



## CRWI Update September 30, 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  
Westlake US 2, 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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### HWC MACT RTR

EPA filed their reply brief on the deadline suit on September 15, 2023. The brief contained an additional affidavit from Penny Lassiter responding to the plaintiff's allegations that EPA could complete the rulemaking in less time. In this affidavit, Ms. Lassiter stated that EPA has identified two units that have PCB emissions data and the Agency expects to get additional data on more unregulated HAPs when the responses to the questionnaires are received. They also gave a timeline for the testing phase of the Information Collection Request. EPA expects to send out the testing request by January 31, 2024, and expect results to be submitted by July 31, 2024. EPA plans to send a draft test plan to stakeholders late in November. The plaintiffs responded to the additional affidavit thanking EPA for recognizing that PCBs emissions should be regulated for the source category but re-iterated their original position that the Agency should be able to complete the rulemaking within 18 months. As of the end of September, the judge has not released a ruling.

### New HAP infrastructure proposed rule

In January 2022, EPA listed 1-bromopropane as a new hazardous air pollutant (HAP). This created a number of implementation questions on how any newly listed HAPs should be incorporated into existing NESHAPs. These include:

- Whether current MACT rules would apply to newly added HAPS;
- How and when the new HAP would be included in the major-area source determination; and
- If the new HAP triggers a major source determination, when do major source requirements kick in?

On September 13, 2023, EPA proposed to amend the General Provisions of Part 63 to address some of these issues. In 2022, EPA made a policy statement that any newly listed HAP is not regulated under existing NESHAPs until the Agency promulgates emissions limits for that HAP under that NESHAP. The Agency reiterated that position and asked for comments on whether

regulatory text should be added to make this clear. EPA has determined that once a new HAP is listed, any facility must include emissions from that HAP in their major source determination. This could change an area source into a major source. The Agency is labeling these facilities as a Major Source Due to Listing (MSDL). If this occurs, the former area source is now subject to major source requirement for the HAPs emitted. While they do not have to meet any emission limits for the newly listed HAP, they must meet the existing MACT limits for the already listed HAPs. In addition, once an area source becomes a MSDL, it will be required to make an initial notification under Subpart A and will need to submit a Title V permit application within one year after the unit becomes a MSDL. EPA has determined that if a facility goes from area source to MSDL, it does not impact the new v. existing determination for that site. EPA is proposing to set the timetable for coming into compliance with emission limits for any newly listed HAP when they promulgate those emission limits. Comments are due by November 13, 2023.

### **Major source reclassification proposed rule**

This process started in 1995 when EPA released a policy statement that any source was allowed to take restrictions to reduce their emissions below the level that made them a major source as long as this was done before the compliance date for that source category. After the compliance date, the source would remain a major source even if emissions were reduced below the threshold. This was called the “once in, always in” policy. This was revised in 2018 with a memo and then codified in 2020 allowing a source to reclassify at any time as long as they took federally enforceable limits that would restrict emissions below the major source threshold. When the new administration took office, concern was expressed that the 2020 rule would allow a facility to reclassify as an area source and because the area source restrictions may be less stringent than major source standards, actually increase emissions as a result of the reclassification. On September 27, 2023, EPA proposed a rule to amend the 2020 regulation to place additional restrictions on those sources that have reclassified or may wish to do so in the future. As proposed, any source that wants to reclassify must meet the following criteria:

- Any permit limit taken to reclassify must be federally enforceable;
- Any limit must contain safeguards to prevent emission limits from increasing beyond the applicable emission limits if the facility was to remain a major source; and
- Reclassification will only take effect once a permit has been issued to the reclassified source.

As proposed, these requirements would apply to all sources that have reclassified since January 25, 2018, as well as those who choose to reclassify in the future. The comment period closes on November 13, 2023.

## Actions at OMB

In September, EPA sent two actions to the Office of Management and Budget (OMB) for their review. The revisions to the guidance on the disposal and destruction of per- and polyfluoroalkyl substances was sent to OMB on September 25, 2023. It is anticipated that this review will be completed by the December 20, 2023, statutory deadline. In addition, the final rule to amend the risk management plan regulations was sent to OMB on September 25, 2023.

