

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, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
HYDRAULIC FRACTURING			
<p>NEW YORK STATE <i>Norse Energy Corp. v. Town of Dryden</i> Upholding Local Ban on Natural Gas Drilling</p>	<p>In a recent decision, New York’s Appellate Division, Third Department, held that a local law banning natural gas drilling was not preempted by New York’s Oil, Gas and Solution Mining Law (OGSML). In <i>Norse Energy Corp. v. Town of Dryden</i>, a natural gas production company challenged a local zoning ordinance banning all activities relating to exploration for, and the production or storage of, natural gas and petroleum in the Town of Dryden. The company alleged that the ban violated the supersession clause of the OGSML, which provides that “[t]he provisions of [Article 23 of the New York Environmental Conservation Law] shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries; but shall not supersede local government jurisdiction over local roads or the rights of local governments under the Real Property Tax Law.” Affirming the trial court decision below, the appellate court concluded that while this provision prevents local governments from regulating the details of oil, gas and solution mining, it does not prevent them from exercising their zoning authority to bar such activities. In support of its decision, the court concluded that the legislative history of Article 23 shows that the law was enacted to address regulatory matters, such as well spacing and permitting, and not more traditional land use issues. The court also pointed to case law arising under similar provisions of the Mined Land Reclamation Law as evidence that the Legislature did not intend for the OGSML to preempt the zoning authority of municipalities, citing the New York Court of Appeals decision in <i>Frew Run Gravel Products v. Town of Carroll</i>, 71 NY2d 126 (1987). Finally, the court rejected the argument that local laws banning drilling conflict with the policies of the OGSML and are therefore preempted.</p>	<p>The decision makes clear that local governments can prohibit (or limit the location of) natural gas drilling under their zoning laws. However, such laws must focus on establishing permitted and prohibited uses of land and not on the details of the oil, gas and solution mining process. Thus, while a law banning natural gas drilling is acceptable under the court’s decision, one banning “high-volume hydraulic fracturing” might not be since it arguably addresses how natural gas drilling is conducted. The plaintiff is expected to seek leave to appeal the <i>Dryden</i> decision to the New York Court of Appeals; however, it is unclear whether the court will accept the case.</p>	<p>To date, dozens of cities, towns and villages have amended their zoning codes to prohibit natural gas drilling. The recent appellate court decision may prompt other municipalities to enact similar bans.</p>

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
REMEDICATION			
<p>FEDERAL OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air</p>	<p>EPA made available for comment its draft OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air, which describes the recommended framework for assessing vapor intrusion (VI) and provides guidance on monitoring and terminating building mitigation systems. The guidance begins with a brief overview of VI, addressing the definition of VI, relevant statutory authorities, the scope and applicability of the guidance, additional companion documents and resources, historical context, and public involvement. The remainder of the document consists of nine sections addressing:</p> <ul style="list-style-type: none"> • Conceptual model of vapor intrusion, describing VI and identifying the variables that affect vapor migration and entry. • Overview of VI guidance. • Considerations for nonresidential buildings, including issues associated with worker handling of hazardous chemicals. • Preliminary analysis of VI, addressing situations where only limited site-specific data may be available. • Detailed investigation of VI involving site-specific VI assessments emphasizing multiple lines of evidence. • Risk management framework containing general recommendations about risk-informed decisionmaking pertaining to VI. • Building mitigation and subsurface remediation, including combining subsurface VI remediation and other final cleanup actions with engineering exposure controls. • Preemptive mitigation/early action. • Planning guide for community involvement. <p>The guidance also includes appendices addressing: (1) chemicals of potential concern; (2) generic attenuation factors used to develop screening levels; (3) data quality assurance considerations; and (4) procedures for calculating vapor source concentration from groundwater sampling data.</p> <p>The draft guidance can be found on EPA’s website at: www.epa.gov/oswer/vaporintrusion/documents/vaporIntrusion-final-guidance-20130411-reviewdraft.pdf.</p>	<p>The guidance describes vapor intrusion as “the general term given to migration of hazardous vapors from any subsurface contaminant source, such as contaminated soil or groundwater, through the vadose zone and into indoor air.” The guidance applies to both residential and non-residential buildings and so is of potential interest to anyone involved with sites affected by subsurface volatile organic contamination.</p>	<p>EPA is accepting comments on the draft VI guidance until May 24, 2013.</p> <p>EPA last published guidance relating to VI in 2002. The agency considered public comments submitted from 2002 through 2012 as well as recommendations from the EPA Office of the Inspector General.</p>

