

# Young / Sommer LLC

## ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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**Final Statutes, Regulations, Guidance and Cases**

Citation	Summary	Implications	Schedule/Notes
<b>ENVIRONMENTAL REVIEW</b>			
<p><b>NEW YORK STATE State Environmental Quality Review Act (SEQRA) Short/Full EAF Workbooks and Related Materials</b> 6 NYCRR § 617.20, Appendices A and B</p>	<p>DEC has published various <b>resources designed to help applicants and agencies complete the revised short and full environmental assessment forms (EAF)</b>, which took effect October 7, 2013. DEC revised the EAFs in 2012 to reflect changes in environmental concerns and make the forms easier to use.</p> <p>As part of the EAF “rollout,” DEC published a pair of workbooks explaining how to answer each question in the short and full EAF. Both forms consist of three parts: (1) Project Information (completed by applicant or project sponsor); (2) Impact Assessment/Identification of Potential Project Impact (completed by lead agency); and (3) Determination of Significance/Evaluation of the Magnitude and Importance of Project and Determination of Significance (completed by lead agency). For each question relating to Parts 1 and 2, the workbooks provide background explaining what information the question is seeking and guidance on answering the question as well as examples, when appropriate. With respect to Part 2, Impact Assessment, the workbook also identifies what questions in Part 1 should be reviewed, provides a list of possible subjects to consider when assessing project impact, and offers examples illustrating each question. Many of these questions are designed to elicit information on the possible size of the impact. If the agency checks moderate to large impact for one or more of the questions in Part 2, it must proceed to Part 3. The workbooks contain general instructions on evaluating significance as well as examples illustrating how significance should be assessed and offering appropriate statements of significance for each example.</p> <p>DEC also is developing the EAF Mapper which finds some of the location-related information needed in Part 1 from DEC data sources and downloads it directly into an electronic EAF. The electronic form will be accompanied by a report containing answers to various questions as well as maps of the project.</p> <p>The workbooks can be accessed on DEC’s website at: <a href="http://www.dec.ny.gov/permits/357.html">www.dec.ny.gov/permits/357.html</a>.</p>	<p>The short and full EAFs are used by agencies to assess the environmental significance of actions they plan to undertake, fund or approve and so are crucial to the SEQRA process. The full EAF had not been substantially revised since 1978, while the short EAF had not been substantially revised since 1987. The EAF workbooks are potentially of interest to anyone involved in the environmental assessment process under SEQRA either as an applicant or agency.</p>	<p>The new forms took effect October 7, 2013. DEC previously made the draft workbooks available for comment.</p> <p>The revisions to the EAFs are part of a larger effort to update SEQRA. Late last year, DEC published a final scope issued in conjunction planned revisions to the SEQRA regulations. Changes under consideration include: (1) revising the list of Type I actions; (2) expanding the list of Type II actions (i.e., actions that do not require SEQRA review); (3) requiring scoping for all environmental impact statements (EISs) and better targeting the scoping process; and (4) revising the rules addressing preparation of the EIS to establish more realistic time frames and minimize the potential for multiple reviews.</p>

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<b>ENFORCEMENT</b>			
<p>NEW YORK STATE <b>Environmental Audit Incentive Policy</b> Commissioner Policy 59</p>	<p>DEC issued a <b>policy document entitled <i>Environmental Audit Incentive Policy</i></b>, which is designed to encourage regulated entities to audit their operations by reducing or waiving penalties for violations that are discovered and disclosed voluntarily. The policy is available to any regulated entity except those that have received an environmental conservation appearance ticket, notice of hearing and complaint, or administrative or judicial order in the past 5 years and were uncooperative in remedying past violations. However, the types of violations that are eligible for the policy are limited. Among other things, the policy excludes violations of laws subject to enforcement actions within the past 5 years, alleged criminal conduct, violations discovered during DEC inspections, and violations required to be self-reported. In addition, violations characterized as significant under various programs may be excluded from eligibility under the policy.</p> <p>To take advantage of the policy, the regulated entity must disclose the violation “expeditiously” in writing, consistent with any applicable time frame established by law; if there is no time frame specified, the violation must be disclosed within 30 days of discovery unless DEC establishes an alternate timeframe in an environmental audit agreement. Violations typically must be corrected no later than 60 days after disclosure to DEC. DEC will waive gravity-based penalties for companies that self-disclose under the policy and may waive other penalties if the company implements environmental audits or environmental management systems during the ordinary course of business or pursuant to an environmental audit agreement. Companies receiving penalty mitigation must identify measures to assure future compliance and state in writing that those measures will be implemented and maintained. The policy includes other incentives to encourage companies to enter into environmental audit agreements.</p> <p>The policy can be found on DEC’s website at: <a href="http://www.dec.ny.gov/regulations/93791.html">www.dec.ny.gov/regulations/93791.html</a>.</p>	<p>The policy represents an attempt by DEC to encourage voluntary environmental compliance by granting penalty waivers to regulated entities that identify noncompliance, self-report the violations to DEC, and take steps to correct the problem and prevent future noncompliance. It also establishes other incentives to encourage companies to enter into agreements with DEC that commit the company to implementing compliance audits and/or using environmental management systems or pollution prevention.</p>	<p>The policy takes effect <b>November 18, 2013</b>. DEC accepted comments on the draft policy earlier this year.</p>

