

# Young / Sommer LLC

## ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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## Final Statutes, Regulations, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
<p><b>HAZARDOUS WASTE</b></p> <p><b>FEDERAL</b></p> <p><b>Authorization for the Use of Electronic Hazardous Waste Manifests</b></p> <p>40 CFR Parts 260, 262, 263, 264, 265 and 271 79 Fed. Reg. 7518 (Feb. 7, 2014)</p>	<p>EPA adopted regulations authorizing the use of electronic manifests to track off-site shipments of hazardous waste from the generator to the final disposal facility. The rule, which implements the Hazardous Waste Electronic Manifest Establishment Act, creates a national e-Manifest system that EPA plans to host on its Central Data Exchange (CDX)/National Environmental Information Exchange Network (Exchange Network) or an equivalent system. The system will be funded initially by appropriations but will eventually be paid for by users of electronic and paper manifests. Specific elements of the final rule include:</p> <ul style="list-style-type: none"> <li>• Adding a definition of “user of the electronic manifest;”</li> <li>• Clarifying that documents that can be submitted electronically will be limited to the manifest and continuation form and that other hazardous waste documents (e.g., land disposal restriction certifications, exception reports, discrepancy reports) must be submitted in hard copy; and</li> <li>• Specifying that transporters will still need to carry a printed copy of the manifest in their vehicle.</li> </ul> <p>The notice includes an extensive discussion of EPA’s decision to use Extensible Mark-up Language (XML) as the electronic format for the manifest as well as the methods to be used to address information security. The notice also outlines the basic principles for selecting electronic signature methods and recommends using digitized handwritten signatures and/or a PIN/password system for the first generation e-Manifest system.</p> <p>The final rule can be found in the February 7, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>The regulation is potentially of interest to anyone that ships hazardous waste to a treatment, storage or disposal facility under a hazardous waste manifest. Facilities can opt out of the electronic manifest and continue to use paper forms. However, EPA’s goal is to maximize the use of electronic manifests. When fully implemented, the system will establish a national repository for manifests. The notice includes an extensive discussion of confidentiality issues, concluding that both individual manifest and aggregated manifest data obtained from the system will not be protected as confidential business information. States will be required to use the federal e-Manifest system.</p>	<p>The rule takes effect August 6, 2014. However, the implementation and compliance date will be delayed until the e-Manifest system is ready for operation and the schedule of fees for manifest-related services has been announced.</p> <p>In adopting the final rule, EPA abandoned its original proposal to adopt a decentralized approach after concluding that a centralized e-Manifest system would be simpler to implement and would provide a more consistent, secure and cost-effective solution that is accessible to more users.</p>

Citation	Summary	Implications	Schedule/Notes
<p>REMEDICATION</p> <p>NEW YORK STATE Streamlined Procedures for Executing Environmental Easements</p>	<p>DEC announced streamlined procedures for executing environmental easements required for properties in its Brownfield, Superfund and Environmental Restoration programs. The changes waive the requirement for title insurance for most properties and simplify the requirements for site surveys. Key provisions are summarized below:</p> <ul style="list-style-type: none"> <li>• <b>Title requirements.</b> Under the revised policy, a last owner search will generally be sufficient to document ownership and authority to convey an easement for most properties. However, DEC reserves the right to require additional information, up to requiring a full title report in certain circumstances (e.g., underwater lands, restricted deed transfers, multiple party ownership).</li> <li>• <b>Survey requirements.</b> DEC requires a survey map as part of any environmental easement package and has published a revised/updated list of mandatory survey components.</li> <li>• <b>Environmental easement checklist/certification.</b> DEC has published a new environmental easement checklist identifying the requirements and attachments that must be included as part of the submission to DEC for an environmental easement. Both the owner and the owner's attorney must certify that the checklist has been completed. The checklist addresses the following subjects: special circumstances (to determine whether additional title work is necessary); verification of property ownership; verification of property subject to easement; survey review; easement review; and submissions (i.e., documents required for a complete environmental easement package).</li> </ul> <p>The revised requirements are posted on the following pages of DEC's website: title requirements <a href="http://www.dec.ny.gov/chemical/48231.html">www.dec.ny.gov/chemical/48231.html</a>; survey requirements <a href="http://www.dec.ny.gov/chemical/48242.html">www.dec.ny.gov/chemical/48242.html</a>; easement checklist <a href="http://www.dec.ny.gov/chemical/65118.html">www.dec.ny.gov/chemical/65118.html</a>.</p>	<p>The changes are potentially of interest to anyone undertaking cleanup activity under New York's Brownfield Cleanup, Superfund, or Environmental Restoration programs.</p>	

