ENVIRONMENTAL BREAKFAST CLUB
REGULATORY SUMMARY

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Final Statutes, Regulations, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
AIR			
FEDERAL **Tier 3 Motor Vehicle Emission and Fuel Standards** 40 CFR Parts 79, 80, 85, et al. 79 Fed. Reg. 23414 (April 28, 2014)	EPA adopted **stricter motor vehicle and fuel standards** for light-duty vehicles (LDVs), light-duty trucks, medium-duty passenger vehicles, and heavy-duty vehicles (HDVs) up to 14,000 pounds gross vehicle weight rating (GVWR) to be phased in over eight years beginning in 2017. The Tier 3 standards adopt a "systems approach" to reducing emissions, addressing the vehicle and fuel as an integrated system. Key components of the Tier 3 standards include: • ***Vehicle emission standards.*** EPA adopted new fleetwide average standards for exhaust emissions of nonmethane organic gases (NMOG) and nitrogen oxide (NOx) as well as new particulate matter (PM) standards that apply on a per vehicle basis. Similar Tier 3 standards were adopted for HDVs up to 14,000 pounds GVWR, many of which are diesel fueled. Compliance will be determined using both the traditional Federal Test Procedure and the Supplemental Federal Test Procedure, a composite test that simulates higher temperatures, speeds and accelerations. EPA also extended the useful period during which the standards apply from 120,000 to 150,000 miles. • ***Evaporative emission standards.*** EPA adopted evaporative emission standards that require covered vehicles to have essentially zero fuel vapor emissions while in use; the standards are comprised of stricter emission limits, new test procedures, and a new fuel/evaporative system leak emission standard. • ***Fuel.*** Because sulfur in fuel hinders the performance of emission control equipment, EPA reduced the allowable sulfur content of gasoline from 30 to 10 ppm as of 2017. In addition, EPA updated its federal emission test fuel to encompass the wide variety of fuels and fuel blends currently on the market. The Tier 3 standards are intended to harmonize both with California's low emission vehicle program and with the agency's recently adopted fuel economy and greenhouse gas emission standards. As a result, manufacturers should be able to produce a single fleet of vehicles that complies with all applicable regulations. The regulations can be found in the April 28, 2014 Federal Register at: www.gpo.gov/fdsys.	The Tier 3 rule is primarily of interest to automobile manufacturers and fuel refiners. The proposed NMOG and NOx tailpipe standards for LDVs represent approximately an 80% reduction from today's fleet average. The petroleum industry strongly objected to the Tier 3 proposal, arguing that it will substantially increase the cost of gasoline.	The final rule takes effect June 27, 2014. Overall, the final Tier 3 program is very similar to EPA's proposal. The biggest change relates to the ethanol content of gasoline used in emission testing. EPA originally proposed to increase the ethanol content of test fuel from E0 to E15. However, EPA ultimately decided to designate E10 as the test fuel because E15 is not yet widely available.

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
WATER			
FEDERAL **EPA and Army Corps Rule Regarding Identification of Waters Protected by the Clean Water Act** 33 CFR Part 328 et al. 79 Fed. Reg. 22188 (Apr. 21, 2014)	EPA and the U.S. Army Corps of Engineers (ACOE) made available for comment **a draft rule describing how the agencies will identify waters protected by the Clean Water Act** (CWA) and address recent U.S. Supreme Court decisions on this issue. The CWA prohibits the discharge of pollutants into "navigable waters" except in compliance with specific CWA requirements. Navigable waters, in turn, is defined as "waters of the United States." Over the years, many questions have arisen about the scope of CWA jurisdiction in light of this definition. In 2001, the U.S. Supreme Court concluded that CWA jurisdiction did not extend to isolated ponds. A 2006 decision considered whether CWA jurisdiction extended to wetlands adjacent to non-navigable tributaries but failed to reach a consensus. The proposed rule includes the following key provisions: • ***Waters of the United States.*** The regulation defines waters of the United States to mean: traditional navigable waters; interstate waters, including interstate wetlands; territorial seas; impoundments of traditional navigable waters, interstate waters or wetlands; tributaries of such waters; and adjacent waters and wetlands. • ***Other waters.*** In addition, the agencies propose that "other waters" (i.e., those not specifically listed above), could be determined to be "waters of the United States" through a case-specific showing that the waters alone, or in combination with other similarly situated waters in the region, have a "significant nexus" to a traditional navigable water, interstate water or the territorial seas. EPA is specifically taking comment on alternate approaches to determining whether other waters are similarly situated and have the requisite nexus to a specifically identified water of the United States. • ***Exclusions.*** The agencies propose to exclude specified waters from the definition of waters of the United States, including wastewater treatment systems, prior converted cropland, water transfers, and certain ditches, among other exemptions. • ***Definitions.*** The agencies propose new definitions, including the terms "adjacent" "neighboring," "riparian area," "floodplain," "tributary," "wetlands" and "significant nexus." The proposed rule can be found in the April 21, 2014 Federal Register at: www.gpo.gov/fdsys.	The proposed rule potentially affects virtually all CWA programs, including ACOE § 404 permits, National/State Pollutant Discharge Elimination System wastewater discharge permits, and CWA § 401 water quality certifications. According to EPA, the proposed rule will "reduce documentation requirements and the time currently required for making jurisdictional determinations. It will provide needed clarity for regulators, stakeholders and the regulated public for identifying waters as 'waters of the United States,' and reduce time and resource demanding case-specific analyses prior to determining jurisdiction and any need for permit or enforcement actions." 79 Fed. Reg. at 22191. Industry has objected that the proposed rule contains a number of ambiguous terms – including "tributaries," "streams," "neighboring" and "adjacent" – that improperly expand the law's reach.	EPA and the ACOE are accepting comments on the proposed rule until **July 21, 2014**. On April 21, 2014, the same agencies also announced that they are accepting comment on an interpretive rule to address the exemption from permitting provided under CWA § 404(f)(1)(A) for discharges of dredged or fill material associated with certain agricultural conservation practices based on the Natural Resources Conservation Service conservation practice standards. The deadline for submitting comment on the interpretive rule is **June 5, 2014**.