Citation	Summary	Implications	Schedule/Notes
REMEDIATION			
FEDERAL Guidance for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites	<p>EPA made available for comment its draft <i>Guidance for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites</i>, which provides guidance on investigating and assessing petroleum vapor intrusion (PVI), with a focus on underground storage tanks (USTs). The guidance outlines the following steps for addressing PVI:</p> <ul style="list-style-type: none"> • Assess and mitigate immediate threats to safety (i.e., explosion/fire). • Conduct a site characterization and develop a conceptual site model. • Delineate a lateral inclusion zone (i.e., the spacing between clean monitoring points). • Identify preferential transport pathways within the inclusion zone (pathways that could result in PVI into buildings inside or outside the lateral inclusion zone). • Determine vertical separation distances for each building within the inclusion zone to narrow the investigation to potential receptors overlying contamination. • Mitigate PVI, as appropriate. <p>The document includes a table and flowchart outlining the PVI assessment process as well as detailed supporting technical guidance on various subjects.</p> <p>The draft guidance can be found on EPA’s website at: www.epa.gov/oust/cat/pvi/petroleum-vapor-intrusion-review-draft-04092013.pdf.</p>	<p>The guidance is primarily of interest to gasoline stations and non-marketing facilities regulated under the federal UST program. However, it may also be of interest to petroleum-only brownfield sites with conditions similar to those found at typical leaking UST sites. Other sites with petroleum contamination typically will be addressed under EPA’s general VI guidance.</p>	<p>EPA is accepting comments on the draft PVI guidance until May 24, 2013.</p>
WATER			
NEW YORK STATE Environmental Benefit Permit Strategy Rankings	<p>DEC made its revised Environmental Benefit Permit Strategy (EBPS) rankings available for review. The EBPS rankings prioritize State Pollutant Discharge Elimination System (SPDES) permits for full technical review based on criteria outlined in DEC guidance. The review under the EBPS program occurs independent of routine SPDES permit renewals. Each year, DEC publishes the priority list for central office, which handles most major industrial SPDES permits, and for each DEC regional office. SPDES permits on the top 10 percent of the lists are scheduled for review in the coming year.</p> <p>The 2013/2014 rankings can be found on DEC’s website at: www.dec.ny.gov/permits/6054.html.</p>	<p>Facilities in the top 10 percent of the EBPS rankings can expect their SPDES permits to be subject to a full technical review in the upcoming year.</p>	<p>Any interested party may submit a request to change a facility’s rankings.</p>

Other Recent Developments (Final)

AIR

FEDERAL: In response to petitions for reconsideration, EPA revised the **National Emission Standards for Hazardous Air Pollutants (NESHAP)**, otherwise known as the Mercury and Air Toxics Standards (MATS), 40 CFR Part 63, subpart UUUUU, and **New Source Performance Standards (NSPS)**, 40 CFR Part 60, subpart Da, **for new coal and oil-fired electric utility steam generating units**. EPA adopted the utility NESHAP and revised the NSPS in February 2012 more than a decade after first concluding that hazardous air pollutants from utility boilers should be regulated under the NESHAP program. Various industry representatives challenged the rules arguing, among other things, that EPA did not use all of the data in the record when it set the new source emission limits. After considering the petitions for reconsideration, EPA made various changes to the MATS for new utility units, including: (1) raising the limits for sulfur dioxide (coal and solid oil-derived units), filterable particulate matter (PM) (various units), and hydrogen chloride, lead, selenium and mercury (coal-fired units only); and (2) revising the rules governing PM monitoring, including requiring emissions testing after every exceedence of the operating limit for new sources equipped with PM continuous parameter monitoring systems and specifying the number of exceedences presumed to be a violation of the standard. EPA postponed a final decision on proposed changes to the rules governing startups and shutdowns pending further review. The final rule can be found in the April 24, 2013 Federal Register at: www.gpo.gov/fdsys; it became effective on that date.

Implications: The revisions are primarily of interest to owners/operators of power plants.

