

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</p> <p>FEDERAL Repeal of Once In, Always In Guidance under National Emission Standards for Hazardous Air Pollutants (NESHAP) Program</p>	<p>EPA issued a memorandum announcing repeal of the controversial “once in, always in” (OIAI) guidance under the Clean Air Act’s (CAA) NESHAP program. CAA § 112 establishes emission standards applicable to major and area sources of hazardous air pollutants (HAPs) in specific source categories. The major source standards—which are typically stricter than their area source counterparts—apply to sources with the potential to emit at least 10 tons per year (tpy) of any single HAP or 25 tpy of any combination of HAPs. In 1995, EPA issued guidance declaring that sources could switch to area source status by capping emissions until the first compliance date of the standard, i.e., until the first date the source was required to comply with an emission limit or other substantive requirement of the applicable NESHAP. Thereafter, sources were required to comply permanently with the applicable major source standard regardless of their emissions. Although EPA proposed to rescind this so-called “once in, always in” guidance in 2007, the change was never finalized. With the recent memorandum—entitled <i>Reclassification of Major Sources as Area Sources under Section 112 of the Clean Air Act</i>—EPA declared that the OIAI guidance violates the plain language of the CAA, pointing to the statutory definitions of “major source” and “area source,” which purportedly make clear that any major source that accepts permit conditions limiting its potential emissions below the major source thresholds is, by definition, an area source and no longer subject to any applicable major source standards under the NESHAP program. EPA also noted that the CAA contains no temporal limitations on the determination of whether a source emits or has the potential to emit HAPs above the major source thresholds. To the extent the 1995 guidance imposed such a temporal limitation, EPA now argues its earlier interpretation violates the plain language of the Act. EPA also echoed the concerns of critics of the OIAI policy, who argue that it discourages HAP emission reduction projects.</p> <p>Additional information about the OIAI policy withdrawal can be found on EPA’s website at: www.epa.gov/stationary-sources-air-pollution/reclassification-major-sources-area-sources-under-section-112-clean.</p>	<p>The rescission of OIAI policy is potentially of interest to any facility currently subject to a major source NESHAP. The recent memorandum allows facilities to accept permit conditions that will reduce their potential HAP emissions below the 10 tpy/25 tpy major source thresholds and thus avoid regulation under applicable major source NESHAPs in favor of less stringent area source standards (or perhaps no standards at all, depending on the source category). Critics of rescission of the OIAI policy argue that it will allow sources to evade the strict emission controls imposed on major sources by capping emissions, leading to increased pollution.</p>	<p>EPA intends to publish a Federal Register notice shortly to take comment on adding regulatory text to incorporate the changes contained in the memorandum.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>NEW YORK STATE Amendments to Public Water System Regulations 10 NYCRR Subpart 5-1</p>	<p>The New York State Department of Health (DOH) revised the State’s public water system (PWS) regulations, set forth at 10 NYCRR Subpart 5-1, to conform to federal regulations and incorporate certain State statutory changes. Key federal conforming changes include:</p> <ul style="list-style-type: none"> • Minor and Short-Term Revisions to Lead and Copper Rule. DOH revised the existing rules governing the management of lead and copper pipes in drinking water systems to incorporate changes to the federal rule that eliminated unnecessary requirements, reduced reporting burdens, and promoted consistent implementation of the federal lead and copper rule. DOH also incorporated federal changes relating to monitoring, treatment, customer awareness, lead service line replacement, and public education. The revisions do not affect the lead and copper maximum contaminant level goals, action levels, or other basic regulatory requirements. • Stage 2 Disinfectant and Disinfection Byproduct Rule. The rule incorporates changes to federal rules designed to reduce the potential risk of adverse health effects associated with two common disinfection byproducts (DBPs)—total trihalomethanes and haloacetic acids. The rule requires certain public water systems to complete an initial distribution system evaluation to characterize DBPs and identify monitoring locations. The revisions also expand the rule to cover all community water systems and non-transient non-community water systems that either add a primary or residual chemical disinfectant or deliver water treated with such chemicals. • Long Term 2 Enhanced Surface Water Treatment Rule. DOH implemented changes to reduce exposure to cryptosporidium and other microorganisms associated with high-risk drinking water systems, such as those using surface water or groundwater directly influenced by surface water or that hold finished water in uncovered water storage facilities. • Variances and Exceptions Rule. DOH provided options for achieving compliance with the regulations through the issuance of variances. <p>In addition, DOH revised Subpart 5-1 to conform to the New York Public Health Law by amending the cross-connection control rules relating to backflow tester certification and requiring operators of public water systems serving a population of more than 3,300 to submit water supply emergency plans.</p> <p>Notice of the final regulations can be found in the January 17, 2018 State Register at: https://docs.dos.ny.gov/info/register/2018/jan17/toc.html.</p>	<p>The revisions are primarily of interest to municipalities and other entities that own/operate public water systems regulated by DOH. Most of the changes are necessary to conform the State PWS regulations to federal program requirements, enabling the State to maintain full primacy for delivery, oversight and management of New York’s PWS program. The remaining amendments update the regulations to incorporate changes to the New York Public Health Law into the State’s implementing regulations.</p>	<p>The revised rule took effect January 17, 2018.</p>

