

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Final Statutes, Rulemakings, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
ZONING			
<p>NEW YORK STATE <i>Colin Realty Co. v. Town of North Hempstead</i> Standard for Evaluating Request for Off-Street Parking Variances</p>	<p>New York’s highest court held that requests for off-street parking variances should be evaluated as area rather than use variances provided the property is intended to be used for a purpose permitted in the zoning district. In <i>Colin Realty Co. v. Town of North Hempstead</i>, 2014 WL 5285474 (2014), the applicant sought to place a full-service restaurant in a building that formerly housed a gift shop, both uses authorized under the zoning code. The Zoning Board of Appeals (ZBA) granted the necessary conditional use permit after finding that the storefront was in a preexisting nonconforming building and that the benefits of granting the necessary variance from the parking restrictions outweighed the detriments. Both the trial and intermediate appellate courts upheld the ZBA’s determination in the face of conflicting precedent over the proper classification of variances from off-street parking requirements. After reviewing the relevant precedent, the New York Court of Appeals concluded that variances from off-street parking requirements are area rather than use variances. As a preliminary matter, the court noted that an earlier case suggesting that an applicant was not entitled to a variance under the more lenient test for area variances was extraneous to the decision and might be considered dictum. More important, the previous decision was issued before the state adopted legislation setting standards for use and area variances. According to the court, the relevant statutory provisions define “area variance” as an authorization to use land “in a manner which is not allowed by the dimensional or physical requirements” of the zoning regulations. <i>See, e.g.,</i> General City Law § 81-b(1). Off-street parking requirements “regulate how the property’s area may be developed, akin to minimum lot size or set-back restrictions.” As a result, the court found that requests to relax off-street parking requirements require an area rather than a use variance as long as the underlying use is permitted in the zoning district.</p>	<p>The decision clarifies that requests for variances from parking restrictions should be reviewed under the less stringent standard for area variances.</p>	

