



CRWI Update May 31, 2023

MEMBER COMPANIES

Bayer CropScience
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
TEConsulting, LLC
TRC Environmental Corporation
Trinity Consultants
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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Appendix to EEE updated

In the 1999 final rule, EPA included the requirement to conduct an interference response test in the Appendix to 40 CFR Part 63, Subpart EEE. No one was really sure what this was or how it ended up in the final rule. As a result, EPA provided a guidance letter allowing users to ignore this paragraph. This was corrected in a March 29, 2023, rulemaking with an effective date of May 30, 2023. As of May 31, 2023, that provision is no longer in the Code of Federal Regulations.

Discarded lithium batteries are hazardous waste

As more lithium batteries are coming to end of their useful life and being discarded, EPA released a memo (May 24, 2023) setting up guidelines on how these materials should be handled. The Agency has decided that most lithium batteries in use today are likely to be hazardous waste when discarded due to ignitability and reactivity. Under the guidance, lithium batteries are to be managed as universal waste until they reach their final destination as long as the batteries are intact (not leaking). The household hazardous waste exemption applies but the Agency is encouraging households to separate these materials and not combine them with normal household waste. Batteries that can be refurbished and reused are also excluded. Once the batteries reach their final destination (shredding), they must be handled as hazardous waste. Damaged batteries can only be handled as universal waste if the damage does not breach an individual cell casing. Additional details can be found at <https://rcrapublic.epa.gov/files/14957.pdf>.

LEAN decision proposed rules

In 2020, the U.S. Court of Appeals for the District of Columbia Circuit (*LEAN v. EPA*, 955 F. 3d. 1088) released an opinion that EPA has an obligation to set standards for unregulated pollutants as part of technology reviews under Clean Air Act section 112(d)(6). In May, EPA published two proposed rules that added emission limits that were not included in the original rules. For the taconite iron ore processing source category, the Agency is proposing to add emission limits for mercury, hydrochloric acid, and hydrofluoric acid. This proposed rule was published on May 15, 2023. For the

plywood and composite wood products source category, EPA is proposing to add emission limits for acetaldehyde, acrolein, formaldehyde, methanol, phenol, propionaldehyde, non-mercury HAP metals, mercury, hydrogen chloride, polycyclic aromatic hydrocarbons, dioxin/furan, and methylene diphenyl diisocyanate. The plywood proposed rule was published on May 18, 2023.

OMB review

Four proposed rules were sent to the Office of Management and Budget (OMB) for review in May. One (submitted May 8, 2023) would propose to add perfluorooctanoic acid (PFOA), perfluorooctane sulfonic acid (PFOS), perfluorobutane sulfonic acid (PFBS), hexafluoropropylene oxide dimer acid (HFPO-DA or GenX) to the list of hazardous constituents in 40 CFR 261 Appendix VIII. Also submitted on May 8, 2023, is a proposed rule to modify the regulations at 40 CFR Part 264 to clarify that the definition of hazardous waste found in RCRA section 1004(5) is applicable to corrective action for releases from solid waste management units. While these two steps do not bring any PFAS compounds into the RCRA hazardous waste realm, it does represent regulatory steps by the Agency to set up a mechanism under the Corrective Action Program to address these four compounds.

In addition, EPA submitted (May 8, 2023) a proposed rule to consider revisions to the regulations that allow for the open burning and open detonation (OB/OD) of waste explosives. A recent National Academy of Sciences report found that safer alternatives are available and this rulemaking will require broader use of these alternatives where applicable.

The Clean Air Act allows EPA to add compounds to their list of hazardous air pollutants (HAP). The Agency recently added one compound (1-bromopropane) to that list. What is not clear is once the Agency adds a new HAP, how this gets integrated into existing rules for any source category that emits the newly listed pollutant. On May 15, 2023, the Agency submitted a proposed rule to set up an infrastructure for addressing that issue.

OMB typically takes 90 days to review an agency action. Expect these proposed rules to be released in the August-September time frame.

Large municipal waste incinerator deadline suit

Several entities sued EPA for failing to review and revise, if appropriate, the large municipal incinerator emission limits every five years. On May 23, 2023, EPA and the Department of Justice released a proposed decree that would require EPA to sign a proposed rule addressing this issue by December 31, 2023. The Agency would have until November 30, 2024, to sign a final rule. Comments on the proposed decree will be open for 30 days once published in the *Federal Register*.