Citation	Summary	Implications	Schedule/Notes
<p>FEDERAL Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel-Containing Fracking Fluid 79 Fed. Reg. 8451 (Feb. 12, 2014)</p>	<p>EPA issued a guidance document clarifying the underground injection control (UIC) permit requirements for hydraulic fracturing activities involving diesel-containing fracturing (fracking) fluid. Under the 2005 Energy Policy Act, Congress revised the Safe Drinking Water Act to exclude hydraulic fracturing from the UIC permit program, however, the exemption does not apply to the injection of hydraulic fracturing fluids that contain diesel. As a result, hydraulic fracturing operations using fluids that contain diesel must obtain a Class II UIC permit. EPA's <i>Permitting Guidance for Oil and Gas Hydraulic Fracturing Activities Using Diesel Fuels</i> identifies by Chemical Abstract Service Registry Number the five types of diesel fuel regulated under the UIC program. The guidance also contains recommendations for permit writers implementing the UIC requirements for activities involving diesel-containing fracturing fluid with respect to: permit application and review process, including information submitted with permit application; permit duration and well closure; area of review requirements; well construction; well operation, mechanical integrity testing, monitoring and reporting; financial responsibility; and public notification and environmental justice. For each element the guidance summarizes the relevant regulatory requirements and offers recommendations for applying those requirements to hydraulic fracturing activities that use diesel fuel.</p> <p>Notice of the guidance can be found in the February 12, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>. A link to the guidance document can be found in the notice.</p>	<p>The guidance applies in states such as New York where EPA implements the UIC program. The technical recommendations in the guidance are for EPA staff to consider when permitting diesel fuel hydraulic fracturing wells and staff may consider alternative approaches that are consistent with statutory and regulatory requirements</p> <p>States that implement the UIC program themselves (so-called primacy states) are not directly subject to the guidance. However, these primacy states are required to issue UIC permits for fracking operations using diesel fuels and may rely on the guidance to define the scope of their permitting obligations.</p>	<p>EPA released the draft guidance document in May 2012 for comment.</p>

## Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
<b>AIR</b> <b>FEDERAL</b> <b>New Source Performance Standards for Residential Wood Heaters, Residential Hydronic Heaters, Residential Forced-Air Furnaces, and Residential Masonry Heaters</b> 40 CFR Part 60, subparts AAA, QQQQ and RRRR 79 Fed. Reg. 6330 (Feb. 3, 2014)	<p>EPA proposed to update standards for newly manufactured wood stoves, while establishing standards for other new wood heaters. EPA previously adopted New Source Performance Standards (NSPS) for adjustable burn rate wood stoves; these standards are set forth at 40 CFR Part 60, subpart AAA. With this rulemaking, EPA is proposing to update those standards to address technological improvements and expand coverage to include single burn rate wood heaters/stoves and pellet heaters/stoves. In addition, EPA is proposing standards for new wood-fired residential hydronic heaters and forced air furnaces (subpart QQQQ) and new residential masonry heaters (subpart RRRR). Like the existing standards, the new and revised standards primarily regulate equipment manufacturers rather than users. Manufacturers must test representative heaters/stoves from each model line using EPA-approved testing methods to determine whether they meet the particulate matter emissions standards set forth in the regulation and can be certified. Once the certification is issued, the following requirements apply:</p> <ul style="list-style-type: none"> <li>• The manufacturer must affix a permanent label to each stove containing key identifying information as evidence that the stove was properly certified.</li> <li>• The manufacturer must provide an owner's manual containing information relating to installation, operation and maintenance.</li> <li>• Operators must use only approved fuels (pellets produced under a licensing agreement with key trade organizations; no garbage, yard waste, rubber, plastic, etc.) and must operate the unit consistent with the instructions in the owner's manual.</li> </ul> <p>In addition, the manufacturer must conduct a quality assurance program to ensure that the appliances being produced, in fact, conform to the certified design and meet the applicable standards. The proposed rule also includes provisions for EPA to conduct audits to ensure compliance.</p> <p>The proposed rule can be found in the February 3, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>The proposed rule applies to manufacturers of new woodstoves, wood heaters (including indoor and outdoor wood-fired boilers), hydronic heaters, forced air furnaces, and masonry heaters. The rule does not cover existing units. In addition, it does not cover outdoor fireplaces, pizza ovens, barbecues, cook stoves, camp stoves, manufactured or site-built masonry fireplaces, traditional Native American bake ovens, or heaters fueled solely by coal, gas or oil.</p>	<p>EPA is accepting comments on the proposed standards until <b>May 5, 2014</b>.</p> <p>Under the proposal, the standards for most wood heaters would be implemented in two phases. The first limit would take effect 60 days after the final rule is published in the Federal Register while the second, lower limit would take effect 5 years later. However, EPA is taking comment on a three-step transition period extending over 8 years. The compliance deadlines for masonry heaters would be based on the number of heaters manufactured each year (either 60 days after the final rule is published in the Federal Register or within 5 years based on the number of heaters produced).</p>

