

Regulatory Updates
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SAFETY

CDC Issues Interim Public Health Recommendations for Fully Vaccinated People

– On July 27, CDC issued guidance that vaccinated individuals wear masks in indoor public settings where there is substantial or high COVID-19 transmission. Read the full guidance [here](#). To view the level of community transmission at the county level, click [here](#). (CDC website, 7/27/2021.)

Heat Stress Review – This [link](#) is a good review of heat stress risks and what employers can do, including managing this risk along with COVID-19. One such risk is loss of the body’s natural adaptation to heat (acclimatization); this can occur if your workplace has closed temporarily, or if employees have been off work for more than one week. (CDC website, 8/26/2020.)

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ENVIRONMENT

Thousands Evacuated after Lithium Battery Blast – Know what you have stored at your facilities and routinely communicate this information to first responders as required under EPCRA. On June 29, “explosions rang out across a Chicago suburb after a fire broke out at what locals believed was a long-ago-abandoned paper mill. It turns out that the facility was now being used to store as much as 200,000 pounds of lithium batteries, authorities learned. As toxic gas spewed from the damaged building, an evacuation order was issued for approximately 1,000 homes in a one-square-mile radius of the facility. On July 1, Illinois EPA referred an enforcement action to the state Attorney General. Violations include the release of pollutants to the air and water and improper hazardous waste disposal. More violations may be added, [the Agency said in a statement](#), as authorities learn more about the company’s activities. . . This event is a reminder of the hazards that lithium batteries pose, and why they are regulated as hazardous materials in transportation. It also reminds us why regulators sometimes require chemical inventory reporting and contingency planning. Under the Emergency Planning and Community Right-to-Know Act (EPCRA), for instance, facilities that store large volumes of some hazardous substances must provide local emergency responders with details about the types and quantity of chemicals on site.

“If you ever wonder why it’s important for facilities to share information with local emergency response organizations, consider this: Firefighters who responded to this incident first tried dousing the fire with water. They quickly stopped using water when they discovered the source of the flames—recognizing that water can exacerbate lithium battery fires. Had they known what to expect, first responders could have come prepared. Instead, the lack of information impeded the response and the incident endangered firefighters’ lives more than necessary.” (Lion Technology, Inc., Roger Marks, July 2, 2021.)

Six-Alarm Fire in Chemical Plant Results in Environmental Suit – Sometimes the property damage and permit violation costs are just the beginning. “Illinois AG Kwame Raoul sued chemical manufacturer Chemtool Inc. over allegations that a six-alarm fire in its chemical factory resulted in air and water pollution in violation of the Illinois Environmental Protection Act. The complaint alleges that containers storing over 4 million gallons of crude oil and petroleum products were compromised by the fire in Chemtool’s factory, resulting in significant air and water pollution; that the fire released toxic ash into the air that landed on buildings, land, and water; and that firefighting foam containing a ‘forever chemical’ was found in the nearby Rock River after a pump failure, among other things. The complaint seeks declaratory and injunctive relief—including requiring Chemtool to contain and prevent further chemical discharges and runoffs—clean-up costs, civil penalties, and attorneys’ fees and costs, among other things.” (Lexology, Cozen O’Connor - Bernard Nash and Lori Kalani 7/15/2021.)

EPA To Improve Access, Transparency, And Timeliness of Air Toxics Data and Risk Information - “On June 23, 2021, EPA announced ‘a move to provide more frequent updates to national air toxics data and risk estimates as part of the agency’s commitment to making high-quality information available on a timely basis to the public.’ EPA states that its

new approach will provide an annual, more systematic update for all air toxics information, including emissions, ambient concentrations, national screening risk estimates, and monitoring data. Starting later in 2021 and continuing in future years, EPA will make information about the estimated risks of air toxics available to the public using the latest air emissions inventory, beginning with 2017. This information will be incorporated into EPA's Environmental Justice Screening Tool (EJSCREEN) to help communities screen for potential risks. Ultimately, EPA will start reporting risk information each year in its annual Air Trends Report. This will enable the public to gain more timely air quality information on air toxics, as well as see trends in emissions and risks over time." (Lexology, Bergeson & Campbell PC, 7/16/2021.)

Third Circuit Ruling May Change the Contours of CERCLA Release Reporting Requirements for Air Releases to NRC – This ruling could eventually affect NRC (National Response Center) reporting requirements. We'll be monitoring developments closely. This decision doesn't change the law of the land, so continue reporting releases to the National Response Center as you have in the past.

On June 21, 2021, the U.S. Court of Appeals for the Third Circuit issued its opinion in *Clean Air Council v. U.S. Steel*, a case that reversed EPA's 30-year-old position concerning release reporting of air releases under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). CERCLA imposes heavy penalties on companies, including individual 'persons in charge,' that fail to report releases of certain hazardous chemicals 'immediately.' However, Congress excluded some types of releases from CERCLA's reporting requirements under the 'federally permitted release' exclusion. EPA's longstanding interpretation of that exclusion had been that a federally permitted release is one that occurs *in compliance with* a federally enforceable permit, that is, that a release violating a permit term is not exempted. In *Clean Air Council*, the Third Circuit (which covers Delaware, New Jersey, Pennsylvania, and the U.S. Virgin Islands) unanimously held that the exemption extends to air releases 'subject to' such a permit but not necessarily 'in compliance with' that permit, affirming the Western District of Pennsylvania's decision to dismiss a lawsuit on those grounds. *Clean Air Council* is an important decision for companies facing similar failure-to-report suits and for those deciding what releases must be reported to whom.

