Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB
REGULATORY SUMMARY

February 1, 2013

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Final Statutes, Regulations, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
AIR			
FEDERAL **National Ambient Air Quality Standards for Particulate Matter** 40 CFR Parts 50-53 and 58 78 Fed. Reg. 3086 (Jan. 15, 2013)	EPA **strengthened the 2006 national ambient air quality standards (NAAQS) for fine particulate matter ($PM_{2.5}$)**, fulfilling its obligation to review each NAAQS every five years and responding to a 2009 court decision remanding two of the existing $PM_{2.5}$ standards back to EPA for further review. Key provisions include: • Lowering the primary (health-based) annual $PM_{2.5}$ standard from 15 to 12 micrograms per cubic meter ($\mu g/m^3$) after accepting comments on alternative levels down to 11 $\mu g/m^3$. According to EPA, recent studies show that the existing standard does not adequately protect public health. • Retaining the 24-hour $PM_{2.5}$ standard of 35 $\mu g/m^3$. • Retaining the 24-hour primary standard for coarse particles (PM_{10}) of 150 $\mu g/m^3$. • Retaining the secondary standards for PM (with minor changes) to protect against welfare impacts. As part of the rulemaking, EPA also decided to: (1) relocate approximately 50 $PM_{2.5}$ monitors to sites near roadways in major cities; (2) revise the air quality index to reflect the new $PM_{2.5}$ standard; and (3) grandfather facilities from compliance with the prevention of significant deterioration program if the permit has been deemed complete or notice of a draft permit or preliminary determination has been issued before dates specified in the regulation. EPA elected not to finalize a new secondary standard for $PM_{2.5}$ of 30 deciviews, a visibility metric. Under the proposal, an area met the standard if the 90th percentile of 24-hour visibility index values in one year, averaged over three years, was no more than 30 deciviews. Ultimately, EPA concluded that the existing secondary 24-hour $PM_{2.5}$ standard provides sufficient visibility protection, making a new visibility-related standard unnecessary. The final rule can be found in the January 15, 2013 Federal Register at: www.gpo.gov/fdsys.	EPA's revised standards could result in the designation of additional $PM_{2.5}$ nonattainment areas. According to EPA, states with $PM_{2.5}$ nonattainment areas can meet the NAAQS by reducing direct emissions of $PM_{2.5}$ and/or emissions of nitrogen and sulfur oxides, both of which can transform into fine particles.	The rule takes effect March 18, 2013. States must submit their initial area designation recommendations by December 13, 2013; EPA plans to complete initial designations by December 13, 2014.

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FEDERAL **National Emission Standards for Hazardous Air Pollutants for Reciprocating Internal Combustion Engines** 40 CFR Part 63, subpart ZZZZ 78 Fed. Reg. 6674 (Jan. 30, 2013)	EPA revised **the National Emission Standards for Hazardous Air Pollutants** (**NESHAP**) **for new and existing stationary reciprocating internal combustion engines (RICE)** located at major and area sources of hazardous air pollutants. The standards, set forth at 40 CFR Part 63, subpart ZZZZ, were adopted in stages and impose different emission limits, management practice and other requirements on RICE depending on various factors, including the type of source (major versus area), whether the source is new or existing, the type of engine, the type of fuel burned, and whether the unit is used for emergencies. The standards have been the subject of multiple lawsuits and petitions for reconsideration; this rulemaking addresses many of the issues raised in these challenges. Major changes include: • Allowing stationary 4-stroke rich burn spark ignition engines subject to a 76 percent reduction in formaldehyde emissions to demonstrate compliance by showing that the engine is achieving at least a 30% percent reduction in total hydrocarbon (THC) emissions. According to EPA, testing for THC is cheaper and easier than testing for formaldehyde. • Allowing owners/operators of stationary emergency RICE to operate their engines as part of a demand response program within the 100 hours per year already permitted for maintenance and testing of such engines. This provision allows these engines to help stabilize the grid and support local electric system reliability without subjecting them to the stricter standards applicable to non-emergency units. • As part of the allowable 100 hours, authorizing certain emergency units to operate up to 50 hours per year to prevent voltage collapse or line overloads. • Starting in 2015, requiring entities with 100 horsepower or larger engines that agree to operate between 15 and 100 hours per year for emergency demand response purposes to submit annual reports. EPA also adopted changes designed to ease compliance for certain units located in remote areas, including parts of Alaska. As part of the rulemaking, EPA conformed the New Source Performance Standards for internal combustion engines, set forth at 40 CFR Part 60, subparts IIII and JJJJ, to the revised NESHAPs where necessary. The revisions to the RICE standards can be found in the January 30, 2013 Federal Register at: www.gpo.gov/fdsys.	Industries identified as potentially regulated under the RICE rule include electric power generation, transmission or distribution, medical and surgical hospitals, natural gas transmission, and crude oil production, among many others.	The rule takes effect April 1, 2013.

