

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Final Statutes, Rulemakings, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
<p>AIR NEW YORK STATE Emergency Cooling Tower Regulation 10 NYCRR Part 4</p>	<p>In response to a recent outbreak of Legionnaires’ disease in New York City, the New York State Department of Health (DOH) recently adopted an emergency regulation, set forth at 10 NYCRR Part 4, calling for the registration, inspection and maintenance of cooling towers in the State. Among other things, the regulation requires owners of cooling towers to:</p> <ul style="list-style-type: none"> • Register the tower online with DOH by September 16, 2015. • Collect samples, assess results and take immediate action in response to the testing by September 16, 2015 and every 90 days thereafter until a formal plan is developed. The standards for interpreting the Legionella culture results are contained in Appendix A. All cooling tower cleaning and disinfection activities must be performed by commercial pesticide applicators or technicians certified under Category 7G. • Arrange for cooling tower inspections by September 16, 2015 and every 90 days thereafter. The inspections must be performed by a licensed professional engineer, certified industrial hygienist, certified water technologist or environmental consultant with specified training and experience; the results must be entered into the DOH online system. • Submit an annual certification by November 1, 2016 and annually thereafter. The certification must be completed by a person qualified to conduct inspections and must state that: the cooling tower was inspected, tested, cleaned and disinfected in compliance with the rule; the condition of the cooling tower is appropriate for its intended use; and a maintenance program has been prepared and implemented. • Develop and implement a maintenance program and plan by March 1, 2016 in accordance with specified standards that includes a schedule for routine bacteriological sampling. <p>The emergency rule can be found in the September 2, 2015 State Register at: http://docs.dos.ny.gov/info/register/2015/september2/toc.html. General information about legionella and the new rule can be found at: www.health.ny.gov/diseases/communicable/legionellosis.</p>	<p>The regulation will affect any facility with a cooling tower, which is defined as “a cooling tower, evaporative condenser or fluid cooler that is part of a recirculated water system incorporated into a building’s cooling, industrial process, refrigeration or energy production system.” Given the breadth of the definition of cooling tower and the absence of a de minimis exemption, the regulation affects a wide range of facilities across New York State.</p> <p>In addition to the specific requirements for cooling towers, the rule provides that all general hospitals and residential health care facilities “shall, as the department may determine appropriate” adopt a Legionella sampling plan for their potable water distribution systems, report the results of each sampling, and take necessary responsive measures.</p>	<p>Affected facilities must register their cooling towers, collect samples and conduct inspections under the emergency rule by September 16, 2015. The rule will expire November 14, 2015 unless DOH extends the emergency rule an additional two months. Under New York’s emergency rulemaking procedures, DOH must propose and adopt a permanent rule in accordance with the State Administrative Procedures Act by the time the emergency rule expires.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>FEDERAL Revisions to Water Quality Standards Regulation 40 CFR Part 131 80 Fed. Reg. 51020 (Aug. 21, 2015)</p>	<p>EPA revised the federal water quality standards (WQS) regulation to clarify key procedures for adopting and implementing WQS. Under the Clean Water Act (CWA), states must develop WQS based on the designated use of waterbodies (propagation of fish, shellfish and wildlife, recreation, public water supply, etc.). With the current rulemaking, EPA revised 40 CFR Part 131 to clarify key provisions and ensure more effective program implementation. Major changes include:</p> <ul style="list-style-type: none"> • Requiring the EPA administrator to issue a formal, signed determination when a new WQS is necessary to meet CWA requirements. According to EPA, this change will eliminate any confusion over precisely when the agency has made such determinations. • Clarifying when a use attainability analysis is required; adding a definition of “highest attainable use;” and requiring states to designate each waterbody with the highest attainable use when changing designated uses. • Clarifying that states must reexamine water quality criteria during their triennial review of WQS to determine if any criteria should be revised in light of new or updated CWA criteria recommendations. • Clarifying the rules relating to antidegradation. Currently, the regulations require states to adopt an antidegradation policy and identify implementation methods, with special attention on protecting high quality (“Tier 2”) waters. With this rulemaking, EPA: (1) clarified that high quality waters can be identified on either a parameter-by-parameter or waterbody-by-waterbody basis; (2) required additional public involvement where the identification was made on a waterbody-by-waterbody basis; (3) specified that states must conduct an alternatives analysis before authorizing degradation of high quality waters; and (4) required states to develop and make available to the public implementation methods for their antidegradation policies. EPA rejected a request by environmental groups that states be required to adopt antidegradation regulations. • Establishing an explicit regulatory framework for states to use when the applicable designated uses are not achievable in the near future, including the requirements for a variance and the need for reevaluation when a variance is issued. <p>The regulation can be found in the August 21, 2015 Federal Register at: www.gpo.gov/fdsys.</p>	<p>The regulation will primarily affect states and tribes, who are responsible for adopting and implementing WQS. Facilities will be affected by the changes to the extent WQS determine the effluent limits contained in National/State Pollutant Discharge Elimination System permits.</p>	<p>The revised water quality standard regulation takes effect October 20, 2015.</p>