The proposed rules to clarify that corrective actions could be used to address emerging pollutants, to add certain per- and polyfluoroalkyl substances to the list of hazardous substances under CERCLA, and to revise requirements for open burn/open detonation remain at OMB. These proposed rules were sent to OMB in May. OMB typically takes 90 days to review an action.

## PFAS

Congress modified the reporting requirements for per- and polyfluoroalkyl substances (PFAS) under TSCA as a part of the 2020 National Defense Authorization Act. Companies that manufacture PFAS compounds are required to report uses, production volumes, byproducts, disposal, exposure, and existing information on environmental and health effects. In previous rulemakings, EPA has listed several compounds that must be reported. On September 28, 2023, EPA signed a final rule in which they decided to use a broad definition of PFAS instead of listing individual compounds. As it pertains to TSCA, PFAS is defined as including at least one of these three structures:

- $R-(CF_2)-CF(R')R''$ , where both the  $CF_2$  and  $CF$  moieties are saturated carbons;
- $R-CF_2OCF_2-R'$ , where  $R$  and  $R'$  can either be  $F$ ,  $O$ , or saturated carbons; or
- $CF_3C(CF_3)R'R''$ , where  $R'$  and  $R''$  can either be  $F$  or saturated carbons.

This definition becomes effective 30 days after publication in the *Federal Register*. Whether this definition is used under other environmental programs is yet to be seen. A copy of the signed rule can be found at [https://www.epa.gov/system/files/documents/2023-09/prepublicationcopy\\_7902-02\\_fr-doc\\_aa\\_esignatureverified\\_2023-09-28.pdf](https://www.epa.gov/system/files/documents/2023-09/prepublicationcopy_7902-02_fr-doc_aa_esignatureverified_2023-09-28.pdf).

## Environmental justice

EPA has agreed to investigate whether the Delaware Department of Natural Resources and Environmental Control (DNREC) violated Title VI of the Civil Rights Act when they approved a permit for a bioenergy plant in Sussex County. The basis for the complaint was DNREC failed to provide adequate information, notice, and public participation opportunities to the Black, Haitian, and Latino residents living near the facility. Specifically, the complaint states that DNREC failed to provide language services for residents with limited English proficiency. On the surface, this appears to reverse the

recent withdrawal of the complaint in Louisiana. It is more likely that the Agency is trying to find more solid legal grounds to continue their environmental justice work.

EPA released an update to their cumulative risk framework on June. Several states have submitted comments pointing out concerns with the process. For example, Texas submitted comments that there are no current regulations requiring them to conduct this type of an assessment and without that requirement, the State has no authority to do so. Oregon and California pointed out that it is not clear how a cumulative risk assessment and a cumulative impact assessment differ.

### **Fenceline monitoring**

In 2015, EPA promulgated regulations that required refineries to install fenceline monitors for benzene. If the annual rolling average exceeded the action level ( $9 \mu\text{g}/\text{m}^3$ ), the facility is required to conduct a root cause analysis to determine the source of the emissions and take corrective action. Other than failure to complete a root cause analysis and take corrective action when the action level is exceeded, the regulations do not clearly identify when an exceedance of the action level is a violation of the requirements.

On September 6, 2023, EPA's Office of Inspector General released a report concluding that the current program has not ensured that all refineries that exceed the action levels are responding in a manner to reduce benzene emissions. The report states that from January 2018 to September 2021, 13 of the 18 refineries had benzene levels above the action level for more than 20 weeks. The report attributed some of this to using modeling instead of actual data and the failure to submit data to the permitting authority. OIG recommended that the Agency provide guidance to the delegated authorities on what constitutes a violation of the current regulations and how to identify data gaps, develop a strategy to ensure refineries address excess emissions, and increase the use of actual data instead of modeling in site-specific plans. EPA agreed to address these concerns by April 2024. A copy of the report can be found at <https://www.epa.oig.gov/reports/audit/epa-should-enhance-oversight-ensure-all-refineries-comply-benzene-fenceline>.

