

# Young / Sommer LLC

## ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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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, Regulations, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
<b>BULK STORAGE/REMEDICATION</b>			
<p>NEW YORK STATE  <b>Second Emergency Rule Adding PFOA and PFOS to Hazardous Substance List</b>                      6 NYCRR Part 597</p>	<p>DEC adopted a second emergency rule to provide it with the tools to <b>address the discovery of perfluorooctanoic acid (PFOA) and related substances in drinking water wells</b> in Hoosick Falls and elsewhere. In May 2016, DEC adopted an emergency rule adding PFOA-acid, perfluorooctane sulfonic acid (PFOS-acid) and PFOA and PFOS salts to the list of hazardous substances regulated under the chemical bulk storage (CBS) program. Amending 6 NYCRR Part 597 to include these substances allows DEC to regulate them under the CBS program and require reporting of PFOA and PFOS releases. More important, adding these substances to the Part 597 list allows DEC to address PFOA and PFOS-contaminated sites under the State Superfund program, which defines “hazardous waste” to include both traditional hazardous wastes and any hazardous substance listed in Part 597. As part of this rulemaking, DEC also set a deadline of April 25, 2017 for facilities to dispose of fire-fighting foam containing these substances.</p> <p>The emergency rule can be found on DEC’s website at: <a href="http://www.dec.ny.gov/regulations/104968.html">www.dec.ny.gov/regulations/104968.html</a>. The August 10, 2016 State Register notice announcing the second emergency rule can be found at: <a href="http://docs.dos.ny.gov/info/register/2016/aug10/toc.html">http://docs.dos.ny.gov/info/register/2016/aug10/toc.html</a>.</p>	<p>PFOA and PFOS have been widely used in fire-fighting foam, stain-resistant carpeting, and semi-conductor coatings, among other uses.</p> <p>Although the rule addresses PFOA and PFOS generally, it is clearly targeted at providing DEC with the regulatory authority needed to address PFOA and PFOS contamination in Hoosick Falls and neighboring communities.</p>	<p>DEC proposed a permanent rule at the same time it published the first emergency rulemaking designating PFOA and PFOS as hazardous substances under 6 NYCRR Part 597. The deadline for submitting comments on the proposed permanent rule has closed.</p> <p>The recent emergency rule took effect July 21, 2016 and will expire September 18, 2016.</p>

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<b>REMEDICATION</b>			
<p>NEW YORK STATE  <b>Reproposed Brownfield Cleanup Program Regulations Implementing Recent Statutory Changes</b>                      6 NYCRR Part 375</p>	<p>DEC revised <b>New York’s Brownfield Cleanup Program (BCP) regulations</b>, set forth at 6 NYCRR Part 375, to implement the 2015 amendments to the BCP statute limiting eligibility for tangible property tax credits for projects in New York City. The statute specifies that sites in New York City must meet one or more of several criteria to qualify for tangible property tax credits under the BCP program, including that the site will be used for “affordable housing” or is “underutilized.” In the face of strong opposition to an earlier proposal, DEC adopted a revised definition of underutilized that allows for greater flexibility. Like the earlier proposal, the final version considers various factors, including the extent of recent usage (based on permissible floor area), future use, the need for substantial government assistance, and other factors. However, DEC has revised the definition to: allow mixed use development, including some residential; drop the requirement that the project need substantial government assistance for largely industrial uses; reduce from five to three years the time that a property has to be underutilized relative to applicable zoning; and expand eligibility to vacant sites. DEC also adopted a definition of “affordable housing project” with minor changes from the original proposal.</p> <p>The revised brownfield regulation can be found on DEC’s website at: <a href="http://www.dec.ny.gov/regulations/101908.html">www.dec.ny.gov/regulations/101908.html</a>.</p>	<p>The rule is primarily of interest to those engaged in brownfield redevelopment efforts in New York City.</p> <p>As required by the 2015 BCP amendments, DEC also revised 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 statewide change means applicants must conduct sampling before submitting applications.</p>	<p>The rule took effect August 12, 2016.</p>

