Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB
REGULATORY SUMMARY

January 7, 2014

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Final Statutes, Regulations, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
CLIMATE CHANGE			
NEW YORK STATE **Carbon Dioxide Budget Trading Program** 6 NYCRR Part 242	DEC revised **New York's Regional Greenhouse Gas Initiative (RGGI) regulations** to implement changes agreed to among the RGGI states. The RGGI establishes a multistate CO_2 cap-and-trade program for power plants in the Northeast. With the close of the first control period, the RGGI states made various changes to the program, which DEC incorporated into 6 NYCRR Part 242. • ***Emission cap.*** The RGGI states reduced the 2014 regional CO_2 budget from 165 million to 91 million tons, with a decline of 2.5% annually from 2015 to 2020. For allocation year 2014, the regulations reduce New York's 2014 statewide CO_2 trading program baseline budget from 64.3 million tons annually to 35.2 million tons, with an additional 2.5% reduction annually through 2020. • ***Budget adjustment.*** To address excess allowances during the first reporting period, the regulations reduce the baseline budget during the years 2014-2020 to account for banked allowances (vintage 2009, 2010 and 2011) held by market participants after the first control period. The baseline budget also is reduced during the years 2015-2020 to account for surplus allowances (vintage 2012 and 2013) held by market participants as of the end of 2013. • ***Cost containment reserve (CCR).*** The regulations implement a CCR – a fixed additional supply of allowances that is available for sale if allowance prices exceed specified thresholds. The CCR is intended to stabilize prices and replaces a provision that extends the control period to four years if prices get too high. • ***Interim compliance obligation.*** The RGGI program originally required participants to provide allowances equal to emissions at the end of a three-year control period. The revised rule also requires participants to hold allowances equal to at least 50% of their emissions for each of the first two years of the compliance period. • ***Reserve price.*** The regulations set a minimum reserve price at auction of $2.00 in 2014, with an increase of 2.5% each year thereafter. The rule can be found on DEC's website at: www.dec.ny.gov/regulations/propregulations.html.	The RGGI program applies only to power plants. Although the sale of CO_2 allowances under the RGGI program has generated many millions of dollars for renewable energy, energy efficiency and other similar projects, the RGGI program has not resulted in significant reductions in greenhouse gas (GHG) emissions because actual emissions from participating sources have been well below the RGGI cap since the start of the program. The low GHG emission levels were due to several factors, including the weak economy and the decision by many utilities to switch from petroleum and coal to natural gas. The revised RGGI model rule and DEC's implementing regulations reduce the CO_2 cap to current emission levels and make other changes.	The revised rule took effect January 1, 2014, consistent with the agreement among the RGGI participants. DEC made nonsubstantive changes to the rule following the public comment period.

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Citation	Summary	Implications	Schedule/Notes
WATER			
NEW YORK STATE **SPDES General Permit for Stormwater Discharges Associated with Municipal Separate Storm Sewer Systems**	A New York appellate court reversed a lower court decision that had **rejected key aspects of DEC's State Pollutant Discharge Elimination System (SPDES) general permit for stormwater discharges from municipal separate storm sewer systems (MS4s)**. The MS4 general permit authorizes municipalities with MS4s to discharge stormwater provided they seek coverage under the permit and develop and implement a stormwater management program (SWMP). In *Natural Resources Defense Council, Inc. v. DEC*, 111 A.D.3d 737 (2d Dept. 2013) petitioners alleged that DEC's 2010 MS4 general permit violates the federal Clean Water Act because it creates an impermissible self-regulatory system that fails to require MS4s to reduce their discharges of pollutants to the "maximum extent practicable" as required by statute. The Appellate Division, Second Department disagreed, noting that the general permit at issue is consistent with the scheme for general permits envisioned by EPA. More specifically, the court noted that: (1) the MS4 general permit requires permittees to prepare a SWMP that describes best management practices and sets measurable goals for each practice; and (2) the general permit includes enforcement measures sufficient to comply with the maximum extent practicable standard, including the potential for public and DEC review of the notice of intent and for DEC to require an individual SPDES permit. The court went on to reject the trial court's conclusion that the general permit violated federal and state water discharge permitting laws because it did not provide an opportunity for public hearings on individual notices of intent, concluding that DEC's interpretation of the term "permit application" was entitled to deference. According to the court, it was not arbitrary and capricious for DEC to limit the opportunity for public hearings to those situations in which a new general permit is proposed or an existing general permit is renewed since any modifications resulting from public notice and comment will extend to all covered entities.	The trial court decision had raised serious questions about the legal status of MS4 discharges from the hundreds of municipalities throughout the state that are covered by the MS4 general permit; it also raised broader questions about DEC's approach to developing and implementing SPDES general permits. The appellate division decision validates DEC's SPDES general permitting strategy and relieves municipalities of the potentially onerous duty of conducting a public hearing every time they file a notice of intent seeking coverage under the MS4 general permit.	