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
AIR/CLIMATE CHANGE			
<p>FEDERAL Emission Guidelines for Existing Municipal Solid Waste Landfills 40 CFR Part 60, subpart Cf 80 Fed. Reg. 52100 (Aug. 27, 2015)</p>	<p>EPA proposed revisions to its emission guidelines for “landfill gas” from existing municipal solid waste (MSW) landfills, to be set forth at 40 CFR Part 60, subpart Cf. Although landfill gas contains methane, carbon dioxide (CO₂) and nonmethane organic compounds (NMOCs), the current emission guidelines for existing MSW landfills focus on NMOCs. In 2014, EPA published an advance notice of proposed rulemaking seeking comment on ways to achieve additional reductions in methane and NMOC emissions. Based on this review, EPA proposed the following requirements for existing MSW landfills:</p> <ul style="list-style-type: none"> • Consistent with the current rule, existing landfills would be subject to the guidelines if they have a design capacity of 2.5 million metric tons and 2.5 million cubic meters of waste. • Active landfills that meet these thresholds must install landfill gas collection and control (LGCC) systems if annual NMOC emissions are 34 metric tons or more (down from 50 metric tons under the existing guidelines). Closed landfills would remain subject to the 50 metric ton per year limit. Landfills would have 30 months to install any required controls. No controls would be necessary if the landfill can demonstrate, based on surface emissions monitoring, that emissions of methane are below 500 parts per million for four consecutive quarters. • EPA proposed to eliminate existing wellhead operating limits for oxygen, nitrogen and temperature while retaining the limits for negative pressure. Landfills would continue to record temperature and oxygen/nitrogen levels at well heads to help determine whether their LGCC systems are operating properly. • EPA proposed to clarify that landfill gas can be used for beneficial uses other than as a fuel for stationary combustion sources, including as a vehicle fuel, in production of high Btu gas for pipeline injection, and as a raw material in chemical manufacturing. <p>The proposed rule can be found in the August 27, 2015 Federal Register at: www.gpo.gov/fdsys.</p>	<p>The updated emission guidelines would apply to landfills that accepted waste after November 8, 1987 and began construction, reconstruction or modification on or before July 17, 2014. According to EPA, an estimated 989 open and closed landfills would be subject to the proposed emission guidelines. Of this number, 574 are currently required to collect and control their emissions; an additional 106 open landfills would be newly subject to controls.</p> <p>The rule was proposed as part of the Obama administration’s Strategy to Reduce Methane Emissions, which was published in March 2014. The strategy focuses on reducing methane emissions from the four major sources of human-related methane: landfills, coal mining, agriculture, and oil and gas.</p>	<p>EPA is accepting comments on the proposed emission guidelines until October 26, 2015.</p>

Citation	Summary	Implications	Schedule/Notes
AIR/CLIMATE CHANGE			
FEDERAL Standards of Performance for Municipal Solid Waste Landfills 40 CFR Part 60, subpart XXX 80 Fed. Reg. 52162 (August 27, 2015)	<p>The same day EPA published its proposed revisions to the emission guidelines for existing MSW landfills EPA published a supplemental rule seeking comment on changes to the New Source Performance Standards (NSPS) for new, modified, and reconstructed MSW landfills in addition to those proposed in July 2014. The July 2014 proposal called for retaining the same design capacity threshold for triggering the NSPS but reduced the NMOC emission level at which MSW landfills must install controls from 50 to 40 metric tons per year. With the supplemental proposed rule, DEC is requesting comment on a proposal to further reduce the emission level necessitating the installation of controls to 34 metric tons per year, consistent with the proposed emission guidelines discussed above.</p> <p>The supplemental proposed rule can be found in the August 27, 2015 Federal Register at: www.gpo.gov/fdsys.</p>	<p>The supplemental proposed rule is primarily of interest to owners/operators of new, reconstructed and modified MSW landfills. It would apply to MSW landfills that commenced construction, reconstruction or modification after July 17, 2014.</p> <p>The proposal fulfills EPA’s obligation to review NSPS every eight years and addresses issues that have arisen over the years concerning implementation of the standard.</p>	<p>EPA is accepting comments on the supplemental proposed rule until October 26, 2015.</p>

