

# Young / Sommer LLC

## ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Prepared by:  
Elizabeth Morss  
Young/Sommer LLC  
5 Palisades Drive  
Albany, NY 12205  
(518) 438-9907, ext. 232  
emorss@youngsommer.com  
<http://www.youngsommer.com>

Final Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
<b>AIR</b>			
<p>FEDERAL  <b>National Emission Standards for Hazardous Air Pollutants for Chemical Manufacturing Area Sources</b>                      40 CFR Part 63, subpart VVVVVV                      77 Fed. Reg. 75740 (Dec. 21, 2012)</p>	<p>EPA revised the <b>area (i.e., minor) source standards for chemical manufacturing sources under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program</b> in response to a notice of reconsideration filed by a pair of industry trade associations. The standards, which are set forth at 40 CFR Part 63, subpart VVVVVV, regulate chemical manufacturing process units (CMPUs) that use, generate as byproducts, or produce one or more of 15 specifically-listed organic or metal hazardous air pollutants (HAPs). Categories of equipment and activities covered by the standard include process vents, storage tanks, transfer operations, wastewater systems, heat exchange systems, and equipment leaks. Key changes include:</p> <ul style="list-style-type: none"> <li>• Requiring facilities to comply with only the most stringent provisions when two overlapping NESHAP rules apply.</li> <li>• Replacing a provision requiring “direct and proximal (thorough)” leak inspections with one requiring facilities to conduct quarterly sensory inspections of all equipment and process vessels provided these methods are capable of detecting leaks within the CMPU.</li> <li>• Allowing covers/lids to be removed from process vessels during manual operations.</li> <li>• Requiring leak inspections to be conducted when a CMPU is operating in organic HAP service or metal HAP service.</li> <li>• Establishing an affirmative defense to civil penalties for excess emissions during malfunctions and special requirements applicable during startups, shutdowns and malfunctions.</li> </ul> <p>EPA lifted a stay on Title V permit requirements for facilities that became synthetic area sources by installing air pollution controls on at least one CMPU. These sources must submit Title V permit applications by December 21, 2013 unless the permitting authority sets an earlier date.</p> <p>The rule can be found in the December 21, 2012 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>Activities potentially subject to the NESHAP include:</p> <ul style="list-style-type: none"> <li>• Agricultural chemicals and pesticides manufacturing;</li> <li>• Cyclic crude and intermediate production;</li> <li>• Industrial inorganic chemical manufacturing;</li> <li>• Industrial organic chemical manufacturing;</li> <li>• Inorganic pigments manufacturing;</li> <li>• Miscellaneous organic chemical manufacturing;</li> <li>• Plastic materials and resins manufacturing;</li> <li>• Pharmaceutical production; and</li> <li>• Synthetic rubber manufacturing.</li> </ul>	<p>The rule took effect December 21, 2012. The compliance deadline for existing sources has been extended to March 21, 2013. Title V applications for existing synthetic minor sources that installed a federally enforceable control device on at least one affected CMPU must be submitted by December 21, 2013.</p>

Citation	Summary	Implications	Schedule/Notes
<b>REMEDICATION</b>			
<p>FEDERAL  <b>Institutional Controls: A Guide to Planning, Maintaining and Enforcing Institutional Controls at Contaminated Sites</b>  <b>Institutional Controls: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites</b></p>	<p>EPA issued a <b>pair of guidance documents intended to facilitate the development, implementation and enforcement of institutional controls</b> at Superfund and other federal remedial sites. Institutional controls (IC) are administrative and legal controls designed to minimize the potential for exposure to contamination and/or protect the integrity of a response action. Examples include proprietary controls (e.g., easements/restrictive covenants), government controls (e.g., groundwater use restrictions, zoning ordinances, and fish consumption bans), and informational devices (e.g., recorded notices, state registries, and advisories). The first guidance document, <i>Institutional Controls: A Guide to Planning, Implementing, Maintaining and Enforcing Institutional Controls at Contaminated Sites</i>, highlights common issues relating to ICs and the roles/responsibilities of the parties. After reviewing the definition and role of ICs, the document provides guidance on each stage of the IC process: (1) planning (e.g., selection, implementation and assurance plans, cost estimation and funding, community involvement, and capacity for implementation and maintenance); (2) general implementation issues (documentation in decision documents and IC stewardship); (3) specific guidance on implementing proprietary and government controls and informational devices; (4) maintaining institutional controls (e.g., operation and maintenance, periodic reviews, government participation, and monitoring); and (5) enforcement.</p> <p>The second document, <i>Institutional Controls: A Guide to Preparing Institutional Control Implementation and Assurance Plans at Contaminated Sites</i>, provides guidance on developing ICIAPs, which are typically prepared by the government or a responsible party and explain how ICs should be implemented, maintained, enforced, modified or terminated at a particular site.</p> <p>The guidance documents can be found on EPA’s web site at: <a href="http://www.epa.gov/superfund/policy/ic/guide/index.htm">www.epa.gov/superfund/policy/ic/guide/index.htm</a>.</p>	<p>These guidance documents are primarily of interest to owners/operators of contaminated sites, attorneys, engineers and others involved in site cleanups under the federal Superfund, brownfields, federal facility, underground storage tank, and corrective action programs.</p>	