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>FEDERAL Effluent Limitations Guidelines and Standards for Discharges to POTWs from Dental Practices 40 CFR Parts 403 and 441 79 Fed. Reg. 63258 (Oct. 22, 2014)</p>	<p>EPA proposed effluent limitations guidelines to limit discharges of mercury and other metals from dental practices to publicly owned treatment works (POTWs). According to a recent study, approximately half of all mercury discharged to POTWs can be attributed to dental amalgam, which is used by dentists to fill cavities. To address this problem, EPA is proposing to require dentists to achieve a 99% reduction of total mercury from mercury amalgam process wastewater. The agency anticipates that dentists will achieve this standard by implementing the following measures:</p> <ul style="list-style-type: none"> • Installing and properly operating and maintaining an amalgam separator certified to meet at least a 99% reduction of total mercury. Facilities with existing separators that do not meet the 99% control standard can keep their equipment for 10 years or until it is replaced, whichever occurs first. • Compliance with two additional best management practices (BMPs)—not flushing scrap amalgam down the drain and cleaning chair-side traps with non-bleach, non-chlorine cleaners. These BMPs are intended to prevent mercury discharges that bypass the separator. Dentists that typically do not handle amalgam except in emergencies can submit a certification to EPA that exempts them from the rule. <p>Ordinarily, sources subject to categorical standards must comply with detailed recordkeeping and reporting requirements found in the general pretreatment regulations. In recognition of the large number (and relatively small size) of the sources subject to the dental office point source category, EPA proposed special discharge monitoring, reporting and recordkeeping requirements for “dental industrial users” (DIUs). Among other things, DIUs must prepare a baseline report, a 90-day compliance report, and annual reports demonstrating ongoing compliance with the rule. In addition, dental dischargers must comply with tailored recordkeeping requirements.</p> <p>The proposed effluent guidelines can be found in the October 22, 2014 Federal Register at: www.gpo.gov/fdsys,</p>	<p>The proposed rule is primarily of interest to dental practices that use dental amalgam. EPA is not proposing to include wastewater discharges from facilities where the practice consists exclusively of one or more of the following dental specialties: oral pathology, oral and maxillofacial radiology, oral and maxillofacial surgery, orthodontics, periodontics or prosthodontics.</p> <p>Twelve states, including New York, already have implemented programs to reduce dental mercury discharges. Like the federal program, New York’s dental mercury regulation, set forth in the state’s hazardous waste regulation at 6 NYCRR subpart 374-4, contemplates the use of amalgam separators to reduce mercury discharges from dental practices. Currently, New York is not delegated to implement the federal pretreatment program. Accordingly, the state and federal regulations will be implemented simultaneously.</p>	<p>EPA is accepting comments on the proposed effluent guidelines until December 22, 2014.</p> <p>Existing dental practices will be expected to comply with the guidelines three years after the effective date of the final rule.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>NEW YORK STATE General Permit for Groundwater Discharges of Treated Sanitary Wastes GP-0-15-001</p>	<p>DEC proposed a revised general permit for private/commercial/institutional (PCI) discharges to groundwater of between 1,000 and 10,000 gallons per day (gpd) of treated sanitary waste per outfall under the State Pollutant Discharge Elimination System (SPDES) permit program. This permit authorizes the discharge of sanitary waste, without the admixture of industrial wastes, from on-site wastewater systems that discharge to groundwater. The new General Permit, identified as GP-0-15-001, is available only to PCI facilities using standard or alternative technologies referenced in specific DEC design standard documents. Facilities seeking coverage under the General Permit must submit the following documents: an application for SPDES General Permit GP-0-15-001; an engineering report and site plan signed and stamped by a licensed professional engineer (PE); and a design certification signed and stamped by a licensed PE that the system meets state design standards. If DEC concludes that the project can be authorized under the General Permit it will return a validated permit to the applicant that authorizes the specific outfall described in the application. Wastewater discharge from the system is allowed when the local health agency approves on-site system plans, design and construction and the applicant submits an affirmation of local approval to DEC; where local health department approval is not required, the applicant must submit a PE certification of on-site treatment works construction to DEC. The General Permit includes provisions addressing maximum flow, strength and character; septic tank inspections; facility maintenance; recordkeeping; annual regulatory fees; permit transfers; and facility operations. It also includes general conditions applicable to all authorized permits.</p> <p>The draft revised General Permit can be found on DEC's website at: www.dec.ny.gov/permits/6061.html.</p>	<p>The revised General Permit is primarily of interest to facilities such as apartment complexes, restaurants, and schools that discharge sanitary-only waste to groundwater in quantities between 1,000 and 10,000 gpd. In a change from the existing permit, DEC also is proposing to allow use of the General Permit at facilities with multiple outfalls from 1,000 to 10,000 gpd where the combined design flow is less than 30,000 gpd.</p> <p>The revised permit contains several significant changes from the existing PCI General Permit, including: (1) adding the cumulative discharge limit of 30,000 gpd; (2) requiring submission of the signed/stamped engineering report and design certification with the permit application; (3) reorganizing the permit; and (4) adding provisions relating to permit transfers.</p>	<p>DEC is accepting comment on the revised General Permit until December 5, 2014.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>NEW YORK STATE Draft New York State Aquatic Invasive Species Management Plan</p>	<p>DEC made available for comment a draft New York State Aquatic Invasive Species Management Plan, outlining the state’s strategy for preventing, detecting and responding to aquatic invasive species (AIS) during the next five years. The plan, which focuses on fresh waters, provides an overview of the AIS issue both generally and in New York State and identifies four basic objectives: prevention (stopping the introduction of AIS into and spread within New York State); detection (conducting and promoting surveillance and monitoring activities to identify new invaders and document the distribution/impacts of AIS); response (identifying and implementing the appropriate response to AIS introductions); and capacity (securing adequate long-term funding for AIS programs). For each objective, the plan generally includes an issue statement and immediate and long term actions relating to education and outreach, leadership and coordination, research and information, and regulation and legislation. The plan identifies more than 50 action items, with the following actions classified as “high priority:”</p> <ul style="list-style-type: none"> • Expand the state’s existing boat launch steward programs for public and private boat launch sites and ensure consistency across the state. • Develop an AIS response framework, i.e., a systematic process for evaluating AIS introductions and formulating appropriate responses. • Implement an effective AIS public awareness campaign and regularly evaluate these efforts. • Provide leadership for the AIS program to ensure proper coordination among government and nongovernment organizations. • Create AIS response teams that serve as “first responders” when AIS are found in a DEC region. • Expand the use of AIS disposal stations at boat launch sites. • Identify and evaluate risks associated with various pathways for AIS introduction and movement within New York. <p>The draft AIS Management Plan can be found on DEC’s website at: www.dec.ny.gov/animals/99053.html.</p>	<p>The plan is potentially of interest to anyone who lives near or uses the state’s freshwater resources, including homeowners, marina operators, boaters, municipalities, and others. The plan is part of a larger effort by DEC to address invasive species. Recent measure include: regulations restricting the commercial importation and sale of invasive plant and animal species; rules requiring boaters to take precautions to ensure AIS are not introduced at state-operated boat launch facilities; and a regulation adopted by the Lake George Park Commission requiring third party inspections and other measures prior to launching boats into Lake George.</p>	<p>DEC is accepting comment on the draft plan until December 12, 2014.</p>

