

# Young / Sommer LLC

## ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

September 5, 2014

Prepared by:  
Elizabeth Morss  
Young/Sommer LLC  
5 Palisades Drive  
Albany, NY 12205  
(518) 438-9907, ext. 232  
emorss@youngsommer.com  
<http://www.youngsommer.com>

Final Statutes, Rulemakings, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
<b>WATER</b>			
<p>FEDERAL  <b>Standards for Cooling Water Intake Structures at Existing Facilities</b>                      40 CFR Parts 122 and 125                      79 Fed. Reg. 48300                      (Aug. 15, 2014)</p>	<p>EPA <b>adopted technology-based standards for existing power generating and manufacturing facilities that are designed to withdraw more than 2 million gallons per day (mgd)</b> from waters of the United States and use at least 25% of that water for cooling purposes. The rules, which will be implemented through the National Pollutant Discharge Elimination System (NPDES) permitting program, fulfill Clean Water Act § 316(b), 33 USC § 1326(b), which requires EPA to establish best technology available (BTA) for cooling water intake structures to minimize impingement (trapping of aquatic organisms against intake screens) and entrainment (drawing of organisms into cooling system). With respect to impingement, the rule offers seven options: (1) closed-cycle recirculating system; (2) cooling water intake structure with maximum through-screen design intake velocity of 0.5 feet per second (fps); (3) cooling water intake structure with maximum through-screen intake velocity of 0.5 fps; (4) operate an off-shore velocity cap; (5) operate intake modified traveling screen approved by EPA; (6) operate any other combination of technologies, management practices and operational measures determined to be BTA; or (7) achieve a specified impingement standard. Options 1, 2 and 4 are essentially pre-approved technologies while options 3, 5 and 6 require submission of more detailed, site-specific information. With respect to entrainment, all facilities must submit a site-specific BTA determination while those that withdraw at least 125 mgd must submit an Entrainment Characterization Study and other information spelled out in the regulation. New units at an existing facility must be equipped to achieve one of two compliance alternatives, both of which reference closed-cycle cooling. Any facility not covered by the rule is subject to the CWA § 316(b) standards on a case-by-case basis, with BTA selected using best professional judgment.</p> <p>The rule can be found in the August 15, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>According to EPA, the rule will affect approximately 521 manufacturing facilities and 544 power plants. EPA already has adopted BTA standards for new facilities; earlier rules setting standards for certain existing facilities were remanded back to EPA by a federal court.</p>	<p>The final rule will take effect October 14, 2014.</p> <p>EPA proposed BTA in April 2011 for existing power generation and manufacturing facilities that withdraw cooling water. EPA published two Notices of Data Availability in June 2012 that further clarified its approach to establishing BTA for existing facilities.</p>

**Proposed Statutes, Regulations and Guidance**

Citation	Summary	Implications	Schedule/Notes
<b>CHEMICAL</b>			
<p>FEDERAL  <b>Chemical Facility Anti-Terrorism Standards</b>                      6 CFR Part 27                      79 Fed. Reg. 48693                      (Aug. 18, 2014)</p>	<p>The Department of Homeland Security (DHS) published an advance notice of proposed rulemaking (ANPR) seeking input on ways to <b>improve its Chemical Facility Anti-Terrorism Standards (CFATS)</b> adopted in 2007. Under the regulation, facilities that possess one or more specifically listed chemicals of interest (COI) above the screening threshold quantity (STQ) listed in the regulation must submit a “top-screen” analysis to DHS. DHS reviews the top-screen analysis and other relevant information to determine whether to require the facility to prepare a security vulnerability assessment (SVA) or alternative analysis. DHS reviews any required SVAs to determine whether a particular facility is high-risk and must submit a site security plan (SSP) or alternative plan for DHS approval. The COI list includes several hundred flammable, explosive and toxic chemicals that pose a potential threat from release, theft, or sabotage. DHS published the recent ANPR to help identify ways to make the CFATS program more effective in achieving its regulatory objectives; the ANPR is part of a larger effort to implement an Obama administration executive order requiring federal agencies to review and enhance safety and security at chemical facilities in the wake of several high-profile accidents. The ANPR requests information on a range of subjects including: (1) ways to improve its current approach to identifying CFATS-covered facilities and ensuring compliance with CFATS requirements; (2) treatment of non-traditional chemical facilities (i.e., facilities that store significant quantities of chemicals but are not chemical producers/distributors); (3) clarification of terminology; (4) whether and how DHS should clarify or modify the risk-based performance standards contained in the regulation; and (5) possible changes to the list of COIs contained in Appendix A of the regulation.</p> <p>The ANPR can be found in the August 18, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>The ANPR is of interest to any facility that stores COIs above STQs. According to DHS, since the program began, it has received over 48,500 top screens and has notified close to 8,900 facilities that it has initially designated them as high-risk and that they are therefore required to submit SVAs. As of June 17, 2014, DHS had authorized plans for 1,648 facilities.</p>	<p>DHS is accepting comments on the ANPR until <b>October 17, 2014</b>.</p>