Sackett decision

In 2004, Michael and Chantell Sackett purchased a lot near Priest Lake in Idaho. They began backfilling the property in preparation of building a house. A few months after they started, EPA informed the Sacketts that their property contained wetlands and that their activities violated the Clean Water Act. At that time, EPA classified the wetlands on the property as “waters of the United States” because “they were near a ditch that fed into a creek, which fed into Priest Lake, a navigable, intrastate lake.” EPA ordered the Sacketts to restore the site, threatening civil penalties of \$40,000 per day. The Sacketts challenged this decision in federal district court and lost. The Ninth Circuit Court of Appeals upheld the district court ruling. The Sacketts appealed to the Supreme Court. On May 25, 2023, the Supreme Court released a decision that overturned all previous rulings and held that the Clean Water Act only extends to wetlands that have a continuous surface connection to the “waters of the United States.” That is, it must be a relatively permanent body of water connected to traditional navigable waters. This ruling also overturned two previous Supreme Court cases that held that adjacent wetlands can be considered as “waters of the United States.” With this ruling, this Supreme Court has restricted EPA’s authority to claim jurisdiction through the regulatory process. Even though this process took 19 years, it will likely embolden others to challenge EPA’s authority.

Chevron deference

The Supreme Court has agreed to accept a case (*Loper Bright Enterprises v. Raimondo*) that could either reverse or narrow the Chevron deference. This is a case where fishermen and conservative groups are challenging a rule that requires fishing vessel owners to pay the costs of federally mandated monitors. The specific challenge is “Whether the Court should overrule Chevron or at least clarify that statutory silence concerning controversial powers expressly but narrowly granted elsewhere in the statute does not constitute an ambiguity requiring deference to the agency.” The Chevron decision was released in 1984. It set forth a two-part legal test for when the courts should defer to the interpretation of an agency. In the first part, the court is to ask if the intent of Congress in the legislation is ambiguous or clearly stated? If it is clearly stated, that is the end of the matter. If not, a federal court must decide whether the agency interpretation is based on a permissible construction of the statute (one that is not arbitrary, capricious, or obviously contrary to the statute). As long as the agency’s interpretation is reasonable, a federal court cannot substitute its own statutory construction as superior to the agency’s construction. It must defer to the Agency’s interpretation. Should the Supreme Court modify the Chevron deference, it could change the way courts look at agency actions where the statute is ambiguous and possibly allow the courts to have a greater role in deciding what is a “reasonable interpretation.”

BP Whiting settlement

On May 17, 2023, EPA and the Department of Justice announced a settlement with BP Products North America for violations at their Whiting, IN refinery. The settlement agreement includes a \$40 million civil penalty, additional measures to reduce benzene and other organic emissions, installing 10 air monitoring stations outside the fence line, spending at least \$5 million to replace diesel vehicles with lower-emitting vehicles, and spending at least \$1.25 million in the Hammond, East Chicago, Whiting, and Gary, communities that surround the refinery. Additional information can be found at <https://www.justice.gov/enrd/consent-decree/us-et-al-v-bp-products-north-america-inc-0>.

Proposed carbon emission limits

On May 23, 2023, EPA proposed to set carbon dioxide limits for fossil fuel-fired electric generation units. Facilities are expected to be able to meet these limits using carbon capture and sequestration, substituting non-fossil fuel derived hydrogen as a fuel, and/or adopting highly efficient generation technologies. Comments are due by July 24, 2023.

RCRA Info web portal

In May, EPA added maps to their RCRA Info portal to show the effects of sea level rise on hazardous waste facilities, an overview of hazardous waste management facilities, an overview of hazardous waste generation, hazardous waste generation on federal and tribal lands, and a map showing the interstate transport of hazardous waste. These can be found at <https://rcrapublic.epa.gov/rcra-public-web/action/explore>. In addition, EPA listed four specific actions hazardous waste facilities could use to protect against natural disasters. These are:

- Construct physical barriers (sand caps, retaining walls, etc.);
- Using engineering controls (pumps, moving electrical controls, etc.);
- Develop containment, monitoring and treatment systems, and subgrade infrastructure to withstand changing conditions; and
- Developing landfill or remediation caps that are resilient to climate induced threats.