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Other Recent Developments (Final)

CLIMATE CHANGE

FEDERAL: EPA adopted a rule **conditionally excluding geologically sequestered carbon dioxide streams from regulation as hazardous waste**. One possible solution to climate change is geological sequestration of CO_2 – the process of injecting CO_2 from a source such as a coal-fired power plant through a well deep into the subsurface, trapping or "sequestering" the carbon. In December 2010, EPA created a new Class VI category of injection well under the Underground Injection Control program to address CO_2 injection wells. During the process of developing the new rule, questions arose about the potential applicability of the hazardous waste program to geological sequestration. With the current rulemaking, EPA excluded CO_2 streams from regulation as hazardous waste provided they are managed in a Class VI well, are not mixed with other hazardous wastes, and meet certain other conditions. In issuing the rule, EPA concluded that the management of CO_2 under the specified conditions would not present a substantial risk to human health or the environment. The final rule takes effect March 4, 2014; it can be found in the January 3, 2014 Federal Register at: www.gpo.gov/fdsys. In a related development, EPA made available for comment *Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells*, which provides information on transitioning injection wells used for enhanced oil and gas recovery (Class II wells) to CO_2 geological sequestration wells (Class VI wells). EPA is accepting comment on the draft guidance until **March 1, 2014**. The guidance can be found on EPA's website at: http://water.epa.gov/type/groundwater/uic/class6/gsguidedoc.cfm.

Implications: The proposed rule is primarily of interest to coal-fired power plants and other sources interested in pursuing geological sequestration of CO_2.

HAZARDOUS/SOLID WASTE

NEW YORK STATE: Governor Cuomo recently signed the **Mercury Thermostat Collection Act**, which requires establishment of a manufacturer sponsored program for collecting and properly disposing of mercury-containing thermostats. According to the bill's sponsors, over 300,000 mercury thermostats are removed each year almost 99% of which are sent to landfills or incinerators. Beginning July 1, 2014, the law requires thermostat manufacturers to establish a program for collecting out-of-service mercury thermostats. As part of the program, manufacturers must develop and implement collection programs and offer all thermostat wholesalers collection containers; containers also must be made available to qualified contractors, thermostat retailers, and qualified local government authorities upon request. In addition, manufacturers must conduct education and outreach efforts, including establishing a public information website and developing education and outreach materials targeted at contractors and the general public. The statewide goal for calendar year 2015 is to collect 15,500 out-of-service mercury thermostats. A press release about the law can be found on DEC's web site at: www.dec.ny.gov/press/95004.html.

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Implications: The law is primarily of interest to thermostat manufacturers, wholesalers and retailers and to contractors engaged in installing, servicing or removing heating, ventilation and air conditioning equipment.

REMEDIATION

FEDERAL: EPA **amended its all appropriate inquiries rule 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. EPA later amended the rule to allow the use of ASTM Standard E2247-08 by those purchasing relatively large tracts of rural property or forestlands. With the current rulemaking, EPA authorized the use of ASTM's new E1527-13 standard as an option for conducting site assessments. EPA plans to propose a rule in the near future removing the reference to ASTM E1527-05 from the all appropriate inquiries rule. The rule took effect December 30, 2013; it can be found in the Federal Register on that date at: www.gpo.gov/fdsys.