WATER

FEDERAL: EPA issued a **revised general permit under the National Pollutant Discharge Elimination System (NPDES) permit program authorizing discharges incidental to the normal operation of non-military and non-recreational vessels 79 or more feet in length**. EPA issued the first vessel general permit (VGP) in 2008 after a federal district court vacated a long-standing rule exempting discharges incidental to normal vessel operations from NPDES permitting; in response, Congress adopted a series of moratoriums prohibiting NPDES permitting of incidental discharges from commercial fishing vessels and small vessels. The VGP establishes effluent limits, best management practices, and inspection, monitoring, reporting and recordkeeping requirements to control discharges. The revised VGP expands the list of discharge categories covered by the permit. In addition, the revised permit for the first time contains numeric ballast water discharge limits for most vessels (expressed as the number of living organisms per cubic meter of ballast water); it also contains more stringent limits for certain other discharges. Certain commercial fishing boats are exempt from the permit requirements until December 2014 because of the congressional moratorium. A separate permit for smaller vessels, proposed at the same time as the permit for larger vessels, is still undergoing interagency review. Information about the VGP can be found at: cfpub.epa.gov/npdes/vessels/vgpermit.cfm.

Implications: The revised permit covers large commercial vessels (79 feet or more in length).

FEDERAL: The Court of Appeals for the Ninth Circuit recently held that **stormwater runoff containing wood preservative discharged from utility poles is not regulated under the Clean Water Act (CWA) or Resource Conservation and Recovery Act (RCRA)**. In *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, 2013 WL 1319462 (9th Cir. 2013), an environmental group brought a citizen suit against a pair of utilities alleging that discharges of pentachlorophenol from their wooden utility poles violates both the CWA and RCRA. The Ninth Circuit affirmed the district court decision dismissing the action for failing to state a cause of action, declaring with respect to the plaintiff's CWA claims that: (1) allegations of generalized stormwater runoff do not establish a "point source" as that term is defined in the CWA absent an allegation that the stormwater is discretely collected and conveyed to waters of the United States; and (2) stormwater runoff from defendants' utility poles is not "associated with industrial activity" and so does not require a SPDES permit. In support of the latter argument, the court noted, among other things, that stormwater runoff from utility poles does not meet the definition of "discharge associated with industrial activity" in EPA's stormwater regulations and that utility poles are not covered by any of the Standard Industrial Classification codes listed in EPA's stormwater regulations. With respect to RCRA, the court concluded that preservative escaping from treated utility poles through normal wear and tear was not automatically "solid waste" within the meaning of RCRA.

Implications: The decision clarifies that incidental discharges of pollutants to stormwater that are not channeled in any way and/or do not meet the definition of "discharge associated with industrial activity" under the federal stormwater regulations are not regulated under the CWA.

ZONING

NEW YORK STATE: A New York appellate division court recently issued a **decision addressing the line between household pets and other animals for zoning purposes**. In *La Russo v. Neuringer*, 2013 WL 1318816 (2d Dept. 2013), a village resident appealed a determination by the Mamaroneck Zoning Board of Appeals (ZBA) that keeping a coop of racing pigeons was not a permissible accessory use under the Village zoning code. The Appellate Division, Second Department, affirmed the lower court decision, upholding the ZBA's determination that keeping dozens of racing pigeons did not qualify as maintaining a "reasonable number of customary household pets". Among other things the court noted, that the pigeons were specially trained to compete in races and that pigeons that were old, slow or weak would be sold or destroyed. The court also noted that there was nothing in the record to suggest that other residents in the Village were keeping dozens of pigeons on their residential lots for any purposes. The court therefore concluded that the ZBA's decision to reject the coop was neither unreasonable nor irrational.

Implications: The decision provides some insight into the factors that may be considered in distinguishing household pets from other animals for zoning purposes.

Other Recent Developments (Proposed)**AIR**

FEDERAL: EPA proposed to **revise the New Source Performance Standards (NSPS) for the oil and natural gas sector**. EPA's original NSPS, set forth at 40 CFR Part 60, subparts KKK and LLL, addressed emissions of volatile organic compounds (VOCs) and sulfur dioxide from new, modified and reconstructed natural gas processing plants. Following a periodic review required under 42 USC § 7411(b), EPA adopted new standards, set forth at 40 CFR Part 60, subpart OOOO, addressing emissions from processing plants as well as upstream production activities and transmission and storage facilities – sources that were not previously subject to the NSPS. Of particular note, EPA adopted operational standards for completion of hydraulically fractured gas wells and standards to reduce VOC emissions from gas-driven pneumatic controllers, compressors, and storage vessels. Immediately after the standards were adopted, EPA discovered that it had seriously underestimated the number of tanks subject to the rule; as a result, industry complained that there would not be sufficient control equipment to meet the standard by the deadlines in the rule. To address this problem, EPA proposed to extend the deadlines for operators to install emission control equipment on storage vessels. EPA also proposed to amend the definition of storage vessel to clarify that it does not apply to fuel tanks and make other changes designed to ease compliance. EPA is accepting comments on the proposed revisions until **May 13, 2013**; the rulemaking can be found in the April 12, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The proposed rule is primarily of interest to oil and natural gas processing facilities.