Other Recent Developments (Final)

AIR

FEDERAL: EPA **designated most of New York State as attainment/unclassifiable under the 2010 national ambient air quality standard (NAAQS) for sulfur dioxide (SO₂)**. After concluding that short-term SO₂ exposures pose the greatest risk to public health, EPA revoked the existing 24-hour and annual primary SO₂ standards and replaced them with a new 1-hour SO₂ NAAQS. Under the CAA, EPA must designate areas within two years of adopting a new/revised standard (with a possible one-year extension). However, the lack of available SO₂ ambient air monitoring data and other obstacles significantly complicated the designation process, resulting in a court order requiring the designation of nonattainment areas in four rounds. During the first two rounds, EPA designated a small number of areas as nonattainment, attainment/unclassifiable and unclassifiable based primarily on data obtained from existing ambient air monitors. During the current round, EPA used ambient air monitoring data and/or air quality modeling results to designate numerous areas (almost all as attainment/unclassifiable). The fourth round—which is scheduled to be completed in 2020—will designate the approximately 50 remaining areas based on data obtained from newly installed SO₂ monitors. The recent SO₂ NAAQS designation rule can be found in the January 9, 2018 Federal Register at: www.gpo.gov/fdsys; it takes effect April 9, 2018.

Implications: EPA designated all of the Capital Region as attainment/unclassifiable for SO₂. The New York City metropolitan area and most of the remaining upstate counties also were designated attainment/unclassifiable for SO₂. A few New York State counties with newly installed ambient air monitors will not be classified under the 2010 SO₂ NAAQS until 2020.

SOLID WASTE

NEW YORK STATE: In January 2018, the New York State Plastic Bag Task Force issued a **report entitled *An Analysis of the Impact of Single-Use Plastic Bags: Options for New York State Plastic Bag Legislation*** to assess possible options for managing single-use plastic bags in the wake of a 2009 law requiring certain large stores and retail chains that provide single-use plastic carryout bags to customers to collect bags and arrange for recycling. The law, while reducing use and disposal of plastic bags, covers only a small percentage of bags in commerce. To fill the gap, various local governments have enacted laws banning such bags; New York City adopted a law imposing a fee of at least 5 cents on carryout merchandise bags. The State Legislature imposed a moratorium on the City law and a task force was established to study the issue. The resulting report addresses the problems associated with single-use bags (litter, harm to fish and wildlife, interference with recycling equipment, management/disposal costs, etc.) and reviews programs adopted nationally and internationally to address the problem. The Task Force report identified eight options for addressing plastic bag waste, exploring the pros and cons of each. The options are: (1) strengthen and enforce New York's existing Plastic Bag Reduction, Reuse and Recycling Act; (2) require manufacturers to fund and implement a program for collecting and recycling single-use plastic bags; (3) impose a fee on single-use plastic bags; (4) impose a per transaction fee for single-use bags (same fee regardless of number of bags used per transaction); (5) impose fee on single-use plastic and paper bags; (6) ban sale and use of single-use plastic bags; (7) ban plastic bags

