



ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

November 4, 2011

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Final Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
REMEDIATION			
<p>FEDERAL Recommended Evaluation of Institutional Controls: Supplement to the “Comprehensive Five-Year Review Guidance” OSWER Directive 9355.7-18</p> <p>Enforcement Discretion Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections</p>	<p>EPA published a pair of Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) guidance memoranda:</p> <ul style="list-style-type: none"> • Evaluation of Institutional Controls. EPA’s Office of Solid Waste and Emergency Response (OSWER) issued a directive entitled <i>Recommended Evaluation of Institutional Controls: Supplement to the “Comprehensive Five-Year Review Guidance,”</i> which provides guidance on conducting five-year reviews of the institutional control (IC) component of remedies. ICs are non-engineered instruments designed to minimize the potential for human exposure at remedial sites. Examples include proprietary controls such as easements and restrictive covenants, governmental controls such as zoning and building codes, and enforcement and permit tools such as consent orders and permit conditions. The guidance identifies the components of the review process (e.g., document review, site interviews, and site inspection) and provides guidance on assessing the protectiveness of the remedy. It also includes a comprehensive list of sample protectiveness determinations and recommendations for various remedies. • Interpretation of “Affiliation” Language. EPA’s Office of Enforcement and Compliance Assurance (OECA) issued a document entitled <i>Enforcement Discretion Regarding the Affiliation Language of CERCLA’s Bona Fide Prospective Purchaser and Contiguous Property Owner Liability Protections</i> that is intended to help decide whether an entity is “affiliated” with a potentially responsible party and so cannot be exempt from CERCLA liability as a bona fide prospective purchaser or contiguous property owner. After reviewing the statute, the document identifies preliminary issues to be considered before analyzing whether there is a prohibited affiliation, discusses the statutory exceptions to the “no affiliations” requirement, and summarizes the considerations relevant to applying the affiliation language. <p>The IC guidance can be found on EPA’s website at: www.epa.gov/superfund/cleanup/postconstruction/641333.pdf; the affiliation guidance can be found at: cfpub.epa.gov/compliance/resources/policies/cleanup/superfund by clicking on “Bona Fide Prospective Purchasers”.</p>	<p>The OSWER IC guidance is primarily of interest to parties negotiating CERCLA settlements and those responsible for overseeing CERCLA cleanups that call for leaving contamination in place and so necessitate ICs.</p> <p>The OECA guidance is primarily of interest to individuals claiming CERCLA exemptions as a bona fide prospective purchaser or contiguous property owner.</p>	

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>NEW YORK STATE SPDES General Permit for Point Source Discharges to Surface Waters from Pesticide Applications Permit No. GP-0-11-001</p>	<p>DEC issued its SPDES General Permit for Point Source Discharges to Surface Waters of New York from Pesticide Applications. This State Pollutant Discharge Elimination System (SPDES) general permit is required for “operators” planning to apply pesticides labeled for aquatic uses to, in or over the surface waters of the state. To obtain coverage under the permit, the applicant must submit a notice of intent (NOI) to DEC and comply with the terms of the general permit, including: (1) minimizing discharges; (2) preparing a pesticide discharge management plan; (3) conducting visual monitoring and assessments; (4) implementation of corrective measures and incident reporting requirements; (5) records maintenance and retention; and (6) standard permit conditions. The final permit excludes from the permitting requirement aquatic pesticide applications to ponds of one acre or less in size that have no outlet to surface water and lie wholly within privately-owned lands.</p> <p>The permit and related materials, including a NOI form and pesticide discharge management plan template, can be found on DEC’s website at: www.dec.ny.gov/chemical/70489.html.</p>	<p>The general permit is primarily of interest to pesticide applicators and entities, such as towns, that retain someone to conduct an aquatic pesticide application.</p> <p>DEC already requires permits for aquatic pesticide applications under ECL Article 15 and/or Article 24. The new general permit is required to satisfy court decisions which found that the federal Clean Water Act requires permits for discharges to waters of the United States of chemical pesticides that leave a residue and biological pesticides.</p>	<p>The permit took effect November 1, 2011.</p>

