

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

April 3, 2015

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
AIR			
<p>FEDERAL State Implementation of 2008 Revisions to Ozone NAAQS 40 CFR Parts 50, 51 et al. 80 Fed. Reg. 12264 (Mar. 6, 2015)</p>	<p>EPA adopted regulations for states implementing the 2008 ozone national ambient air quality standards (NAAQS). In 2008, EPA lowered the primary and secondary 8-hour ozone NAAQS from 0.08 to 0.075 ppm following a contentious review process. Although the Obama administration EPA reopened that process, the President ultimately decided to wait until completion of the next formal NAAQS review before deciding whether to lower the standard further. After designating nonattainment areas under the 0.075 ppm ozone NAAQS in May 2012, EPA adopted this rule summarizing the requirements for states implementing the standards. Among other things, the rule addresses: (1) the deadlines for submitting nonattainment area state implementation plan (SIP) elements and the deadlines for attaining the NAAQS; (2) whether states can rely on federal ozone control measures to demonstrate compliance with the NAAQS; (3) the modeling required to demonstrate attainment; (4) the procedure for obtaining credit for emission reductions associated with innovative or creative approaches such as energy efficiency, renewable energy, land use planning, and travel efficiency; (5) requirements for demonstrating reasonable further progress, including establishing a baseline year, inclusion of emission sources located outside the nonattainment area, and other issues; (6) reasonably available control technology (RACT) and reasonably available control measure (RACM) requirements; (7) transportation and general conformity; (8) contingency measures required in the event an area fails to meet a milestone or achieve attainment; (9) application of new source review requirements; (10) emission inventory and emission statement requirements; and (11) allowing states to combine SIP submittals to reduce administrative burdens. The rule also revoked the 1997 ozone NAAQS effective April 6, 2015.</p> <p>The rule can be found in the March 6, 2015 Federal Register at: www.gpo.gov/fdsys.</p>	<p>EPA has designated the New York City metropolitan area and Chautauqua County as marginal nonattainment under the 2008 8-hour ozone NAAQS. The rule contains the requirements DEC must implement in developing a SIP for these areas. DEC’s efforts to attain the 2008 ozone NAAQS could lead to the adoption of stricter limits on sources of volatile organic compounds (VOCs) and nitrogen oxides (NOx), the two primary precursors to ground-level ozone formation.</p>	<p>The rule takes effect April 6, 2015.</p> <p>States must make various submissions implementing the ozone NAAQS over the next four years. The precise schedule for submitting key SIP elements is spelled out in the rule.</p>

Citation	Summary	Implications	Schedule/Notes
REMEDICATION			
<p>Legislative Changes to Brownfield Cleanup Program A.3006B/S.2006B</p>	<p>As part of its final budget bill the Legislature agreed on major changes to New York’s Brownfield Cleanup Program (BCP). The bill (A.3006B/S.2006B) extends existing BCP tax credits and, in a change from the Governor’s program bill proposed in January, imposes new limits on eligibility for the tangible property component of the brownfield redevelopment tax credits only on projects in New York City. Highlights from the final bill include:</p> <ul style="list-style-type: none"> • Changing the definition of “brownfield site” from sites that are “complicated by the presence or potential presence” of contamination to sites that are contaminated at levels exceeding DEC soil cleanup objectives or other health or environmental standards adopted by the Department. This change means applicants must conduct sampling before submitting applications. • 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 where DEC cannot identify viable responsible parties. • Specifying that sites in New York City must meet the following criteria to qualify for the tangible property component of the brownfield redevelopment tax credit: (1) at least half of the site is in an “environmental zone;” (2) the property is “upside down” (property where cost of investigation/remediation equals or exceeds 75% of property’s appraised value if uncontaminated) or “underutilized” (to be defined by DEC in regulations adopted by October 1, 2015); or (3) site will be used for affordable housing. • Applying the new tax credit program to sites accepted into the BCP program on or after July 1, 2015 or the date DEC proposes regulations defining the term “underutilized,” whichever is later. Sites that entered the program after June 23, 2008 must receive their certificate of completion by December 31, 2019 to receive tax credits under the existing program. • Authorizing DEC to establish a fast track program known as BCP-EZ that allows DEC to waive certain procedural requirements associated with the BCP for applicants seeking BCP liability protections but not tax credits. <p>The BCP legislation can be found in Part BB of A.3006B/S.2006B at: http://assembly.state.ny.us.</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 the eligibility of projects in New York City for tangible property tax credits (i.e. the credits awarded to BCP developers for development rather than cleanup of the site). The Legislature declined to enact tougher tangible property tax credit applicability criteria for projects located outside New York City.</p>	<p>Governor Cuomo introduced a similar bill during the last legislative session that failed to pass. At the close of the session in June 2014, the legislature voted to extend the deadline for obtaining tax credits under the existing BCP until March 31, 2017. In a controversial move, the Governor vetoed the extension, putting pressure on the Legislature to enact reforms before the tax credit program sunset at the end of 2015.</p>