with a fee on allowable alternatives; and (8) continue existing laws/policies. Regardless of the approach taken, the report emphasized the importance of education and outreach to make consumers aware of the problems with plastic bags and encourage the use of reusable bags. The Task Force report can be found on DEC's website at: www.dec.ny.gov/chemical/112291.html.

Implications: The Task Force report is of interest to plastic bag manufacturers as well as retailers/consumers that use the bags; it is also of interest to solid waste management and disposal facilities that handle the bags.

REMEDICATION

FEDERAL: In January 2017, EPA released its first **list of Superfund National Priorities List (NPL) sites with the greatest expected redevelopment and commercial potential**. Upon taking office, EPA Administrator Scott Pruitt announced his intention to refocus the agency on its core priorities, including remediation of Superfund sites. Toward that end, the Administrator convened a Superfund task force which issued a report in July 2017 that identified five goals for the Superfund program, including encouraging private investment and promoting redevelopment and community revitalization. In fulfillment of these goals, EPA recently issued a list of 31 NPL sites in 20 states with the “greatest expected redevelopment and commercial potential.” EPA prepared a fact sheet for each site describing the site itself (size, existing infrastructure, current site uses, and use restrictions), its setting (floodplains and other features, nearby land uses, future use plans, nearby population, etc.) and remedial status. Information about EPA's Superfund redevelopment efforts can be found at: www.epa.gov/superfund-redevelopment-initiative.

Implications: The announcement is of general interest to NPL site owners/operators and others with an interest in the Superfund program and property redevelopment.

GENERAL

FEDERAL: EPA issued an **interim guidance document addressing the relationship between EPA and the states on environmental enforcement**, including a new emphasis on state primacy. The guidance—entitled *Interim OECA Guidance on Enhancing Regional-State Planning and Communication on Compliance Assurance Work in Authorized States*—notes that EPA has formed a work group to develop strategies for federal/state collaboration in inspections and enforcement. In the interim, EPA has issued the guidance memo to “begin the movement toward a more collaborative partnership between the EPA and authorized States” that calls for periodic meetings among senior leadership to address key issues, including state environmental compliance needs and problems, planned inspections, utilization of combined resources to meet national inspection coverage expectations, and planned program audits. Of perhaps greater note, the memorandum declares that EPA “will generally defer to authorized States as the primary day-to-day implementer of their authorized/delegated programs, except in specific situations” listed in the memorandum. Where EPA identifies violations but the state asks to take the lead, the EPA region is expected to defer to the state except in limited circumstances. Where the EPA region and state disagree on a particular enforcement matter, the matter will be elevated to EPA's Office of Enforcement and Compliance Assurance Assistant Administrator for resolution. EPA will reach out to the EPA regions and states for feedback on the Interim Guidance and

consider changes based on that feedback. The interim guidance can be found on EPA's website at: www.epa.gov/compliance/interim-oecca-guidance-enhancing-regional-state-planning-and-communication-compliance.

Implications: The interim guidance marks a major change in the relationship between EPA and the states on environmental enforcement matters and is of general interest to any facility with a federally delegated permit that is enforceable by EPA.