Proposed Statutes, Regulations, and Guidance

Citation	Summary	Implications	Schedule/Notes
<p><b>AIR</b></p> <p>NEW YORK STATE  <b>Waste Fuels</b>                      6 NYCRR subpart 225-2</p>	<p>DEC is <b>proposing to replace its existing rules governing the burning of waste fuel for energy recovery with new rules</b> that update key definitions and constituent requirements, remove outdated work practices, expand the number of facilities eligible to burn waste oil, update the monitoring, reporting, and recordkeeping requirements, and make other updates/corrections. The proposed new rule, which is set forth at 6 NYCRR subpart 225-2, includes the following provisions:</p> <ul style="list-style-type: none"> <li>• <b>Definitions.</b> DEC is proposing to revise the definition of “waste oil” in 6 NYCRR Part 200 to eliminate any reference to chemical waste. Consistent with this change, DEC is also dropping the distinction between Waste A and Waste B fuels. According to DEC, this change means that facilities that burn used oil containing chemical waste and off-spec waste oils that do not meet the limitations in subpart 225-2 will be regulated under 6 NYCRR Part 212 (process operations) or the hazardous waste regulations. DEC also is adding a new definition of residual oil to Part 200.</li> <li>• <b>Constituent limits.</b> Waste fuel must meet specific constituent limits for PCBs, total halogens, sulfur, gross heat content, and lead in order to be burned. With this rulemaking, DEC is proposing to lower the limits for PCBs and lead, while removing a 99% combustion efficiency requirement, which DEC concluded can lead to increased emissions of nitrogen oxides.</li> <li>• <b>Applicability.</b> DEC is proposing to expand eligibility to burn waste oil by lowering the minimum permissible heat input requirement from 20 to 10 million British thermal units (mmBtus), consistent the threshold under the New Source Performance Standards for small boilers.</li> <li>• <b>Space heaters.</b> DEC is expanding the permitting exemption for “automotive maintenance/service facilities” by broadening the term to include junkyards and fleet maintenance facilities.</li> </ul> <p>DEC also is proposing changes to the monitoring, reporting and recordkeeping requirements.</p> <p>The proposed rule can be found on DEC’s website at:  <a href="http://www.dec.ny.gov/regulations/107051.html">www.dec.ny.gov/regulations/107051.html</a>.</p>	<p>The proposed rule is primarily of interest to facilities that burn waste oils in combustion, incineration and process sources, including automotive maintenance/service facilities burning their own waste oil in space heaters. The proposed changes to the rule will expand the number of facilities allowed to burn waste oil as fuel while shifting the regulation of facilities burning waste oil combined with chemical waste to 6 NYCRR Part 212.</p>	<p>DEC is accepting comments on the replacement version of subpart 225-2 until <b>October 5, 2016</b>. A public hearing on the proposed rule is scheduled for <b>September 30, 2016</b> at 1:00 p.m. at DEC Headquarters, 625 Broadway, Albany, Room 129A/B.</p>

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<b>HAZARDOUS WASTE</b>			
<p>FEDERAL  <b>Hazardous Waste Manifest User Fees</b>                      40 CFR Parts 262, 263 et al.                      81 Fed. Reg. 49072 (July 26, 2016)</p>	<p>EPA <b>proposed user fee regulations applicable to electronic and paper manifests</b> submitted via the e-Manifest system currently being established by EPA to fulfill the requirements of the Hazardous Waste Electronic Manifest Establishment Act. EPA adopted regulations implementing the electronic manifest law in February 2014 and has spent the last several years developing the e-Manifest computer system. With the current rulemaking, EPA is seeking comment on the fees that will be imposed on users to recoup the costs of the system and make it essentially self-sustaining. Key issues include:</p> <ul style="list-style-type: none"> <li>• EPA’s proposal to impose user fees on all manifests, including those used to ship state-only regulated wastes. The fees will cover both the costs of processing the manifests and those associated with providing public access to manifest data.</li> <li>• EPA’s plan to impose the costs of manifests on commercial treatment, storage and disposal facilities rather than waste generators.</li> <li>• Alternative formulas for imposing fees, including system-related cost categories (system setup, operation and maintenance and indirect costs), types of manifests and fee categories, and various formula options.</li> <li>• Fee trajectory issues, i.e., actions EPA will take to adjust e-manifest user fees to address inflation and other program cost changes to ensure fee schedules keep pace with program costs.</li> <li>• Possible premiums for complex manifest transactions, including consolidated shipments, split or breakdown shipments, and hazardous waste rejections or regulated residues, among others. In particular, EPA is proposing to charge premiums for stray and extraneous documents and paper manifest corrections. In addition, EPA is seeking comment on a proposal to incentivize the use of electronic manifests over paper ones.</li> <li>• Proposal to process payments via a monthly invoicing system based on actual manifest usage while taking comment on other options, including prepayments based on projected or historic use.</li> </ul> <p>In addition, EPA is taking comment on other matters, including fee dispute resolution, financial and other sanctions, and submission of data corrections.</p> <p>The proposed rule can be found in the July 26, 2016 Federal Register at <a href="http://www.gpo.gov/fdsys">www.gpo.gov/fdsys</a>.</p>	<p>The proposed rule is potentially of interest to anyone engaged in the generation, storage, treatment or disposal of hazardous waste.</p> <p>The e-manifest system, including user fees, will be administered by EPA. However, states must adopt the user fee provisions of the final rule to maintain consistency with the federal hazardous waste regulations.</p>	<p>EPA is accepting comments on the proposed user fee regulations until <b>September 26, 2016</b>.</p>

