

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
REMEDICATION			
FEDERAL Groundwater Remedy Completion Strategy	<p>EPA made available for comment a draft <i>Groundwater Remedy Completion Strategy</i> that outlines a step-wise plan and decisionmaking process for evaluating groundwater remedies to determine whether they are operating as anticipated or whether other remedial actions are necessary to achieve cleanup goals. The EPA strategy is comprised of five elements:</p> <ul style="list-style-type: none"> • Understand site conditions. The first step involves obtaining a comprehensive understanding of site conditions and response actions. • Design site-specific remedy evaluations. This step contemplates developing criteria for evaluating the groundwater remedy during implementation based on remedy operations, remedy progress, attainment of cleanup levels, and other site factors. • Develop performance metrics and collect monitoring data. This step involves identifying the methods for measuring the performance of remedy operations (extraction rate, capture zone, effluent concentration, etc.), progress (rate of reduction of contaminant volume/mass, microbial populations, etc.) and attainment (individual well concentrations, individual well trends, etc.). This step also involves periodically evaluating the groundwater monitoring network to ensure adequate and accurate assessment of groundwater contaminant concentrations, trends and changes. • Conduct remedy evaluation. This step includes evaluating: (1) the engineering, operating and monitoring components of the remedy; (2) the remedy performance metrics and monitoring data; and (3) whether the well is achieving the goal of aquifer restoration. • Make management decisions. If the evaluation outlined above shows that the remedial action will not achieve cleanup objectives, the remedy must be reviewed to determine whether other remedial alternatives should be implemented or whether a waiver of applicable or relevant and appropriate requirements is necessary. <p>The draft guidance can be found at the following website: http://op.bna.com/env.nsf/r?Open=rlen-9czmtf.</p>	<p>The guidance is potentially of interest to anyone engaged in groundwater remediation activities under the federal Superfund program. The guidance is one of several documents EPA is releasing that are intended to serve as a “roadmap” for addressing groundwater cleanups.</p>	<p>EPA is accepting comments on the draft strategy document until December 20, 2013.</p>

Citation	Summary	Implications	Schedule/Notes
OCCUPATIONAL SAFETY AND HEALTH			
<p>FEDERAL Tracking Workplace Injuries and Illnesses 29 CFR Parts 1904 and 1952 78 Fed. Reg. 67254 (Nov. 8, 2013)</p>	<p>OSHA is proposing major changes to the rules governing tracking of injuries and illnesses to improve access to the information. The existing rule, set forth at 29 CFR Part 1904, requires certain employers to record work-related injuries and illnesses that involve death, loss of consciousness, days away from work, restriction of work, transfer to another job, medical treatment other than first aid, or diagnosis of a significant injury or illness by a physician or other licensed health care professional. Covered employers must complete Form 301 (Injury and Illness Incident Report) for each reportable injury/illness and record the incident on Form 300 (Log of Work-Related Injuries and Illnesses). Each year, employers use the information from these forms to complete Form 300A (Summary of Work-Related Injuries and Illnesses). With this rulemaking, OSHA is proposing to require electronic submission of injury/illness data to the agency as follows:</p> <ul style="list-style-type: none"> • Establishments required to keep injury/illness records under Part 1904 with 250 or more employees must electronically submit data from these records to OSHA on a quarterly basis. In addition, summary data from OSHA Form 300A must be submitted annually. • Establishments required to keep injury/illness records under Part 1904 with 20 or more employees in certain designated industries must electronically submit data from Form 300A to OSHA annually. The designated industries include all industries covered by Part 1904 that exceed a specified injury rate (two or more serious injuries or illnesses per 100 full-time employees). The list of affected industries is included in the proposed rule. • All employers specifically notified by OSHA must electronically submit injury/illness information as specified in the notification. <p>OSHA will provide a secure website for data collection. Employers will register their establishments and be assigned a login ID and password. According to OSHA, requiring electronic submission will enable employers, OSHA and others to better identify workplace hazards, leading to improved workplace safety and health.</p> <p>The proposed amendments can be found in the November 8, 2013 Federal Register at: www.gpo.gov/fdsys.</p>	<p>According to OSHA, the existing workplace injury/illness recordkeeping rule covers 750,000 employers with 1,500,000 establishments. EPA estimates that there are approximately 38,000 establishments that will be subject to the quarterly reporting requirement.</p> <p>EPA plans to make the collected data public. In particular, OSHA is considering making the following data available in a searchable online database: (1) all data fields from OSHA Form 300A (Summary Form); (2) all data fields from OSHA Form 300 (Log) except the employee's name; and (3) certain data fields from Form 301 (Incident Report) (case number, date of injury or illness, time employee began work, time of event, what the employee was doing just before the incident occurred, what happened, what the injury or illness was, what object or substance directly harmed the employee, and the date of death, if applicable).</p>	<p>OSHA is accepting comments on the proposed revisions until February 6, 2014.</p>

