

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

April 5, 2018

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Final Statutes, Regulations, Guidance and Cases

Citation	Summary	Implications	Schedule/Notes
<p>AIR</p> <p>FEDERAL Assessing Major Modifications under New Source Review Preconstruction Permitting Program 83 Fed. Reg. 13745 (Mar. 30, 2018) (notice announcing issuance of guidance memorandum)</p>	<p>EPA issued a memorandum entitled <i>Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program</i>, announcing its interpretation of the rules governing how emission decreases are addressed when determining whether a project triggers new source review (NSR). Under the nonattainment NSR and prevention of significant deterioration programs (collectively, NSR), modifications at major facilities are considered significant for NSR purposes if increased emissions exceed specified thresholds. This review requires two steps. First, the applicant must determine if the project itself exceeds the significant emission increase threshold. If yes, the applicant must then conduct an emissions “netting” analysis to determine whether cumulative emission increases and decreases during the previous five years exceed the threshold. In the past, emission decreases associated with the project were not considered until Step 2, i.e., as part of the netting process. With the recent guidance memorandum, EPA announced that it had reinterpreted the regulations and concluded that emission decreases associated with the project under review should be considered during Step 1 of the NSR process. The memorandum includes a comprehensive review of the NSR statute and regulations explaining why the change in interpretation is justified. According to EPA, the earlier interpretation had the practical effect of preventing certain projects and significantly delaying others because facilities were reluctant to deal with the complexities of netting.</p> <p>The memorandum can be found on EPA’s website at: www.epa.gov/nsr/project-emissions-accounting.</p>	<p>The guidance is potentially of interest to major air emissions sources that could trigger NSR if modified. By allowing facilities to consider project-related decreases during Step 1, EPA anticipates that more projects at major facilities will be able to avoid NSR during Step 1 under the federal NSR program.</p>	<p>DEC has adopted its own regulations implementing NSR. These regulations, which are set forth at 6 NYCRR Part 231, explicitly declare that when calculating “project emission potential,” the facility “must consider only the proposed emission increases.” 6 NYCRR § 231-4.1(b)(40). Given the discrepancy between the federal and State language, it is unclear what impact the EPA guidance will have on NSR analyses in New York.</p>

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SOLID WASTE			
<p>NEW YORK STATE Enforcement Discretion Letter Relating to Newly Enacted Solid Waste Regulations</p>	<p>DEC issued a letter announcing its intent to exercise enforcement discretion in relation to various aspects of its recent revisions to the State’s solid waste regulations, set forth at 6 NYCRR Part 360 et al. In late 2017, DEC reorganized and updated its solid waste regulations, including adopting major changes to the rules governing the management and reuse of construction and demolition (C&D) debris. Prior to the revisions, various beneficial use determinations (BUDs) allowed the reuse of recycled asphalt pavement and other uncontaminated C&D debris. However, changes to the regulations significantly complicated these activities, potentially requiring certain materials be landfilled rather than reused. The enforcement discretion letter, dated March 1, 2018, provides that recognizable uncontaminated concrete and concrete products, asphalt pavement, brick, glass, soil and rock that are under the control of the generator, subject to various BUDs, and destined for and/or managed at facilities subject to the requirements of 6 NYCRR subpart 361-5 (C&D handling and recovery facilities) are considered commercial product or raw material and are not subject to Part 360. This change means that material suppliers (i.e., the companies generating these recyclable materials) will not be subject to permitting requirements and will not require Part 364 waste transporter permits to move the materials provided the conditions in the letter are satisfied.</p> <p>The letter also announced DEC’s intent to exercise enforcement discretion in other areas as well: (1) DEC authorized the use of waste tires to secure tarpaulins consistent with BUD 1137-0-00, dated December 4, 2014, which permits the use of waste tires to anchor plastic film or other cover material for corn silage, haylage or other agricultural feeds if certain conditions are met; (2) DEC delayed the enforcement of sampling requirements under 6 NYCRR § 361-5.4(e) for fill material or residue leaving permitted C&D facilities; and (3) in response to comments from small generators, such as dentists offices, DEC will require that sharps and regulated medical waste (RMW) containers be removed from patient care or use areas to central storage when the container has reached its fill line, is otherwise filled, or the container generates odor or other evidence of putrefaction, whichever occurs first. (The current regulation require containers of untreated RMW be removed from patient care areas every 24 hours.)</p> <p>A link to the enforcement discretion letter can be found on DEC’s website at: www.dec.ny.gov/regulations/81768.html.</p>	<p>The overhaul of the solid waste regulations included numerous changes to the rules governing the management and reuse of construction and demolition materials. According to industry, these changes greatly complicated reuse of clean materials such as milled asphalt by classifying them as waste at the point of generation, thus subjecting the management and transportation of these materials to the solid waste regulations. Industry challenged the regulations and DEC issued the enforcement discretion memorandum to resolve some of the disputed issues raised by the revised regulations.</p>	<p>The enforcement discretion memorandum will remain in effect until the regulations are amended or May 3, 2019, whichever occurs first.</p>