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NEW YORK STATE **Requirements for Heavy-Duty Vehicles Owned/Operated on Behalf of State Agencies** 6 NYCRR Part 248	DEC revised **the rules implementing the Diesel Emissions Reduction Act (DERA) of 2006 to address court decisions rejecting key elements of the rule and recent legislative changes**. DERA requires heavy-duty vehicles that are owned by, operated by or on behalf of, or leased by any state agency to implement measures to reduce sulfur dioxide, nitrogen oxide (NOx) and other emissions. The implementing regulations, set forth at 6 NYCRR Part 248, require state agencies, state and regional public authorities, and contractors working on behalf of these entities to use only heavy-duty vehicles (HDVs) that are: (1) fueled with ultra-low sulfur diesel fuel; and (2) equipped with best available retrofit technology (BART) that achieves specified reductions in particulate matter and, potentially, NOx emissions (unless the HDV has received a BART waiver). Also, certain HDVs must be equipped with low NOx rebuild kits, which are designed to correct flaws in the engine's software that lead to excess NOx emissions. Under Part 248, "contractor" was originally defined to include both prime and subcontractors. A pair of courts rejected this provision, concluding that the phrase "on behalf of" contained in the statute referred only to prime contractors. Also, the legislature revised the statute to extend the compliance schedule and add a new waiver provision. With this rulemaking, DEC: (1) revised the definitions of "contractor," "prime contractor" and "on behalf of" to clarify that the rule does not cover subcontractors; (2) excluded most companies delivering materials to the work site from regulation; (3) replaced the three-part compliance schedule with a single compliance deadline of December 31, 2013 for using and maintaining BART; and (4) added a new "useful life" waiver provision that allows DEC to exclude from regulation equipment that will be permanently taken out of service by December 31, 2013. The revised regulation can be found on DEC's website at: www.dec.ny.gov/regulations/propregulations.html.	Under Part 248, as revised, any HDVs owned/operated by a state agency or prime contractor that are used to provide "regulated entity work" to the state must satisfy Part 248. For purposes of the regulation, a HDV is any on or off-road vehicle powered by diesel fuel with a gross vehicle weight of more than 8,500 pounds; in the case of off-road vehicles, the term also includes vehicles with an engine of 50 horsepower or greater. The term does not include heavy-duty construction vehicles, emergency vehicles, most agricultural equipment, and certain other vehicles.	The revised rule takes effect February 9, 2013 (30 days after filing).

Other Recent Developments (Final)

AIR

FEDERAL: The Court of Appeals for the District of Columbia Circuit **struck down a 2010 rule establishing monitoring/modeling thresholds for fine particulate matter under the Prevention of Significant Deterioration (PSD) program**. New major facilities and facilities undergoing significant modifications must show that emissions from the project will not cause NAAQS violations or exceed specified "increments" (allowable increases in the amount of a particular pollutant in the ambient air). To simplify the review process, EPA established significant impact levels (SILs) and significant monitoring concentrations (SMCs) for $PM_{2.5}$. Facilities that show that emissions for the project will not exceed the SIL are not required to conduct more extensive air quality modeling or analysis; similarly, facilities that show that the ambient impact of a project is less than the SMC can avoid the requirement to collect additional monitoring data to establish background concentrations. In *Sierra Club v. EPA,* 2013 WL 216018 (D.C. Cir. 2013), the Court of Appeals for the District of Columbia Circuit vacated the regulations establishing the $PM_{2.5}$ SMC after concluding that the CAA is "extraordinarily rigid" in requiring new and modified sources to conduct monitoring. With respect to the SIL, the court accepted EPA's concession that it needed to revise portions of the SIL and vacated and remanded key portions of that provision back to EPA for further review.