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OCCUPATIONAL SAFETY AND HEALTH			
<p>FEDERAL Request for Information Relating to Process Safety Management Standards 29 CFR § 1910.119 78 Fed. Reg. 73756 (Dec. 9, 2013)</p>	<p>OSHA is requesting information in anticipation of revising its process safety management (PSM) standard, contained in 29 CFR § 1910.119. The PSM standard is a comprehensive program for highly hazardous chemicals that integrates technologies, procedures, and management practices to help ensure a safe workplace. Facilities subject to the PSM must conduct a comprehensive hazard assessment and implement written operating procedures, employee training, prestartup safety reviews, evaluation of mechanical integrity of critical equipment and written procedures for managing change. Possible revisions to the PSM standard under consideration include:</p> <ul style="list-style-type: none"> • Atmospheric tanks. The current PSM rule exempts flammable liquids stored in tanks or transferred that are kept below their normal boiling point without chilling or refrigeration. OSHA is considering eliminating this exemption. • Reactivity hazards. OSHA is considering updating the PSM standard to address certain currently unregulated reactive chemicals. • Management system elements. OSHA is seeking comment on possible new PSM procedures, including: (1) establishing indicators to track PSM effectiveness; (2) requiring ongoing “due diligence” to fill the gaps between day-to-day work activities and periodic audits; and (3) ensuring employee process safety competency. • Engineering practice updates. To address improvements in industry practice, OSHA is considering requiring employers to periodically evaluate updates to recognized and generally accepted good engineering practices. • Mechanical integrity. OSHA is considering expanding the mechanical integrity program to cover all types of safety-critical equipment not just specific equipment categories. • Management of change. The existing PSM standard requires employers to establish and implement written procedures to manage change but does not mandate that employers follow them. OSHA is considering changing this requirement. <p>The request for information can be found in the December 9, 2013 Federal Register at: www.gpo.gov/fdsys.</p>	<p>The PSM standard, which was adopted in the early 1990s, applies to facilities with processes that involve certain toxic and flammable chemicals above threshold quantities. In the wake of several high profile chemical accidents, President Obama issued Executive Order 13650, entitled <i>Improving Chemical Facility Safety and Security</i>, requiring OSHA to publish a request for information to identify issues relating to modernization of the PSM standards.</p>	<p>OSHA is accepting information and comments on possible changes to the PSM standard until March 10, 2014.</p>

Other Recent Developments (Final)

AIR

FEDERAL: EPA **adopted a rule implementing a recent court decision vacating and remanding two key elements of the Prevention of Significant Deterioration (PSD) program relating to fine particulate matter (PM_{2.5})**. New and modified facilities that trigger the PSD program must determine the impact of their emissions on ambient air quality. To reduce the burden on permittees, EPA adopted PM_{2.5} screening thresholds known as the significant monitoring concentration (SMC) and significant impact level (SIL) that exempt projects from preconstruction monitoring data collection and air impact analysis requirements provided emissions are below the respective thresholds. In *Sierra Club v. EPA*, 705 F.3d 458 (D.C. Cir. 2013), the Court of Appeals for the District of Columbia Circuit vacated the PM_{2.5} SMC after concluding that the Clean Air Act is “extraordinarily rigid” and requires all new and modified sources subject to PSD to conduct preconstruction ambient air monitoring. At EPA’s request, the court vacated and remanded key aspects of the SIL provisions back to the agency. With the recent rulemaking, EPA removed the SIL from the regulation and set a PM_{2.5} SMC of 0.0 micrograms per cubic meter, effectively requiring preconstruction monitoring in all cases. EPA adopted the revisions without public comment on the ground that the rule was a “necessary ministerial act” and therefore exempt from regular Administrative Procedure Act requirements. The rule can be found in the December 9, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule means all new construction/modification that triggers PSD for PM_{2.5} must comply with all air impact analysis requirements regardless of their likely impact on ambient air. EPA plans to issue a separate rule on the SILs.

FEDERAL/NEW YORK STATE: EPA **determined that New York County has attained the coarse particulate matter (PM₁₀) national ambient air quality standard (NAAQS)** based on ambient air monitoring data collected from 2010 through 2012. 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 PM₁₀ 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 PM₁₀ NAAQS. The final determination can be found in the December 2, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The announcement is primarily of interest to companies located in New York City.

