

# Young / Sommer LLC

## ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Proposed Statutes, Regulations and Guidance

| Citation  | Summary  | Implications   | Schedule/Notes  |
|---|--|--|---|
| AIR   |  |  |   |
| <p>NEW YORK STATE<br/> <b>Surface Coating Processes and Commercial and Industrial Adhesives, Sealants and Primers</b><br/>                     6 NYCRR Part 228</p> | <p>DEC proposed to <b>overhaul its surface coating regulations</b> to address several EPA-issued control techniques guidelines (CTGs) and make other changes, including: (1) restructuring the rule for ease of use; (2) lowering certain applicability thresholds and volatile organic compound (VOC) content limits; (3) adding coating subcategories; and (4) increasing the overall removal efficiency rating for add-on controls. Specific changes to 6 NYCRR subpart 228-1 include:</p> <ul style="list-style-type: none"> <li>• <b>Applicability.</b> DEC revised the applicability provisions, assigning each type of coating line to one of five classes (A through E) and revising the applicability thresholds downward for several common types of coating lines. For example, the threshold for upstate miscellaneous metal parts coating lines was reduced from 10 tons per year (tpy) VOC potential to emit to three tons of actual VOC emissions; the threshold for miscellaneous plastic parts decreased from 50 tpy potential emissions to 3 tpy actual emissions.</li> <li>• <b>Definitions.</b> DEC added several dozen new definitions, many of which are found in the CTGs addressed by the revisions.</li> <li>• <b>General requirements.</b> DEC clustered the operating requirements applicable to all coating lines into § 228-1.3 (e.g., opacity, recordkeeping, prohibition of sale or specification, and handling, storage and disposal of VOCs). DEC also added a new general requirement limiting the types of application techniques that may be used at Class A and most Class B coating lines.</li> <li>• <b>Compliant materials.</b> DEC revised the VOC content limits for many types of coating lines. In many cases, the changes include increasing the number of coating categories, reducing the allowable VOC content of certain coatings, and establishing different content limits for air dried versus baked coatings.</li> <li>• <b>Add-on controls.</b> DEC increased the overall removal efficiency of add-on control devices from 80 to 90% for incinerators and 85 to 90% for air cleaning devices.</li> </ul> <p>DEC also made minor changes to the commercial and industrial adhesives, sealants and primers standards adopted in 2010.</p> <p>The proposed rule can be found on DEC's website at:<br/> <a href="http://www.dec.ny.gov/regulations/propregulations.html">www.dec.ny.gov/regulations/propregulations.html</a>.</p> | <p>With this rulemaking, DEC is revising the reasonably available control technology requirements in 6 NYCRR subpart 228-1 to reflect seven recently-issued CTGs, each of which covers surface coating operations already included in the subpart. The new regulations revise the VOC content limits and applicability thresholds for sources in these categories while leaving the limits for other surface coating categories largely intact. The following surface coating categories are most affected by the proposed changes: metal furniture, large appliance, flat wood paneling, miscellaneous metal parts, miscellaneous plastic parts, auto/transportation and business machine parts, marine pleasure crafts, motor vehicle materials, automobile and light duty truck assembly, and wood finishing. In addition, any facility that relies on emission controls to meet its subpart 228-1 obligations will be required to satisfy stricter overall removal efficiency standards.</p> | <p>DEC is accepting comments on the proposed rule until <b>December 28, 2012</b>. A public hearing is scheduled for 2:00 p.m. on December 20, 2012 at DEC's headquarters in Albany (with additional hearings scheduled in Avon and Long Island City).</p> |

