

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Final Statutes, Regulations, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
<p>AIR FEDERAL NESHAP for Area Source Industrial, Commercial and Institutional Boilers 40 CFR Part 63, Subpart JJJJJ 81 Fed. Reg. 63112 (Sept. 14, 2016)</p>	<p>EPA revised the National Emission Standards for Hazardous Air Pollutants (NESHAP) for area source industrial, commercial and institutional boilers after reviewing issues raised in petitions for reconsideration filed in 2013 immediately after the area source rule was adopted. EPA’s final decisions on the issues raised for reconsideration are set forth below:</p> <ul style="list-style-type: none"> • Startup and shutdown. EPA adopted two alternative definitions of startup specifically relevant to the first-ever firing of fuels or the firing of fuel after a shutdown event. EPA also revised the definition of shutdown to clarify that it begins when the boiler no longer supplies useful thermal energy. • Particulate matter (PM) standard for certain boilers. EPA finalized an alternative PM standard that allows new or reconstructed oil-fired boilers that combust ultra-low sulfur liquid fuel to satisfy the area source NESHAP without performance testing. EPA adopted the rule after finding that boilers burning ultra-low sulfur fuel consistently achieve the PM emission limit specified in the regulation. • Limited use boilers. EPA upheld its decision to establish a subcategory for limited-use boilers as well as the standards for those boilers. • PM/mercury testing. EPA replaced a provision eliminating the performance testing requirement when the test shows that PM emissions are equal to or less than half of the applicable PM emission limit with one requiring performance testing every five years or when a new fuel other than ultra-low sulfur liquid fuel is burned. EPA also finalized a provision specifying that additional fuel sampling is not required for 12 months when mercury in coal is found to be equal to or less than half of the mercury emission limit. • Malfunction affirmative defense. Consistent with other NESHAP rulemakings, EPA deleted the affirmative defense to civil penalties for violations caused by malfunctions in light of recent court decisions. In addition, EPA adopted technical corrections and clarifications to correct inadvertent errors and omissions. <p>The rule can be found in the September 14, 2016 Federal Register at: www.gpo.gov/fdsys.</p>	<p>The rule is primarily of interest to owners/operators of area source boilers and process heaters subject to regulation under the Subpart JJJJJ NESHAP. The rule does not apply to natural gas-fired area source boilers.</p>	<p>The final rule took effect September 14, 2016.</p>

Citation	Summary	Implications	Schedule/Notes
HAZARDOUS WASTE			
<p>FEDERAL <i>Strategy for Addressing the Retail Sector under RCRA's Regulatory Framework</i> Sept. 12, 2016</p>	<p>As part of an ongoing review, EPA issued a <i>Strategy for Addressing the Retail Sector under RCRA's Regulatory Framework</i> outlining its plans for addressing the unique hazardous waste management issues facing retailers. After extensive outreach, EPA issued a Notice of Data Availability (NODA) in 2014 seeking information on the hazardous waste management challenges facing retailers and possible methods for resolving them. Since then, EPA has pursued various hazardous waste management initiatives that will likely benefit retailers, including proposed changes to the rules governing hazardous waste generators and a special rule addressing management of pharmaceuticals, which are a key component of the hazardous waste stream generated by retailers. The strategy document summarizes EPA's past efforts, the potential impact of proposed changes to the hazardous waste rules on retailers, and EPA's upcoming activities to address retail issues, including: (1) development of a guide on recycling aerosol cans under the existing hazardous waste program; (2) options for adding common waste streams to the universal waste program, including aerosol cans, pesticides and/or electronics; and (3) development of a policy addressing reverse distribution (i.e., the process of returning unused goods to a central location before determining their ultimate disposition). The strategy document includes a pair of appendices summarizing EPA's key observations about hazardous waste management in the retail industry and its outreach efforts to key stakeholders since the NODA.</p> <p>The strategy document can be found on EPA's website at: www.epa.gov/hwgenerators/strategy-addressing-retail-sector-under-resource-conservation-and-recovery-acts.</p>	<p>Unique issues facing retailers when managing hazardous waste include: (1) difficulties managing pharmaceuticals and aerosol cans, which are a significant percentage of retail hazardous waste; (2) unpredictable waste generation rates attributable to product recalls, accidental product spills and breakage, seasonality and customer "midnight dumping;" (i.e., "episodic" waste generation issues); (3) the large variety of goods sold, many of which lack detailed information concerning their contents, complicating waste characterization; (4) high employee turnover making training difficult; and (5) the difficulties of managing hazardous products through reverse distribution programs.</p>	