CLIMATE CHANGE

FEDERAL: EPA **amended its greenhouse gas (GHG) reporting rule** to incorporate changes to the global warming potential (GWP) of some GHGs and make other changes. The GHG reporting rule, 40 CFR Part 98, requires certain facilities and fuel/chemical suppliers to annually report their GHG emissions to EPA in accordance with source category-specific protocols contained in the

regulation. With this rulemaking, EPA proposed to conform the GWPs contained in the regulation to those used in the International Panel on Climate Change's Fourth Assessment Report. These changes will help ensure consistency between Part 98 GHG reporting results and the Inventory of U.S. Greenhouse Gas Emissions and Sinks EPA compiles annually to meet its international commitments. However, EPA declined to finalize a proposal to add 26 new fluorinated GHGs and their GWPs to Part 98 in the face of comments that the GWPs had not been included in the Fourth Assessment Report or properly peer-reviewed. The rule includes implementation schedules for existing reporters and for facilities required to report for the first time. In addition, the rulemaking contains numerous technical corrections, clarifying revisions and other changes to specific subparts to improve the quality and consistency of the data collected by the agency; it also includes confidentiality determinations for the new or substantially revised reporting data elements. The revisions take effect January 1, 2014. The final rule can be found in the November 29, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is primarily of interest to facilities subject to the GHG reporting rule.

NEW YORK STATE: The New York Appellate Division, Third Department, **upheld New York's participation in the Regional Greenhouse Gas Initiative (RGGI)** against a challenge brought by a conservative taxpayer group. The RGGI is a multi-state carbon dioxide cap-and-trade program applicable to power plants in participating states in the Northeast. In *Thrun v. Cuomo*, the petitioners challenged New York's participation in the RGGI on the grounds that: (1) the program amounted to an unlawful tax on ratepayers without legislative approval and (2) the State violated its constitution by entering into a multi-state program without legislative approval. The Appellate Division, Third Department, upheld a lower court decision dismissing the action, finding that the lawsuit was filed well after the applicable four-month statute of limitations for challenging regulations. The court went on to conclude that the memorandum of understanding (MOU) documenting participation in the RGGI did not impose a binding obligation on New York. As a result, issuing a decision as to the validity of the MOU would have no effect on the rights of the parties, rendering the lawsuit moot.

Implications: The decision is primarily of interest to utilities subject to the RGGI program.

REMEDIATION

NEW YORK STATE: DEC's Division of Environmental Remediation (DER) **issued its Annual Report providing an overview of DER's programs and accomplishments during the 2012-2013 fiscal year**. The report covers the state superfund, brownfield cleanup, environmental restoration, voluntary cleanup, spill response, bulk storage, hazardous waste management, and radiation programs. Items of note include the following: (1) as of March 31, 2013, 45% of approved brownfield cleanup program applications were in DEC Regions 2 and 3, while Regions 1, 4, 5 and 6 accounted for just 11%; (2) close to 17,000 spill incidents were reported to the DEC Spill Hotline in fiscal year 2012-2013, while slightly over 14,000 were closed; (3) the number of bulk storage program inspections increased from 1,465 in 2005-2006 to 6,154 in 2012-2013, a change that is attributable to the federal Energy Policy Act of 2005, which requires certain bulk storage facilities to be inspected at least once every three years; and (4) DEC conducted 843

hazardous waste facility inspections in fiscal year 2012-2013. The report can be found on DEC's website at: www.dec.ny.gov/about/53234.html.

Implications: The Annual Report is potentially of interest to anyone regulated under DEC's remediation, hazardous waste, bulk storage, or radiation programs.

WATER

NEW YORK STATE: DEC issued its **annual report for State Pollutant Discharge Elimination System (SPDES) compliance and enforcement for state fiscal year 2012-2013**. The report provides data on DEC's SPDES enforcement activities for the period from April 1, 2012 through March 31, 2013. Among other things the report: (1) summarizes the number of SPDES permits currently in effect, including individual municipal, industrial and private/commercial/industrial (P/C/I) permits and SPDES general permits for construction, industrial activities, municipal separate storm sewer systems, concentrated animal feeding operations, and PCIs; and (2) provides an overview of SPDES compliance/enforcement efforts, including data on agency inspections, wastewater treatment plant operator training, and enforcement actions, including identification of facilities in significant noncompliance. The report also discusses DEC's efforts to implement the Sewage Pollution Right-to-Know Act, which expanded the requirements for municipal wastewater treatment plants to report discharges of untreated and partially-treated sewage and imposed new recordkeeping and notification requirements on DEC. The SPDES annual report can be found on DEC's website at: www.dec.ny.gov/docs/water_pdf/2012annualrpt.pdf.