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<b>TRANSPORTATION</b>			
<p>FEDERAL  <b>Hazardous Materials Reverse Logistics</b>            49 CFR Parts 171 and 173            79 Fed. Reg. 46748            (Aug. 11, 2014)</p>	<p>The Pipeline and Hazardous Materials Safety Administration (PHMSA) <b>proposed to establish an exception to the hazardous material transportation (Hazmat) regulations to address “reverse logistics”</b>—the return of hazardous materials to or between a vendor, distributor, manufacturer or other person. Currently, hazardous materials shipped from a retailer back to a distribution facility are subject to the same Hazmat requirements as the original shipment; however, the retail employees responsible for packaging and shipping the materials often are not properly trained. With this rulemaking, the PHMSA is proposing to adopt a reverse logistics exception to the Hazmat requirements as follows:</p> <ul style="list-style-type: none"> <li>• <b>Definitions.</b> The proposal defines reverse logistics as “the process of moving goods from their final destination for the purpose of capturing value, recall, replacement, proper disposal, or similar reason.”</li> <li>• <b>Applicability and hazard classes.</b> The proposed exception applies only to shipments made by highway and to consumer products in specific hazard classes that are commonly found in the reverse logistics supply chain and can be easily managed.</li> <li>• <b>Training.</b> Retail employees shipping under the proposed exception must receive training targeted at their reverse logistics duties (recognizing hazardous materials, identifying the hazards associated with those materials, and preparing shipments consistent with the reverse logistics exception).</li> <li>• <b>Segregation.</b> The proposed exception allows the mixing of hazard classes in a single package providing the packages are not leaking; leaking packages must be specially handled.</li> <li>• <b>Packaging.</b> Materials handled under the reverse logistics exception are subject to reduced packaging requirements. In particular, returned materials must be placed in their original (or equivalent) packaging, Inner packaging must be leakproof for liquids and siftproof for solids. For liquids, the outer packaging must hold enough absorbent to contain a spill from the inner packaging.</li> </ul> <p>The PHMSA also proposed to modify an existing exception for the shipment of lead acid batteries to allow for the pickup of batteries from multiple retail entities for the purpose of recycling.</p> <p>The proposed regulations can be found in the August 11, 2014 Federal Register at: <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>The proposed rule is primarily of interest to retailers and others responsible for managing hazardous materials returned by consumers and others. The PHMSA hopes that the exception will ensure the safe handling of such materials through a simplified program tailored to the unique issues associated with reverse logistics. The proposed rule is part of a larger effort by the federal government to examine the problems associated with the management of hazardous materials by retailers. <i>See also</i> 79 Fed. Reg. 8926 (Feb. 14, 2014) (EPA advance notice of proposed rulemaking seeking comment on hazardous waste management issues faced by retailers).</p>	<p>The PHMSA is accepting comments on the proposed rule until <b>October 10, 2014</b>.</p>