Citation	Summary	Implications	Schedule/Notes
BULK STORAGE/REMEDICATION			
<p>NEW YORK STATE Third Emergency Rule Adding PFOA and PFOS to Hazardous Substance List 6 NYCRR Part 597</p>	<p>DEC adopted a third emergency rule to provide it with the tools to address the discovery of perfluorooctanoic acid (PFOA) and related substances in drinking water wells in Hoosick Falls and elsewhere. In January 2016, DEC adopted an emergency rule adding PFOA-acid to the list of hazardous substances regulated under the chemical bulk storage (CBS) program. Amending 6 NYCRR Part 597 to include PFOA allows DEC to regulate the bulk storage of the chemical under the CBS program and require reporting of PFOA releases. More important, adding PFOA to the Part 597 list allows DEC to address PFOA-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. In April 2016, DEC adopted a second emergency rule, together with a proposed permanent rule, that expanded the list of substances to include perfluorooctane sulfonic acid (PFOS-acid) and PFOA and PFOS salts to the list of hazardous substances, further expanding its remedial authority. DEC also set a deadline of April 25, 2017 for facilities to dispose of fire-fighting foam containing these substances</p> <p>The recent emergency rule can be found on DEC’s website at: www.dec.ny.gov/regulations/104968.html.</p>	<p>PFOA and PFOS have been widely used in fire-fighting foam, Teflon, stain-resistant carpeting, and semi-conductor coatings, among other uses.</p> <p>Although the rule addresses PFOA and PFOS generally, it is targeted at providing DEC with the regulatory authority needed to address PFOA contamination in Hoosick Falls and neighboring communities. PFOA and PFOS have been identified as persistent chemicals by EPA and others, and production is currently being phased out under the Toxic Substances Control Act. As a result, few companies will likely be required to comply with the CBS requirements for this chemical.</p>	<p>The deadline for commenting on the proposed permanent rule has closed.</p> <p>The recent emergency rule took effect September 16, 2016 and will expire on November 14, 2016. Under New York’s emergency rulemaking procedures, DEC must adopt a permanent rule by the time the emergency rule expires. However, DEC can obtain additional time by adopting a new emergency rule.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>FEDERAL Implementation of NPDES e-Reporting Rule 40 CFR Part 127 81 Fed. Reg. 62395 (Sept. 9, 2016)</p>	<p>EPA published a notice identifying the “initial recipient” of electronic information under the National Pollutant Discharge Elimination System (NPDES) permit program. In October 2015, EPA adopted a rule requiring electronic submission of most paper-based reports under the NPDES program. The rule applies to reports, notifications and other submissions, including discharge monitoring reports (DMRs) and various stormwater-related notices and reports. During the first year, states must submit basic facility data, permit information, and performance data (inspections, violations, etc.) to the electronic system; in addition, NPDES/SPDES permittees must begin submitting DMRs electronically. The recent notice identifies whether states have agreed to accept electronic submission or are opting out, making EPA the initial recipient.</p> <p>The notice can be found in the September 9, 2016 Federal Register at: www.gpo.gov/fdsys. Information about DEC’s implementation of the NPDES e-Reporting rule can be found at: www.dec.ny.gov/permits/105366.html.</p>	<p>The notice is potentially of interest to any facility with an individual or general NPDES permit.</p> <p>New York has joined the majority of states and agreed to be the initial recipient of electronic submissions under the NPDES program.</p>	<p>The requirement to submit DMRs electronically is scheduled to take effect December 21, 2016.</p>
<p>NEW YORK STATE Emergency Lead Testing in School Drinking Water 10 NYCRR subpart 67-4</p>	<p>The New York State Department of Health (DOH) adopted an emergency rule establishing lead testing requirements for school drinking water. The rule requires all school districts, including those already classified as public water systems, to test potable water outlets for lead and develop and implement a lead remediation plan, where necessary. For buildings serving elementary school age children (prekindergarten through fifth grade), the first samples were required to be collected by September 30, 2016, with an October 31, 2016 deadline for all other schools. If the results exceed 15 parts per billion, the school must: prohibit use of the outlet until the problem is remediated; supply the building with adequate potable water; immediately report the test results to the local health department; and notify staff and parents in writing and via the school’s website. Schools also must post a list of buildings found to be lead-free and report the sample results to DOH and others by November 11, 2016 through DOH’s electronic reporting system.</p> <p>The emergency rule and related information can found be at: www.health.ny.gov/environmental/water/drinking.</p>	<p>The regulation implements A.10740, which was signed by Governor Cuomo on September 6, 2016. The emergency rule is primarily of interest to school districts and board of cooperative education service facilities (collectively public schools) and to the students, teachers and staffs in those schools. The rule does not apply to private schools.</p>	<p>The emergency rule took effect September 6, 2016 and will expire on December 4, 2016 unless DOH extends it or adopts a replacement emergency rule. DEC will publish a notice of proposed rulemaking to adopt a permanent rule at some future date.</p>