## Other Recent Developments (Final)

### AIR

FEDERAL: In a lengthy decision, the Court of Appeals for the District of Columbia Circuit considered a host of **challenges to the major and area source standards for boilers and process heaters** adopted under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program, 42 USC § 7412, together with the standards for **commercial/industrial solid waste incineration (CISWI)** units adopted under 42 USC § 7429. The court in *United States Sugar Corp. v. EPA*, 2016 WL 4056404 (2016), rejected all of industry's challenges to the rules, concluding, among other things, that: (1) the provision requiring certain units to undertake energy audits did not violate the Clean Air Act; (2) EPA did not err when it determined that malfunctions should not be taken into account when setting maximum achievable control technology (MACT) floors; and (3) EPA's pollutant-by-pollutant (i.e., hypothetical composite) approach to establishing MACT floors was reasonable. Although the court also rejected many of the environmental petitioners' challenges to the MACT standards, it agreed that while EPA could reasonably create subcategories of regulated units based on the percentage of the "subcategory-defining fuel" used, it could not exclude sources based on fuel usage when setting MACT without violating the CAA, which calls for determining MACT based on emissions from the best performing sources. In addition to vacating this portion of the rule, the court remanded the following provisions back to EPA for further review/explanation: (1) the selection of carbon monoxide as a surrogate for non-dioxin/furan organic air toxics; (2) the exclusion of burnoff ovens, soil treatment units and space heaters from regulation as CISWIs; (3) the exclusion of synthetic area source boilers from Title V permitting requirements; and (4) the decision to require generally available control technology rather than MACT standards for non-mercury emissions from coal-fired area source boilers.

Implications: The decision is primarily of interest to owners/operators of units regulated under the major and area source boiler standards (40 CFR Part 63, subparts DDDDD and JJJJJ) and CISWI standards (40 CFR Part 60, subparts CCCC and DDDD).

### REMEDIATION

NEW YORK STATE: In late July, Governor Cuomo signed Assembly Bill A.9568A, which amends New York's Civil Practice Law and Rules (CPLR) to establish a **special statute of limitations for personal injuries caused by contamination at newly designated Superfund sites**. Under CPLR § 214-c, plaintiffs suffering from "latent" injuries/illnesses caused by exposure to chemicals must commence an action within three years from when the injury is discovered or reasonably should have been discovered, whichever is sooner. The recently enacted law, set forth at CPLR § 214-f, allows personal injury actions to be brought under CPLR § 214-c or within three years of the time a site containing any substance or combination of substances has been designated as a federal or State Superfund site, whichever is later. Although the law was specifically enacted to assist residents of Hoosick Falls in bringing personal injuries for alleged PFOA contamination, it will increase the potential for toxic tort litigation at any newly listed Superfund site. Industry groups have expressed concern that the statute could increase pressure on DEC to designate sites under the State Superfund

program for purposes of reviving toxic tort claims. The legislation can be found on the Assembly website at: <http://assembly.state.ny.us>.

Implications: The law is potentially of interest to potentially responsible parties at recently designated Superfund sites and at contaminated sites that have not yet been placed on the State and/or federal Superfund lists.

## CHEMICAL

**FEDERAL:** The **Department of Homeland Security (DHS)** published a document summarizing its new methodology for **prioritizing reviews under the Chemical Facility Anti-Terrorism Standards (CFATS) regulation**. CFATS requires facilities that possess one or more chemical of interest above the screening threshold quantity listed in the regulation to submit a “top-screen” analysis to DHS, which may eventually lead to the preparation of a security vulnerability assessment (SVA) and site security plan (SSP) or alternative plan for DHS approval. DHS has developed a new Chemical Security Assessment Tool (CSAT), which is designed to simplify the CFATS review process and improve the identification of facilities that require a full CFATS submission. The recent notice describes the process and schedule for transitioning from the old to the new CSAT and identifies facilities that will not be required to submit a top-screen analysis. The notice can be found in the July 20, 2016 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

Implications: The notice is of interest to any facility potentially regulated under the CFATS program.