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| <p>NEW YORK STATE<br/> <b>Sulfur-in-Fuel Standards</b><br/>                     6 NYCRR subpart 225-1</p> | <p>DEC proposed to <b>overhaul its sulfur-in-fuel standards</b>, which limit the sulfur content of distillate and residual oils and solid fuels. The current standards, set forth at 6 NYCRR subpart 225-1, are being repealed and replaced by a new subpart 225-1 that: (1) incorporates the limit on the sulfur content of No. 2 heating oil enacted in 2010; (2) lowers the allowable sulfur content of residual oil and distillate oil other than No. 2 heating oil; (3) deletes outdated provisions; and (4) imposes new recordkeeping and reporting requirements. Major changes include:</p> <ul style="list-style-type: none"> <li>• Limiting the sulfur content of No. 2 heating oil burned in industrial, commercial and residential sources to 15 parts per million (ppm) or less effective July 1, 2012.</li> <li>• Reducing the allowable sulfur content of other fuels burned in stationary combustion installations effective July 1, 2014 as follows: (1) distillate oil, 15 ppm; (2) residual oil, 5,000 ppm (lower downstate); and (3) waste oil, 7,500 ppm. The regulations prohibit the purchase of higher sulfur fuels as of July 1, 2014; in the case of distillate and residual oils, facilities may use existing supplies until July 1, 2016. Current sulfur-in-fuel standards remain in place until then, with some exceptions.</li> <li>• Requiring regulated entities to keep records documenting compliance with the rule and specifying what information must be included in records retained by oil/coal sellers.</li> <li>• Requiring data collected pursuant to the subpart to be tabulated and summarized.</li> <li>• Requiring owners of facilities with Title V permits to provide records and summaries to DEC on a semiannual basis.</li> <li>• Requiring owners subject to the sulfur content limits to report receipt of non-complying fuels at the end of each calendar quarter in which exceedances occur.</li> </ul> <p>Consistent with the existing regulation, the new rule authorizes exceptions for fuel shortages and variances for fuel mixtures, equivalent emission rates, and experiments.</p> <p>The proposed rule can be found on DEC's website at:<br/> <a href="http://www.dec.ny.gov/regulations/propregulations.html">www.dec.ny.gov/regulations/propregulations.html</a>.</p> | <p>The rule is potentially of interest to anyone who sells or purchases oil or solid fuels for use in stationary combustion installations, such as boilers. Among other things, the rule lowers the allowable sulfur content for several common types of fuel, including distillate oil (e.g., No. 1 and 2 fuel oil), residual oil (e.g., No. 4, 5 and 6 fuel oil), and waste oil, as defined in the rulemaking. It also imposes significant additional recordkeeping and reporting requirements on both oil sellers and purchasers, including a new requirement that Title V facilities report their tabulated sulfur content information to DEC every six months, presumably as part of their Title V semi-annual report.</p> | <p>DEC is accepting comments on the proposed rule until <b>December 28, 2012</b>. A public hearing is scheduled for 2:00 p.m. on December 20, 2012 at DEC's headquarters in Albany (with additional hearings scheduled in Avon and Long Island City).</p> |

## Other Recent Developments (Final)

### AIR

FEDERAL: EPA stayed the compliance date for the **chemical manufacturing area (i.e., minor) source standards**, set forth at 40 CFR Part 63, subpart VVVVVV, to allow the agency time to finalize changes proposed in January 2012. The subpart VVVVVV National Emission Standards for Hazardous Air Pollutants (NESHAP) regulates chemical manufacturing process units (CMPUs) located at area sources that use, generate as byproducts, or produce one or more of 15 specifically-listed organic or metal hazardous air pollutants. Categories of covered equipment and activities include process vents, storage tanks, transfer operations, wastewater systems, heat exchange systems, and equipment leaks. In January 2012, EPA proposed to revise the rules to address concerns raised by various industry representatives, several of which involve questions of applicability. The original compliance date for subpart VVVVVV was October 29, 2012. With this rulemaking, EPA extended the date to December 24, 2012 to provide the agency with time to finalize the revisions. The stay can be found in the October 25, 2012 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The subpart VVVVVV rule applies to a wide range of area source chemical manufacturing sources including industrial organic and inorganic chemical manufacturing, miscellaneous chemical manufacturing, pharmaceutical production, and plastic materials and resins manufacturing sources, among others.

### CLIMATE CHANGE

FEDERAL: EPA and the National Highway Traffic Safety Administration (NHTSA) **issued new standards to improve the fuel economy of light-duty motor vehicles and reduce greenhouse gas (GHG) emissions**. The standards, which will be implemented in two phases, apply to passenger cars and light trucks, including sport utility vehicles, minivans and pickup trucks, manufactured in model years 2017 through 2025. The first phase runs from 2017-2021 and requires on an average industry fleetwide basis a range from 40.3 to 41.0 miles per gallon (mpg) as of 2021. The second phase runs from 2022-2025 and conditionally calls for an average fleetwide standard between 48.7 and 49.7 mpg in model year 2025, although a subsequent feasibility assessment and rulemaking is necessary to establish the final phase 2 fuel economy standard. The GHG emission standards, which are harmonized with the fuel economy standards, limit industry-wide carbon dioxide for model year 2025 vehicles to 163 grams per mile. According to EPA and the NHTSA, the fuel savings associated with the standards will outweigh higher vehicle costs, resulting in direct benefits to consumers. The fuel economy improvements and GHG emission reductions will be achieved through technology improvements, including advances in engines and transmissions, vehicle weight reductions, lower tire rolling resistance, improvements in vehicle dynamics, diesel engines, more efficient accessories, improvements in vehicle air conditioners, and increased use of alternative technologies such as hybrid and electric vehicles. The final rule takes effect December 14, 2012; it can be found in the October 15, 2012 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The rule affects light-duty manufacturers and purchasers.