## Other Recent Developments (Final)

### AIR

FEDERAL: EPA **revised 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, 42 USC § 7412, 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 standard, set forth at 40 CFR Part 63, subpart III, applies to new and existing major sources that produce FPUF or rebond foam. The revised rule prohibits the use of hazardous air pollutant-based auxiliary blowing agents to produce specific grades and densities of foam, a practice that has already stopped 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 required compliance with emission standards during startup and shutdown and submission of electronic copies of required performance test reports to EPA. However, EPA declined to adopt a proposal to establish an affirmative defense to penalties for excess emissions during malfunctions in the wake of a federal appeals court decision invalidating a similar defense in the cement plant NESHAP. The rule can be found in the August 15, 2014 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: According to EPA, there are currently 12 FPUF production facilities subject to the NESHAP.

FEDERAL: EPA **denied petitions to reconsider several provisions of its NESHAP for new and existing stationary reciprocating internal combustion engines (RICE)** located at major and area sources of hazardous air pollutants. The standards, set forth at 40 CFR Part 63, subpart ZZZZ, establish emission limits and other requirements for RICE. In response to various petitions, EPA agreed to accept comment on the following RICE rule revisions adopted in January 2013: (1) a provision allowing certain engines to delay the requirement to purchase ultra-low sulfur diesel fuel until January 1, 2015; (2) a provision delaying the requirement for operators of certain engines to submit annual reports on engine use until March 31, 2016; and (3) criteria for allowing engines at area sources to be used for 50 hours in non-emergency situations to supply power as part of a financial arrangement with another entity. After conducting a detailed assessment of the comments received, EPA declined to revise the regulation as requested in the petitions. The notice of the final decision on the petitions for reconsideration can be found in the August 15, 2014 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The notice is primarily of interest to owners/operators of stationary RICE.

NEW YORK STATE: DEC **removed the reference to the downstate fine particulate matter (PM<sub>2.5</sub>) nonattainment area from the definition of nonattainment area.** The downstate PM<sub>2.5</sub> nonattainment area covers New York City, Long Island, and Orange, Rockland and Westchester counties. EPA recently finalized the redesignation of this area from nonattainment to attainment for PM<sub>2.5</sub>. With this rulemaking, DEC revised the definition of “nonattainment area” in 6 NYCRR § 200.1(av)(2) to delete the reference to the PM<sub>2.5</sub> nonattainment area. This change means that new and modified major PM<sub>2.5</sub> sources in this area will be subject to the Prevention of Significant Deterioration program rather than the more stringent nonattainment New Source Review program with respect to PM<sub>2.5</sub> emissions. The revision can be found on DEC’s website at: [www.dec.ny.gov/regulations/98564.html](http://www.dec.ny.gov/regulations/98564.html).

Implications: The rule is primarily of interest to facilities in the New York City metropolitan area.

## HAZARDOUS WASTE

FEDERAL: A federal appeals court **rejected an effort by citizens groups to use the Resource Conservation and Recovery Act (RCRA) to address railyard diesel emissions.** In *Center for Community Action & Environmental Justice v. BNSF Railway Co.*, 2014 WL 4085860 (9th Cir. 2014), environmental organizations commenced a citizen suit under 42 USC §6972(a)(1)(B) alleging that particulate matter found in diesel emissions from the defendants’ railyard constituted a “solid waste and hazardous waste” the “handling, storage, treatment, transportation, or disposal” of which may present an imminent and substantial endangerment to public health or the environment. The Court of Appeals for the Ninth Circuit rejected this argument after finding that: (1) the emission of air pollutants does not constitute “disposal” as defined under RCRA; (2) the existence of provisions elsewhere in RCRA specifically addressing emissions of air pollutants confirms that Congress did not intend to regulate air emissions as solid waste disposal; and (3) the collective history of the Clean Air Act and RCRA confirms that the CAA governs air pollutants while RCRA governs land disposal and that “indirect sources” of air pollutants like defendants’ railyards are excluded from federal regulation under both programs.

Implications: The decision clarifies that air emissions from indirect sources such as railyards are not subject to federal air pollution or solid/hazardous waste laws.