Proposed Statutes, Regulations and Guidance

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ENVIRONMENTAL REVIEW			
<p>NEW YORK STATE Reproposed Revisions to State Environmental Quality Review Act Regulations 6 NYCRR Part 617</p>	<p>DEC repropose its revisions to the State Environmental Quality Review Act (SEQRA) regulations, set forth at 6 NYCRR Part 617, following a review of the public comments received on the first proposed rule. In general, the revisions are intended to update the SEQRA process by expanding the list of actions that do not require SEQRA review and updating and streamlining the SEQRA process. Key provisions of the repropose SEQRA regulations include:</p> <ul style="list-style-type: none"> • Adding definition of green infrastructure and revising the definitions of critical environmental area, positive declaration and scoping. • Revising the list of Type I actions to reduce certain thresholds for residential subdivisions, add a new threshold for parking spaces in association with nonresidential facilities in smaller communities, and revise the criteria for projects involving unlisted actions within or substantially contiguous to a historic resource or projects involving structures determined to be eligible for listing on the State Register of Historic Places. • Expanding the list of Type II actions to reflect experience with the SEQRA review process and encourage environmentally sound projects, including green infrastructure retrofits, certain solar energy projects, renovation and reuse of existing structures, and sale/conveyance of certain real property by public auction, among other actions. • Revising the scoping provisions to require scoping for all EISs; require an explanation of why issues were not included in the final written scope; and specify that issues raised after completion of the final scope must be addressed in the DEIS or attached as an appendix to the DEIS. • Revising the rules addressing preparation of the EIS to require determinations of adequacy of a resubmitted draft EIS be based solely on the previous written list of deficiencies provided by the lead agency; require EISs to address measures to avoid or reduce an action’s environmental impacts and vulnerability from the effects of climate change such as sea level rise and flooding; and facilitate electronic posting of EISs. <p>The draft regulations can be found on DEC’s website at: www.dec.ny.gov/permits/83389.html.</p>	<p>The SEQRA process has been widely criticized for being too complicated and taking too long. The proposed revisions to the SEQRA regulations are intended to streamline the review process by updating the list of Type I and Type II actions to better target projects for environmental review and focusing the review on those issues that have the potential to result in a significant adverse environmental impact through mandatory scoping for all EISs and other changes.</p> <p>In response to public comment, DEC revised the draft regulations to: drop the following items from the list of Type II actions—small subdivisions, anaerobic digesters at wastewater treatment plants, in-fill development in municipal centers, and co-location of cellular antennas; revise the proposed Type II designation for reuse of existing buildings; modify other proposed Type II listings; delete proposed definitions based on the decision to drop certain Type II actions; modify the existing SEQRA regulations to require a project sponsor to include any late-filed comments on the EIS as an appendix to the draft; and make other changes.</p>	<p>DEC is accepting comments on the revised regulations until May 4, 2018. No public hearing on the repropose regulations is scheduled.</p> <p>The proposed revisions follow several other important SEQRA developments, including updated Environmental Assessment Forms (with workbooks) and a spatial data platform known as the EAF mapper.</p>