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
<p><b>AIR</b></p> <p>NEW YORK STATE  <b>Process Operations</b>                      6 NYCRR Part 212</p>	<p>DEC has made preliminary draft regulations available to <b>replace its existing 6 NYCRR Part 212, General Process Emission Source regulation, with a new Process Operations regulation.</b> Part 212 applies to emissions and emission sources not regulated under other, more specific state air pollution regulations. Under Part 212, DEC assigns an environmental rating to air contaminants and determines the level of emission control required based on the source’s emission rate potential (ERP). The preliminary draft revisions to Part 212 maintain the basic structure of the program while making various changes:</p> <ul style="list-style-type: none"> <li>• <b>Applicability:</b> The new Part 212 will apply upon application for a new or modified permit or registration or upon application for renewal.</li> <li>• <b>Determination of environmental rating.</b> The revised regulation includes a general overview of the factors considered by DEC in assigning environmental ratings to contaminants.</li> <li>• <b>Exceptions.</b> The list of exceptions to Part 212 has been revised and expanded.</li> <li>• <b>Determining emission standards.</b> Facilities subject to the new Part 212 generally must comply with the emission control standards spelled out in 6 NYCRR subpart 212-2, which are based on the contaminant’s environmental rating and ERP. Where a source will apply best available control technology or toxic BACT, DEC may specify a less stringent permissible emission rate. With certain exceptions, sources that comply with New Source Performance Standards (NSPS) or National Emission Standards for Hazardous Air Pollutants (NESHAPs) need not comply with the limits in subpart 212-2. Special rules apply to specific persistent, bioaccumulative or toxic (PBT) chemicals.</li> </ul> <p>The rule also includes opacity standards and sampling and monitoring provisions.</p> <p>A copy of the preliminary draft standards can be obtained from Steve DeSantis at DEC at: <a href="mailto:sxdesant@gw.dec.state.ny.us">sxdesant@gw.dec.state.ny.us</a>.</p>	<p>The Part 212 regulations apply to all regulated air emission sources that are not subject solely to more specific emission standards. The rule has been in place for over 40 years; the core provisions have not been revised since 1985. The preliminary draft revisions are intended to provide consistency with the federal NESHAP program and ensure proper regulation of the most toxic contaminants. In particular, DEC has lowered the applicability threshold for A-rated contaminants from 1 lb/hour to 0.1 lb/hour to ensure highly toxic contaminants are properly controlled. Emissions of PBTs must meet specific annual mass emission limits or achieve strict emission control standards. Facilities subject to a NESHAP that emit PBTs must submit a Toxic Impact Assessment showing that emissions of each PBT will not exceed specified guideline and mass concentrations.</p>	<p>A public information meeting on the preliminary draft revisions to 6 NYCRR Part 212 is scheduled for <b>November 12, 2013</b> at 10:00 a.m. at DEC Headquarters in Albany. DEC has not specified a deadline for submitting written comments on the preliminary draft rule.</p>