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

NEW YORK STATE: DEC announced that it has **rescinded Program Policy DER-15, *Presumptive/Proven Remedial Technologies***, which was adopted in 2007 and provided guidance on generally accepted presumptive/proven remedial technologies that may be applied under DEC's various hazardous waste and oil spill cleanup programs. The guidance described presumptive remedies for sites contaminated with specific contaminants, including volatile and semi-volatile organic compounds, metals, PCBs, and pesticides. For each category of contaminants, the policy included a brief description of presumptive remedies for soil contamination, groundwater contamination and vapors, including limits on the application of the remedy to particular types of sites. According to DEC, the policy does not reflect current best practices for site remediation and does not take adequate account of site-specific conditions. According to DEC, the current definition of "presumptive remedy" in Program Policy DER-10, *Technical Guidance for Site Investigation and Remediation*, and DEC's regulations at 6 NYCRR Part 375 adequately describe presumptive remedy without the need for further guidance. In the same notice, DEC also announced that it is rescinding as obsolete Technical and Administrative Guidance (TAGM) 4051, *Early Design Strategy*. The notices of withdrawal can be found in the December 24, 2013 Environmental Notice Bulletin at: www.dec.ny.gov/enb/20131224_not0.html.

Implications: The announcement is potentially of interest to individuals engaged in the investigation and remediation of remedial sites in New York.

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WATER

FEDERAL: A federal district court **dismissed a lawsuit seeking to overturn the water quality trading program** offered by EPA as an option for states regulated under the Chesapeake Bay total maximum daily load (TMDL) plan. Under the Clean Water Act (CWA), states must identify waters that are impaired for their designated uses and establish TMDLs – pollution budgets designed to identify necessary reductions in pollutant loads. The Chesapeake Bay TMDL allocates allowable nitrogen, phosphorus and sediment pollution between point and nonpoint source discharges and identifies measures designed to assure the attainment and maintenance of water quality standards in the tidal portion of the Chesapeake Bay watershed. In *Food and Water Watch v. EPA*, a pair of environmental groups challenged EPA's TMDL plan on the ground that it allows states to use offsets and water pollution trading to meet their obligations under the plan. The District Court for the District of Columbia dismissed the suit after concluding that the plaintiffs lacked standing because any possible injury associated with the use of offsets or trading was not actual or imminent. Among other things, the court concluded that the plaintiffs had offered no evidence that trading would result in the creation of "hotspots" of pollution particularly since any offsets/trades would have to comply with the TMDL and CWA. The court also concluded that plaintiffs could not show that any injuries were "traceable" to the TMDL. The court went on to find that even if plaintiffs had standing, they failed to state a claim because the TMDL's references to offsets and trading are not mandatory and so do not constitute a final agency action subject to judicial review. The decision can be found at: http://www2.bloomberglaw.com/public/desktop/document/FOOD_AND_WATER_WATCH_et_al_v_UNITED_STATES_ENVIRONMENTAL_PROTECTI/3.

Implications: The TMDL affects facilities in south central New York that discharge to the Susquehanna and Chemung River basins.

NEW YORK STATE: The Appellate Division, Second Department, affirmed a lower court **decision invalidating a village law that prohibited the removal of groundwater for use outside the village**. In *Woodbury Heights Estates Water Co. v. Village of Woodbury*, 111 A.D.3d 699 (2d Dept. 2013), the plaintiff, a private water works corporation formed to provide water in the Village of Woodbury obtained a certificate of extension pursuant to New York's Transportation Corporations Law authorizing it to sell water to a neighboring town. This extension conflicted with a village law prohibiting the removal of groundwater for use outside the village except according to an intermunicipal agreement. The court concluded that the local law was preempted by both New York's Transportation Corporations Law and the Environmental Conservation Law (ECL). The Transportation Corporations Law authorizes the formation of water works corporations and gives those corporations broad powers, including the authority to extend their service into neighboring areas. According to the court, these provisions evince an intent to preempt local laws that have the effect of prohibiting the transfer of water from one municipality to another. The court also concluded that the local law is preempted by ECL Article 15, which requires a permit from DEC for certain water withdrawals.

Implications: The decision clarifies that local governments generally are barred from enacting laws restricting water withdrawal activities.