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
AIR/CLIMATE CHANGE			
<p>FEDERAL Greenhouse Gas-Related Prevention of Significant Deterioration Rule Revisions 40 CFR Parts 51, 52, 60, 70 and 71 81 Fed. Reg. 68110 (Oct. 3, 2016)</p>	<p>EPA proposed to revise its Prevention of Significant Deterioration (PSD) and Title V operating permit regulations to implement the Supreme Court’s decision invalidating key components of its controversial 2010 greenhouse gas (GHG) tailoring rule. In the wake of a Supreme Court decision that GHGs are pollutants under the federal Clean Air Act (CAA), EPA established special “tailored” applicability thresholds for GHGs under the PSD and Title V permit programs. In 2014, the Supreme Court concluded in <i>Utility Air Regulatory Group v. EPA</i>, that EPA exceeded its CAA authority when it imposed PSD and Title V permitting requirements on sources based solely on their GHG emissions. However, the Court upheld the portion of the rule that required sources that are otherwise regulated under the PSD program to install best available control technology (BACT) for GHGs. In August 2015, EPA revised its PSD and Title V regulations to delete those sections of the regulations implementing the tailoring rule that were readily severable. With the current rulemaking, EPA is proposing changes to key definitions in the PSD and Title V permit regulations to implement the Supreme Court’s decision. EPA also is proposing a “significant emissions rate” of 75,000 tons per year of GHGs, establishing the level below which BACT is not required for a source’s GHG emissions under the PSD program. According to EPA, this change is needed because the Supreme Court held that EPA had not properly justified on <i>de minimis</i> grounds the 75,000 ton per year carbon dioxide equivalent threshold that determines whether GHG BACT is required for sources that are otherwise subject to PSD.</p> <p>The proposed rule can be found in the October 3, 2016 Federal Register at: www.gpo.gov/fdsys.</p>	<p>The proposed rule is potentially of interest to major air emission sources regulated under the PSD and/or Title V air permitting programs. Both EPA and New York State previously issued guidance implementing the Supreme Court’s decision. The current regulations are necessary to conform the regulations to the Court’s decision and formally establish a <i>de minimis</i> threshold for requiring BACT for GHGs.</p>	<p>EPA is accepting comments on the proposed regulations until December 2, 2016.</p>

Other Recent Developments (Final)

AIR

NEW YORK STATE: DEC **amended its regulations to incorporate California's latest low emission vehicle (LEV) and zero emission vehicle (ZEV) standards** into 6 NYCRR Part 218, Emission Standards for Motor Vehicles and Motor Vehicle Engines. California adopted its so-called LEV III emission standards in 2012 for 2017 to 2025 model year vehicles up to 14,000 pounds gross vehicle weight rating. These standards largely align with EPA's Tier 3 criteria pollutant emission standards, which were adopted in 2014. In a related development, DEC conformed its ZEV requirements to the California program. The ZEV program requires manufacturers to sell an increasing percentage of ZEV vehicles (or equivalents) in the State. The revisions focus on the requirements for intermediate vehicle manufacturers (i.e., manufacturers with California sales between 4,501 and 20,000 new light and medium-duty vehicles). The final rule, which took effect October 5, 2016, can be found on DEC's website at: www.dec.ny.gov/regulations/106554.html.

Implications: The revisions are primarily of interest to motor vehicle manufacturers and dealers.