Other Recent Developments (Final)

AIR

FEDERAL: A federal circuit court recently **upheld EPA's 2013 revisions to key aspects of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for portland cement manufacturing plants, while rejecting EPA's adoption of an affirmative defense to penalties for excess emissions occurring during malfunctions**. The court in *Natural Resources Defense Council v. EPA*, 2014 WL 1499825 (D.C. Cir. 2014) concluded that: (1) EPA's decision to adopt a less stringent particulate matter (PM) standard did not violate Clean Air Act (CAA) § 112(d)(7), 42 USC § 7412(d)(7), which, according to EPA, functions as a savings clause rather than as a restriction on its ability to voluntarily reduce the stringency of emission standards under CAA § 112; (2) EPA could consider cost-effectiveness in deciding whether to adopt "beyond-the-floor" maximum achievable control technology (MACT) standards; and (3) EPA's decision to set a new compliance date of 2015 was reasonable since it had adopted a new PM standard. In the most significant aspect of the decision, the court concluded that the CAA did not authorize EPA to establish an affirmative defense to penalties for excess emissions during malfunctions. According to the court, the CAA's citizen suit provision vests authority over private suits in the courts. Accordingly, only the courts can determine, on a case-by-case basis, whether civil penalties are appropriate.

Implications: In the past several years, EPA has included an affirmative defense to penalties for excess emissions during malfunctions in all newly adopted/revised NESHAPs. This decision invalidates this defense and so is likely to have a widespread impact on the NESHAP program.

FEDERAL: A federal circuit court recently **upheld EPA's NESHAP for coal and oil-fired power plants** against challenges by industry, various states and environmental groups. The court in *White Stallion Energy Center, LLC v. EPA*, 2014 WL 1420294 (D.C. Cir. 2014) concluded, among other things, that: (1) EPA's determination that it was "appropriate and necessary" to regulate hazardous air pollutant emissions from power plants under the NESHAP program was reasonable; (2) EPA was not required to consider the cost of compliance in making its appropriate and necessary determination; (3) EPA was allowed to consider environmental harms in deciding whether to regulate power plants under the NESHAP program; (4) EPA could consider both major and area sources in establishing maximum achievable control technology (MACT) standards for power plants; (5) EPA's approach to assembling data for purposes of establishing the "MACT floor" for mercury emissions was reasonable; (6) EPA did not err in failing to establish a separate category for circulating fluidized bed units; (7) the statute authorized EPA to allow compliance with emission standards to be demonstrated through emission averaging; and (8) EPA provided a reasonable explanation for its decision to allow facilities to demonstrate compliance with the non-mercury metal standards via one of three methods—continuous parametric monitoring, quarterly performance testing, or performance testing once every three years for qualifying low emitting units.

Implications: The decision is primarily of interest to owners/operators of coal and oil-fired power plants.

REMEDIATION

NEW YORK STATE: The New York Appellate Division, Third Department, recently **upheld a decision by DEC to deny an application to reclassify a site under the state Superfund law**. In *ELG Utica Alloys, Inc. v. DEC,* 2014 WL 1386296 (3d Dept. 2014), DEC classified petitioner's property as a Class 2 site ("Significant threat to the public health or environment – action required") based on PCB contamination. When the owner's application to reclassify the site as Class 3 ("Does not present a significant threat to the public health or environment – action may be deferred") was denied, the matter was heard by an administrative law judge (ALJ) who found the site should be reclassified; however, that decision was overturned by the DEC Commissioner. The court upheld the Commissioner's decision after finding: (1) the Commissioner did not exceed his jurisdiction by reviewing the ALJ's decision; (2) the Commissioner's determination should not be annulled because of the five-year delay between the ALJ's recommended decision and the Commissioner's final determination; (3) the Commissioner did not premise his determination on the mere presence of PCBs at the site (which is barred by previous case law) but instead found that PCBs were present in concentrations that exceeded environmental quality standards and could therefore constitute a significant threat; and (4) the Commissioner's determination was supported by substantial evidence, including credible testimony from a former employee of petitioner that significant quantities of PCB-contaminated oil were disposed on the site.