## Other Recent Developments (Proposed)

### AIR

**NEW YORK STATE:** DEC **proposed to designate the New York City metropolitan area as nonattainment under the 2015 ozone national ambient air quality standard**. In 2015, EPA lowered the 8-hour ozone NAAQS from 0.075 ppm to 0.070 ppm following a contentious public review period. Based on ambient air quality data from the 2013-2015 period, DEC is recommending to EPA that the New York City metropolitan area, which encompasses New York City, Long Island, and Westchester and Rockland counties, continue to be designated nonattainment for ozone, while recommending that the remainder of the state be designated attainment under the new, lower standard. DEC is accepting comments on the designation recommendations until **August 19, 2016**. The recommendations can be found in the July 20, 2016 Environmental Notice Bulletin at: [www.dec.ny.gov/enb/20160720\\_not0.html](http://www.dec.ny.gov/enb/20160720_not0.html).

Implications: The notice is primarily of interest to major sources of volatile organic compounds and nitrogen oxides in New York City, Long Island, and Westchester and Rockland counties.

## OTHER

**FEDERAL:** The Pipeline and Hazardous Materials Safety Administration (PHMSA) **proposed to expand the applicability of the oil spill response plan (OSRP) requirement to include trains transporting a specified quantity of liquid petroleum oil** in the face of public concerns regarding the transportation of crude oil by rail. Currently, the Clean Water Act requires “onshore facilities,” including rolling stock, to prepare OSRPs for the transportation of more than 42,000 gallons of oil “per package,” a quantity that excludes typical crude oil tank cars. (Basic plans are required for containers with a capacity of 3,500 gallons of petroleum oil.) With the current rulemaking, the PHMSA is proposing to require OSRPs for any single train transporting 20 or more loaded tank cars of liquid petroleum oil in a continuous block or 35 or more loaded tank cars of liquid petroleum oil throughout the train, excluding the locomotive. This quantity aligns with the definition of “high-hazard flammable train” (HHFT) in the final rule adopted last year setting new requirements and operational controls for these trains. Other proposed changes include: requiring covered railroads to develop response zones describing the resources available in the event of a worst case discharge; requiring railroads to provide advance notifications of HHFTs to State Emergency Response Commissions and their tribal counterparts and specifying the type of information that must be provided (number of trains per week through each county, routes, materials shipped, point of contact, etc.); and incorporating by reference an alternative to the current boiling point tests specified in the hazardous material regulations. The PHMSA is accepting comments on the proposed rule until **September 27, 2016**; it can be found in the July 29, 2016 Federal Register at: [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys).

**Implications:** The proposed rule is primarily of interest to railroads, petroleum storage terminals and others directly or indirectly involved in the transportation of crude oil and other “liquid petroleum oils” by rail.

## Upcoming Deadlines

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

**August 19, 2016:** Deadline for submitting comments on DEC’s proposal to designate the New York City metropolitan area as nonattainment under the 2015 ozone NAAQS. See the July 20, 2016 Environmental Notice Bulletin at [www.dec.ny.gov/enb/20160720\\_not0.html](http://www.dec.ny.gov/enb/20160720_not0.html) for details.

**September 2, 2016:** Deadline for submitting comments on EPA’s Clean Energy Incentive Program for incentivizing certain early emission reductions under the Clean Power Plan (extended from August 29, 2016). See the June 30, 2016 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**September 13, 2016:** Deadline for submitting comments on DEC’s proposed overhaul of the solid waste management regulations (extended from July 15, 2016). See DEC’s website at [www.dec.ny.gov/regulations/81768.html](http://www.dec.ny.gov/regulations/81768.html) for details.

**September 26, 2016:** Deadline for submitting comments on EPA's proposed user fees for its electronic hazardous waste manifest system. See the July 26, 2016 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**September 27, 2016:** Deadline for submitting comments on PHMSA's proposed rules requiring preparation of OSRPs for certain liquid petroleum oil trains. See the July 29, 2016 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.

**September 30, 2016:** Public hearing on DEC's proposed replacement rule regulating the burning of waste oils in combustion, incineration and process sources to be held at 1:00 p.m. at DEC Headquarters, 625 Broadway, Albany, Room 129A/B.

**October 5, 2016:** Deadline for submitting comments on DEC's proposed replacement rule regulating the burning of waste oils in combustion, incineration and process sources. See DEC's website at [www.dec.ny.gov/regulations/107051.html](http://www.dec.ny.gov/regulations/107051.html) for details.

**December 7, 2016:** Deadline for submitting comments on EPA's proposed rejection of a petition seeking to expand the definition of corrosive waste under the hazardous waste regulations (extended from June 10, 2016). See the April 11, 2016 Federal Register at [www.gpo.gov/fdsys](http://www.gpo.gov/fdsys) for details.