Citation CLIMATE CHANGE	Summary	Implications	Schedule/Notes
<p>FEDERAL New Source Performance Standards for Greenhouse Gas Emissions from Power Plants 40 CFR Part 60, subpart TTTT 79 Fed. Reg. 1430 (Jan. 8, 2014); 79 Fed. Reg. 10750 (Feb. 26, 2014) (notice of data availability)</p>	<p>EPA re-proposed New Source Performance Standards limiting carbon dioxide (CO<sub>2</sub>) emissions from new fossil fuel-fired electric generating units (EGUs) – a category that includes boilers, integrated gasification combined cycle units, and combined cycle units which generate electricity for sale and meet certain size criteria. In the wake of a 2007 Supreme Court decision declaring that greenhouse gases (GHGs) are pollutants, EPA found that such emissions endanger public health and welfare because they contribute to climate change and signed a consent agreement with environmental groups committing to develop NSPS for GHG emissions from EGUs. The proposed rule, which will be set forth at 40 CFR Part 60, subpart TTTT, requires new coal-fired utility boilers and integrated gasification combined cycle units to meet either a 1,100 CO<sub>2</sub> lb/MWh limit measured over a 12-month operating period or a 1,000-1,050 CO<sub>2</sub> lb/MWh limit over a seven-year period. These limits can only be met by installing carbon capture and storage (CCS) technologies. By comparison, natural gas-fired stationary combustion units are subject to one of two CO<sub>2</sub> emission limits depending on their size. Those over 850 million British thermal units per hour (mmBtu/hr) heat input would have an emission limit of 1,000 CO<sub>2</sub> lb/MWh while those units with a heat input of 850 mmBtu/hr or less would have an emission limit of 1,000-1,050 CO<sub>2</sub> lb/MWh. According to EPA, the longer compliance period for coal-fired units provides flexibility by allowing sources to phase in the use of partial CCS, which EPA claims is a feasible technology.</p> <p>NSPS typically apply to both new and modified sources in a particular source category. In this case, however, EPA concluded that it did not have sufficient information to develop a CO<sub>2</sub> emission standard for modifications. As a result, the standard applies only to new EGUs.</p> <p>The proposed rule can be found in the January 8, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>The rule is primarily of interest to companies contemplating the construction of new EGUs. EPA anticipates that all newly constructed natural gas-fired units will be able to meet the 1,000/1,050 CO<sub>2</sub> lb/MWh standard by installing the natural gas combined cycle technology on which the standard is based; however, coal-fired units can meet the NSPS only by installing CCS technology. Long term, EPA plans to propose GHG emission standards for certain existing fossil fuel-fired EGUs.</p>	<p>EPA is accepting comments on the proposed rule until <b>May 9, 2014</b> (extended from March 10, 2014). EPA also published a notice of data availability (NODA) seeking feedback on its interpretation of the relationship between the proposed NSPS and a provision of the 2005 Energy Policy Act (EPA Act). EPA has concluded that the EPA Act bars the agency from making technology determinations solely on projects that received assistance under the EPA Act but allows them to consider such technologies in conjunction with other information.</p> <p>EPA originally proposed NSPS for GHG emissions from power plants in April 2012. However, industry strongly objected to the standards on the ground that they effectively barred construction of coal-fired power plants because they necessitated construction of CCS, an arguably unproven technology. Industry also objected that the original NSPS for gas-fired power plants was too strict.</p>