Other Recent Developments (Proposed)

AIR

FEDERAL: EPA **proposed updates/corrections to the regulations for source testing of emissions** found in 40 CFR Part 51 (Requirements for Preparation, Adoption and Submittal of Implementation Plans), Part 60 (Standards of Performance for New Stationary Sources) and Part 63 (National Emission Standards for Hazardous Air Pollutants). EPA has identified methods for testing emissions from sources under various CAA programs. With this rulemaking, EPA is proposing to amend source test methods, performance specifications, quality assurance/quality control procedures, and testing regulations to correct typographical errors, update testing procedures, and add alternative equipment and methods that EPA has deemed acceptable. The changes cover: methods found in 40 CFR Part 51; the NSPS for boilers, glass manufacturing plants, and new residential wood heaters as well as numerous test methods and performance specifications spelled out in Part 60, Appendix A and B; and the NESHAPs for wool fiberglass manufacturing, industrial, commercial and institutional boilers and process heaters, and coal and oil-fired electric utility steam generating units and various methods contained in Part 63, Appendix A. EPA is accepting comment on the proposed corrections/updates until **March 27, 2018**; the rule can be found in the January 26, 2018 Federal Register at: www.gpo.gov/fdsys.

Implications: The proposed rule is of general interest to anyone required to conduct source emission testing under the CAA.

HYDRAULIC FRACTURING

REGIONAL: The Delaware River Basin Commission (DRBC) proposed regulations **banning hydraulic fracturing in the Delaware River Basin** (Basin) and imposing other restrictions on the import and export of water for hydraulic fracturing purposes. The DRBC regulates surface and ground water-related activities in the parts of New York, Pennsylvania, New Jersey and Delaware that discharge to the Basin. Among other things, the DRBC sets in-stream water quality standards, prohibits degradation of groundwater and provides special protection to the non-tidal segment of the Delaware River to preserve its exceptionally high water quality and water supply values. In conjunction with the recent rulemaking, the DRBC found that using high volume hydraulic fracturing (HVHF) to extract oil and natural gas from tight shale formations presents well-documented risks, vulnerabilities and impacts to the quality and quantity of surface and ground water in the Basin. To limit those risks, the DRBC is seeking comments on regulations that would: (1) ban HVHF in the Basin; (2) require DRBC approval of transfer of surface water, groundwater, treated wastewater, or mine drainage water for use in HVHF outside the Basin; and (3) require advance DRBC approval and compliance with extensive requirements for projects involving

the treatment and discharge of HVHF water within the Basin. These additional requirements include regulation as a centralized waste treatment facility under 40 CFR Part 437, completion of treatability studies (including requiring whole effluent toxicity [WET] testing), analysis of alternatives to importation, and imposition of additional effluent limits to address HVHF-specific pollutants. The DRBC is accepting comments on the proposed regulations until **February 28, 2018**; they can be found in the January 3, 2018 State Register at: <https://docs.dos.ny.gov/info/register/2018/jan3/toc.html>.

Implications: The proposed rule is primarily of interest to companies engaged in natural gas and petroleum production and communities in the Delaware River Basin.

Regulatory Agenda

DEC published its **regulatory agenda for 2018**. The agenda identifies the regulatory changes DEC may pursue in the upcoming year. Key items on the agenda include:

- **6 NYCRR Part 182, Endangered and Threatened Species**: Revise regulation to update list of endangered/threatened species, and improve jurisdictional determination and permit review processes and special license procedures for possession of non-native, federally listed species and parts.
- **6 NYCRR Subpart 202-2, Emission Statements**: Revise regulation to require electronic submission of annual emission statements beginning in 2021 (for calendar year 2020 reporting) for facilities with Title V air operating permits.
- **6 NYCRR Part 203, Oil and Gas Sector Emissions**: New rule to reduce criteria pollutant and methane emissions from the oil and gas sector that addresses and expands on EPA's control techniques guideline issued for the industry.
- **6 NYCRR Part 205, Architectural and Industrial Maintenance Coatings**: Include additional and more restrictive limits on volatile organic compound (VOC) content.
- **6 NYCRR Part 208, Landfill Gas Collection and Control Systems**: Revise regulation to include federal emission guidelines and compliance times for municipal solid waste landfills and perhaps additional measures to assist in meeting the goals of the State's Methane Reduction Plan.
- **6 NYCRR Part 212, Process Operations**: Repeal existing nitrogen oxide (NO_x) control requirements for hot mix asphalt plants and create a new regulation covering additional pollutants; revise the provisions addressing process operations to allow for a second compliance option when a source owner is required to demonstrate compliance with a NESHAP.
- **6 NYCRR Part 219, Incinerators**: Amend existing Subpart 219-4 to better reflect the current state of cremation technology; sunset Subpart 219-5 (existing incinerators) and Subpart 219-6 (existing incinerators, New York City, Nassau and Westchester counties), which are currently covered by more stringent standards; and propose new Subpart 219-10 setting limits on NO_x emissions from municipal waste combustors.
- **6 NYCRR Part 222, Distributed Generation Sources**: Develop a new rule to replace the rule adopted in November 2016, which was invalidated by a state court. The distributed generation rule covers stationary reciprocating or rotary internal combustion engines that feed the distribution grid or produce electricity for use at host facilities or both.

- **6 NYCRR Subpart 225-2, Fuel Composition and Use:** Revise eligibility provisions; remove out-of-date regulatory references and work practices; update waste oil constituent limits; and make other changes. NOTE: EPA proposed changes to this rule in 2016 but allowed them to lapse. The new proposal will address the comments raised during review of the earlier proposal.
- **6 NYCRR Part 226, Solvent Metal Cleaning Processes:** Remove out-of-date regulatory references; update work practices; and establish requirements that meet the federal control techniques guideline for industrial cleaning solvents.
- **6 NYCRR Subpart 227-1, Stationary Combustion Installations:** Remove out-of-date regulatory references and update permissible emission rates for particulate matter.
- **6 NYCRR Subpart 228-1, Surface Coating Facilities:** Lower the VOC content limits for surface coatings used in motor vehicle and mobile equipment repair and refinishing.
- **6 NYCRR Part 230, Gasoline Dispensing Sites and Transport Vehicles:** Update and clarify testing requirements for gas stations; conform various provisions to new federal requirements and guidance; require prior notification to DEC for each test; require new vapor leak detection equipment; and delete Stage II VOC control equipment requirements currently applicable downstate.
- **6 NYCRR Part 235, Consumer Products:** Implement additional VOC product content limits.
- **6 NYCRR Part 247, Outdoor Wood Boilers:** Update rule to conform to federal emission standards and certification requirements of federal New Source Performance Standard.
- **6 NYCRR Part 257, Air Quality Standards:** Repeal or revise State ambient air quality standards, many of which have not been revised in decades despite major changes to the federal NAAQS.
- **6 NYCRR Parts 321-325, Pesticide Application:** Add rules relating to use of EPA-exempt pesticides (i.e., minimum risk pesticides); incorporate changes to the federal certification and training regulations; and update the current pesticide use regulations.
- **6 NYCRR Part 327, Use of Chemicals for the Control or Elimination of Aquatic Vegetation:** Amend rule to incorporate relevant provisions of Parts 328 (undesirable fish) and 329 (aquatic insects) and address current statutory requirements.
- **6 NYCRR Part 367, Returnable Beverage Containers:** Revise regulations to incorporate statutory changes, address changes in the beverage industry, and make other changes/improvements that will lead to improved compliance and enforcement.
- **6 NYCRR Part 368, Product Stewardship and Labeling:** Rename regulation; conform recycling emblem regulations to national labeling guidelines; and develop regulations implementing laws addressing mercury-added consumer products and product stewardship requirements for electronic waste.
- **6 NYCRR Parts 370-374, 376, Hazardous Waste Management:** As appropriate, incorporate changes to the federal hazardous waste regulations adopted since January 2002, including the 2016 “generator improvements rule,” which significantly revised the rules governing hazardous waste generators. DEC is also considering making various State-initiated changes and corrections.