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SOLID WASTE			
<p>FEDERAL Revisions to Solid Waste Management Requirements for Disposal of Coal Combustion Residuals from Electric Utilities 40 CFR Part 257 83 Fed. Reg. 11584 (Mar. 15, 2018)</p>	<p>EPA proposed revisions to its 2015 rule regulating the disposal of coal combustion residuals (CCR) (i.e., coal ash) from utilities as solid waste to address provisions remanded back to the agency by a federal court, establish alternative performance standards and make other changes. EPA adopted the regulations in the wake of the catastrophic failure of several coal ash impoundments as well as more general concerns about environmental contamination relating to CCR storage and disposal in surface impoundments and landfills. The existing rule contains structural integrity design standards and requires periodic stability assessments and inspections; requires installation of groundwater monitoring wells, periodic sampling, locational restrictions and other provisions to protect groundwater; establishes operating criteria to limit contamination associated with day-to-day operation of CCR units; and establishes closure standards and procedures. With the recent rulemaking, EPA proposed changes in response to a judicial remand of a challenge to the rule, including clarifying the type and magnitude of nongroundwater releases that would require corrective action; determining the height of woody and grassy vegetation for slope protection; and modifying the alternative closure provisions. In addition, EPA proposed changes pursuant to the Water Infrastructure Improvements for the Nation (WIIN) Act, which gave states the ability to set certain alternative performance standards relating to establishment of risk-based groundwater protection standards, corrective action, groundwater monitoring, corrective action compliance demonstrations, post-closure care period, and compliance certifications. Finally, EPA proposed to revise the rule to allow the use of CCR in the construction of final cover systems for certain CCR units.</p> <p>The proposed revisions to the CCR rule can be found in the March 15, 2018 Federal Register at: www.gpo.gov/fdsys.</p>	<p>The rule is primarily of interest to owners/operators of coal-fired utilities. At the time EPA adopted the rule, it estimated that approximately 40% of CCR is beneficially used in various ways, including as an ingredient in concrete and wallboard. The remaining CCR is disposed in hundreds of large on-site landfills and surface impoundments. Over the years, several CCR impoundments have failed, causing extensive damage; more generally, CCR storage and disposal has been linked to ground and surface water contamination and complaints about fugitive dust. The changes to the CCR rule were required to address a court remand, respond to legislation compelling EPA to allow certain alternative performance standards, and address issues that have arisen since the rule was adopted.</p>	<p>EPA is accepting comments on the proposed rule until April 30, 2018.</p>

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WATER			
<p>NEW YORK STATE Advance Notice Regarding Proposed State Pollutant Discharge Elimination System General Permit for Discharges of Winery, Brewery, and Hard Cider Process Wastewater to Groundwater</p>	<p>DEC is accepting comment on a planned State Pollutant Discharge Elimination System (SPDES) general permit for discharges of process wastewater from wineries, breweries and hard cideries to groundwater. The planned permit would apply to existing and newly licensed wineries, breweries and hard cideries that discharge process wastewater, with or without the admixture of sanitary wastewater, to groundwater from onsite wastewater treatment systems that have a design peak flow of less than 10,000 gallons per day. Existing discharges would be allowed to continue to operate using their current septic systems until a modification is needed to accommodate an expansion or if the system fails. The owner/operator would be required to obtain a certification from a professional engineer that the system is operating correctly and is being properly maintained and submit a Notice of Intent seeking general permit coverage.</p> <p>Facilities constructed after the effective date of the permit (i.e., new facilities) would have to install systems designed by a licensed professional engineer that meet specified effluent criteria and are designed in accordance with New York State design standards for intermediate-sized wastewater treatment systems and include a subsurface treatment system based on the peak daily flow expected after flow equalization. The facility would need to be equipped with flow monitoring and equalization (to address expected effluent variability) and adequate controls to ensure that the system does not receive effluent flows that exceed its design capacity.</p> <p>In addition, owners/operators of both new and existing systems would be required to: prepare an operation and maintenance plan that includes both a flow monitoring and periodic inspection component; comply with operation and maintenance provisions; conduct quarterly sampling; and comply with various recordkeeping and reporting requirements.</p> <p>The advance notice regarding the proposed permit can be found on DEC's website at: www.dec.ny.gov/docs/water_pdf/wbc2018advnotice.pdf.</p>	<p>Wastewater from wineries, breweries and cideries is considered an industrial discharge since it can have significant ranges in pH and contain high levels of oxygen demanding organic material and solids. Because the number of these businesses has increased significantly in recent years and because the wastewater they discharge is similar, DEC determined that a general permit is an appropriate tool for regulating these discharges.</p>	<p>DEC is accepting comment on the advance notice regarding the planned general permit until May 31, 2018. It is specifically seeking answers from individuals in these industries to questions included in the back of the advance notice.</p>

Other Recent Developments (Final)

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: OSHA proposed to **delay the effective date of its 2017 beryllium standards** until May 11, 2018 to provide the agency with time to complete negotiations arising from challenges to the standards. In January 2017, EPA lowered the permissible exposure limit for beryllium and adopted other ancillary standards in the face of increasing evidence of the cancer and other health risks associated with beryllium exposure. With the arrival of the Trump administration, OSHA proposed to revoke the ancillary beryllium requirements for the shipyard and construction industries based on evidence that exposure is limited in these industries and that the new requirements may overlap with other standards. At that time, OSHA announced it would not enforce the ancillary construction and shipyard standards. With the recent notice, OSHA delayed the effective date of the standards for general industry, shipyards and construction until May 11, 2018. See the OSHA website at www.osha.gov/laws-regs/standardinterpretations/2018-03-02 for the announcement.