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HAZARDOUS WASTE	FEDERAL	<p>As part of an ongoing review, <b>EPA is seeking information and comment on hazardous waste management practices in the retail sector.</b> EPA began this review in 2008, reaching out to key stakeholders for feedback on the unique challenges facing retailers that generate hazardous waste. The recent Notice of Data Availability provides an overview of EPA's review process, summarizes the unique issues facing retailers, assesses the available data to estimate the number of retail stores that generate hazardous waste, and provides a list of questions in nine general categories. These questions are designed to elicit additional information on the hazardous waste management challenges facing retailers and possible methods of resolving them. The nine information categories are:</p> <ul style="list-style-type: none"> <li>• Suggestions for improving hazardous waste management policies, guidance and regulations for retail operations;</li> <li>• Information about the retail universe and the hazardous waste generated (number and type of facilities, quantity and types of waste generated, activities that generate hazardous waste, etc.);</li> <li>• Episodic generation (ramifications of hazardous waste regulations in the context of episodic generation for both the retail sector and regulators);</li> <li>• Stores' hazardous waste programs (i.e., how do stores identify and characterize hazardous waste and handle the waste before it is shipped off-site);</li> <li>• Hazardous waste training, including difficulties associated with high turnover, part-time and seasonal employees;</li> <li>• Aerosol cans;</li> <li>• Transportation and reverse logistics (i.e., process whereby retailers send products they are unable to sell back to a central processing center for decision regarding final disposition), including how the point of generation of hazardous waste affects shipping; and</li> <li>• Sustainability efforts undertaken by retail facilities.</li> </ul> <p>The NODA and request for information and comment can be found in the February 14, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>Unique issues facing retailers when managing hazardous waste include: (1) difficulties managing pharmaceuticals and aerosol cans, which are a significant percentage of retail hazardous waste; (2) potential variation in waste generation rates attributable to product recalls, accidental product spills and breakage, seasonality and customer "midnight dumping," (i.e., "episodic generation"); and (3) the implications of reverse distribution.</p>	<p>EPA is accepting comments on the NODA and request for information until <b>April 15, 2014.</b></p>

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<p>REMEDICATION</p> <p>Governor's Program Bill Containing Changes to Brownfield Cleanup Program A08559-B/S06359-B</p>	<p>As part of the budget bill submitted to the Legislature, Governor Cuomo proposed major changes to New York's Brownfield Cleanup Program (BCP), many of which are targeted at addressing concerns that the program has awarded significant tangible property tax credits to sites that would likely have been cleaned up without incentives. Key changes include:</p> <ul style="list-style-type: none"> <li>• Extending brownfield tax credits to December 31, 2022.</li> <li>• Revising the definition of "brownfield site" from sites that are "complicated by the presence or potential presence" of contamination to sites that have contamination at levels exceeding DEC soil cleanup objectives. This change means applicants must conduct sampling before submitting applications.</li> <li>• Extending the BCP to volunteers at Class 2 (i.e., state Superfund) sites who own the site or are under contract to purchase the site provided DEC cannot identify any viable potentially responsible parties.</li> <li>• Limiting eligibility for tangible property tax credits to BCP sites that: (1) have been vacant for 15 or more years; (2) have been both vacant and tax delinquent for 10 or more years; (3) are "upside down," i.e., have cleanup costs that exceed the value of the property; or (4) are a "priority economic development project" as defined in the statute.</li> <li>• Changing the rules for calculating eligible tangible property tax credits and site preparation tax credits and eliminating the requirement that volunteers pay DEC oversight costs.</li> <li>• Dropping from the BCP sites that entered the program prior to June 23, 2008 but have not received certificates of completion (COCs) by December 31, 2015 and sites that entered the program between June 23, 2008 and July 1, 2014 but have not received COCs by December 31, 2017.</li> <li>• Repealing the insurance and real property tax credits for sites accepted into the BCP after June 30, 2014.</li> <li>• Establishing a fast track program that authorizes DEC to waive certain procedural requirements associated with the BCP for applicants seeking BCP liability protections but not tax credits.</li> <li>• Requiring applicants to implement work plans within 90 days of DEC approval and complete work in accordance with an agreed-upon schedule.</li> </ul> <p>The budget bill has been introduced as A08559-B/S06359-B. It can be found at: <a href="http://assembly.state.ny.us">http://assembly.state.ny.us</a>. The BCP portion is located in Part Q of the bill.</p>	<p>The bill is potentially of interest to entities currently in the BCP as well as those considering projects on contaminated land. Among other things, it redefines brownfield site to make entry into the program more difficult and limits eligibility for tangible property tax credits (i.e., the credits awarded to BCP developers for development rather than cleanup of the site).</p> <p>Industry has criticized the new limits on eligibility for tangible property tax credits as unrealistic, arguing that few sites can meet the criteria for vacancy/tax delinquency contained in the bill.</p>	