FEDERAL: EPA proposed **additional changes to the National Emission Standards for Hazardous Air Pollutants for mineral wool production, 40 CFR Part 63, subpart DDD, and wool fiberglass manufacturing, 40 CFR Part 63, subpart NNN, as part of its ongoing residual risk and periodic technology review**. Under Clean Air Act § 112, 42 USC § 7412, EPA must assess whether any residual risk remains after imposing technology-based standards and revise them as necessary; EPA also must conduct a periodic review of the underlying technology to confirm that it remains current. Following that review, EPA proposed major changes to the NESHAPs for both source categories, including: adding emission limits for various pollutants not covered by the current standards; modifying testing, monitoring, notification, reporting and recordkeeping requirements; and revising the rules relating to startups, shutdowns and malfunctions. Upon further review, however, EPA concluded that many mineral wool fiberglass plants no longer meet the definition of major source. With this rulemaking, EPA proposed to establish an area source standard, set forth at 40 CFR Part 63, subpart NN, that would apply to gas-fired glass-melting furnaces located at wool fiberglass manufacturing facilities that are area sources. EPA also proposed additional changes to the air toxics standards for major source wool fiberglass and mineral wool production facilities. EPA is accepting comments on the proposed revisions to the standards until **May 30, 2013**; the rulemaking can be found in the April 15, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The proposed revisions are primarily of interest to wool fiberglass and mineral wool production facilities. EPA estimates that there are approximately seven mineral wool facilities and 30 wool fiberglass facilities operating nationwide;

most of wool fiberglass production facilities are currently area sources and most of the remaining facilities are expected to change their production processes to become area sources.

FEDERAL: EPA proposed to exempt certain substitute refrigerants from the prohibition against venting, releasing or disposal under Title VI of the Clean Air Act. Title VI regulates the manufacture, use and disposal of ozone-depleting substances such as chlorofluorocarbons (CFCs) and hydrochlorofluorocarbons (HCFCs) used as refrigerants. Among other things, the law prohibits the venting of refrigerants during the maintenance, service, repair and disposal of appliances; this prohibition extends to substitutes for CFCs and HCFCs unless EPA determines that the release of the substitutes does not pose a threat to the environment. With this rulemaking, EPA is proposing to exempt from the venting prohibition three hydrocarbon refrigerant substitutes that EPA previously identified as acceptable under its Significant New Alternatives Policy (SNAP) program. The three refrigerants are isobutane (R-600a), and R-441A, and propane (R-290). In reaching its decision, EPA concluded that these substitute refrigerants, when used as authorized under the SNAP program, do not pose a threat to the environment as they have a low global warming potential and no ozone-depletion potential, and will not noticeably affect local air quality if vented. EPA went on to find that the refrigerants are unlikely to pose a toxicity risk to the general population and that flammability risks are adequately controlled by worker safety, building and fire codes. EPA is accepting comments on the proposed rule until **June 11, 2013**; it can be found in the April 12, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The proposed rule is primarily of interest to owners of air conditioning and refrigeration equipment and those engaged in the repair and disposal of such equipment.

FEDERAL/NEW YORK STATE: EPA proposed to approve revisions to New York's State Implementation Plan (SIP) incorporating changes to the following state air regulations: (1) 6 NYCRR §212.12, adding control requirements for hot mix asphalt plants to reduce nitrogen oxide (NOx) emissions from combustion during the aggregate drying and heating process; (2) 6 NYCRR Part 220, revising the reasonably available control technology (RACT) requirements for NOx emissions from Portland cement plants and adding NOx RACT requirements for glass manufacturing plants; and (3) 6 NYCRR subpart 227-2, revising the NOx control requirements for a wide variety of combustion sources located at major NOx facilities. With one exception, EPA reviewed each of the regulations and concluded that they were consistent with the CAA, EPA regulations and EPA policy; EPA approved Part 220 based on DEC's commitment to submit individual RACT determinations to EPA as SIP revisions by December 1, 2013. EPA is accepting comments on the proposed approval until **May 10, 2013**; the notice can be found in the April 10, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: Once approved, the listed regulations can be enforced by EPA as well as DEC.