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: The Occupational Safety and Health Administration (OSHA) issued a pair of **fact sheets focused on process safety management (PSM) issues**. The first fact sheet, entitled *The Use of Metrics in Process Safety Management (PSM) Facilities*, discusses the use of metrics to track safety performance by employers enrolled in OSHA's Voluntary Protection Program and their potential value to PSM-regulated employers. The fact sheet distinguishes between "lagging metrics" (i.e., retrospective metrics gathered after an incident) and "leading metrics" (i.e., preventative metrics that reveal the performance of key work processes) and lists examples of both types of metrics, together with samples of information tracked by facilities relating to each metric. For example, the fact sheet identifies "preventive maintenance" as a leading metric that can be tracked via completion rates, open items, overdue safety critical preventive maintenance, and number of inspections. The second fact sheet, entitled *The Importance of Root Cause Analysis During Incident Investigation*, discusses the importance of conducting a root cause analysis under the PSM or EPA Risk Management Program regulations when an incident occurs. The fact sheet discusses the benefits of root cause analyses for employers, lists root cause analysis tools, and provides a list of resources containing additional information about using these tools. The fact sheets can be accessed via links in the October 3, 2016 OSHA *Quick Takes* online publication at: www.osha.gov/as/opa/quicktakes/qt100316.html.

Implications: The fact sheets are potentially of interest to any employers attempting to track safety performance and/or investigate safety-related incidents/accidents.

Other Recent Developments (Proposed)

AIR

FEDERAL: EPA **revised its rules governing the exclusion of “exceptional events” that contribute to air quality violations** to address issues that have arisen since the rule was first adopted. In 2005, Congress amended the Clean Air Act to authorize EPA to exclude data associated with exceptional events from consideration in making attainment determinations and other national ambient air quality standard-related decisions. EPA adopted regulations implementing the exceptional events provision in 2007 and followed up in 2013 with interim guidance designed to address implementation issues. With this rulemaking, EPA: (1) authorized federal land managers to submit exceptional events demonstrations in certain circumstances; (2) clarified how key elements in the statute should be interpreted (i.e., what is an event that “affects air quality,” is not “reasonably controllable or preventable,” is “caused by” “human activity that is unlikely to recur” or by a “natural event”); (3) clarified the content and organization of exceptional event submittals, including requiring an initial notification by the state to EPA of a potential exceptional event; and (4) removed specific exceptional event-related deadlines that apply in situations other than initial area designations and identified in the preamble to the final rule the intended deadlines for EPA’s response to an exceptional events submittal. In conjunction with the rule, EPA issued a *Guidance on the Preparation of Exceptional Events Demonstrations for Wildfire Events that May Influence Ozone Concentrations*. EPA also plans to issue guidance on prescribed fires, stratospheric ozone intrusions, and other exceptional events-related subjects. The final rule took effect September 30, 2016; it can be found in the October 3, 2016 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is primarily of interest to state agencies responsible for ambient air quality monitoring and data analysis in conjunction with nonattainment designations.

WATER

NEW YORK STATE: DEC made available for comment a **draft document, entitled *Maintenance Guidance: Stormwater Management Practices*, which provides guidance on how to inspect and maintain the stormwater management practices** (SMPs) found in the New York State Stormwater Design Manual. Many SMPs required as part of new and redevelopment projects require ongoing oversight and maintenance to remain functional. DEC’s recent guidance establishes a hierarchical program for ensuring that these SMPs are properly operated and maintained. Basic inspection and maintenance are expected to be performed primarily by property owners, managers and other untrained individuals. The document contains guidance on conducting these so-called “Level 1” inspections tailored to each SMP category (e.g., rainwater harvesting, disconnection and sheetflow, swales, tree planting, etc.), together with a checklist identifying the problems likely to be identified during the inspection and potential follow-up actions. The document also includes guidance for identifying when Level 2 inspections (performed by trained municipal staff) and Level 3 inspections (performed by qualified professionals) must be performed as well as the appropriate follow-up activities for each

group. The deadline for submitting comments on the draft guidance has closed; the guidance can be found on DEC's website at www.dec.ny.gov/chemical/41392.html.

Implications: The guidance is potentially of interest to municipalities responsible for overseeing SMPs as well as property owners and managers responsible for SMP operation and maintenance.

NEW YORK STATE: DEC is accepting comments on **proposed changes to the classifications of waterbodies in the Lake Champlain drainage basin**, following a periodic review to ensure that the assigned classifications are consistent with the waterbodies' best use. In accordance with the Clean Water Act goal that all surface waters be "fishable," DEC has proposed to upgrade 123 Class D "item numbers" (i.e., waterbody segments) from Class D (protective of fish survival) to Class C (fishable); an additional 23 segments will be upgraded to Class C(T) (trout) or higher. In addition, some portions of Lake Champlain will be upgraded from Class AA to AA(T) to protect trout, while Lake George will be upgraded from Class AA Special to AA Special (TS) to protect trout spawning. Where DEC concluded that specific item numbers must remain Class D, it prepared a use attainability analysis explaining its decision not to upgrade the use. The imposition of higher classifications means the waterbody segments will be subject to stricter water quality standards. This, in turn, could potentially affect the discharge limits assigned to facilities with SPDES permits. As part of the same rulemaking, DEC also proposed to reorganize the regulation (which is set forth at 6 NYCRR Part 830), add/revise definitions, revise and update maps and make other minor changes/corrections. DEC is accepting comments on the draft revisions until **November 7, 2016**; public information meetings and a public hearing are also scheduled. The rulemaking can be found on DEC's website at: www.dec.ny.gov/regulations/107391.html.