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<p>NEW YORK STATE <i>Environmental Monitoring Services</i></p>	<p>DEC made available for comment a draft updated policy specifying the procedures and standards for assigning environmental monitors to facilities in New York. The draft policy, entitled <i>Environmental Monitoring Services</i>, identifies the circumstances under which DEC can require an individual or firm to be employed as an environmental monitor at a site. Services provided by an environmental monitor may include construction oversight, on-site inspections, oversight of day-to-day activities, and review of plans and operating documents. According to the policy, environmental monitoring services can be provided by appropriately qualified individuals in one of the following four ways in descending order of preference: (1) DEC employees; (2) individuals employed by another governmental or quasi-governmental agency; (3) individuals or firms whose services are directly contracted by DEC; and (4) individuals or firms whose services are directly contracted by the regulated entity. The decision regarding whether/how to provide monitoring services will be made by DEC in its sole discretion. Going forward, all environmental monitoring services will be required to be provided through the terms of an environmental permit, order on consent, Commissioner's order after hearing, judicial order or brownfield cleanup agreement (BCA); they can no longer be imposed through a memorandum of understanding, memorandum of agreement, cooperative agreement, or other mechanism. The environmental monitoring language contained in the permit, order or BCA must conform to language specified in Appendices A or B of the policy unless changes are approved by DEC's General Counsel.</p>	<p>Environmental monitors may be employed in the following cases: (1) where environmental monitoring is required by law (e.g., commercial hazardous waste facilities utilizing secure land burial as a primary disposal technique); (2) where material being handled at the facility or site is of particular concern due to its characteristics or quantity; (3) where compliance history or past practices at the facility has included significant or repeat violations or has resulted in conditions that pose a serious threat; or (4) where justified by exceptional circumstances relating to facility size, throughput or location.</p>	<p>DEC is accepting comments on the draft program policy until April 14, 2014.</p>
	<p>The draft program policy can be found on DEC's website at: <a href="http://www.dec.ny.gov/docs/materials_minerals_pdf/draftmonitor.pdf">www.dec.ny.gov/docs/materials_minerals_pdf/draftmonitor.pdf</a>.</p>		

## Other Recent Developments (Final)

### AIR

**NEW YORK STATE:** EPA approved 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. DEC revised its surface coating reasonably available control technology (RACT) standards in 2013 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 has approved DEC's changes to the surface coating RACT rule for incorporation into New York's SIP. EPA also accepted DEC's declaration that the state does not have any facilities subject to the fiberglass boat manufacturing materials CTG. The final rule can be found in the March 4, 2014 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

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

### HAZARDOUS/SOLID WASTE

**FEDERAL:** EPA adopted a rule conditionally excluding carbon dioxide (CO<sub>2</sub>) streams being geologically sequestered from regulation as a hazardous waste. One possible solution to climate change is geological sequestration of CO<sub>2</sub> – the process of injecting CO<sub>2</sub> 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<sub>2</sub> 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 recent rulemaking, EPA exempted CO<sub>2</sub> streams that would otherwise qualify as a hazardous waste from regulation under the Resource Conservation and Recovery Act provided they are managed in a Class VI well and meet certain other conditions. The rule took effect March 4, 2014; it can be found in the January 3, 2014 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The rule is primarily of interest to coal-fired power plants and others interested in pursuing geological sequestration of CO<sub>2</sub>.