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ZONING

NEW YORK STATE: The Appellate Division, Second Department, considered the **role of zoning maps** in a challenge to a request for a zoning interpretation by a town's Zoning Board of Appeals (ZBA). The plaintiff in *S&R Development Estates, LLC v. Feiner*, 2013 WL 6801043 (2d Dept. 2013), purchased land that was zoned for multifamily residential according to the town's zoning map. When the plaintiff submitted an application for site plan approval, he was informed by town administrators that the property was actually situated in an area zoned for single-family residential, a determination that was affirmed by the ZBA. The appeals court upheld the lower court decision annulling the ZBA's finding. In support of its decision, the court quoted the town's zoning code, which stated that the official zoning map is the "final authority" as to the current zoning classification of land in the town; the court also cited New York Town Law §§ 264 and 265, which establish requirements for public notice and comment prior to amending zoning regulations, restrictions and boundaries. The court went on to note that there was no evidence that the depiction of the property in the multifamily district was the result of a "scrivener's error."

NEW YORK STATE: The Appellate Division, Second Department, considered a constitutional challenge to a local law establishing **special requirements for corner lots**. The law at issue in *Nicholson v. Incorporated Village of Garden City*, 2013 WL 6801067 (2d Dept. 2013), rezoned corner lots on four avenues in the central section of the Village of Garden City to R-20C, a residential zoning classification that prohibits subdivision of corner lots unless the resulting lot has a minimum size of 40,000 square feet; previously, the lot was zoned R-20, which required a minimum lot size of 20,000 square feet. The Second Department rejected the trial court's conclusion that the law was unconstitutional, noting as a preliminary matter that local laws are "cloaked with the same strong presumption of constitutionality as a statute." The court went on to find that the local law was not inconsistent with the village comprehensive plan and was enacted after a study by an expert who advised it on the necessity of additional regulation. Moreover, contrary to plaintiffs' suggestion, its property was not arbitrarily singled out for different, less favorable treatment than neighboring properties but was instead one of 20 affected corner lots.

Other Recent Developments (Proposed)

WATER

NEW YORK STATE: The Lake George Park Commission reproposed rules to require **mandatory inspections of trailered vessels prior to launch into Lake George to limit the spread of aquatic invasive species** (AIS). The regulation, to be set forth at 6 NYCRR subpart 646-9, prohibits the introduction of AIS into Lake George by any means, including trailered boats. Under the proposal, before launching into Lake George, all trailered boats must be inspected by a trained "vessel inspection technician" to confirm that they are clean, drained and dry. Boats that do not pass inspection must be washed and decontaminated at the inspection station with high

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pressure hot water. Inspected vessels will then be outfitted with "vessel inspection control seals" (VICS) that connect the boat to the trailer. Boats leaving Lake George must be cleaned and drained before leaving the launch site, at which point they will receive a new VICS. These boats can relaunch into the lake without a new inspection provided the VICS is intact. All launch sites must be registered with the Commission and launch operators must keep records documenting each launch. In addition, launch operators must maintain their launch areas so as to prevent trailered vessels not equipped with intact VICS from launching into the lake. According to the Commission, the regulation will not result in significant additional costs to boat owner/operators or the operators of launch sites, who already employ individuals to assist boat operators. The subpart will expire December 31, 2015 unless the Commission decides to continue the program. The Commission proposed boat launching regulations in August 2013 and revised the proposal following the public comment period. The Commission is accepting comments on the reproposed rule until **January 23, 2014**; no additional public hearings are scheduled. The reproposed rule can be found in the December 24, 2013 State Register at: http://docs.dos.ny.gov/info/register/2013/dec24/toc.html.

Implications: The rule is primarily of interest to owners/operators of boat launches on Lake George and boaters using the lake.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

January 23, 2014: Deadline for submitting comments on the reproposed mandatory trailered vessel inspection requirements for Lake George. See the December 24, 2013 State Register at http://docs.dos.ny.gov/info/register/2013/dec24/toc.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 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.

March 1, 2014: Deadline for submitting comments on EPA's *Draft Underground Injection Control (UIC) Program Guidance on Transitioning Class II Wells to Class VI Wells.* The document can be found at http://water.epa.gov/type/groundwater/uic/class6/gsguidedoc.cfm.

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

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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.

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