## REMEDIATION

FEDERAL: EPA issued a **policy memorandum summarizing its revised procedures for managing the duration of remedial design/remedial action (RD/RA) negotiations under the federal Superfund program**. Pursuant to the September 29, 2012 memorandum, EPA is expected to develop an RD/RA Negotiation Plan before issuing the Record of Decision (ROD); a Negotiation Plan template is included as an attachment to the memorandum. EPA then has 90 days from the date of the ROD to issue a Special Notice Letter (SNL); the goal is to complete the RD/RA negotiations within 120 days thereafter. The memorandum establishes a schedule and suggested program for addressing delays in meeting these timeframes, outlining a program of status conferences to be held at each stage of the delay as well as possible measures to expedite settlement. The policy memorandum can be found on EPA's website at: [www.epa.gov/enforcement/cleanup/documents/policies/superfund/rev-rdra-neg-timeline-2012.pdf](http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/rev-rdra-neg-timeline-2012.pdf).

Implications: The policy memorandum is potentially of interest to individuals/companies involved in Superfund cleanups.

## HYDRAULIC FRACTURING

NEW YORK STATE: A state trial court **invalidated a two-year moratorium on natural gas drilling** after concluding that the law passed by the City of Binghamton did not meet the standards for a properly enacted moratorium. In December 2011, the city adopted a law banning natural gas drilling and exploration that sunsets after two years unless repealed sooner. In describing the law, the city's attorney referred to it on several occasions as a moratorium. After dispensing with various procedural, standing, statute of limitations, and preemption arguments, the Broome County Supreme Court concluded in *Jeffrey v. Ryan*, 37 Misc. 3d 1204(A) (Sup. Ct. Broome Co. 2012) considered whether the law was a moratorium or an exercise of the city's police powers. According to the court, the inclusion of a "sunset" provision "leads to no other conclusion except that th[e] law is a moratorium." The court went on to conclude that the city failed to show that the law was adopted in response to a dire necessity given that DEC had not yet published regulations authorizing drilling; moreover, the city could not show that there was a crisis condition since DEC was not yet issuing permits. As a result, the city did not meet the standards for granting a moratorium when it passed the law.

Implications: To date, more than 80 communities in New York have adopted moratoriums on gas drilling; the *Jeffrey* case raises doubts about the continued viability of these laws.

## ENVIRONMENTAL REVIEW

NEW YORK STATE: New York's highest court recently considered the **circumstances under which an agency can be required to prepare a supplemental environmental impact statement (EIS) under the State Environmental Quality Review Act (SEQRA)**. In *Bronx Committee for Toxic Free Schools v. New York City School Construction Authority*, 2012 WL 5199403 (N.Y. Ct. App. 2012), the New York City School Construction Authority (SCA) proposed to build several schools on a site remediated under New

York's brownfield program. However, the final EIS for the site did not include information about the methods chosen by the SCA for the long-term maintenance and monitoring of the contaminated site. On appeal, the court agreed with the lower courts that this information was of sufficient importance and relevance to warrant preparation of a supplemental EIS. While apparently conceding that information regarding ongoing maintenance and monitoring of engineering controls at the site was important, the SCA had argued that no supplemental EIS was required because it could not decide on the measures before the EIS was filed and had adequately addressed them in a site management plan required under the brownfield program. The court of appeals disagreed, noting that SEQRA requires a supplemental EIS to address subjects not adequately addressed in the EIS arising from project changes, newly discovered information, or changed circumstances. The maintenance and monitoring information sought by petitioners met this requirement. The court also rejected the suggestion that submission of a brownfield site management plan justified short-circuiting SEQRA review, noting that the programs serve two different purposes.

Implications: The decision clarifies the circumstances under which a supplemental EIS is required.

## ZONING AND LAND USE

NEW YORK STATE: The U.S. Court of Appeals for the Second Circuit **upheld a trial court decision which found that a town abused its authority under SEQRA and local zoning laws** when it prevented a church from moving forward with construction plans. The church in *Fortress Bible Church v. Feiner*, 694 F.3d 208 (2d Cir. 2012) sought to build a combined worship facility and school in the Town of Greenburgh. After the church refused to donate a fire truck or make any other payment in lieu of taxes, the Town issued a positive declaration under SEQRA. Over the next several years, the Town continually asked for more information from the church, prompting the church to eventually file suit charging the Town with violating the Religious Land Use and Institutionalized Persons Act (RLUIPA), as well as its constitutional free exercise and equal protection rights and Article 78 of New York's Civil Procedure Law. On appeal, the Town argued that RLUIPA – which bars states from implementing land use regulations in a manner that imposes a substantial burden on religious exercise – did not apply because SEQRA is not a land use regulation. The court disagreed, holding that “when a government uses its statutory environmental review process as the primary vehicle for making zoning decisions, those decisions constitute the application of a zoning law and are within the purview of RLUIPA.” The court went on to find that the church was substantially burdened within the meaning of the statute because its existing facilities were inadequate and the Town's actions amounted to a complete, bad faith denial of the authorization needed to construct a new facility.