### WATER

**NEW YORK STATE:** The Lake George Park Commission adopted a rule requiring mandatory inspections of trailered vessels prior to launch into Lake George to limit the spread of aquatic invasive species (AIS). The regulation, which is set forth at 6 NYCRR subpart 646-9, prohibits the introduction of AIS into Lake George by any means, including trailered boats. 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 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. In response to public comment, the Commission expanded the number of planned regional inspection stations from five to six. The rule can be found in the February 19, 2014 State Register at: [docs.dos.ny.gov/info/register/2014/feb19/toc.html](http://docs.dos.ny.gov/info/register/2014/feb19/toc.html).

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

## ZONING

NEW YORK STATE: The Appellate Division, Second Department, recently considered the **standard for assessing potential conflicts between rezoning decisions and a municipality’s master plan**. In *Hart v. Town Board of Town of Huntington*, 2014 WL 444174 (2d Dept. 2014), the town board rezoned a parcel from single family residential to a retirement community district. While a proposal to develop the parcel as a retirement community was pending, the town adopted a master plan that urged preservation of open space while promoting a more diverse housing stock affordable to all income groups. After the town approved the project, petitioners sued alleging that the rezoning of the parcel constituted illegal spot zoning and was not accomplished in accordance with the town’s master plan. As a preliminary matter, the court noted that parties challenging town board determinations bear a heavy burden of showing that the regulation at issue is not justified by any reasonable interpretation of the facts. The court went on to find that there was no clear conflict between the rezoning and the town’s new master plan, which included as goals both the preservation of open space and the need for diverse housing stock. Under these circumstances, the court found that the town’s decision was in compliance with the overall policies of the master plan and did not constitute illegal spot zoning.

NEW YORK STATE: The Appellate Division, Second Department, **considered the merits of a decision to grant an extraordinary hardship waiver to a business located in the core preservation area of the Long Island pine barrens**. In *Long Island Pine Barrens Society, Inc. v. Central Pine Barrens Joint Planning & Policy Commission*, 2014 WL 305244 (2d Dept. 2014), the property at issue was located in the “core preservation area” of the Long Island pine barrens and had traditionally been leased for use as a state police barracks. Petitioner purchased the property, and when the police left, began operating a commercial landscaping business on the

site. After being informed that the use was not allowed in the core preservation area, the owner applied for and obtained an extraordinary hardship waiver from the Central Pine Barrens Joint Planning and Policy Commission (Commission). On appeal, the court reversed the lower court's decision that the petitioners lacked standing to bring the action, while upholding dismissal of the case on the merits. The court noted that the statute governing activities in the pine barrens allows the Commission to grant extraordinary hardship waivers where it finds that the application is consistent with the purposes of the statute and would not result in substantial impairment of the resources in the central pine barrens area. In upholding the grant of the waiver in this case, the court rejected petitioners' argument that the hardship was self-created because the owner bought the property with constructive notice of the restrictions on its development, finding that the Commission's decision to permit a beneficial use of the property that was less intensive than pursued by the previous owner was not an error of law or arbitrary and capricious.

#### **Other Recent Developments (Proposed)**

##### **AIR**

**FEDERAL:** EPA proposed revisions to the **National Emission Standards for Hazardous Air Pollutants (NESHAP) for acrylic and modacrylic fibers, polycarbonate, and amino/phenolic resins 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. Acrylic and modacrylic fibers and polycarbonate are regulated under the generic maximum achievable control technology standard, set forth at 40 CFR Part 63, subpart YY. With this rulemaking, EPA concluded that the standard provides an ample margin of safety to protect public health and prevent adverse environmental effects and that no revisions are necessary to address residual risk. Following the periodic technology review, EPA proposed to eliminate the less stringent of two currently available options for complying with leak detection and repair program requirements. Following the residual risk/periodic technology review process, EPA proposed no changes to the amino/phenolic resins production standard set forth at 40 CFR Part 63, subpart OOO. 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. EPA is accepting comments on the proposed revisions until **March 10, 2014**; the rulemaking can be found in the January 9, 2014 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

**Implications:** According to EPA, there are approximately 23 facilities in the three source categories subject to the two NESHAPs.