Other Recent Developments (Final)

AIR

FEDERAL: EPA adopted a **framework for state agencies to provide data on current air quality in areas with large sources of sulfur dioxide (SO₂) emissions**. EPA established a new NAAQS for SO₂ in 2010 that focuses on short-term exposures. Because of this short-term focus, the NAAQS is considered a “source-oriented” standard rather than a regional one; as a result, strategies to achieve the NAAQS are expected to focus on large point sources such as power plants and major industrial facilities. Because the current air monitoring network is not adequate to collect the required air quality information, EPA adopted a strategy that calls for identifying monitoring locations using source emissions data in addition to ambient air monitoring data. Under the final rule, air agencies must submit to EPA a list of sources within their jurisdiction that have annual SO₂ emissions of 2,000 tons per year (tpy), as well as any sources identified by EPA or the state that warrant air quality characterization. The state must then assess the impact of those sources on ambient air quality using either monitoring data or modeling. In the alternative, a state may limit emissions from specific sources to less than 2,000 tpy to avoid the need to characterize the area. The state must indicate what approach(es) it plans to adopt by July 1, 2016; the remaining deadlines depend on which option the state selects. In finalizing the rule, EPA rejected its preferred option which would have linked the facility emission threshold to the population of the area where the source is located (with a lower ton per year threshold for more populated areas). The final rule, which takes effect September 21, 2015, can be found in the August 21, 2015 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is primarily of interest to states. The focus on source-oriented monitors is likely to result in the designation of more nonattainment areas than an area-oriented approach. EPA has already designated nonattainment areas under the 2010 SO₂ NAAQS using available ambient air monitoring data.

WATER

NEW YORK STATE: DEC revised its **wetland delineation guidance to extend the length of time freshwater wetland determinations and surveyed delineations will be considered fixed**. New York maps and regulates freshwater wetlands of 12.4 acres or more and those of “unusual local importance.” Because of the scale of the maps, and because conditions on the ground may change, these maps do not always reflect the precise boundaries of the wetland. DEC’s 1987 guidance, entitled *Confirmation of Freshwater Wetlands Determinations and Delineations*, establishes a process for determining the precise boundaries of a wetland where that information is needed for development or other purposes. Determinations issued pursuant to this process (including surveyed delineations commissioned by the landowner and reviewed/approved by DEC) are currently considered fixed by DEC if, within three years, the landowner has begun ground work, filed a complete freshwater wetland permit application or taken other steps toward construction. With the current notice, DEC increased the length such boundary determinations/delineations are considered

fixed from three to five years. Notice of the change can be found in the August 26, 2015 Environmental Notice Bulletin at: www.dec.ny.gov/enb/20150826_not0.html.

Implications: The change is relevant to anyone engaged in activities affecting freshwater wetlands.

ZONING

NEW YORK STATE: After litigation spanning more than a decade, the New York Appellate Division, First Department, concluded that **New York City's zoning ordinance barring adult establishments from all but a few areas of the City was unconstitutional**. Following a 1993 study of the impact of adult establishments on the quality of urban life, New York City revised its zoning ordinance to limit the location of such establishments, which it defined based on whether a substantial portion of their business involved specified activities. After this approach was criticized as too vague, the City adopted a formula that defined regulated businesses as those with at least 40% of floor areas or stock devoted to adult purposes. When businesses took steps to get around that limit, the City revised the ordinance to establish a list of criteria for assessing whether a store or venue (in the case of live entertainment) should be covered by the ordinance. After New York's highest court concluded that the City had raised triable issues of fact as to the nature of the adult businesses under review, the case was returned to the lower court. In *For the People Theaters of New York, Inc. v. City of New York*, the Appellate Division, First Department, noted as an initial matter that regulations that infringe on constitutionally protected speech or conduct must be justified by unrelated concerns and no broader than necessary for their purpose. After reviewing the Court of Appeals decision, the appellate division examined the businesses in relation to the criteria set forth in the revised ordinance and concluded that the City had not met its burden of showing that the adult bookstores and video stores and adult eating and drinking establishments were adult businesses within the meaning of the ordinance.