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OCCUPATIONAL SAFETY AND HEALTH			
FEDERAL Miscellaneous OSHA Materials on Worker Safety and Health	<p>The Occupational Safety and Health Administration (OSHA) announced the publication of numerous documents that explain workers' and employers' rights and obligations under various health and safety programs.</p> <ul style="list-style-type: none"> • <i>Small Entity Compliance Guide for the Respiratory Protection Standard.</i> This guide provides small businesses with a step-by-step guide to compliance with OSHA's respiratory protection program. After a comprehensive introduction, the guide provides an explanation of each component of the standard using the rule itself as the framework. The document is organized in a question and answer format and includes compliance checklists, where appropriate. • <i>Employer Rights and Responsibilities Following an OSHA Inspection.</i> This guidance explains what happens after an OSHA inspection, addressing the types of violations, citation posting requirements, employer options (accepting or contesting citation), informal conferences and settlement, achieving compliance, and contesting citations, among other subjects. • <i>Laboratory Safety Guidance.</i> This document is intended for individuals with primary responsibility for maintaining the safety of laboratories and ensuring compliance with OSHA standards. After providing an overview of potentially applicable OSHA standards and the hierarchy of controls (engineering controls, administrative controls, work practices, and personal protective equipment), the guide examines the OSHA requirements applicable to each of the different types of hazards potentially found in a laboratory (chemical, biological, physical and safety). • <i>Quick cards and other materials</i> summarizing key information for workers relating to permit-required confined space entry in general industry, working safely in trenches, preventing nail gun injuries, and preventing heat stress, among other subjects. <p>These documents can be accessed via the October 17, 2011 press release announcing the publications, which can be found at: www.osha.gov/whatsnew.html.</p>	<p>These documents are potentially of interest to employers and employees in a wide range of industries.</p>	

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
AIR			
<p>NEW YORK STATE Air Permitting Regulations 6 NYCRR Part 201</p>	<p>DEC is seeking input from stakeholders on proposed revisions to New York’s air permitting regulations, which have not been significantly revised since 1996 when DEC adopted changes required to implement the Clean Air Act’s Title V permitting requirements. Major changes to 6 NYCRR Part 201 under consideration include:</p> <ul style="list-style-type: none"> • Clarifying the procedures for obtaining approval of physical changes at existing Title V facilities. • Revising language requiring all facilities with new emission sources that are subject to New Source Performance Standards (NSPS) and/or emit any hazardous air pollutants to obtain a state facility permit. • Requiring facilities continuing to operate under pre-1996 certificates to operate to submit a permit or registration application. • Revising the list of exempt and trivial activities, including adding an exemption for gasoline stations registered under New York’s petroleum bulk storage program. • Revising the provisions relating to “temporary” emission sources to extend the exemption to all facilities (not just those subject to Title V permits) and increase the current operational limit from 30 days per calendar year to 90 consecutive days from the date of first operation. • Requiring more information from facility owners/operators on permit application forms. • Eliminating outdated emission thresholds relating to fuel use from cap-by-rule provisions and relocating the cap-by-rule requirements from 6 NYCRR subpart 201-7 to subpart 201-4 (registration). • Adding a permit term (perhaps 10 years) to registrations and state facility permits, which are currently issued for an indefinite period. • Requiring facilities that emit one or more of approximately 60 specifically listed persistent, bioaccumulative and toxic (PBT) compounds from non-exempt emission sources in quantities above specified thresholds to obtain a state facility permit from DEC. <p>The DEC fact sheet summarizing the proposed changes can be found at: www.bcnys.org/inside/envircom.htm.</p>	<p>The proposed revisions are potentially of interest to any facility required to obtain an air registration or permit from DEC. As previously noted, DEC has not significantly revised the Part 201 regulations since 1996. Since that time, DEC has identified various provisions that require clarification or correction. Moreover, certain developments under the Clean Air Act have expanded the scope of the air permitting program in ways not anticipated by DEC when the Part 201 regulations were overhauled. With this rulemaking, DEC is hoping to simplify/clarify the air permitting rules and eliminate outdated provisions.</p> <p>DEC’s proposal to require facilities that emit certain PBTs above specific thresholds to obtain a state facility permit is designed to provide the Department with regulatory and emissions information on facilities that emit significant quantities of PBTs but would not otherwise be required to obtain a state facility permit.</p>	<p>DEC has prepared preliminary draft revisions to the regulations and is currently seeking input from stakeholders on the planned revisions and other possible changes. A stakeholder meeting is scheduled at DEC Headquarters in Albany on November 14, 2011 at 1:30 p.m.; conference call-in is available.</p> <p>DEC is soliciting input on possible changes to the rule until several weeks after the stakeholder meeting. It will then develop draft regulations, which it hopes to propose formally in 2012.</p> <p>Questions about the rule and any written comments should be directed to Mark Lanzafame at DEC at: mrlanzaf@gw.dec.state.ny.us.</p>