Implications: The decision will likely compel more facilities to conduct full air quality analyses for projects that trigger PSD.

NEW YORK STATE: DEC **revised 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 amend 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 recent rulemaking, DEC revised 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. The revised rule can be found on DEC's website at: www.dec.ny.gov/regulations/propregulations.html.

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

WATER

FEDERAL: The U.S. **Supreme Court reaffirmed an earlier determination that the transfer of polluted water between two parts of the same water body does not require a wastewater discharge permit** under the National Pollutant Discharge Elimination system (NPDES) permit program. In *Los Angeles County Flood Control District v. Natural Resources Defense Council*, 2013 WL 68691 (2013), the plaintiffs commenced a citizen suit alleging that water quality measurements from monitoring stations in the Los Angeles and San Gabriel Rivers showed that the county flood control district was not meeting the requirements of its municipal separate storm sewer system permit. The Court of Appeals for the Ninth Circuit found for the plaintiffs, concluding that the flow of

polluted water from concrete channels into unlined portions the same waterway constituted an illegal discharge. The Supreme Court reversed, citing its decision in *South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95 (2004) for the proposition that the flow of polluted water from an improved portion of a navigable waterway into an unimproved portion of the same waterway does not qualify as a "discharge of pollutants" under the Clean Water Act. The court declined to consider petitioners' argument that the exceedances detected via in-stream monitoring were enough to trigger liability, concluding that it was not related to the narrow question on which certiorari was granted.

Implications: The decision reinforces the general rule that NPDES permits are not required when pollutants are transferred between two parts of the same waterbody. This issue has arisen frequently in connection with the New York City watershed.

FEDERAL: The U.S. Army Corps of Engineers (ACOE) **amended its nationwide permit (NWP) regulations to eliminate certain inconsistencies between the regulations and the typical NWP**. Individuals proposing to undertake activities that will disturb wetlands or waterways frequently must obtain a permit from the ACOE. To streamline the permit approval process, the ACOE has issued NWPs for project categories that typically result in minimal disturbances; many of the NWPs require project proponents to notify Corps district engineers prior to commencing NWP activities. Currently, most NWPs subject to preconstruction notification (PCN) provisions require the ACOE to issue a verification letter within 45 days of receipt of the PCN; by comparison, the existing ACOE regulations, set forth at 33 CFR Part 330, require a written response within 30 days. To eliminate this inconsistency, the ACOE revised the regulations to establish a 45-day review period for PCNs. The ACOE also revised the regulations to specify that NWP verification letters expire at the same time as the NWP itself rather than two years after issuance of the letter. The revisions take effect on February 27, 2013; they can be found in the January 28, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule changes are primarily of interest to consultants, developers and other involved in projects subject to NWPs.

ZONING

NEW YORK STATE: The New York Appellate Division, Third Department, issued a **decision clarifying the relationship between the SEQRA review process and environmental reviews required in conjunction with zoning approvals**. The plaintiffs in *Troy Sand & Gravel Co. v. Town of Nassau*, 101 A.D.3d 1505 (3d Dept. 2012) received a mining permit from DEC following a full SEQRA review that included an EIS. In the course of reviewing plaintiffs' applications for a special use permit and site plan review, the town sought expert help, with the costs to be reimbursed by the applicant. On appeal from the lower court's partial grant of the applicant's request for a preliminary injunction, the appellate division concluded that while DEC's SEQRA determination was binding on the town, that determination did not supplant the town's regulations governing review of special use permit applications or predetermine the town's decision on plaintiffs' zoning application. Instead, the town remained entitled to independently review plaintiffs' special use application in accordance with the standards set out in its zoning regulations. The court went on to find that New

York's Mined Land Reclamation Law did not preempt the town's local zoning regulations because those regulations did not directly regulate the specifics of the mining process.