Other Recent Developments (Proposed)

AIR

FEDERAL: EPA **proposed three separate determinations related to the 36 areas currently classified as marginal nonattainment under the 2008 ozone standard**. EPA reduced the ozone NAAQS from 0.80 ppm to 0.75 ppm in 2008, which led to the designation of 46 areas throughout the country as nonattainment for ozone, 36 of which were classified as marginal nonattainment, the lowest classification. With this rulemaking, EPA is proposing the following determinations for these areas based on monitoring data collected for the years 2012-2014: (1) 17 marginal areas attained the 2008 ozone NAAQS by the July 20, 2015 deadline; (2) eight marginal areas qualify for a one-year extension of the attainment deadline; and (3) 11 marginal areas failed to attain the 2008 ozone NAAQS by the applicable deadline. Areas in the last category must be reclassified to moderate nonattainment, implement additional emission reduction measures required by the Clean Air Act for such areas, and achieve the 2008 ozone NAAQS by July 20, 2018. EPA is taking comment on two alternative approaches for setting the deadline for states to submit the revisions to

their state implementation plans needed to address moderate nonattainment areas requirements. EPA is accepting comments on the proposed rule until **September 28, 2015**; it can be found in the August 27, 2015 Federal Register at: www.gpo.gov/fdsys.

Implications: The Jamestown area (Chautauqua County) is currently attaining the NAAQS and so is eligible for redesignation to attainment. The New York City metropolitan area (which includes New York City, Long Island and Westchester and Rockland counties) did not attain the ozone NAAQS and so must be redesignated moderate nonattainment.

OTHER

NEW YORK STATE: DEC is **accepting applications for its New York Environmental Leaders (NYEL) program**, which seeks to recognize and provide incentives to organizations that demonstrate use of sustainable business practices or pollution prevention practices that exceed environmental compliance. Companies accepted into the NYEL program are considered a priority for DEC assistance, and are provided access to a specially designated DEC contact to facilitate communication between DEC and the NYEL member; they are also eligible to use the NYEL logo and receive other positive recognition from DEC. The program consists of two tiers: a leadership tier (open to organizations with a track record of environmental leadership) and an entry tier. Applications for entry into the program this year must be submitted to DEC by **October 31, 2015**. NYEL information and application forms can be found on DEC's website at: www.dec.ny.gov/chemical/939.html.

Implications: This announcement is potentially of interest to companies seeking state recognition for their environmental compliance efforts.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

September 28, 2015: Deadline for submitting comments on OSHA's proposed revisions to its injury/illness recordkeeping requirements. See the July 29, 2015 Federal Register at www.gpo.gov/fdsys for details.

September 28, 2015: Deadline for submitting comments on EPA's proposed rule announcing the status of marginal ozone nonattainment areas based on recent monitoring data. See the August 27, 2015 Federal Register at www.gpo.gov/fdsys for details.

September 30, 2015: Deadline for submitting data to assist DEC in identifying impaired waters that do not meet water quality standards. See DEC's website at www.dec.ny.gov/chemical/31290.html for details.

October 1, 2015: Deadline for submitting comments on EPA's/NHTSA's joint standards to reduce fuel consumption and GHG emissions from medium and heavy-duty engines and vehicles, including trailers (extended from September 11, 2015). See the July 13, 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.

October 26, 2015: Deadline for submitting comments on EPA's proposed revisions to the emission guidelines for existing municipal solid waste landfills and its supplemental proposal for changes to the standards for new/modified landfills. See the August 27, 2015 Federal Register at www.gpo.gov/fdsys for details.

October 31, 2015: Deadline for submitting application to enroll in DEC's New York Environmental Leaders program. Information on the program can be found at www.dec.ny.gov/chemical/939.html.

November 5, 2015: Deadline for submitting comments on OSHA's proposed update to its beryllium standards. See the August 7, 2015 Federal Register at www.epa.gov/fdsys for details.