Implications: The report provides a useful overview of DEC's SPDES program.

CHEMICAL

FEDERAL: EPA **expanded the types of information required to be reported electronically under the Toxic Substances Control Act (TSCA)**. TSCA imposes testing and reporting requirements and occasional production bans on the manufacture of toxic chemicals. Among other things, TSCA gives EPA the authority to: require testing of chemicals where risks or exposures of concern are found (Section 4); require pre-manufacture notification prior to producing new chemical substances (Section 5); establish rules addressing significant new uses of existing chemicals (Section 5); and maintain an inventory of chemicals and impose recordkeeping and reporting requirements on persons who manufacture, import, process or distribute chemicals in commerce (Section 8). With the current rulemaking, EPA expanded the amount of information (e.g., forms, reports and other documents) required to be submitted electronically under TSCA using EPA's Central Data Exchange and Chemical Information Submission System, a web-based reporting tool. The rule takes effect March 4, 2014; it can be found in the December 4, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is primarily of interest to companies that manufacture, process or import chemicals. It is part of a larger EPA initiative to increase transparency and public access to chemical information.

ZONING

NEW YORK STATE: New York's highest court **clarified which zoning designation a municipality must apply when an application is submitted before the zoning code changes.** In *Rocky Point Drive-In LP v. Town of Brookhaven*, the plaintiff sought to construct a home improvement center on land the town rezoned from J-2, which permitted retail stores but not commercial centers, to CR, which permitted "commercial recreation." The applicant filed suit, alleging that the town had unduly delayed review of its application, which was first submitted in 2000. After the trial court agreed with the plaintiff that the town had treated its application differently than others, the Second Department reversed, finding that the trial court's determination was not supported by the evidence. On appeal, the Court of Appeals noted that in land use cases, the law in effect when the application is decided typically applies subject to the so-called "special facts" exemption. Under that exception, where the land owner establishes that it was entitled as a matter of right to the underlying land use application, the application is determined under the zoning law in effect at the time the application is submitted. In the present case, the record showed that the applicant did not meet the threshold requirement that it was entitled to the requested land use permit because the home improvement center was considered a "commercial center" under the original J-2 classification and was therefore a prohibited use. In reaching its decision, the court rejected plaintiff's arguments that it was subject to selective enforcement and that the Appellate Division failed when it applied a "bad faith" rather than a "negligence" standard to its claim.

Implications: The decision clarifies when municipalities must apply the zoning code in effect at the time an application is submitted.

OTHER

FEDERAL: EPA has added ortho-nitrotoluene to the list of chemicals required to be reported under the **Toxic Release Inventory (TRI) program**, which requires certain industrial facilities to submit annual reports documenting the amount of listed chemicals that are discharged to air or water or disposed of on land. EPA included the chemical based on its classification by the National Toxicology Program in its 12th Report on Carcinogens as "reasonably anticipated to be a human carcinogen." Facilities must include ortho-nitrotoluene on the TRI reports for the reporting year beginning January 1, 2014 (report due July 1, 2015). The rule can be found in the November 7, 2013 Federal Register at: www.gpo.gov/fdsys. In another TRI-related development, EPA denied a petition seeking to remove chlorsulfuron from the list of chemicals subject to TRI reporting. According to EPA, its review shows that chlorsulfuron meets the listing criteria due to its toxicity to aquatic plants and should therefore remain on the list. The notice can be found in the December 9, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The changes are potentially of interest to facilities required to file TRI reports.

Other Recent Developments (Proposed)

AIR

FEDERAL: EPA **proposed revisions to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for flexible polyurethane foam (FPUF) production** following a residual risk/periodic technology review. Under Clean Air Act § 112, EPA must assess whether any residual risk remains after imposing technology-based NESHAPs and revise the standard as necessary; EPA also must conduct a periodic review of the underlying technology to confirm that it remains current. The current standard, set forth at 40 CFR Part 63, subpart III, applies to new and existing major sources that produce FPUF or rebond foam. The proposed rule would prohibit the use of hazardous air pollutant-based auxiliary blowing agents to produce specific grades and densities of foam, a practice that has already ceased at existing facilities. With this prohibition, EPA concluded that the standard provides an ample margin of safety to protect public health and prevent adverse environmental effects and that no other revisions to address residual risk are necessary. EPA declined to require additional controls following its periodic technology review after concluding that the high costs and minimal emission reductions associated with the possible changes do not justify revising the standard. As part of the rulemaking, EPA also proposed to: (1) require compliance with emission standards during startup and shutdown; (2) establish an affirmative defense to penalties for excess emissions occurring during malfunctions; and (3) require facility owners to submit electronic copies of required performance test reports to EPA. The proposed rule can be found in the November 4, 2013 Federal Register at: www.gpo.gov/fdsys. The deadline for submitting comments has closed.