Implications: The decision clarifies the relationship between the SEQRA review process and environmental reviews required by local zoning ordinances.

OTHER

FEDERAL: The Pipeline and Hazardous Material Safety Administration (PHMSA) **amended the hazardous materials regulations (HMR) to maintain alignment with international standards**. The regulations, which are set forth at 49 CFR Parts 171-173 and related provisions, regulate the transportation of hazardous materials. Every two years, the PHMSA reviews the HMR to identify changes needed to conform the rules to international standards. Major changes include: (1) authorizing more flexibility when choosing packages for hazardous materials, including allowing use of metals other than steel or aluminum for drums and boxes; (2) adopting flexible bulk container requirements (rules governing the use of reusable packaging for bulk shipments of certain authorized low-hazard commodities); (3) adopting rules addressing chemicals under pressure, which are often incorrectly classified as liquefied gases or shipped under special permits; (4) specifying a minimum size for identification markings on non-bulk packages; and (5) revising and updating the hazardous materials table. The rule took effect on January 1, 2013; it can be found in the January 7, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is primarily of interest to individuals/companies that transport hazardous materials.

Other Recent Developments (Proposed)

AIR

NEW YORK STATE: DEC proposed to **withdraw a state implementation plan (SIP) submitted for the 1987 coarse particulate matter (PM_{10}) national ambient air quality standard** as well as a request for redesignation of the nonattainment area; at the same time, DEC asked EPA to make a clean data finding for New York County based on monitoring data from 2009 through 2011 showing PM_{10} concentrations well below the applicable NAAQS. The finding, if granted, would relieve 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 1987 PM_{10} NAAQS. DEC is accepting comments on the submission until **March 1, 2013**; notice of the determination can be found in the January 30, 2013 Environmental Notice Bulletin at: www.dec.ny.gov/enb/20130130_not0.html.

Implications: The 1987 PM_{10} nonattainment area consists of New York County (i.e., Manhattan).

OTHER

FEDERAL: EPA requested comment on **national enforcement initiatives** to be undertaken in fiscal years 2014-2016. EPA selects priority areas every three years to focus federal resources on the most important environmental problems where noncompliance is a significant contributing factor and where federal enforcement can make a difference. The three criteria for selecting enforcement priorities are: (1) environmental impact; (2) significant noncompliance; and (3) appropriate federal role. The national enforcement initiatives selected for 2014-2016 are the same as those for 2011-2013 and include: (1) municipal sewage infrastructure (addressing sewage discharges from combined sewer systems, sanitary sewer systems and municipal separate storm sewer systems); (2) mineral processing (addressing hazardous waste at phosphoric acid facilities and high risk mineral processing sites); (3) new source review (controlling emissions from coal-fired power plants, cement plants, gas plants, and acid production plants); (4) air toxics (addressing toxic emissions from high-risk facilities by examining leak detection and repair, flares and excess emission sources); (5) energy extraction (addressing land-based natural gas extraction facilities, including corporate-wide evaluations); and (6) concentrated animal feeding operations (addressing animal waste discharges from large animal feeding facilities). With the notice, EPA is soliciting comment on the initiatives identified and on whether other initiatives should be pursued. EPA is accepting comments on the notice until **February 27, 2013**; it can be found in the January 28, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The notice is potentially of interest to facilities engaged in activities targeted under the enforcement initiative.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

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 for details.

February 5, 2013: Public hearing on DEC's proposed infrastructure SIPs for 2008 ozone and 2010 NO_2 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 ozone and 2010 NO_2 NAAQS. See the January 2, 2013 Environmental Notice Bulletin at www.dec.ny.gov/enb/20130102_not0.html for details.

February 27, 2013: Deadline for submitting comments on EPA's proposed national enforcement initiatives. See the January 28, 2013 Federal Register at www.gpo.gov/fdsys for details.

March 1, 2013: Deadline for submitting comments on DEC's request for a clean data finding relating to the 1987 PM_{10} NAAQS. See the January 30, 2013 Environmental Notice Bulletin at www.dec.ny.gov/enb/20130130_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 for details.