**FEDERAL/NEW YORK STATE:** EPA proposed to redesignate New York's downstate fine particulate matter (PM<sub>2.5</sub>) nonattainment area to attainment under the 1997 and 2006 PM<sub>2.5</sub> national ambient air quality standard (NAAQS) based on ambient air monitoring data showing PM<sub>2.5</sub> levels below the NAAQS for three year periods extending from 2007-2009 to 2010-2012.

In addition, EPA is proposing to approve New York's SIP revisions containing a maintenance plan that provides for continued compliance with the PM<sub>2.5</sub> NAAQS through 2025. As part of the rulemaking, EPA also will be approving the 2007 base year emissions inventory as well as the 2009, 2017, and 2025 motor vehicle emission budgets for PM<sub>2.5</sub> and NOx. EPA is accepting comment on the proposed redesignation request until **March 13, 2014**; it can be found in the February 11, 2014 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The proposed redesignation is primarily of interest to facilities in the downstate PM<sub>2.5</sub> nonattainment area, which is comprised of New York City, Long Island and Orange, Rockland and Westchester counties.

## WATER

NEW YORK STATE: DEC made available for comment its **draft list of impaired waters required by Section 303(d) of the federal Clean Water Act**. The list, which is updated every two years, includes waters that do not support appropriate uses and identifies those waters that require and are scheduled for total maximum daily load (TMDL) development. As in previous years, the list includes segments that are impaired for a wide range of contaminants. In conjunction with the 303(d) list, DEC also made available for comment draft revisions to its Consolidated Assessment and Listing Methodology (CALM), which outlines the state's process for monitoring and assessing water quality. DEC is accepting comment on the draft 303(d) list and revised CALM until **March 14, 2014**; they can be found on DEC's website at: [www.dec.ny.gov/chemical/31290.html](http://www.dec.ny.gov/chemical/31290.html).

Implications: Adoption of a TMDL for impaired waters may lead eventually to stricter SPDES permit limits and other discharge restrictions targeted at eliminating the impairment.

## Regulatory Agenda

DEC published its **regulatory agenda for 2014**. The agenda identifies the regulatory changes DEC may pursue in the upcoming year. Key items on the agenda include:

- **6 NYCRR Part 205, Architectural and Industrial Maintenance Coatings:** Include additional and more restrictive limits on volatile organic compounds (VOCs).
- **6 NYCRR Part 212, General Process Emission Sources:** Establish a new procedure for evaluating and reducing air toxic impacts from stationary sources. Note: DEC circulated preliminary changes in Fall 2013.
- **6 NYCRR Part 222, Distributed Generation:** Adopt a new regulation establishing standards for distributed generation sources – stationary internal combustion engines used to produce electricity for use at the facility at which they are located, including emergency generators.
- **6 NYCRR Part 230, Gasoline Dispensing Sites and Transport Vehicles:** Update and clarify testing requirements for gas stations; conform various provisions to new federal requirements and guidance; require prior notification to DEC for each test;

require new vapor leak detection equipment; and delete Stage II VOC control equipment requirements currently applicable downstate.