## Other Recent Developments (Final)

### AIR

FEDERAL/NEW YORK STATE: EPA determined that the New York City metropolitan area has attained the 2006 24-hour fine particulate matter (PM<sub>2.5</sub>) national ambient air quality standard (NAAQS) based on ambient air monitoring data collected from 2007 through 2011. The determination relieves New York of the obligation to submit an attainment demonstration, reasonably available control measures, a reasonable further progress plan, and contingency measures relating to attainment of the 2006 24-hour PM<sub>2.5</sub> NAAQS. The determination does not constitute formal redesignation of the area to attainment, which requires EPA to approve a maintenance plan, among other measures. If the area later exceeds the standard, the state will be expected to address the applicable requirements for the 2006 24-hour PM<sub>2.5</sub> NAAQS. The determination can be found in the December 31, 2012 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The New York City 2006 24-hour PM<sub>2.5</sub> nonattainment area includes New York City and Nassau, Suffolk, Rockland and Westchester Counties; it also includes counties in northern New Jersey and southern Connecticut.

### REMEDIATION

FEDERAL: EPA issued *Revised Enforcement Guidance Regarding the Treatment of Tenants Under the CERCLA Bona Fide Prospective Purchaser Provision*, clarifying the circumstances under which tenants who lease contaminated or formerly contaminated properties are eligible for protection as bona fide prospective purchasers (BFPPs) under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA). Under CERCLA, a “person (or tenant of a person)” that acquires ownership of a facility after January 11, 2002 and meets certain criteria is considered a BFPP and cannot be held responsible for site cleanups under CERCLA. The guidance clarifies that tenants may derive BFPP status from an owner who satisfies the BFPP criteria; however, if the owner loses that status either by its own action or inaction or that of the tenant (perhaps by impeding performance of a response action), the tenant may also lose its BFPP status. Where the tenant is not a BFPP, EPA may exercise its discretion to treat the tenant as a BFPP provided the tenant meets certain criteria. The guidance was motivated, in large part, by EPA’s initiative to locate renewable energy projects on contaminated land and mine sites. In conjunction with the BFPP tenant guidance, EPA also posted three model letters that may be issued by federal/state agencies to provide “comfort” to lessees involved in renewable energy projects on contaminated land. The revised guidance and model letters are available at: [www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012-mem.pdf](http://www.epa.gov/enforcement/cleanup/documents/policies/superfund/tenants-bfpp-2012-mem.pdf).

Implications: The guidance is primarily of interest to current and potential future tenants of contaminated and formerly contaminated properties.

## ZONING

NEW YORK STATE: The New York Appellate Division, Third Department, issued a **decision clarifying the role of “special damages” for purposes of demonstrating standing in zoning cases.** The plaintiffs in *Nemeth v. K-Tooling*, 100 A.D.3d 1271 (3d Dept. 2012), alleged that the defendants’ manufacturing business, which was located in a residentially-zoned area, constituted a private nuisance and violated the local zoning law. As a preliminary matter, the court concluded that the purported noise and odor from defendants’ operations were not “substantial in nature” and “unreasonable in character” and so did not constitute a private nuisance. The court then considered whether special damages are a separate element of standing in a zoning case (which may presumptively be satisfied by showing the plaintiff lives in close proximity to the property violating the zoning law) or whether they are an element of the cause of action for a zoning violation. Despite ambiguous language in several cases, the court concluded that while special damages are not a separate element of the zoning cause of action, they are relevant to standing in the zoning context. With standing established, the court reviewed the alleged zoning violation and concluded that while the activities in the main portion of defendants’ operations were allowed as a nonconforming use, a small addition built in 2001 violated a local law requiring modifications to conform to the restrictions of the residential district where the structure is located. The court therefore concluded that plaintiffs were entitled to an injunction prohibiting defendants from using the addition for nonresidential purposes.