Citation	Summary	Implications	Schedule/Notes
OCCUPATIONAL SAFETY AND HEALTH			
<p>FEDERAL Request for Information on Chemical Management and Permissible Exposure Limits 29 CFR Parts 1910, 1915, 1917, et al. 79 Fed. Reg. 61384 (Oct. 10, 2014)</p>	<p>The Occupational Safety and Health Administration (OSHA) published a request for information (RFI) in conjunction with a comprehensive review of its approach to managing chemical exposures in the workplace, including updating its permissible exposure limits (PELs). PELs are regulatory limits on the amount or concentration of a particular substance allowed in workplace air. OSHA established most PELs in 1971 and the vast majority have never been updated despite evidence showing that many PELs do not adequately protect workers. A 1989 rule seeking to update the PELs was vacated by a federal appeals court which concluded that the agency had failed adequately to explain or support its new PELs. The current RFI provides a detailed overview and history of the PELs, identifying issues associated with the PEL process, including the methods used to develop risk and technological and economic feasibility findings. The RFI also reviews how developments in science and technology may improve the scientific basis for setting PELs. Finally, the RFI provides an overview of possible alternative approaches for managing chemical exposures, including: identifying new sources of information about hazardous chemicals; substituting safer chemicals and processes (in particular, “informed substitution”); classification of chemicals under the revised OSHA Hazard Communication program; health hazard, occupational exposure, and/or control banding (i.e., grouping chemicals based on various criteria, such as toxicity or hazard characteristics or recommended control measures); and task-based exposure assessment and control approaches (i.e., classifying tasks or jobs based on their exposure potential).</p> <p>The RFI can be found in the October 10, 2014 Federal Register at: www.gpo.gov/fdsys.</p>	<p>Numerous industries are subject to one or more PELs. Industry and OSHA generally agree that the PELs are outdated; however, revising the PELs will require a significant expenditure of resources in light of the information required to support changes to each PEL. With the RFI, OSHA is seeking information on possible alternatives both for developing/updating PELs and for managing chemical exposures through measures other than PELs.</p>	<p>OSHA is accepting information in response to the PEL RFI until April 8, 2015.</p>

Other Recent Developments (Final)

CLIMATE CHANGE

FEDERAL: EPA amended its greenhouse gas (GHG) reporting program to address confidentiality concerns regarding certain emission input data by establishing an electronic input verification tool. The GHG reporting rule requires certain industrial sources and fuel and chemical suppliers to submit annual reports quantifying their GHG emissions. In a July 2010 rulemaking on data confidentiality, the agency concluded that data elements that are inputs to emission equations are “emission data” under the GHG reporting rule and must therefore be available to the public pursuant to Clean Air Act § 114(c). Industry objected strongly to this conclusion, arguing that certain data inputs, such as product compositions and raw materials, are trade secrets and should remain confidential. After deferring certain reporting deadlines to allow it time to gather information and evaluate the potential impact of releasing various equation inputs, EPA developed an input verification tool (IVT) that performs electronic verification of the information provided by the reporting company, calculates emissions, and generates a verification summary without retaining the entered inputs. EPA’s final rule: (1) identifies the 23 source categories authorized to use the IVT and the 324 inputs to emission equations that may be entered into the IVT; (2) specifies the format for maintaining records of data entered into the IVT; and (3) for certain reporters required to use the IVT, adds new data elements to be reported. EPA allowed the deferral for reporting other inputs to emission equations to expire, meaning these inputs must be reported to EPA by March 31, 2015. The final rule takes effect November 24, 2014; it can be found in the October 24, 2014 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is primarily of interest to companies required to report emissions under the GHG reporting rule.

NEW YORK STATE: DEC issued an enforcement discretion memorandum announcing that it will follow the Supreme Court’s recent decision regarding the greenhouse gas tailoring rule pending revisions to New York’s Title V and Prevention of Significant Deterioration (PSD) regulations. Under the tailoring rule, EPA concluded that GHGs are regulated under the Title V and PSD programs and established higher “tailored” major source thresholds to avoid triggering permitting requirements for comparatively small emission sources. In *Utility Air Regulatory Group v. EPA*, the Supreme Court concluded that EPA may not require a source to comply with the Title V or PSD permit program based solely on its GHG emissions. However, where a source must comply with PSD for other pollutants and the source/modification exceeds specified thresholds for GHGs, the source can be required to comply with best available control technology (BACT) for GHGs. In its enforcement discretion memorandum, DEC announced that it would no longer apply or enforce provisions of the State’s PSD or Title V permitting regulations which require sources to obtain permits solely because emissions of GHGs exceed major source thresholds. However, sources that trigger PSD for other pollutants will be required to comply with BACT for GHGs if GHG emissions exceed the thresholds in the regulations. The memorandum can be found on DEC’s website at: www.dec.ny.gov/chemical/99156.html.

