the Biden Administration continues to remove Trump Administration rules they do not agree with.

## **Chevron settlement**

On March 15, 2022, the Department of Justice published a proposed settlement agreement with Chevron to address alleged violations involving flares at three Texas facilities (Cedar Bayou, Port Arthur, and Sweeny). Under the agreement, the facilities will minimize flaring, take flaring efficiency measures, and set up fence line monitoring for benzene. A \$3.4 million civil penalty is included. In their press release, the Department emphasized the impact on environmental justice communities near the facilities and the use of fence line monitoring. The fence line monitoring results are to be submitted semi-annually as a spread sheet showing the annual average updated every two weeks for each sample point. The agreement also includes triggers for root cause analysis and corrective action should thresholds be exceeded.

## **ECHO Notify**

On Marh 22, EPA released a new web tool called ECHO Notify to allow the public to stay informed of environmental enforcement and compliance activities in their neighborhood. Once signed up, an individual can receive a weekly email notification when new information is available in the selected community. A tutorial on signing up for this service can be found at <https://echo.epa.gov/tools/echo-notify>.

## **CRWI meetings**

Our next meeting will be on May 18-19, 2022. We are still working on finding a location. Please contact CRWI ([mel@crwi.org](mailto:mel@crwi.org) or 703-431-7343) if you have interest in attending.