Proposed Statutes, Rulemakings, and Guidance

Citation	Summary	Implications	Schedule/Notes
AIR			
<p>FEDERAL State Implementation of Revisions to the Fine Particulate Matter NAAQS 40 CFR Parts 50, 51 and 93 80 Fed. Reg. 15340 (Mar. 23, 2015)</p>	<p>EPA proposed regulations for states implementing the revisions to the fine particulate matter (PM_{2.5}) NAAQS. In 2012, EPA lowered the primary annual PM_{2.5} NAAQS from 15.0 to 12.0 micrograms per cubic meter to provide increased protection against health effects associated with short and long-term PM_{2.5} exposure. EPA designated nonattainment areas under the revised standard in January 2015 and recently proposed this rule summarizing the requirements for states implementing the standard. Among other things, the rule proposes three alternative schemes for addressing PM_{2.5} precursors (i.e., pollutants that contribute to PM_{2.5} formation) in the wake of a court decision clarifying that appropriate regulation of all PM_{2.5} precursors is presumptively required under the CAA as an initial matter. The rule also addresses the proposed requirements for moderate nonattainment areas, including: (1) deadline for submitting attainment plans; (2) emissions inventory requirements, including inventory components, submission schedule, and requirements for both base year and projected inventories; (3) attainment plan control strategy, including general approach, identification and selection of RACT and RACM as well as selection of additional reasonable measures (i.e., other measures needed to provide for timely attainment); (4) modeling for attainment demonstrations; (5) reasonable further progress (RFP) requirements (i.e., procedures for demonstrating that adequate emissions reductions will be achieved through control measures in the SIP, including quantitative milestones); (6) contingency measures (i.e., measures that can be implemented quickly upon failure to meet an RFP milestone); and (7) attainment dates, including attainment date extensions. The rule also addresses how a PM_{2.5} area would be classified as serious as well as the proposed requirements for serious area attainment plans.</p> <p>The rule can be found in the March 23, 2015 Federal Register at: www.gpo.gov/fdsys.</p>	<p>Using air quality monitoring data collected from 2011 to 2013, EPA identified 14 areas in six states as nonattainment for PM_{2.5} either because counties exceed the NAAQS or because they contribute to a violation of the NAAQS in a nearby area. All of New York has been designated unclassifiable/attainment for the annual PM_{2.5} NAAQS.</p> <p>In an effort to simplify implementation of future PM_{2.5} NAAQS revisions, EPA indicated that the proposed rule would be applicable to the 2012 PM_{2.5} NAAQS and any future revisions to the standards. The proposed rule also addresses implementation of earlier PM_{2.5} NAAQS revisions in the wake of a court decision remanding EPA’s earlier implementation rules.</p>	<p>EPA is accepting comments on the draft regulation until May 22, 2015.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>NEW YORK STATE Standards for Individual Onsite Water Supply and Individual Onsite Wastewater Treatment Systems 10 NYCRR Part 75</p>	<p>The New York State Department of Health (DOH) proposed revisions to New York’s regulations governing individual drinking water supplies and septic systems to update the terminology in the regulations and clarify and expand the standards applicable to these systems. Major changes to 10 NYCRR Part 75 include:</p> <ul style="list-style-type: none"> • Replacing the term “individual sewage treatment system” with “individual onsite wastewater treatment system,” adding the word “onsite” to the term “individual water supply system” and revising the regulation to specify that these systems serve only one property. • Specifying that onsite wastewater treatment systems (OWTS) must be designed by a licensed professional (engineer or architect). • Clarifying that designs for OWTS that utilize an alternative system as described in the regulation must be approved by the appropriate State or county health department official prior to construction and certified by the design professional after construction. • Deleting subdivision (e) of Appendix 75-A.9 relating to evaporation-transpiration and evapo-transpiration absorption systems because these systems require very dry climates and so are not suitable for use in New York. • Deleting subdivision (c) of Appendix 75-A.10 concerning engineered systems as unnecessary. Note that these systems can still be approved by obtaining a waiver from design standards under appropriate conditions. • Establishing statewide minimum standards for individual water system water quality. The proposal contains not-to-exceed standards for coliform bacteria, lead, nitrates, nitrites, turbidity, and arsenic and standards for iron, manganese, iron plus manganese, hardness, alkalinity, pH and sodium that, if exceeded, might necessitate water treatment devices or limits on daily consumption of water by certain persons. The regulations do not require that water be tested for compliance with the standards; however, counties may choose to require compliance through their county sanitary codes. <p>The proposed regulations can be found in the March 18, 2015 State Register at: docs.dos.ny.gov/info/register/2015/march18/toc.html.</p>	<p>The proposed revisions are potentially of interest to design professionals, state and county health department officials, developers and others involved in designing and constructing individual onsite water systems (i.e., individual drinking water wells) and individual onsite wastewater treatment systems (i.e., individual septic systems).</p>	<p>DOH is accepting comments on the draft revisions until May 4, 2015.</p>