Implications: The decision is primarily of interest to owners of inactive hazardous waste sites.

ENVIRONMENTAL REVIEW

NEW YORK STATE: New York's Appellate Division, Third Department, recently **upheld a challenge to a local law limiting wetland development in the face of a challenge under the State Environmental Quality Review Act** (SEQRA). In *Gabrielli v. Town of New Paltz,* 2014 WL 1622379 (3d Dept. 2014), the Town of New Paltz enacted a local law to prevent the "despoliation and destruction of wetlands, waterbodies and water courses" that was challenged by opponents on SEQRA grounds. In upholding the law, the court concluded, among other things, that: (1) the Town Board took the requisite "hard look" at the local law, electing voluntarily to complete Part 3 of the Environmental Assessment Form (EAF) analyzing potential environmental impacts in detail and including data and conclusions from the Town Engineer's report in the EAF; (2) the area to be regulated was sufficiently identified where the law defined the regulated areas with reference to a Wetland and Watercourse Map and provided a mechanism for homeowners to obtain a more precise determination at the Town's expense; (3) the law was not unconstitutionally vague in light of the procedures/standards established in the law for identifying the location of regulated wetlands and qualified vernal pools; and (4) the law did not violate ECL § 24-0501(2) by regulating activities exempt by DEC because it applies concurrently to (and not instead of) the state law.

ZONING

NEW YORK STATE: The New York Appellate Division, Third Department, **affirmed a lower court decision finding that a homeowner was conducting an unauthorized home business by keeping exotic animals on his property and collecting fees** from people to view the animals. The property owner in *Salton v. Town of Mayfield Zoning Board of Appeals*, 2014 WL 1316363 (3d Dept. 2014) kept several tigers and leopards in cages at his home. The applicable zoning code required anyone considering a home occupation to present their concept to the Town Planning Board for approval. The court found that the owner was operating a business concerning the exhibition of animals after noting that he had listed a business name on one of his license applications and had business cards which displayed the business name and listed prices for viewing the animals. The court went on to find that the cages used to house the animals were built into the ground and so could be considered structures regulated as accessory uses under the zoning code. Because the owner did not lawfully own any large cats when the zoning code was enacted, his activities did not predate enactment of the provision prohibiting unauthorized home occupations.

Other Recent Developments (Proposed)

AIR

FEDERAL: EPA **proposed to add several additional materials to the list of categorical non-waste fuels that can be burned in boilers rather than commercial and industrial solid waste incineration (CISWI) units.** In 2011, EPA finalized a definition of non-hazardous solid waste to be used to identify whether non-hazardous secondary materials burned as fuels or used as ingredients in combustion units are solid waste and thus whether the units are regulated as CISWIs under CAA § 129 or as boilers under CAA § 112. As part of that rulemaking, EPA adopted a procedure for adding additional materials to the list of non-waste fuels categorically excluded from regulation as solid waste under CAA § 129. With the current rulemaking, EPA is proposing to add the following materials to the list of non-waste fuels that can be burned in boilers: (1) construction and demolition (C&D) wood processed from C&D debris according to best management practices; (2) paper recycling residuals, including old corrugated cardboard rejects, generated from the recycling of recovered paper and paperboard products and burned on-site by paper recycling mills whose boilers are designed to burn solid waste; and (3) creosote treated railroad ties that are processed and combusted in units designed to burn both biomass and fuel oil. EPA is accepting comment on the proposed rule until **June 13, 2014**; it can be found in the April 14, 2014 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is primarily of interest to facilities hoping to burn the listed waste streams in boilers or industrial furnaces.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

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 for details.

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

May 9, 2014: Deadline for submitting application for New York's Environmental Excellence Awards. The application and related materials can be found on DEC's website at www.dec.ny.gov/public/945.html.

June 5, 2014: Deadline for submitting comments on EPA's/Army Corps' proposed interpretive rule exempting from permitting discharges of dredged or fill material associated with certain agricultural conservation practices. See the April 21, 2014 Federal Register at www.gpo.gov/fdsys for details.

June 13, 2014: Deadline for submitting comments on EPA's proposal to add materials to the list of non-waste fuels allowed to be burned in boilers and industrial furnaces. See the April 14, 2014 Federal Register at www.gpo.gov/fdsys for details.

July 21, 2014: Deadline for submitting comments on EPA's/Army Corps' proposed rule defining scope of waters protected under Clean Water Act. See the April 21, 2014 Federal Register at www.gpo.gov/fdsys for details.