## Other Recent Developments (Proposed)

## OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: The Occupational Safety and Health Administration (OSHA) published a supplemental notice of proposed rulemaking seeking comment on **additional changes to the rules governing tracking of injuries and illnesses.** In November 2013, OSHA published a notice of proposed rulemaking to amend its injury/illness reporting regulations to add new electronic reporting obligations and make certain information accessible on OSHA’s website. During the public comment period, many stakeholders expressed concern that the new requirements could motivate employers to under-record employee injuries/illnesses by promoting policies that

deter/discourage reporting, including adopting unnecessarily complex reporting procedures and retaliating against employees who report. With the recent supplemental notice, OSHA announced it was considering whether to amend the proposed rule to: (1) require that employers inform employees of their right to report injuries and illnesses; (2) require any employer injury/illness reporting procedures to be reasonable and not unduly burdensome; and (3) prohibit employers from retaliating against employees who report injuries and illnesses. OSHA is accepting comments on the supplemental proposed rule until **October 14, 2014**; it can be found in the August 14, 2014 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The supplemental rule is potentially of interest to any employer subject to the injury/illness reporting requirements.

## Upcoming Deadlines

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

**September 8, 2014:** Deadline for submitting comments on EPA's proposal to identify certain flammable refrigerants as an acceptable substitute for HFCs under the SNAP program. See the July 9, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**September 15, 2014:** Deadline for submitting comments on the following rulemakings relating to air emissions from MSW landfills: (1) advance notice of proposed rulemaking on emission guidelines for existing MSW landfills; and (2) proposed NSPS for new, reconstructed and modified MSW landfills. See the July 17, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**September 22, 2014:** Deadline for submitting comments on documents containing a possible methodology for estimating lead exposures and incremental health effects created by renovations of public and commercial buildings. See the August 6, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**September 30, 2014:** Deadline for submitting comments on the PHMSA's proposed rules addressing "high hazard flammable trains." See the August 1, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 6, 2014:** Deadline for submitting comments on EPA's proposal to reclassify certain HFCs from acceptable to unacceptable substitutes under the SNAP program. See the August 6, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 7, 2014:** Deadline for submitting comments on EPA's proposed revisions to grain elevator NSPS. See the July 9, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 10, 2014:** Deadline for submitting comments on PHMSA's proposed reversed logistics exception to hazardous material transport regulations. See the August 11, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 14, 2014:** Public hearings scheduled in Albany on DEC's proposed revisions to the PBS, CBS and used oil regulations. Additional hearings are scheduled in Rochester and New York City. In addition, DEC is conducting a webinar and several public information meetings about the proposed rulemaking.

**October 14, 2014:** Deadline for submitting comments on OSHA's supplemental notice of proposed rulemaking seeking comment on possible implications of proposal to require electronic reporting of occupational injuries/illnesses on employer's willingness to report. See the August 14, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 16, 2014:** Deadline for submitting comments on EPA's proposed carbon pollution emission guidelines for existing power plants and emission standards for modified and reconstructed power plants. See the June 18, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 17, 2014:** Deadline for responding to DHS's ANPR seeking input on possible changes to its Chemical Facility Anti-Terrorism Standards. See the August 18, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 20, 2014:** Deadline for submitting comments on EPA's/Army Corps' proposed rule defining scope of waters protected under the Clean Water Act (extended from July 21, 2014). See the April 21, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 28, 2014:** Deadline for submitting comments on EPA's proposed revisions to petroleum refinery NESHAP and NSPS (extended from August 29, 2014). See the June 30, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**October 29, 2014:** Deadline for submitting comments on EPA's request for information on possible revisions to its risk management plan regulations under CAA § 112(r). See the July 31, 2014 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**November 4, 2014:** Deadline for submitting comments on DEC's proposed revisions to the PBS, CBS and used oil management regulations and DEC's Draft Program Policy, DER-40, *Operator Training*. The draft regulations can be found at [www.dec.ny.gov/chemical/92526.html](http://www.dec.ny.gov/chemical/92526.html). The draft program policy can be found at [www.dec.ny.gov/regulations/2387.html](http://www.dec.ny.gov/regulations/2387.html).