Other Recent Developments (Final)

AIR

FEDERAL: EPA revised the **National Emission Standard for Hazardous Air Pollutants (NESHAP) for off-site waste and recovery operations (OSWRO)** following a residual risk/periodic technology review. Under Clean Air Act (CAA) § 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 technology underlying the NESHAP to confirm that the standard remains current. The OSWRO standard, set forth at 40 CFR Part 63, subpart DD, applies to facilities that accept wastes from off-site sources for treatment where the treatment activities are not covered by other, more specific NESHAPs (such as those applicable to landfills or hazardous waste incinerators). Following the residual risk review, EPA concluded that the risks from off-site waste recovery operations are acceptable. Based on the technology review, EPA required Level 2 controls for certain tanks storing material with a vapor pressure of 13 kPa or greater after finding that the costs of this option were reasonable given the level of hazardous air pollutant emission reductions that would be achieved. EPA also established a more stringent leak definition for valves in gas and vapor service and light liquid service and pumps in light liquid service and required periodic instrument monitoring of certain connectors. Other changes include: (1) eliminating exemptions to emission limits during periods of startup, shutdown and malfunction; (2) requiring electronic submission of performance test and evaluation reports; (3) revising routine maintenance provisions; and (4) making various technical amendments and other corrections. The rule took effect March 18, 2015, the date it was published in the Federal Register at: www.gpo.gov/fdsys.

Implications: According to EPA, there are approximately 50 sources nationwide that are subject to the OSWRO NESHAP.

REMEDICATION

FEDERAL: EPA issued **guidance to facilitate improvements in communication, coordination, and collaboration among its water, Superfund, and enforcement programs when addressing contaminated sediment**. The guidance, entitled *Promoting Water, Superfund and Enforcement Collaboration on Contaminated Sediments*, identifies various activities to enhance communication, coordination and collaboration that should be implemented as a matter of course, including sharing monitoring data and electronic data management and mapping capabilities, coordinating actions and schedules among different legal authorities, and engaging EPA, state, tribal, and local entities early in the process and over the long-term. Other activities that may be appropriate at the program or site-specific level depending on circumstances include: aligning Superfund cleanup, water infrastructure improvement, total maximum daily load (TMDL) development and implementation, and National Pollutant Discharge Elimination System (NPDES) permit actions to facilitate coordinated progress; sharing knowledge of upland/upstream sources and/or background contamination; developing site remediation plans that may serve to reduce site loads to impaired waters; developing NPDES permit conditions that address contaminants of concern at Superfund sites; developing TMDLs that reflect cleanup reductions from remediation of contaminated sediment and any ongoing sources that would recontaminate the sediment; and developing settlements or enforcement

orders that address multi-program issues. The guidance can be found on EPA's website at: <http://water.epa.gov/scitech/swguidance/standards/library/upload/promoting-water-sediments-memo.pdf>.

Implications: The guidance is primarily of interest to those engaged in remediating sites with contaminated sediment and/or those who are discharging pollutants to areas with contaminated sediment.

ZONING

NEW YORK STATE: The New York State Appellate Division, Second Department, issued a decision **upholding a variance granted for the "life of the job,"** in the face of various objections by the Zoning Board of Appeals (ZBA) and others. In *Waterways Development Corp. v. Town of Brookhaven*, 2015 WL 894748 (2d Dept. 2015), a developer received a variance in 1986 from the Town authorizing it to construct a 100-acre retirement community that was approved "due to magnitude of project" for the "life of job." The developer partially completed the project, went bankrupt, and sold the property. The property was resold to Waterways Development Corp., which applied for building permits to complete the project. After the permits were denied, Waterways appealed to the ZBA challenging the Building Department's determination that new variances were required. The ZBA found that the variances did not survive the 25-year construction hiatus and that the original variances also were void pursuant to a 2003 law that provided that all unexpired variances with no expiration date became null and void on August 31, 2005. The court found that: (1) the plain language of the variance approval stated that the original variances were "approved for life of job;" (2) the ZBA's determination contravened Waterways' vested rights to complete construction of the project; and (3) the 2005 law did not apply to the variances at issue, which were granted for the life of the project and not in perpetuity.