## OTHER

FEDERAL/NEW YORK STATE: The U.S. Court of Appeals for the Second Circuit, which covers New York, issued a decision **requiring an insurance company to pay to remediate a contaminated site after concluding that the plain language of a continuing coverage provision required the insurer to indemnify the insured.** In *Olin Corp. v. American Home Assurance Co.*, 2012 WL 6602909 (2d Cir. 2012), Olin owned property that was contaminated between 1956 and 1987. The property was covered by various insurance policies, including two excess policies for the periods 1966-1969 and 1969-1972, both of which included the following language: “[I]n the event that personal injury or property damage arising out of an occurrence covered hereunder is continuing at the time of termination of this Policy, Underwriters will continue to protect the Assured for Liability in respect of such personal injury or property damage without payment of additional premium.” The court concluded that the three conditions in this provision were met: (1) property damage occurred during both policy periods based on an earlier court decision which held that the spread of earlier contamination meets the definition of property damage; (2) the damage arose out of an occurrence covered by both policies, where occurrence was defined as, among other things, a continuous or repeated exposure to conditions which unexpectedly and unintentionally resulted in property damage during the policy period; and (3) the property damage was continuing at the time of termination of each policy since migration of the chemicals continued after the policy terminated. The court went on to conclude that damages should be allocated on a pro rata basis from 1966 through 1987, when contamination from the site ceased migrating.

Implications: This case is potentially of interest to parties involved in the cleanup of contaminated sites.

## Other Recent Developments (Proposed)

### AIR

NEW YORK STATE: DEC is **accepting comment on its “infrastructure” state implementation plans** (SIPs) describing the state’s program for achieving and maintaining attainment with the 2008 eight-hour ozone NAAQS and 2010 one-hour nitrogen dioxide (NO<sub>2</sub>) NAAQS. Under Clean Air Act §110(a)(1) and (2), all states, regardless of whether they have any nonattainment areas, must submit infrastructure SIPs that meet basic requirements relating to ambient air monitoring, enforcement, emission inventories, modeling, collection of permitting fees, and emission limits and control standards, among other provisions. With the recent notice, DEC is accepting comments on the proposed infrastructure SIPs for the two recently adopted NAAQS. A public hearing on the proposed SIPs is scheduled for February 5, 2013 at DEC headquarters in Albany; the deadline for submitting written comments is **February 12, 2013**. The announcement of the proposed SIPs can be found on DEC’s website at: [www.dec.ny.gov/enb/20130102\\_not0.html](http://www.dec.ny.gov/enb/20130102_not0.html).

### HAZARDOUS AND SOLID WASTE

FEDERAL: EPA **made available for comment a proposed interpretation of its polychlorinated biphenyl (PCB) regulations that would generally allow the recycling of plastic separated from automobile shredder residue** provided certain conditions are met. In an effort to prevent the introduction of PCBs into plastics, the Institute of Scrap Metal Recycling Industries developed Voluntary Procedures for Recycling Plastics from Shredder Residue. With the recent notice, EPA proposed to allow facilities that follow this procedure to consider automobile plastics as an “excluded PCB product” that is exempt from the general prohibition against PCB manufacturing, processing, distribution in commerce and use. EPA is accepting comments on the proposed interpretation until **January 11, 2013**; it can be found in the December 12, 2012 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The draft interpretation is primarily of interest to automobile recyclers.

### REMEDATION

FEDERAL: EPA published a request for additional information in conjunction with its 2010 **advance notice of proposed rulemaking (ANPR) addressing the possible establishment of a lead renovation, repair and painting program for public and commercial buildings**. EPA issued a lead renovation, repair and painting rule in 2008 that covers pre-1978 housing and child occupied facilities. In settlement of a lawsuit brought by environmental groups, EPA agreed to commence a rulemaking to address renovations in public and commercial buildings. The 2010 ANPR provided an overview of the health and environmental issues associated with lead renovation activities and sought comment on key issues, including the definitions of public and commercial building and the extent of lead paint hazards associated with these buildings (both interior and exterior). With the current notice, EPA is seeking additional information from the public pertaining to renovation, repair and painting activities in and on public and

commercial buildings. EPA also is providing advance notice that it will hold a public meeting on the issue on June 26, 2013. Under the terms of the court-approved settlement agreement, EPA must sign a proposed rule setting standards for public/commercial buildings or determine that these activities do not create lead-based paint hazards by July 1, 2015. EPA is accepting additional comment on the 2010 ANPR until **April 1, 2013**; the request for information can be found in the December 31, 2012 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The notice is primarily of interest to construction companies and others engaged in public and commercial building repair and renovation activities.