Implications: The rule is potentially of interest to any facility that discharges wastewater into the Lake Champlain drainage basin. According to DEC, its review shows that the proposed reclassifications will not have a cost impact on SPDES-permitted facilities.

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: OSHA made available for comment three **draft documents addressing implementation of the OSHA process safety management program**. The PSM regulation, which is set forth at 29 CFR § 1910.119, requires employers that handle highly hazardous, reactive, flammable, toxic or explosive substances to identify potential hazards and implement procedures designed to minimize the risks to their employees and others associated with their activities. OSHA previously issued a Process Safety Management Guide (OSHA 3132), which provides general guidance on PSM compliance. As a companion to this guidance, OSHA has made available guides addressing PSM in relation to explosive and pyrotechnics manufacturing, small businesses, and storage facilities. Each guide provides an overview of the PSM program, a discussion of the elements of the PSM program specifically relevant to the facilities covered by the guide, and an appendix containing responses to frequently asked questions. The deadline for submitting comments on the draft guides has closed; they can be found in the OSHA rulemaking docket under Docket ID No. OSHA-2016-0021 at: www.regulations.gov.

Implications: The guidance is potentially of interest to facilities that manage highly hazardous chemicals and are subject to the PSM standard.

FEDERAL: OSHA proposed **the latest in a series of rulemakings designed to remove or revise outdated, duplicative, unnecessary, and inconsistent requirements** in its safety and health standards. Key changes include: clarifying the rules for determining whether a worker's hearing loss is work-related; deleting the term "unexpected" from the lockout-tagout standards under the general industry, construction and shipyard rules to make clear that the standards cover all equipment servicing activities in which there are energization, startup, or stored energy hazards; removing periodic chest x-ray requirements for lung-cancer screening from the inorganic arsenic, coke oven emissions, and acrylonitrile standards and updating other chest x-ray requirements; consistent with the general industry standard, revising the construction standard to require that available personal protective equipment be properly fitted; updating the requirements for signs, signals and barricades in the construction standard to incorporate updated Federal Highway Administration standards; revising the standards for excavations and underground construction, caissons, cofferdams, and compressed air; and revising the construction, shipyard and general industry standards to delete provisions requiring certain documents to include the employee's social security number. OSHA is accepting comment on the proposed rulemaking until **December 5, 2016**; it can be found in the October 4, 2016 Federal Register at: www.gpo.gov/fdsys.

Implications: The rule is of general interest to companies subject to OSHA standards.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

October 13, 2016: Public information meetings on proposed reclassification of waters in the Lake Champlain drainage basin scheduled from 2:00 to 4:00 p.m. and 6:00 to 8:00 p.m. at Town of Plattsburgh Town Office Meeting Room, 151 Banker Road, Plattsburgh.

October 24, 2016: Deadline for submitting comments on EPA's proposed revisions to Title V permit rules to clarify petition process. See the August 24, 2016 Federal Register at www.gpo.gov/fdsys for details.

November 1, 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 for details.

November 2, 2016: Public hearing on proposed reclassification of waters in the Lake Champlain drainage basin scheduled for 11:00 a.m. at Town of Plattsburgh Town Office Meeting Room, 151 Banker Road, Plattsburgh.

November 7, 2016: Deadline for submitting comments on proposed reclassification of waters in the Lake Champlain drainage basin. See DEC's website at www.dec.ny.gov/regulations/107391.html for details.

December 2, 2016: Deadline for submitting comments on EPA's proposed revisions to the PSD and Title V regulations to implement Supreme Court-mandated changes to the 2010 GHG tailoring rule. See the October 3, 2016 Federal Register at www.gpo.gov/fdsys for details.

December 5, 2016: Deadline for submitting comments on OSHA's Standards Improvement Project rulemaking eliminating/revising outdated and/or unnecessary OSHA standards. See the October 4, 2016 Federal Register at www.gpo.gov/fdsys 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 for details.