Implications: The decision is potentially of interest to municipalities reviewing construction/expansion projects undertaken by religious organizations.

## GENERAL/OTHER

NEW YORK STATE: New York's Appellate Division, Third Department, **dismissed on standings grounds a lawsuit challenging DEC's regulations requiring incidental taking permits** for any activity likely to result in the “taking” of an endangered or

threatened species. Petitioners in *Association for a Better Long Island, Inc. v. DEC*, 97 A.D.3d 1085 (3d Dept. 2012) challenged the regulations based on their ownership of property that contains or is in close proximity to endangered and threatened species. In dismissing the lawsuit, the court concluded that “petitioners’ allegations that they may be required to comply with the regulations is potential, speculative harm that is insufficient to confer standing.” The court went on to declare that the challenges to the regulations were not ripe because the burdens they complain of might never arise, making their complaint speculative and abstract.

Implications: The decision means the revised endangered species regulations are likely to remain in place unless successfully challenged by a developer or landowner denied an incidental taking permit or issued a permit with conditions.

## **Other Recent Developments (Proposed)**

### **AIR**

NEW YORK STATE: DEC is accepting comments on a **proposed revision to its uniform permitting rules to address recently proposed changes to its air permit regulations** as applied to state facility permits. Earlier this year, DEC proposed to revise 6 NYCRR Part 201 and related provisions to update its air permitting regulations and incorporate new requirements. Among other things, DEC proposed to establish a 10-year permit term for state facility air permits, which are currently issued for an indefinite period. With the current rulemaking, DEC proposed to revise the uniform permitting rules at 6 NYCRR Part 621 to clarify that all new or modified state facility permits will be issued for no more than 10 years. DEC is accepting comments on the proposed rule until **December 28, 2012**. A public hearing is scheduled for 2:00 p.m. on December 20, 2012 at DEC’s headquarters in Albany (with additional hearings scheduled in Avon and Long Island City). The proposed rule can be found on DEC’s website at: [www.dec.ny.gov/regulations/propregulations.html](http://www.dec.ny.gov/regulations/propregulations.html).

Implications: The proposed rule is potentially of interest to facilities with state facility air permits.

### **GENERAL/OTHER**

FEDERAL: EPA is **accepting comments on three regulations under section 610 of the Regulatory Flexibility Act**, which requires federal agencies to review regulations that have or will have a significant economic impact on a substantial number of small entities within 10 years of promulgation. The three regulations subject to review are: (1) the 2001 exhaust emission standards for heavy-duty highway engines and vehicles and standards for highway diesel fuel; (2) the 2003 NESHAP for reinforced plastic composites production (40 CFR Part 63, subpart WWWW); and (3) the 2003 National Pollutant Discharge Elimination System permit regulations and effluent limitations guidelines for concentrated animal feeding operations (CAFOs). In conjunction with the review, EPA is seeking comment on the following factors: continued need for the rules; nature of complaints/comments about the rules; complexity of the rules; possible regulatory overlap, duplication or conflict; and degree to which technology, economic conditions, or other factors

have changed in areas affected by the rules. EPA is accepting comments on the regulations until **December 31, 2012**. The section 610 notice can be found in the October 31, 2012 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The notice is potentially of interest to heavy-duty diesel vehicle and diesel fuel producers and users, reinforced plastic composites production facilities, and CAFOs.

## Upcoming Deadlines

**NOTE:** This calendar contains items of general interest.

**November 5, 2012:** Deadline for submitting comments on EPA's proposed revisions to the TSCA PCB manifest regulations. See the September 6, 2012 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**December 20, 2012:** Public hearing on DEC's proposed revisions to the following regulations scheduled for 2:00 p.m. at DEC Headquarters, 625 Broadway, Albany: (1) sulfur-in-fuel limits; (2) surface coating regulations; and (3) uniform procedures as applied to state facility air permits. NOTE: Additional public hearings are scheduled during the same week in Avon and Long Island City.

**December 28, 2012:** Deadline for submitting comments on EPA's proposed revisions to the stationary combustion turbine NSPS (extended from October 29, 2012). See the August 29, 2012 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**December 28, 2012:** Deadline for submitting comments on revisions to the following DEC rulemakings: (1) sulfur-in-fuel limits; (2) surface coating regulations; and (3) uniform procedures as applied to state facility air permits. See DEC's website at [www.dec.ny.gov/regulations/propregulations.html](http://www.dec.ny.gov/regulations/propregulations.html) for details.

**December 31, 2012:** Deadline for submitting comments on EPA's 610 review of the heavy-duty engine/fuel standards, reinforced plastic composites NESHAP, and CAFO standards/permitting requirements. See the October 31, 2012 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.