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<b>OTHER</b>			
<p>NEW YORK STATE  <b>Prohibited and Regulated Invasive Species</b>                      6 NYCRR Part 575</p>	<p>DEC proposed <b>regulations to identify and classify invasive species and establish a permit system</b> in an effort to restrict the sale, purchase possession, propagation, introduction, importation and transport of invasive species. The proposed rule, to be set forth at 6 NYCRR Part 575, defines invasive species as “a species that is nonnative to the ecosystem under consideration, and whose introduction causes or is likely to cause economic or environmental harm or harm to human health” that significantly outweighs any benefits. The rule distinguishes between prohibited and regulated invasive species and provides specific lists of each, identified by scientific and common names and species categories. With certain exceptions, individuals are barred from possessing with intent or actually selling, importing, purchasing, transporting, introducing or propagating any prohibited invasive species. In addition, such species must be rendered nonliving and nonviable before disposal. By comparison, while individuals may legally possess regulated species they may not be knowingly or carelessly introduced into the wild. Regulated species must be sold with a label or notice that states “Invasive Species – Harmful to the Environment,” lists non-invasive alternatives, and provides instructions on preventing their spread. The rule contains exemptions for various management, transportation and other activities. DEC may issue permits authorizing possession of prohibited/regulated species for research, education and other approved activities.</p> <p>The regulations classify non-native species as prohibited or regulated based on a ranking system established in <i>A Regulatory System for Non-Native Species</i> (June 2010). The “invasiveness rank” assigned – very high, high, medium, low or insignificant – is balanced against the socioeconomic benefits of a particular species. For example, a moderately invasive species that imposes significant economic harm may be prohibited while one with no significant adverse economic impacts may merely be regulated. The rule includes a petition process for adding/removing invasive species from the list.</p> <p>The proposed regulation can be found on DEC’s website at: <a href="http://www.dec.ny.gov/regulations/2359.html">www.dec.ny.gov/regulations/2359.html</a>.</p>	<p>The proposed regulation is primarily of interest to individuals engaged in the sale and distribution of plants and animals such as pet shops, nurseries, and landscaping services. However, the rule extends to anyone who “purchases, transports, introduces or propagates any prohibited invasive species.” Thus, an individual who knowingly purchases a prohibited invasive plant from a catalogue or gives a cutting of such a plant to someone else is arguably violating the proposed regulation. By comparison, the rule includes an exception for persons who incidentally or unknowingly possess, sell, import, purchase, transport, or introduce a prohibited or regulated species and take reasonable precautions.</p>	<p>DEC is accepting comments on the proposed regulation until <b>December 23, 2013</b>. A public hearing on the proposal will be held on December 16, 2013 at 3:00 p.m. at DEC Headquarters in Albany (with additional hearings scheduled in mid-December in Buffalo, Syracuse and Stony Brook).</p>

## Other Recent Developments (Final)

### CLIMATE CHANGE

FEDERAL: EPA released the third round of **data received under its mandatory greenhouse gas (GHG) reporting program**. Under 40 CFR Part 98, facilities in certain industrial categories that directly emit more than 25,000 metric tons of carbon dioxide equivalent must report their GHG emissions to EPA annually following source category-specific protocols; suppliers of certain fossil fuels and industrial gases also must report emissions associated with their products. Among stationary sources, the data released by EPA show that power plants remained by far the largest GHG producers in 2012, accounting for 64% of GHG emissions among direct emitters required to report under the program. However, emissions from power plants have decreased approximately 10% in the two years since reporting began due largely to the substitution of natural gas for coal. The petroleum and natural gas sector was a distant second, followed closely by petroleum refining and chemical production. EPA has developed a data publication tool known as “FLIGHT” that allows users to view GHG data in a variety of ways, including by location, facility, industrial sector, or state. The data can be found on EPA’s website at: [www.epa.gov/ghgreporting/ghgdata/index.html](http://www.epa.gov/ghgreporting/ghgdata/index.html).

Implications: The data provide a snapshot of recent GHG emissions from larger sources.

### BULK STORAGE

FEDERAL: EPA released **updated guidance on implementing the spill prevention, control and countermeasure (SPCC) rule**, set forth at 40 CFR Part 112, which requires owners of certain facilities that store oil in bulk to prepare an SPCC plan identifying the measures implemented to prepare for, prevent and respond to oil spills. The document, entitled *SPCC Guidance for Regional Inspectors*, provides background information about the history and purpose of the SPCC program, as well as detailed instructions on complying with key program requirements, including: applicability (definition of oil and facility, relationship with Department of Transportation programs, storage capacity thresholds, exemptions, applicability for different types of containers); environmental equivalence (authorizing alternative compliance measures that achieve equivalent levels of environmental protection); secondary containment and determinations of impracticability; oil/water separators; facility diagram and description; and inspection, evaluation and testing. The guidance document also includes extensive appendices, including various sample SPCC plans, SPCC inspection checklists, and policy documents. The guidance can be found on EPA’s website at: [www.epa.gov/emergencies/content/spcc/spcc\\_guidance.htm](http://www.epa.gov/emergencies/content/spcc/spcc_guidance.htm).