Other Recent Developments (Final)

AIR

FEDERAL: EPA published a **memorandum explaining its plan for implementing the 2008 rule reducing the current 8-hour ozone national ambient air quality standard** (NAAQS) from 0.80 parts per million (ppm) to 0.75 ppm following the Obama administration's decision to suspend efforts to further reduce the standard during this round of the NAAQS review process. EPA plans to proceed with its initial area designations under the 2008 ozone standard using the most current, certified air quality data available and hopes to finalize initial area designations by mid-2012. EPA also will begin an expedited rulemaking in the near future to outline the implementation requirements for the 2008 standard. Further revisions to the ozone NAAQS based on EPA's ongoing review of the standard will be proposed in fall 2013. The memorandum can be found on EPA's website at: www.epa.gov/air/ozonepollution.

Implications: Based on its preliminary review of ozone air quality data from 2008-2010, EPA has identified two nonattainment areas in New York under the 0.75 ppm ozone standard – the New York City metropolitan area (comprising New York City, Long Island and Westchester and Rockland Counties) and Jamestown.

HAZARDOUS WASTE

NEW YORK STATE: DEC issued a letter to the Business Council of New York State **clarifying that it was not imposing two fees for hazardous waste generated in 2010 during the transition to the new hazardous waste fee program** enacted by the legislature in 2010. Under the 2010 law, the legislature repealed its previous hazardous waste program fees and replaced them with a \$130 per ton fee billed based on the prior year's actual waste generation. To facilitate transition to the new billing scheme, the law requires bills generated during the first year of the program to be based on an average of actual generation during the previous three years. Earlier this year, DEC sent out bills which indicated that waste generators would be required to pay "a transition invoice" now and a subsequent bill later, raising concerns that DEC was double-billing facilities for wastes generated in 2010. With the recent letter, DEC confirmed that although two invoices will be sent in 2011, the first invoice covers the 2010 billing period and will be based on the average of hazardous waste generated in 2007, 2008, and 2009 while the second invoice will cover the 2011 billing period and will be based on wastes generated in 2010. In its letter DEC blamed the confusion on the fact that the notices sent out with the bills were "not a model of clarity." The letter also clarifies that facilities that did not generate any hazardous waste in 2010 are not subject to fees even if they generated waste during the three previous "transition" years. A summary of the controversy and DEC's letter in response can be found on the Business Council's website at: www.bcnys.org/inside/env/2011/1025update.html.

Implications: The letter is potentially of interest to any facility required to pay hazardous waste generator fees.

BULK STORAGE

FEDERAL: EPA adopted a direct final rule **extending the deadline for farms to amend and implement their spill prevention, control and countermeasure (SPCC) plans** to May 10, 2013. EPA revised the SPCC regulations in 2002 and has extended the deadline for complying with the new requirements numerous times since then. Currently, most facilities must prepare or amend and implement their SPCC plans by November 10, 2011. According to EPA, the extension of the compliance date for farms to May 10, 2013 is necessary because many farms have been affected by flooding and other natural disasters in 2011; moreover, the sheer number of farms has complicated EPA's efforts to reach out to farm owners/operators potentially affected by the rule. In light of these considerations, EPA concluded that farms needed additional time to come into compliance with the revised SPCC plan rule. The direct final rule takes effect November 7, 2011 unless EPA receives adverse comment; it can be found in the October 18, 2011 Federal Register at: www.gpo.gov/fdsys.

Implications: The extension is primarily of interest to owners/operators of farms storing more than 1,320 gallons of oil aboveground (42,000 gallons underground).