- **6 NYCRR Part 375, Environmental Remediation Programs:** Provide additional direction on issues encountered since the rule was adopted; implement changes to the program enacted by the Legislature in 2015; incorporate soil cleanup objective changes; and make other changes and corrections.
- **6 NYCRR Part 505, Coastal Erosion Management:** Revise regulations, which have not been amended since 1988, to clarify definitions, add new defined terms, and clarify language addressing regulated activities in natural protective features areas.
- **6 NYCRR Parts 596-599, Chemical Bulk Storage (CBS); Parts 610-611, Major Oil Storage Facilities (MOSF); Part 613, Petroleum Bulk Storage (PBS):** As part of phase 2 of its bulk storage rulemaking, DEC plans to: incorporate changes to the federal underground storage tank regulations to ensure federal/State consistency; ensure consistency between PBS and CBS regulations, where appropriate; incorporate MOSF requirements currently found in New York Department of Transportation regulations; incorporate procedures currently contained in DEC guidance relating to MOSF licensing; enhance MOSF monitoring, maintenance, procedures and equipment to prevent leaks and spills; incorporate Navigation Law requirements into the MOSF petroleum remediation regulations; and update the list of hazardous substances and clarify spill reporting requirements.
- **6 NYCRR TBD, Waste Water Reuse:** New rule to address statutes relating to water efficiencies and promotion of the reuse of reclaimed wastewater.
- **6 NYCRR TBD, Water Well Registration and Reporting:** New rule establishing registration, reporting, certification and enforcement provisions for water wells.
- **6 NYCRR Part 621, Uniform Procedures Act:** Update main text of Part 621 to reflect changes to other regulations and make minor clarifications and corrections to address inaccurate references and clarify permitting procedures.
- **6 NYCRR Part 676, Salt Storage:** New rule regulating the private and municipal storage of road salt and road salt/sand mixtures.
- **6 NYCRR Parts 700-706, Water Quality Standards:** Add/revise ambient water quality standards, standard-setting procedures, implementation procedures and other regulatory provisions.
- **6 NYCRR Part 750, State Pollutant Discharge Elimination System (SPDES) Permits:** Incorporate new federal SPDES standards and criteria and make other changes.

The 2018 Regulatory Agenda can be found on DEC's website at: www.dec.ny.gov/regulations/36816.html.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

February 5, 2018: Deadline for submitting comments on EPA's proposed ozone nonattainment area designations. See the January 5, 2018 Federal Register at www.gpo.gov/fdsys for details.

February 5, 2018: Deadline for submitting comments of DEC's proposed climate smart community projects regulations (extended from January 22, 2018). See DEC's website at www.dec.ny.gov/regulations/propregulations.html for details.

February 26, 2018: Deadline for submitting information on EPA's ANPR seeking feedback on proposed emission guidelines to limit GHG emissions from existing power plants in place of the Clean Power Plan. See the December 28, 2017 Federal Register at www.gpo.gov/fdsys for details.

February 28, 2018: Deadline for submitting comments on DRBC's proposed regulations banning HVHF in the Delaware River Basin and limiting imports and exports of water in conjunction with HVHF. See the January 3, 2018 State Register at <https://docs.dos.ny.gov/info/register/2018/jan3/toc.html> for details.

March 27, 2018: Deadline for submitting comments regarding EPA's corrections/updates to regulations for source testing of emissions. See the January 26, 2018 Federal Register at www.gpo.gov/fdsys for details.

April 26, 2018: Deadline for submitting comments on EPA's proposed repeal of the Clean Power Plan. Note that the comment period closed January 16, 2018 but was reopened. See the October 16, 2017 Federal Register at www.gpo.gov/fdsys for details.