Implications: The guidance document is primarily of interest to facilities that store oil in bulk. The SPCC rule applies to facilities with more than 42,000 gallons of underground or 1,320 gallons of aboveground oil storage capacity (including containers and equipment with a capacity of 55 gallons or more).



## REMEDICATION

FEDERAL: The Court of Appeals for the Second Circuit concluded in *New York v. Next Millenium Realty, LLC*, that **measures taken by New York to address contamination of a town's drinking water supply were ongoing removal actions under the federal Superfund law** and that the State's cost recovery action was therefore timely. The town installed a granular activated carbon (GAC) system to treat volatile organic compounds in its drinking water supply wells, followed several years later by an air stripper. After conducting its own investigation, DEC issued a final record of decision selecting a permanent remedy to address the pollution source that included continuing the existing GAC and air stripper systems. In a cost recovery action, the district court concluded that the GAC and air stripper systems were "remedial" and that the action was therefore time-barred because it was filed more than six years after commencement of construction. The Second Circuit vacated the lower court decision, concluding that the GAC and air stripper were removal measures because both systems were installed in response to an immediate public health hazard and designed to address contamination at the endpoint rather than permanently remediate the problem. At the same time, the court rejected defendants' argument that the duration and cost of the measures indicated that they were remedial rather than removal actions. Based on this finding, the court concluded that the suit was timely under 42 USC § 9613(g)(2)(A), which requires removal-based cost recovery actions to be filed within 3 years of completion of the removal action.

Implications: The decision clarifies the distinction between removal and remedial actions under the federal Superfund program both generally and in relation to the statute of limitations.

FEDERAL: After receiving negative comments, EPA withdrew a direct final rule **amending the standards and practices for all appropriate inquiries to reference American Society for Testing and Materials (ASTM) International's Standard E1527-13, Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process**. In 2005, EPA issued a rule setting standards for conducting "all appropriate inquiries" into prior ownership and use of property for purposes of allowing site owners/purchasers to qualify for liability protections under the federal Superfund program. The rule established a procedure for demonstrating all appropriate inquiries and allowed use of ASTM E1527-05, *Standard Practice for Environmental Site Assessments: Phase I Environmental Site Assessment Process* in lieu of following the requirements in the final rule. With the recent direct final rule, EPA also allowed the use of ASTM E1527-13 to conduct site assessments. However, various commenters objected on the ground that the stricter new standard should replace the old one rather than serve as an alternative. The direct final rule and notice of withdrawal can be found in the August 15, 2013 and October 29, 2013 Federal Registers at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The rule is potentially of interest to anyone involved in purchasing possible brownfield sites.

## WATER

NEW YORK STATE: DEC issued two **general permits for placement, construction, maintenance and removal of stream crossings for timber harvesting**. The first permit (GP-0-13-002), Temporary Bridges/Arch Culverts for Logging Activities,

authorizes temporary bridges no longer than 30 feet placed bank-to-bank and temporary arch culverts in streams no greater than four feet wide. The second permit (GP-0-13-004), Temporary Bridges and Culverts for Logging Activities, applies to bridges no longer than 50 feet as well as temporary culverts in streams no greater than eight feet wide. Individuals seeking coverage under the first permit must submit a completed Request for Authorization Form and supplementary information to DEC and wait five days before proceeding with construction authorized under the permit. Individuals seeking coverage under the second permit must receive written authorization from DEC before proceeding. The permittee must then comply with the terms and conditions of the permit. The permits can be found on DEC's website at: [www.dec.ny.gov/permits/93482.html](http://www.dec.ny.gov/permits/93482.html).

Implications: The permits are primarily of interest to individuals/companies engaged in timber harvesting.