WATER

FEDERAL: EPA **presented its final 2010 Effluent Guidelines Program Plan identifying new or existing industrial wastewater dischargers that have been selected for development of effluent guidelines and/or pretreatment standards**. The guidelines establish technology-based effluent limits for specific categories of direct and/or indirect wastewater dischargers. These effluent limits are then incorporated into National/State Pollutant Discharge Elimination System permits or pretreatment permits unless superseded by stricter water quality-based limits. With the recent notice, EPA announced that it planned to adopt the following new effluent guidelines based on the results of the biennial review required by the Clean Water Act.

- **Shale gas extraction.** In response to the significant projected increase in shale gas production, EPA plans to initiate a rulemaking to establish standards for discharging wastewater associated with the activity, which can contain dissolved solids, fracturing fluid additives, metals and naturally occurring radioactive materials (Proposed rule due 2014).
- **Coalbed methane extraction.** EPA plans to establish coalbed methane standards to address groundwater removed from coalbed formations to facilitate extraction of methane (i.e., natural gas) (Proposed rule due 2013).
- **Dental amalgam.** With the failure of voluntary efforts to encourage installation of amalgam separators in dentist's offices, EPA plans to develop pretreatment standards for dental amalgam, which contains significant quantities of mercury (Proposed rule due 2011). Note: DEC already regulates dental amalgam disposal under its hazardous waste regulations.

In conjunction with issuance of the final 2010 Effluent Guidelines Program Plan, EPA also announced that it is accepting comments, data and information until **November 25, 2011** to assist the agency in completing its 2011 review. The notice can be found in the October 26, 2011 Federal Register at: www.gpo.gov/fdsys.

Implications: The notice is primarily of interest to natural gas extraction companies and dentists.

NEW YORK STATE: DEC has finalized **minor modifications to its SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s)**, GP-0-10-002. The MS4 permit establishes planning, operating, inspection, monitoring, reporting and recordkeeping requirements for municipalities and other entities that operate MS4s. Following a public notice and comment period, DEC revised the MS4 permit to: (1) extend the deadline for submitting Watershed Improvement Strategies from May 1, 2011 to May 1, 2012 for specific waterbodies on Long Island; (2) extend the deadline for submitting Retrofit Plans from March 9, 2011 to March 9, 2012 for specific waterbodies on Long Island; and (3) make minor spelling and other corrections. In response to public comments, DEC proposed to revise Appendix 2 to include an updated list of impaired waterbodies. DEC is accepting comments on the proposed changes to Appendix 2 until **November 18, 2011**; the permit can be found on DEC's website at: www.dec.ny.gov/chemical/41392.html.

Implications: The changes to the MS4 permit are primarily relevant to MS4s located on Long Island.

OTHER

FEDERAL: EPA announced that it is **lifting its 1994 administrative stay of the reporting requirements for hydrogen sulfide under the Toxic Release Inventory (TRI) program**. The TRI program requires certain facilities that manufacture, process or use listed toxic chemicals above specified thresholds to report their environmental releases and other waste management activities annually. EPA expanded the list of chemicals subject to TRI reporting in 1993 to include over 20 new chemicals and chemical categories, including hydrogen sulfide. However, EPA subsequently stayed the applicability of the rule as applied to hydrogen sulfide to address concerns raised by various members of the regulated community. With this notice, EPA announced that it has completed its review and concluded that hydrogen sulfide can reasonably be anticipated to cause chronic human health effects as well as adverse effects in aquatic organisms and that it is therefore authorizing the inclusion of hydrogen sulfide in the TRI program. The first reports on hydrogen sulfide are due July 1, 2013 for reporting year 2012. The notice can be found in the October 17, 2011 Federal Register at: www.gpo.gov/fdsys.

Implications: Hydrogen sulfide is commonly found in natural gas and biogas and is used in the production of certain chemicals.