### **Pharmaceutical waste**

In December 2022, ProMedica Health System sent a letter to EPA requesting to use hazardous waste combustors, municipal waste combustors, hospital, medical, and infectious waste incinerators, and solid waste incinerators to destroy all pharmaceutical hazardous waste. They were requesting an expansion of the conditional exemption for Drug Enforcement Agency materials to include all pharmaceuticals. The reason for the request was the backlog of containerized waste at hazardous waste incinerators. In March, the Agency denied that request but gave some options for handling the wastes. A copy of the response can be found at <https://rcrapublic.epa.gov/rcraonline/>, search on 14959.

## **RCRA model permit**

EPA is in the process of developing a guide to help permit writers draft and review permit conditions for incorporation into a RCRA hazardous waste permit. They have developed a webpage (<https://www.epa.gov/hwpermitting/resource-conservation-and-recovery-act-model-permit>) to house the various modules. The concept behind the webpage is to develop best example language to cover most RCRA permit options. On September 12, 2023, the Agency posted the first module – the permit cover page. EPA intends to add modules to cover containment buildings, boilers and industrial furnaces, incinerators, Subpart X units, organic air emission standards under AA, BB, and CC, and others. A complete list can be found on the website.

## **eBay**

In 2020, EPA issued a stop sales order to eBay for the sale of certain pesticides and products that fraudulently claimed to protect users from Covid. On September 27, 2023, EPA filed a lawsuit in federal district court alleging that eBay had unlawfully distributed and sold more than 23,000 products covered in the 2020 stop sales order. In addition, the lawsuit claims that eBay also distributed more than 5,600 items that violated the methylene chloride rule and more than 343,000 after-market engine defeat devices.

## **Enforcement memo**

On September 28, 2023, David Uhlmann, Assistant Administrator for the Office of Enforcement and Compliance Assurance, released a memo that directed all enforcement personnel within the Agency to focus on using enforcement to address the “climate crisis.” The memo will require all enforcement personnel to:

- Prioritize enforcement and compliance actions to mitigate climate change;
- Include climate adaption and resilience in case conclusions, where appropriate; and
- Provide technical assistance to state and local partners.

These requirements are to apply across all programs and include criminal, civil, federal facilities, and cleanup enforcement. The memo specifically mentions emissions from oil and gas facilities, phasing down production and consumption of hydrofluorocarbons, and emissions of carbon dioxide, nitrous oxide, and volatile organic compounds. Industry sectors mentioned included gas flaring, emissions from storage tanks, and incineration/combustion operations. The memo also encourages the use of supplemental environmental projects to promote wind and solar energy and vehicle electrification. Enforcement teams are encouraged to incorporate “greener cleanup” provisions into CERCLA and RCRA settlement agreements. Enforcement staff is ordered to help identify facilities vulnerable to extreme weather events.

## **EPA personnel**

In April, the Office of Management and Budget told agencies to draft plans to increase in-person work at federal offices. In August, EPA asked senior managers and supervisors to increase their in-office presence but did not require the same for more junior, unionized employees. EPA also asked employees for their preferences. More than 65% said they would consider leaving the Agency if required to work in-person more than is currently required. The major reason for the opposition was commute time.

## **Government funding**

At the 11<sup>th</sup> hour, EPA passed a continuing resolution funding the government for 45 days at the FY 2023 levels. This was a relatively clean continuing resolution and passed with overwhelming support from both Democrats and Republicans. The government is now funded until November 17, 2023. This angered some House Republicans who vowed to start the process of removing Kevin McCarthy as Speaker of the House. Should this process succeed and Mr. McCarthy is removed as Speaker, the House cannot conduct any business until a new Speaker is elected. Thus, the House cannot continue working on the FY 2024 appropriations until a new Speaker is elected. Given that it took 15 votes to get Mr. McCarthy elected as Speaker and with no clear successor, November 17 will not give the House much time to get that job done.

## **CRWI meetings**

Our next meeting will be on November 8-9, 2023, in Kingsport, TN. Please contact CRWI ([mel@crwi.org](mailto:mel@crwi.org) or 703-431-7343) if you are interested in attending.