## Other Recent Developments (Proposed)

### WATER

NEW YORK STATE: DEC made available for comment a draft document entitled *A Survey of Methods for Implementing and Documenting Water Conservation in New York* that contains water conservation methods and best management practices for water conservation for major categories of non-drinking water users, including industrial, commercial, power-generation, agricultural and institutional categories. DEC's recently adopted water withdrawal permitting regulations, set forth at 6 NYCRR Part 601, require that environmentally sound and economically feasible water conservation measures be taken by all permitted water withdrawers. DEC commissioned the report to serve as a resource for non-drinking water users subject to the water withdrawal permitting program. The document contains general suggestions for water conservation followed by a list of specific water conservation measures organized by water use activity, including indoor domestic use, building maintenance and exterior areas, cooling and heating, laundries, agricultural uses, industrial uses (rinsing and cleaning, plating and metal finishing, textiles, mining), and medical facilities. The document also includes a discussion of water reuse, reclaimed wastewater and alternate sources of water as well as methods of documenting water use and conservation efforts. DEC is accepting comments on the draft survey document until **November 22, 2013**; it can be found on the DEC website via a link at: [www.dec.ny.gov/lands/67073.html](http://www.dec.ny.gov/lands/67073.html).

Implications: The document is potentially of interest to any facility subject to DEC's water withdrawal permit program as well as any industrial, commercial or institutional facility with a general interest in water conservation.

### OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: The Occupational Safety and Health Administration (OSHA) has released a pair of **online resources to assist companies interested in improving indoor air quality**. OSHA has established mandatory permissible exposure limits (PELs) on the amount or concentration of a substance allowed in the air to protect worker health. However, many PELs are more than 40 years old and do not reflect current scientific knowledge about exposure risks. To encourage employers to reduce chemical concentrations in the air, OSHA



has created an online toolkit to identify safer chemicals that can be used in place of more hazardous ones. The toolkit can be accessed at: [www.osha.gov/dsg/safer\\_chemicals/index.html](http://www.osha.gov/dsg/safer_chemicals/index.html). OSHA also has created annotated PEL tables that provide a side-by-side comparison of the existing PELs with other limits, including the California Division of Occupational Safety and Health PELs, the National Institute for Occupational Safety and Health recommended exposure limits, and the American Conference of Governmental Industrial Hygienist threshold limit values. This document can be accessed at: [www.osha.gov/dsg/annotated-pels/index.html](http://www.osha.gov/dsg/annotated-pels/index.html). OSHA hopes companies will use these resources to assess their operations and take steps to reduce occupational exposure to hazardous chemicals in the air.

Implications: The initiative is potentially of interest to any company that uses hazardous chemicals that may enter indoor air.

## Upcoming Deadlines

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

**November 4, 2013**: Deadline for submitting comments on EPA's proposed revisions to the reciprocating internal combustion engine NESHAP. See the September 5, 2013 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**November 12, 2013**: Deadline for submitting comments on EPA's proposed revisions to reporting, recordkeeping and confidentiality provisions of the GHG reporting rule. See the September 11, 2013 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**November 12, 2013**: Public stakeholder meeting on preliminary draft revisions to general process emission source regulations scheduled for 10:00 a.m. at DEC Headquarters, 625 Broadway, Albany. Contact Steve DeSantis at DEC at [sxdesant@gw.dec.state.ny.us](mailto:sxdesant@gw.dec.state.ny.us) for additional information.

**November 22, 2013**: Deadline for submitting comments on the draft document entitled *A Survey of Methods for Implementing and Documenting Water Conservation in New York*, issued in conjunction with New York's new water withdrawal permit regulations. The draft document can be found on DEC's website at [www.dec.ny.gov/lands/67073.html](http://www.dec.ny.gov/lands/67073.html).

**December 3, 2013**: Deadline for submitting comments on EPA's proposed revisions to the water quality standards regulations. See the September 4, 2013 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**December 4, 2013**: Deadline for submitting comments on DEC's proposed regulation for LNG facilities (extended from November 4, 2013). See DEC's website at [www.dec.ny.gov/regulations/93069.html](http://www.dec.ny.gov/regulations/93069.html) for details.

**December 12, 2012:** Deadline for submitting comments on EPA's proposed NPDES electronic reporting rule (extended from October 28, 2013). See the July 30, 2013 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**December 16, 2013:** Public hearing on DEC's proposed invasive species regulation scheduled for 3:00 p.m. at DEC Headquarters, 625 Broadway, Albany. Additional public hearings are scheduled in mid-December in Buffalo, Syracuse and Stony Brook.

**December 23, 2013:** Deadline for submitting comments on DEC's proposed invasive species regulation. See DEC's website at [www.dec.ny.gov/regulations/2359.html](http://www.dec.ny.gov/regulations/2359.html) for details.

**January 27, 2014:** Deadline for submitting comments on OSHA's proposed amendments to the standards for occupational exposure to respirable crystalline silica (extended from December 11, 2013). See the September 12, 2013 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.