Clean Air Council is notable for several reasons but has a few significant limitations. First, it is notable because it reverses EPA's longstanding interpretation of the federally permitted release exemption, one that EPA has applied in countless enforcement actions over the last 30 years. Second, it underscores that statutory and regulatory interpretations that environmental practitioners believe are well settled are often less settled than they think unless there is a body of caselaw affirming the prevailing interpretation.

The decision is (currently) of limited value for several reasons. First, it is in just one circuit and remains subject to petitions for rehearing and for a *writ of certiorari* from the Supreme Court. It is thus not the law of the land, and practitioners should be wary

about relying on the precedent outside the Third Circuit states. Indeed, EPA has historically argued that decisions from circuits other than the D.C. Circuit (on issues of national application) and opinions of the Supreme Court are not applicable outside of the circuit issuing the decision. It is likely to take the same view of *Clean Air Council*. Second, it covers only CERCLA and not other state and federal reporting regimes. For example, for releases of substances that are covered by both CERCLA and the Emergency Planning and Community Right to Know Act (EPCRA), this decision provides only partial clarification. The parallel EPCRA issue remains to be litigated, although the language of EPCRA, including its cross-references to CERCLA, suggest that a court would likely rule on the issue consistent with *Clean Air Council*. Third, the decision raises significant questions about how certain air releases may be treated. For example, Title V permits are supposed to incorporate at least by reference all ‘applicable requirements’ for the permitted facility. Does this decision mean that any air release subject to any Title V ‘applicable requirement’ is exempt from CERCLA reporting as a federally permitted release? Would that include programs such as the CAA Risk Management Plan Rule? The Third Circuit’s decision strongly suggests ‘yes,’ but these issues may require clarification. Finally, the decision covers only federally permitted air releases. As the Third Circuit noted, CERCLA has clear language with respect to most other types of releases, stating that the exemption applies only to releases that are ‘in compliance with’ the applicable permits or regulatory requirements. Perhaps EPA will use this decision as an opportunity to issue consistent national guidance that will provide the regulated community with clear guideposts for compliance. While waiting for the next steps to play out, companies should consider the wide-reaching effects of the *Clean Air Council* decision on both the regulatory and litigation fronts.

Read the full article [here](#). (Lexology, Sidley Austin LLP - Timothy K. Webster and Jack Raffetto, 7/7/2021.)

Update on Phaseout of Paper Hazardous Waste Manifests - “Starting June 30, 2021, US EPA [no longer accepts] paper manifests from hazardous waste receiving facilities (i.e., TSDFs). Moving forward, receiving facilities must use one of the following methods to submit manifest data into the e-manifest system through the online RCRAInfo portal:

- Electronic
- Hybrid
- Image only
- Data plus image

How Will the Deadline Impact Generators? Because receiving facilities now must submit manifests to EPA electronically, TSDFs may request that generators create an account in the online system. Some generators may not feel the impact right away. Some TSDFs may continue to accept paper manifests and then manually transfer the required information into the e-manifest system using the image upload or data-plus-image upload option. These alternatives are option. While the deadline for hazardous waste generators to use the e-Manifest system is June 1, 2023, EPA has not yet announced a ‘sunset date’ for paper manifests. . . Use of the electronic hazardous waste manifest system is increasing, but is still far below what EPA hoped when it finalized the e-Manifest Final Rule. Despite the slow adoption

of the new tool, the vision of a fully electronic system to track shipments of hazardous waste is alive and well.” (Lion Technology, Inc., Robert Clarke, CDGP, 6/21/2021.)

EPA Takes no Action on RCRA Corrosives Challenge - “EPA recently denied a petition to revise the definition of a corrosive hazardous waste in the RCRA regulations. The petition sought to lower the threshold for a corrosive hazardous waste from a pH of 12.5 to a pH of 11.5. It also sought to expand the definition of corrosive to cover non-aqueous wastes . . . EPA ‘tentatively’ denied this petition in April 2016 and has now ‘officially’ denied it. The decision is effective June 15, 2021. Under RCRA, a hazardous waste is corrosive if it is:

- Aqueous and has a pH **less than or equal to 2 or greater than or equal to 12.5**; or
- A liquid and **corrodes steel** at rate greater than 6.35 mm (approx. 1/4 inch) per year at a test temperature of 55 degrees Celsius (40 CFR 261.22).”

(Lion Technology, Inc., Roger Marks, 4/11/2021.)

September 1 Deadline for Small Quantity Generators of Hazardous Waste - “[The 2016 Hazardous Waste Generator Improvements Rule](#) finalized a requirement for all small quantity generators (SQGs) of hazardous waste to re-notify EPA of their hazardous waste activities every four years. The purpose of the re-notification requirement is to improve the SQG universe data and to maintain more accurate data into the future for outreach, compliance assistance and oversight activities. Small Quantity Generators (SQGs) are those facilities that generate more than 100 kilograms, but less than 1,000 kilograms of hazardous waste per month. [Click here](#) for more information about hazardous waste generator categories. SQGs are now required to re-notify EPA or their state environmental agency as to their generator status every four years by completing and submitting the Notification of Resource Conservation and Recovery Act (RCRA) Subtitle C Activities (Site Identification Form) in full, also known as EPA Form 8700-12, or state equivalent.

- Find the [federal paper form here](#).
- Many states have opted into MyRCRAID. MyRCRAID is an electronic reporting system for submitting the EPA Site ID form. We encourage SQGs to use MyRCRAID to submit the re-notification online if that is an option in your state. SQGs can find [more information about MyRCRAID here](#) and learn how to submit the re-notification online.

The first re-notification is due by **September 1, 2021**, and then every four years thereafter i.e., September 1, 2025, September 1, 2029, etc.” Read the full article [here](#). (EPA website.)

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Send your suggestions and comments to joel@pinechemicals.org.