Implications: The memorandum is primarily of interest to facilities that are potentially major sources of GHGs.

ENVIRONMENTAL REVIEW

NEW YORK STATE: The Appellate Division, Second Department, **upheld DEC's decision to issue a deer culling permit** in the face of a challenge based on the Department's alleged failure to comply with the State Environmental Quality Review Act (SEQRA). In *Defense of Animals v. Vassar College*, 2014 WL 5350467 (2d Dept. 2014) DEC issued a nuisance deer permit to Vassar College consistent with a 1980 generic environmental impact statement (GEIS) addressing its wildlife game species management program. After the lower court denied plaintiffs' request for a preliminary injunction and the underlying petition, the college proceeded with the deer cull consistent with the permit issued under the GEIS. As a preliminary matter, the Appellate Division declined to dismiss the appeal as academic after concluding that the issues raised in the petition are likely to recur and evade appellate review given the short period of time deer culling permits are valid. The court went on to find that issuance of the nuisance deer permit complied with SEQRA. The court concluded that DEC's use of a GEIS, updated with a supplemental findings statement, to assess the impacts of issuance of nuisance deer permits was proper. According to the court, once a final GEIS has been filed, no further SEQRA compliance is required provided subsequent actions are carried out consistent with the conditions established in the GEIS or its findings statement. In this case, the court found that DEC's determination that the permit requested by Vassar was consistent with the 1980 GEIS was not arbitrary and capricious.

Implications: The decision validates DEC's approach to using GEIS to comply with SEQRA.

Other Recent Developments (Proposed)

CLIMATE CHANGE

FEDERAL: EPA issued a **notice of data availability (NODA) seeking comment on additional issues relating to its proposed Clean Power Plan**, which calls for setting guidelines for carbon dioxide (CO₂) emissions from existing power plants to achieve state-specific emission reductions based on four "building blocks"—improved energy efficiency, fuel switching, renewable energy, and demand side improvements. Based on comments received thus far, EPA is seeking additional input on the following issues identified since the original proposal: (1) whether the interim emission reduction goals (between 2020–2029) provide sufficient flexibility for states that currently are expected to meet their short-term emission reduction obligations by relying on transitioning from coal to natural gas; (2) whether the fuel switching component is too stringent or not stringent enough; (3) whether EPA has properly considered past state actions deploying renewable energy in setting CO₂ reduction targets and the proper extent of reliance on in-state versus out-of-state renewable energy generation; and (4) whether EPA has properly calculated state-specific CO₂ reduction goals. EPA is accepting comments on the NODA until **December 1, 2014**, the deadline for submitting comments on the Clean Power Plan. The NODA can be found in the October 30, 2014 Federal Register at: www.gpo.gov/fdsys.

Implications: The NODA is primarily of interest to owners/operators of power plants, although all electricity customers will likely be affected by the final rule to the extent CO₂ reduction efforts influence energy costs.

WATER

FEDERAL: EPA is seeking comment on its **preliminary determination to adopt a national primary drinking water regulation (NPDWR) for strontium** under the Safe Drinking Water Act (SDWA). EPA must publish a contaminant candidate list (CCL) every five years containing contaminants that are not subject to any existing NPDWRs, are known or anticipated to be in public water systems, and may require regulation under the SDWA. EPA published CCL 3 in 2009, accepting comment on whether to set standards for one or more of 116 possible drinking water contaminants. In 2011, EPA announced plans to issue a NPDWR for perchlorate, a natural and man-made chemical that is used in the manufacture of rocket fuel, fireworks, flares and explosives and may be present in bleach and some fertilizers. In the recent notice, EPA requested comment on its preliminary decision to issue a NPDWR for strontium, a naturally occurring radioactive element. According to EPA, strontium meets all three criteria for SDWA regulatory determinations: it may have an adverse health effect; it occurs with frequency and at levels of public health concern in public drinking water systems; and regulation of strontium in drinking water presents a meaningful opportunity for health risk reduction based on the estimated exposed population, potential impacts on sensitive populations, and estimated exposure from other sources. In the same notice, EPA summarized the results of each stage of its CCL review and announced its preliminary determination not to set standards for the remaining four contaminants evaluated in the final stage of the CCL 3 review—dimethoate, 1,3-dinitrobenzene, terbufos, and terbufos sulfone. EPA is accepting comments on its preliminary regulatory determination to set a NPDWR for strontium until **December 19, 2014**. The notice can be found in the October 20, 2014 Federal Register at: www.gpo.gov/fdsys.