Implications: According to EPA, there are currently 13 FPUF production facilities subject to the NESHAP.

NEW YORK STATE: EPA **proposed to approve a revision to New York's ozone state implementation plan (SIP) incorporating recent changes to the State's surface coating regulations**, set forth at 6 NYCRR Part 228. Earlier this year, DEC revised its surface coating reasonably available control technology (RACT) standards to address changes established by EPA's control technique guidelines (CTG). The rule revised the applicability thresholds for various source categories, imposed stricter control requirements on certain sources, and made other changes/updates. With the current rulemaking, EPA is announcing its intent to approve DEC's changes to the surface coating RACT rule for incorporation into New York's SIP. EPA also announced that it is accepting DEC's declaration that the state does not have any facilities subject to the fiberglass boat manufacturing materials CTG. EPA is accepting comments on the proposed rule until **December 20, 2013**; it can be found in the November 20, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: Approving the revisions to the Part 228 regulations for incorporation into the SIP will make them federally enforceable.

CLIMATE CHANGE

FEDERAL: EPA **proposed to set the renewable fuel standards (RFS) that will apply to all gasoline and diesel transportation fuel produced or imported during calendar year 2014.** Under the RFS program, gasoline and diesel producers and importers must use an increasing percentage of four types of renewable fuel: cellulosic biofuel, biomass-based diesel, advanced biofuel, and renewable fuel. To implement the RFS, EPA established a credit program under which every gallon of renewable fuel is assigned a unique number which is transferred along with the fuel. Refiners, blenders and importers subject to the RFS program must have sufficient RFS credits to meet their obligations under the program. With the current rulemaking, EPA proposed the 2014 volume percentage standards for the four types of fuel subject to the RFS program. For the first time, the total quantity of renewable fuel required is less than that mandated by statute. According to EPA, it must impose a lower renewable fuel mandate because the fuel supply has hit the 10% renewable fuel “blendwall” – the maximum amount of renewable fuel that can be incorporated into gasoline without exceeding the current 10% limit on ethanol content. Although EPA has authorized the use E15 gasoline in newer vehicles, distributors have been slow to adopt the new fuel, leading to a gap between the amount of biofuel required by the RFS program and the amount that can be absorbed by the existing gasoline supply. In a related development, EPA announced that it had received several petitions asking it to waive the national renewable fuel requirement on the ground that there is an inadequate supply of RINs due to the 10% blendwall, a development that will lead reduced gasoline and diesel fuel production. EPA is accepting comments on the RFS rulemaking and waiver petitions until **January 28, 2014**. The RFS rulemaking and notice of the waiver petitions can be found in the November 29, 2013 Federal Register at: www.gpo.gov/fdsys.

Implications: The RFS rule is primarily of interest to motor vehicle fuel producers, blenders, importers and distributors.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

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 20, 2013: Deadline for submitting comments on EPA’s draft *Groundwater Remedy Completion Strategy*. The policy can be found at <http://op.bna.com/env.nsf/r?Open=rten-9czmtf>.

December 20, 2013: Deadline for submitting comments on EPA’s proposed approval of DEC’s recent revisions to its surface coating RACT standards. See the November 20, 2013 Federal Register at www.gpo.gov/fdsys for details.

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 for details.

December 30, 2013: Deadline for submitting comments on the Coast Guard's proposed revisions to the rules governing transfers of oil to/from tank vessels (extended from November 22, 2013). See the October 23, 2013 Federal Register at www.gpo.gov/fdsys for details.

January 2, 2014: Deadline for submitting comments on EPA's proposed revisions to its water quality standards regulations (extended from December 3, 2013). See the September 4, 2013 Federal Register at: www.gpo.gov/fdsys 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 for details.

January 28, 2014: Deadline for submitting comments on EPA's proposed 2014 renewable fuel standards and RFS waiver petitions. See the November 29, 2013 Federal Register at www.gpo.gov/fdsys for details.

February 6, 2014: Deadline for submitting comments on OSHA's proposed amendments to the injury and illness tracking regulations. See the November 8, 2013 Federal Register at www.gpo.gov/fdsys for details.

March 10, 2014: Deadline for submitting information and comments in response to OSHA's request for information on potential revisions to its process safety management standard. See the December 9, 2013 Federal Register at www.gpo.gov/fdsys for details.