## HYDRAULIC FRACTURING

FEDERAL: EPA issued a detailed **progress report on its study of the potential impacts of hydraulic fracturing on drinking water resources**. Hydraulic fracturing involves the injection of large volumes of water, sand and chemicals into the ground at high pressures to extract oil and gas from underground rock formations. At the request of Congress, EPA agreed to study the impact of hydraulic fracturing on drinking water, addressing water acquisition, chemical mixing, fracturing, post-fracturing (including management of flowback), and treatment and disposal. The recent progress report summarizes the work that has been done since EPA issued its final study plan in November 2011. Key elements of the study addressed in the progress report include: (1) analysis of existing data obtained from the oil and gas industry, states with extensive oil and gas activity, and FracFocus, a national hydraulic fracturing chemical registry. EPA also is reviewing scientific literature relevant to the research questions posed in the study; (2) scenario evaluations conducted using computer models to identify conditions that may lead to drinking water impacts; (3) laboratory studies to identify potential impacts of discharging inadequately treated hydrofracking wastewater to rivers; (4) toxicity assessments of hydrofracking chemicals; and (5) case studies, including five retrospective case studies addressing reported instances of drinking water contamination in areas where hydrofracking has occurred and two prospective case studies assessing new hydrofracking activities. Changes to the study implemented since the November 2011 plan include the assessment of data from FracFocus and delays in commencing the prospective case studies. The progress report can be found on EPA's website at: [www.epa.gov/hydraulicfracturing](http://www.epa.gov/hydraulicfracturing).

Implications: The study plan is focused primarily on hydraulic fracturing in shale formations, such as the Marcellus shale in New York; however, portions of the study will also provide information on hydraulic fracturing in coalbed methane and tight sand reservoirs.

## State Regulatory Agenda

NEW YORK STATE: DEC published its **regulatory agenda for 2013**. The agenda identifies the regulatory changes DEC may pursue in the upcoming year. Key items on the agenda include:



- **6 NYCRR Part 203, Indirect Sources of Air Contamination:** Repeal Part 203 as obsolete. Rules addressing indirect emission sources (i.e., sources that attract motor vehicles) have been superseded by transportation and general conformity rules, including 6 NYCRR Part 240, which DEC also plans to update.
- **6 NYCRR Part 205, Architectural and Industrial Maintenance Coatings:** Include additional and more restrictive limits on volatile organic compounds (VOCs).
- **6 NYCRR Part 212, General Process Emission Sources:** Establish a new procedure for evaluating and reducing air toxic impacts from stationary sources.
- **6 NYCRR Part 222, Distributed Generation:** Adopt a new regulation establishing standards for distributed generation sources – stationary internal combustion engines used to produce electricity for use at the facility at which they are located, including emergency generators.
- **6 NYCRR Subpart 225-3, Fuel Composition and Use – Gasoline:** Lower the maximum allowable summertime gasoline volatility and perhaps include upstate counties in the federal reformulated gasoline program.
- **6 NYCRR Part 230, Gasoline Dispensing Sites and Transport Vehicles:** Update and clarify testing requirements for gas stations; conform various provisions to new federal requirements and guidance; require prior notification to DEC for each test; require new vapor leak detection equipment; and delete Stage II VOC control equipment requirements currently applicable downstate.
- **6 NYCRR Part 232, Dry Cleaning:** Streamline and update regulations to make them consistent with federal standards.
- **6 NYCRR Part 235, Consumer Products:** Implement additional VOC product content limits.
- **6 NYCRR Part 247, Outdoor Wood-Fired Hydronic Heaters:** Revise siting and stack height criteria and emission standards for outdoor wood-fired hydronic heat systems.
- **6 NYCRR Parts 360, 364, and 369, Solid Waste Management:** Major revisions including reorganizing the rule to better reflect solid waste topics and addressing subjects not currently covered by the regulations, such as automobile dismantlers, pharmaceutical waste, electronic waste, dredge materials, biohazard incident waste, and yellow grease.
- **6 NYCRR Part 368, Product Stewardship and Labeling:** Rename regulation; make existing recycling emblem regulations consistent with national labeling guidelines; and develop regulations implementing recent laws addressing mercury-added consumer products and product stewardship requirements for electronic waste, cell phones and recyclable batteries.
- **6 NYCRR Part 375, Environmental Remediation Programs:** Provide additional direction on issues encountered since the rule was adopted; incorporate soil cleanup objective changes; consider possible changes to the definition of “significant threat” under the Superfund program; consider opportunities to incorporate sustainable remediation and development techniques into cleanup projects; and make other changes and corrections.
- **6 NYCRR Part 570, Permitting of Liquefied Natural Gas (LNG) Facilities:** Develop new regulations covering the safe siting, construction, operation and inspection of LNG facilities.