Implications: The determination is primarily of interest to owners/operators of public drinking water systems.

NEW YORK STATE: DEC made available for comment its **draft renewal of the SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems (MS4s)**. The existing permit is scheduled to expire April 30, 2015 and DEC is proposing draft renewal permit GP-0-15-003 to replace it. The revised permit contains no major changes to the substance of the MS4 General Permit but is being adopted as a placeholder until a lawsuit challenging the existing MS4 General Permit, GP-0-10-002, is finally resolved. Facilities with coverage under GP-0-10-002 will be permitted to discharge in accordance with the new permit unless otherwise notified by DEC. The new MS4 General Permit will expire on April 30, 2017, at which time DEC will likely make substantive revisions to the permit. DEC is accepting comments on the draft renewal MS4 General Permit until **November 28, 2014**; it can be found on DEC's website at: www.dec.ny.gov/chemical/41392.html.

Implications: The draft renewal MS4 General Permit is primarily of interest to municipalities that operate MS4s covered by the current permit.

NEW YORK STATE: In conjunction with its revised PCI General Permit discussed above, DEC made available for comment a **draft document entitled *Lake George Design Standards for Wastewater Treatment Systems***, which provides licensed professional engineers and others with guidance on the design, operation and maintenance of systems that discharge more than 1,000 gpd of

sanitary-only wastewater to groundwater in the Lake George drainage basin. The draft document is very similar to DEC's *Design Standards for Intermediate Sized Wastewater Treatment Systems* issued earlier this year. The chief difference is that the Lake George standards do not address discharges of sewage to surface water, since this activity is prohibited in the Lake George drainage basin. DEC is accepting comments on the draft guidance until **December 5, 2014**; it can be found on DEC's website at: www.dec.ny.gov/chemical/79072.html.

Implications: The draft document is primarily of interest to homes and businesses that discharge sewage to groundwater in the Lake George drainage basin.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

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

November 14, 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 for details. NOTE: November 14, 2014 is also the deadline for submitting comments on EPA's draft report *Connectivity of Streams and Wetlands to Downstream Waters: A Review and Synthesis*, which was announced in the October 24, 2014 Federal Register.

November 17, 2014: Deadline for submitting comments on EPA's preliminary 2014 effluent guidelines program plan and 2012 and 2013 annual review reports. See the September 16, 2014 Federal Register at www.gpo.gov/fdsys for details.

November 20, 2014: Deadline for submitting comments on EPA's proposed revisions to the ferroalloys NESHAP. See the October 6, 2014 Federal Register at www.gpo.gov/fdsys for details.

November 28, 2014: Deadline for submitting comments on DEC's draft renewal of the SPDES General Permit for Stormwater Discharges from Municipal Separate Storm Sewer Systems, GP-0-15-003. See DEC's website at www.dec.ny.gov/chemical/41392.html for details.

December 1, 2014: Deadline for submitting comments on EPA's proposed carbon pollution emission guidelines for existing power plants (extended from October 16, 2014) and recent notice of data availability seeking comment on additional issues. See the June 18, 2014 and October 30, 2014 Federal Register at www.gpo.gov/fdsys for details.

December 5, 2014: Deadline for submitting comments on the following DEC documents: (1) General Permit GP-0-15-001, Groundwater Discharge of Treated Sanitary Sewage and (2) *Lake George Design Standards for Wastewater Treatment Systems*. These documents can be found on DEC's website at www.dec.ny.gov/permits/6061.html and www.dec.ny.gov/chemical/79072.html, respectively.

December 12, 2014: Deadline for submitting comments on DEC's draft *New York State Aquatic Invasive Species Management Plan*. The document can be found on DEC's website at: www.dec.ny.gov/animals/99053.html.

December 19, 2014: Deadline for submitting comments on EPA's preliminary determination to adopt a national primary drinking water regulation for strontium. See the October 20, 2014 Federal Register at www.gpo.gov/fdsys for details.

December 22, 2014: Deadline for submitting comments on EPA's proposed effluent limitations guidelines and standards for discharges of pollutants from dental practices to POTWs. See the October 22, 2014 Federal Register at www.gpo.gov/fdsys for details.

April 8, 2015: Deadline for submitting information in response to OSHA's RFI on alternative approaches to workplace chemical management, including possible updating of PELs. See the October 10, 2014 Federal Register at www.gpo.gov/fdsys for details.