NEW YORK STATE: DEC proposed to revise its transportation conformity regulations to streamline the rule and conform to federal requirements. Under the CAA, states must ensure that federally funded transportation plans, transportation improvement programs, and individual transportation projects located in nonattainment and maintenance areas are consistent with the SIP. The

transportation conformity regulations identify agencies involved in the review, establish timeframes and lay out the procedures for consultation among involved agencies. With this rulemaking, DEC proposed to repeal 6 NYCRR Part 240 and replace it with a new version that addresses recent changes to the federal transportation conformity regulations. The new DEC regulations focus on the consultation process for involved agencies, including: (1) interagency communications; (2) provision of draft documents; (3) consultation obligations and procedures, including the roles and responsibilities of DEC, the New York State Department of Transportation, and metropolitan planning organizations; (4) development of transportation control measures (TCM) and motor vehicle emissions budgets; (5) specific procedures relating to air quality models, regional significance and project changes, procedures for evaluating certain exempt projects, timely TCM implementation, and assessment of localized violations (so-called “hot spots”), among other subjects; (6) conflict resolution; and (7) public participation. DEC is accepting comments on the proposed revisions until **June 13, 2013**. A public hearing is scheduled for June 4, 2013 at 2:00 p.m. at DEC Headquarters in Albany; additional hearings will be held in Long Island City and Avon. Information about the proposed rule can be found on DEC’s website at: www.dec.ny.gov/regulations/proproregulations.html.

Implications: The revisions are primarily of interest to transportation planners and those engaged in projects with major transportation implications.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

May 10, 2013: Deadline for submitting application for DEC’s Environmental Excellence Awards. See DEC’s website at www.dec.ny.gov/public/945.html for details.

May 10, 2013: Deadline for submitting comments on EPA’s proposal to approve revisions to New York’s ozone SIP incorporating recent changes to state reasonably available control technology regulations addressing hot mix asphalt production plants, stationary combustion installations, Portland cement plants, and glass manufacturing plants. See the April 10, 2013 Federal Register at www.gpo.gov/fdsys for details.

May 13, 2013: Deadline for submitting comments on EPA’s proposed revisions to the oil and natural gas sector NSPS. See the April 12, 2013 Federal Register at www.gpo.gov/fdsys for details.

May 13, 2013: Deadline for submitting comments on EPA’s proposal to include ortho-nitrotoluene on the list of TRI chemicals. See the March 13, 2013 Federal Register at www.gpo.gov/fdsys for details.

May 17, 2013: Deadline for submitting comments on EPA's proposed revisions to the GHG reporting rule. See the April 2, 2013 Federal Register at www.gpo.gov/fdsys for details.

May 20, 2013: Deadline for submitting comments on DEC's draft Full EAF Workbook. See DEC's website at www.nysfeaf.net for details.

May 24, 2013: Deadline for submitting comments on the following EPA documents relating to vapor intrusion: *OSWER Final Guidance for Assessing and Mitigating the Vapor Intrusion Pathway from Subsurface Sources to Indoor Air* and *Guidance for Addressing Petroleum Vapor Intrusion at Leaking Underground Storage Tank Sites*. The general vapor intrusion guidance can be found at www.epa.gov/oswer/vaporintrusion/documents/vaporIntrusion-final-guidance-20130411-reviewdraft.pdf. The petroleum vapor intrusion guidance can be found at: www.epa.gov/oust/cat/pvi/petroleum-vapor-intrusion-review-draft-04092013.pdf.

May 28, 2013: Deadline for submitting comments on EPA's proposed clarification of the compliance certification requirements of its Title V operating permit regulations. See the March 29, 2013 Federal Register at www.gpo.gov/fdsys for details.

May 30, 2013: Deadline for submitting comments on EPA's proposed revisions to the mineral wool production and wool fiberglass manufacturing standards. See the April 15, 2013 Federal Register at www.gpo.gov/fdsys for details.

May 31, 2013: Deadline for submitting comments on EPA's proposed revisions to the stormwater discharge effluent limitation guidelines and standards for the construction and development point source category. See the April 1, 2013 Federal Register at www.gpo.gov/fdsys for details.

June 4, 2013: Public hearing on DEC's proposed revisions to its transportation conformity regulations scheduled for 2:00 p.m. at DEC Headquarters, 625 Broadway, Albany. Additional public hearings are scheduled later in the week at DEC offices in Long Island City and Avon.

June 11, 2013: Deadline for submitting comments on EPA's proposal to exempt certain hydrocarbon-based refrigerants from the prohibition against venting under EPA's program regulating ozone-depleting substances. See the April 12, 2013 Federal Register at www.gpo.gov/fdsys for details.

June 13, 2013: Deadline for submitting comments on DEC's proposed revisions to its transportation conformity regulations. See DEC's website at: www.dec.ny.gov/regulations/propregulations.html for details.