PFAS

Senator Lummis (R-WY) introduced five bills aimed at providing exemptions to per- and polyfluoroalkyl substances (PFAS) Superfund liability for agriculture, airports, certain fire suppression systems, municipal solid waste facilities, drinking water facilities, and wastewater facilities. The bills also define PFAS as a compound containing at least two sequential fully fluorinated carbon atoms. Both industry and environmental groups have opposed these exemptions. The bills are cosponsored by seven Republicans, all on the Environment and Public Works Committee. Notably absent was the Ranking Member of the Committee, Senator Capito (R-WV). She and the Committee Chair, Senator Carper

(D-DE) are rumored to be working on a bi-partisan PFAS bill. Neither the details of the bi-partisan bill nor an estimated timeline for passage has been released.

Last year, the Coosa River Basin Initiative filed a notice of intent to sue the Mount Vernon Mills in Trion, GA. The notice alleged that wastewater containing PFAS was being sent to a municipal wastewater treatment plant that was not capable of removing these contaminants. The parties entered into negotiations and the mill agreed to stop using any PFAS in their process on or before December 31, 2023. In the agreement, PFAS is defined as containing at least one fully fluorinated methyl or methylene carbon atom. Until the facility completely eliminates PFAS from their process, they will isolate and containerize its PFAS containing wastewater and arrange for off-site treatment at a hazardous waste incinerator. The agreement also requires quarterly PFAS testing of the wastewater before it enters the municipal treatment plant until two consecutive samples show non-detects.

Environmental justice

EPA will be holding a training webinar on June 13, 2023, to show stakeholders how to use ECHO facilities searches and EJSCREEN to gather data on their communities. The webinar will also discuss how to interpret these results. You can register for the event at <https://echo.epa.gov/help/training#upcoming>.

The Louisiana Attorney General sued EPA in the U.S. District Court for the Western District of Louisiana alleging that the Agency's attempts to enforce the Civil Rights Act in the state are unlawful. This action is designed to stop multiple actions by the Agency targeting certain facilities in the State. The suit alleges that EPA unconstitutionally delegated its authority to private interest groups while granting to itself powers never delegated by Congress. It also charges that EPA has "lost sight of the agency's actual environmental mission, and instead decided to moonlight as social justice warriors..." The primary focus of this lawsuit is the actions taken by EPA pertaining to the Denka and Formosa facilities in St. John the Baptist Parish. This one should get interesting.

On May 11, 2023, the Department of Justice announced their first environmental justice enforcement task force. This task force is to target environmental crimes and other violations in Puerto Rico and the U.S. Virgin Islands. The announcement stated that the task force would "aggressively enforce civil and criminal environmental laws."

During May, EPA announced two settlement agreements associated with environmental justice. The first (May 4, 2023) was with the Alabama Department of Public Health and the Lowndes County Health Department to develop wastewater management systems in the county. The original complaint was that the county was using enforcement of sanitation laws against residents that did not have the capacity to alleviate those concerns. Under the settlement agreement, the county will stop enforcing sanitation laws for resident that lack the means to purchase sewage systems. The county also agreed to launch a public awareness campaign about raw sewage exposure, determine the proper septic and wastewater management practices for the area, and create an

equitable public health improvement plan within a year. In the second, The City of Chicago and the Department of Housing and Urban Development agreed to a plan where the City would overhaul its zoning and land-use policies to reduce industrial exposures in environmental justice communities.

Environmental groups petitioned Texas and Louisiana on May 30, 2023, to revoke a series of permits they allege violates Title VI of the Civil Rights Act. These permits were granted under an EPA approved screening tools using significant impact levels (SIL). SILs allow state and federal permit writers to discount emissions below a predefined *de minimis* level from calculations of likely emissions increases resulting from a new or modified source. In addition, SILs are often used to shorten the process for issuing prevention of significant deterioration permits.

CRWI meetings

Our next meeting will be on August 16-17, 2023, in Painesville, OH. Please contact CRWI (mel@crwi.org or 703-431-7343) if you have interest in attending.