Other Recent Developments (Proposed)

AIR

FEDERAL: EPA published an **advanced notice of proposed rulemaking (ANPR) seeking comment on a proposed approach to conducting the periodic review of New Source Performance Standards (NSPS)** required under Section 111(b)(1)(B) of the Clean Air Act (CAA), 42 USC § 7411(b)(1)(B). The CAA requires EPA to establish technology-based emission standards for a particular source category if it determines that the source causes or contributes significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. Although the law requires EPA to review each standard at least every eight years, EPA has largely

failed to meet this obligation. With this ANPR, EPA is seeking comment on a proposed strategy for focusing reviews of the NSPS so as to maximize public health and welfare benefits while assuring the effective management of government resources. The ANPR identifies several criteria to be considered in assessing the continued efficacy of a NSPS, including the existence of updated or new control technologies, whether the agency anticipates any new, reconstructed or modified sources in the category in the next eight years, and whether the pollutants at issue are already regulated under other standards. Using these criteria, EPA hopes to identify NSPS that do not require review; the remaining source categories would then be prioritized based on various factors. EPA is accepting comments on the ANPR until **November 23, 2011**; in addition to seeking comments on the strategy generally, EPA is also asking for feedback on a tentative list of source categories determined not to require further review. The ANPR can be found in the October 24, 2011 Federal Register at: www.gpo.gov/fdsys.

Implications: The strategy, if implemented, will likely result in more frequent reviews of NSPS and so is of general interest to industrial facilities, consultants and others responsible for clean air compliance.

FEDERAL: EPA proposed **revisions to its New Source Performance Standards for nitric acid plants**, to be set forth at 40 CFR Part 60, subpart Ga. The standards were first adopted in 1971 and have been the subject of several minor revisions since then. With the current rulemaking, EPA proposed to: (1) reduce the nitrogen oxide (NO_x) emission limit from 3.0 pounds of NO_x per ton of nitric acid produced to 0.50 pounds of NO_x per ton of nitric acid produced based on its review of the capabilities of available emission controls; (2) require compliance with the emission limit at all times, including during startup and shutdown; (3) establish an affirmative defense to civil penalties for exceedances occurring during malfunctions; (4) require the installation, operation and maintenance of an exhaust gas flow rate monitor (in addition to continuous NO_x monitoring); and (5) impose additional reporting and recordkeeping requirements. Although nitric acid plants also emit nitrous oxide, a powerful greenhouse gas, EPA decided not to propose a standard for this pollutant under the NSPS. EPA is accepting comments on the proposed revisions until **November 28, 2011**; the proposed rule can be found in the October 14, 2011 Federal Register at: www.gpo.gov/fdsys.

Implications: The proposed rule is primarily of interest to individuals proposing to construct, modify or reconstruct nitric acid plants. According to EPA, there are currently 40 nitric acid production facilities in the United States.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

November 4, 2011: Deadline for submitting comments on DEC's TOGS 3.1.5, *Guidance for Dam Hazard Classification* (extended from September 28, 2011). See DEC's website at www.dec.ny.gov/lands/4991.html for details.

November 18, 2011: Deadline for submitting comments on proposed revisions to impaired waters list in MS4 General Permit recently finalized by DEC. See DEC's website at www.dec.ny.gov/chemical/41392.html for details.

November 23, 2011: Deadline for submitting comments on ANPR establishing proposed strategy for completing periodic review of NSPS. See the October 24, 2011 Federal Register at www.gpo.gov/fdsys for details.

November 25, 2011: Deadline for submitting comments, data and information in support of EPA's 2011 effluent guidelines review under the Clean Water Act. See the October 26, 2011 Federal Register at www.gpo.gov/fdsys for details.

November 28, 2011: Deadline for submitting comments on EPA's proposed revisions to the nitric acid NSPS. See the October 14, 2011 Federal Register at www.gpo.gov/fdsys for details.

November 30, 2011: Deadline for submitting comments on EPA's revised NSPS and NESHAPs for the oil and natural gas sector (extended from October 24, 2011). See the August 23, 2011 Federal Register at www.gpo.gov/fdsys for details.

December 2, 2011: Deadline for submitting comments on EPA's draft *Guidance for 1-Hour SO₂ NAAQS SIP Submissions* (extended from November 2, 2011). See EPA's website at www.epa.gov/airquality/sulfurdioxide/implement.html for details.

December 12, 2011: Deadline for submitting comments on DEC's revised draft high volume hydraulic fracturing SGEIS, general stormwater permit, and regulations. See DEC's website at www.dec.ny.gov/energy/75370.html for details.