- **6 NYCRR Part 235, Consumer Products:** Implement additional VOC product content limits.
- **6 NYCRR Parts 325 and 326, Pesticides:** Clarify and update existing regulations; include federal requirements relating to removal of residues from pesticide containers prior to disposal or refilling; implement federal requirements for the Worker Protection Standard; and adopt rules addressing federal minimum risk pesticides.
- **6 NYCRR Parts 360, 364, and 369, Solid Waste Management:** Major revisions including reorganizing the rule to better reflect solid waste topics and addressing subjects not currently covered by the regulations, such as automobile dismantlers, pharmaceutical waste, dredge materials, biohazard incident waste, and yellow grease.
- **6 NYCRR Part 368, Product Stewardship and Labeling:** Rename regulation; make existing recycling emblem regulations consistent with national labeling guidelines; and develop regulations implementing recent laws addressing mercury-added consumer products and product stewardship requirements for electronic waste, cell phones and rechargeable batteries.
- **6 NYCRR Parts 370-374, 376, Hazardous Waste Management:** Incorporate changes to the federal hazardous waste regulations adopted since January 2002; incorporate changes to the federal hazardous waste combustor standards adopted since September 1999; and make state-initiated changes and corrections.
- **6 NYCRR Part 375, Environmental Remediation Programs:** Provide additional direction on issues encountered since the rule was adopted; incorporate soil cleanup objective changes; consider possible changes to the definition of “significant threat” under the Superfund program; consider opportunities to incorporate sustainable remediation and development techniques into cleanup projects; and make other changes and corrections.
- **6 NYCRR Parts 595-599, Chemical Bulk Storage; Parts 610-611, Major Oil Storage Facilities; Parts 612-614, Petroleum Bulk Storage:** Incorporate changes implementing the federal Energy Policy Act of 2005, which requires states to adopt training and other requirements relating to underground storage tanks; revise the list of hazardous substances in Part 597 to reflect federal changes and updates; conform key definitions to reflect recent changes to the petroleum bulk storage implementing statute; enhance monitoring, maintenance and equipment requirements to prevent leaks and spills; and make numerous other changes. Note: DEC circulated preliminary draft revisions for comment in Fall 2013.
- **6 NYCRR Part 617, State Environmental Quality Review Act:** Modify lists of Type I and Type II actions and make other changes to streamline the SEQRA process.
- **6 NYCRR Parts 662-665, Freshwater Wetlands:** Update and clarify freshwater wetlands mapping and classification standards and establish more efficient map amendment procedures; repeal Part 662, Freshwater Wetlands – Interim Permit, as obsolete; remove outdated references and procedures; and eliminate outdated land use regulations contained in Part 665.
- **6 NYCRR Part 750, State Pollutant Discharge Elimination System (SPDES) Permits:** Incorporate recently enacted law requiring reporting of discharges of untreated and partially treated sewage; add definitions; update references; and incorporate new federal criteria and standards.

Environmentally-related rulemakings identified by other state agencies include: (1) 10 NYCRR subpart 5-1, Public Water Systems; amend rules relating to water supply emergency plans; incorporate federal regulations to improve control of microbial pathogens and lead and copper in public water supply systems; and update backflow device tester certification requirements; (2) 10 NYCRR Part 75, Standards for Individual Water Systems and Individual Sewage Treatment Systems: clarify design submittal and approval procedures and add new regulations for individual water wells to establish water quality reference standards; (3) 10 NYCRR Part 73, Asbestos Safety Training Program: incorporate revisions made to the New York State Department of Labor's asbestos regulations and make other changes; and (4) 9 NYCRR Parts 1201-1210, 1219-1228, 1240, 1260, Building, Fire and State Energy Conservation Construction Codes: revise code enforcement training program requirements; consider adding new Parts addressing energy efficiency standards for appliances and equipment; clarify responsibility for code enforcement when county/local governments decline to participate; and make numerous other changes. The 2014 regulatory agenda for DEC and other agencies can found at: <http://docs.dos.ny.gov/info/register/2014/jan8/toc.html>.

## Upcoming Deadlines

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

**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](http://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](http://www.gpo.gov/fdsys) for details.

**March 10, 2014:** Deadline for submitting comments on EPA's proposed residual risk/periodic technology review rulemaking for the acrylic and modacrylic fiber, polycarbonate and amino/phenolic resins production categories. See the January 9, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**March 13, 2014:** Deadline for submitting comments on EPA's proposal to redesignate the PM<sub>2.5</sub> downstate nonattainment area to attainment. See the February 11, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**March 14, 2014:** Deadline for submitting comments on DEC's draft Section 303(d) List of Impaired Waters and Consolidated Assessment and Listing Methodology (CALM). These documents can be accessed at [www.dec.ny.gov/chemical/31290.html](http://www.dec.ny.gov/chemical/31290.html).

**April 14, 2014:** Deadline for submitting comments on DEC's draft *Environmental Monitoring Services* program policy. This document can be accessed at [www.dec.ny.gov/docs/materials\\_minerals\\_pdf/draftmonitor.pdf](http://www.dec.ny.gov/docs/materials_minerals_pdf/draftmonitor.pdf).

**April 15, 2014:** Deadline for submitting comments on EPA's NODA and request for information on hazardous waste management in the retail sector. See the February 14, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**May 5, 2014:** Deadline for submitting comments on EPA's draft NSPS for new residential wood heaters, hydronic heaters, forced-air furnaces and masonry heaters. See the February 3, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**May 9, 2014:** Deadline for submitting comments on EPA's proposed NSPS for GHG emissions from utility electric generating units (extended from March 10, 2014). See the January 8, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.