Other Recent Developments (Proposed)

WATER

NEW YORK STATE: DEC made its **draft action agenda for the Hudson River estuary** available for comment. DEC's *Draft Hudson River Estuary Action Agenda 2015-2020* contains a conservation and restoration blueprint that is built around six key benefits: clean water; resilient communities; vital estuary ecosystem; estuary fish, wildlife and habitats; natural scenery; and education, river access, recreation and inspiration. After reviewing selected accomplishments since 1987 in each of the benefit areas, the agenda provides a "vision" for each benefit, followed a series of targets and a list of selected actions for 2015-2020 for each target. For example, in the case of Benefit 1: Clean Water, the goal is to make the Hudson River estuary "drinkable, swimmable and fishable." The priority targets are maintaining and improving water quality in the estuary and watershed to support municipal drinking water supplies, swimming and other water-based recreation and managing water resources to maintain water availability and sustain stream flows to support resilient ecosystems. Each target is accompanied by a list of more specific actions to be implemented during the

2015-2020 period. DEC is accepting comments on the Hudson River Estuary Action Agenda until **May 15, 2015**; it can be found on DEC's website at: www.dec.ny.gov/lands/5104.html.

Implications: The draft plan is potentially of interest to individuals, businesses, and communities along the Hudson River.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

April 6, 2015: Deadline for submitting comments on EPA's proposal to retain the existing NAAQS for lead without revision. See the January 5, 2015 Federal Register at www.gpo.gov/fdsys for details.

April 6, 2015: Deadline for submitting comments on DEC's preliminary draft revisions to the hazardous waste regulations to incorporate changes to the federal regulations and make various state-initiated changes. The preliminary rulemaking and related information and documents can be found on DEC's website at www.dec.ny.gov/regulations/100424.html.

April 8, 2015: Deadline for submitting input on EPA's periodic retrospective review of its regulations to identify rules that are outmoded, ineffective, insufficient or excessively burdensome. The announcement can be found in the March 9, 2015 Federal Register at www.gpo.gov/fdsys.

April 10, 2015: Deadline for submitting application for DEC's Environmental Excellence Award. The application can be found on DEC's website at www.dec.ny.gov/public/945.html.

April 10, 2015: Deadline for submitting comments on DEC's proposed guidance clarifying the criteria that construction activities seeking coverage under the new CGP must meet to continue to use a SWPPP designed in conformance with the 2010 version of DEC's Design Manual. The draft guidance can be found on DEC's website at www.dec.ny.gov/chemical/41392.html.

April 13, 2015: Deadline for submitting comments on OSHA's proposal to update its eye and face protection standards based on national consensus standards. See the March 13, 2015 Federal Register at www.gpo.gov/fdsys for details.

April 22, 2015: Deadline for submitting comments on EPA's proposed revisions to the rules governing the use of dispersants and other substances when responding to oil spills. See the January 22, 2015 Federal Register at www.gpo.gov/fdsys for details.

May 4, 2015: Deadline for submitting comments on DOH's proposed revisions to the standards for individual onsite water and wastewater treatment systems. See the March 18, 2015 State Register at docs.dos.ny.gov/info/register/2015/march18/toc.html for details.

May 7, 2015: Deadline for submitting comment on petition to add n-propyl bromide to list of hazardous air pollutants under CAA § 112 (extended from March 9, 2015). See the February 6, 2015 Federal Register at www.gpo.gov/fdsys for details.

May 15, 2015: Deadline for submitting comments on DEC's *Draft Hudson River Estuary Action Agenda 2015-2020*. The agenda can be found on DEC's website at www.dec.ny.gov/lands/5104.html.

May 22, 2015: Deadline for submitting comments on EPA's proposed regulation containing the SIP requirements for the PM_{2.5} NAAQS. See the March 23, 2015 Federal Register at: www.gpo.gov/fdsys for details.

October 9, 2015: Deadline for submitting information in response to OSHA's RFI on alternative approaches to workplace chemical management, including possible updating of permissible exposure limits (extended from April 8, 2015). See the October 10, 2014 Federal Register at www.gpo.gov/fdsys for details.