- **6 NYCRR Parts 595-599, Chemical Bulk Storage; Parts 610-611, Major Oil Storage Facilities; Parts 612-614, Petroleum Bulk Storage:** Incorporate changes implementing the federal Energy Policy Act of 2005, which requires states to adopt training and other requirements relating to underground storage tanks; revise the list of hazardous substances in Part 597 to reflect federal changes and updates; conform key definitions to reflect recent changes to the petroleum bulk storage implementing statute; enhance monitoring, maintenance and equipment requirements to prevent leaks and spills; and make other changes.
- **6 NYCRR Parts 662-665, Freshwater Wetlands:** Update and clarify freshwater wetlands mapping and classification standards and establish more efficient map amendment procedures; repeal Part 662, Freshwater Wetlands – Interim Permit, as obsolete; remove outdated references and procedures; and eliminate outdated land use regulations contained in Part 665.
- **6 NYCRR Part 750, State Pollutant Discharge Elimination System (SPDES) Permits:** Incorporate recently enacted law requiring reporting of discharges of untreated and partially treated sewage; add definitions; update references; and incorporate new federal criteria and standards.

Environmentally-related rulemakings identified by other state agencies include: (1) 10 NYCRR subpart 5-1, Public Water Systems: amend rules relating to water supply emergency plans; incorporate federal regulations to improve control of microbial pathogens and lead and copper in public water supply systems; and update backflow device tester certification requirements; (2) 10 NYCRR Part 75, Standards for Individual Water Systems and Individual Sewage Treatment Systems: clarify design submittal and approval procedures and add new regulations for individual water wells to establish water quality reference standards; (3) 10 NYCRR Part 73, Asbestos Safety Training Program: incorporate revisions made to the New York State Department of Labor's asbestos regulations and make other changes; and (4) 9 NYCRR Parts 1201-1210, 1219-1228, 1240, 1260, Building, Fire and State Energy Conservation Construction Codes: revise code enforcement training program requirements; consider adding new Parts addressing energy efficiency standards for appliances and equipment; clarify responsibility for code enforcement when county/local governments decline to participate; and make numerous other changes.

The 2013 regulatory agenda for DEC and other agencies can found at: [docs.dos.ny.gov/info/register/2013/jan2/toc.html](http://docs.dos.ny.gov/info/register/2013/jan2/toc.html).

### Upcoming Deadlines

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

**January 7, 2013:** Deadline for submitting comments on EPA's proposed revisions to the utility boiler NESHAP and NSPS as applied to new sources (extended from December 31, 2012). See the November 30, 2012 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**January 11, 2013:** Deadline for submitting comments on DEC's additional proposed revisions to its high-volume hydraulic fracturing regulations. See DEC's website at [www.dec.ny.gov/regulations/77353.html](http://www.dec.ny.gov/regulations/77353.html) for details.

**January 11, 2013:** Deadline for submitting comments on EPA's draft interpretation allowing recycling of plastic separated from automobile shredder residue under its PCB regulations. See the December 12, 2012 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**January 21, 2013:** Deadline for submitting comments on DEC's proposed revisions to various regulations addressing CAFOs and related composting facilities. See DEC's website at [www.dec.ny.gov/regulations/propregulations.html](http://www.dec.ny.gov/regulations/propregulations.html) for details.

**February 4, 2013:** Deadline for submitting comments on OSHA's request for information regarding possible improvements to the construction standards. See the December 6, 2012 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**February 5, 2013:** Public hearing on DEC's proposed infrastructure SIPs for 2008 ozone and 2010 NO<sub>2</sub> NAAQS scheduled for 2:00 p.m. at DEC Headquarters, 625 Broadway, Albany.

**February 12, 2013:** Deadline for submitting comments on DEC's proposed infrastructure SIPs for 2008 and 2010 NO<sub>2</sub> NAAQS. See the January 2, 2013 Environmental Notice Bulletin at [www.dec.ny.gov/enb/20130102\\_not0.html](http://www.dec.ny.gov/enb/20130102_not0.html) for details.

**April 1, 2013:** Deadline for submitting data/information on the possible regulation of lead paint-based hazards associated with renovation, repair and painting activities on or in public and commercial buildings. See the December 31, 2012 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.