Implications: The announcement is primarily of interest to employers that are potentially subject to the general industry, shipyard and construction beryllium standards.

Other Recent Developments (Proposed)

AIR

FEDERAL: As part of a larger initiative targeted at reviewing the Obama administration's efforts to regulate emissions from oil and gas production sources, **EPA proposed to withdraw its 2016 Control Techniques Guidelines (CTG) for the oil and natural gas industry** that contained recommendations for reducing volatile organic compound (VOC) emissions from existing oil and natural gas industry emission sources in ozone nonattainment areas. Under the Clean Air Act (CAA), states with ozone nonattainment areas classified as moderate or higher must adopt reasonably available control technology (RACT) for all sources covered by CTGs as well as all major VOC sources. The 2016 CTG was intended to establish presumptive RACT and so help states fulfill this requirement. With the recent notice, the Trump administration EPA proposed to withdraw the CTG on the ground that it relied on data and conclusions used to develop standards for the oil and gas industry New Source Performance Standard (NSPS) that are currently under reconsideration by EPA. Under these circumstances, EPA argued it was "prudent" simply to withdraw the CTG. In a related development, EPA amended two narrow provisions of the 2016 NSPS to address aspects of the rule that purportedly pose significant and immediate compliance concerns. The first provision requires that leaking components be repaired during unplanned or emergency shutdowns while the second imposes monitoring survey requirements on well sites located on the Alaskan North Slope. EPA is accepting comment on the proposed withdrawal of the CTG until **April 23, 2018**. The proposed CTG withdrawal and final NSPS amendments can be found in the March 9, 2018 and March 12, 2018 Federal Registers, respectively, at: www.gpo.gov/fdsys.

Implications: The CTG and amended rule are primarily of interest to sources in the oil and natural gas production industry.

FEDERAL: EPA proposed the results of its residual risk/periodic technology review of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for leather finishing operations. Under CAA § 112, EPA must assess whether any residual risk remains after imposing technology-based NESHAPs and revise the standard as necessary. EPA also must conduct a periodic review of the technology underlying the NESHAP to confirm that the standard remains current. The leather finishing operations NESHAP, set forth at 40 CFR Part 63, subpart TTTT, applies to “leather finishing” activities at major facilities, which include processes to adjust and improve the physical and aesthetic characteristics of the leather surface through coating applications but does not cover equipment associated solely with leather tanning. After reviewing the existing standard, EPA concluded that the risks remaining after application of the NESHAP were acceptable and that the standards protect public health with an ample margin of safety. EPA also found that there were no cost-effective developments in practices, processes or control technologies and that no changes in the NESHAP were necessary to address technological improvements. As a result, EPA proposed no revisions to the NESHAP’s numerical limits. However, EPA revised the rule to require submission of electronic copies of compliance reports, update the provisions relating to startup, shutdown and malfunction consistent with recent court decisions, and make other technical corrections and clarifications. EPA is accepting comment on the proposed rule until **April 30, 2018**; it can be found in the March 14, 2018 Federal Register at: www.gpo.gov/fdsys.

Implications: According to EPA, there are four facilities in the country subject to the leather finishing NESHAP, one of which is located in New York.

WATER

NEW YORK STATE: DEC proposed revisions of its water quality standards and regulations to implement the federal BEACH Act of 2000 and protect coastal waters for recreation. The proposed regulations—to be set forth at 6 NYCRR Parts 700, 703 and 890—apply to coastal recreation waters, a term that includes the Great Lakes and coastal waters that are designated by the State for swimming, bathing, surfing or similar water contact activities. The regulations set special enterococci and e-coli standards that must be met during the “primary contact recreation season,” which extends from May 1st to October 31st or as determined by DEC on a case-specific basis to protect the best usages of the waters. These standards are consistent with EPA’s 2012 Recreational Water Quality Criteria—recommendations for protecting human health in waters designated for primary contact recreation use. As part of the rulemaking, DEC upgraded the classifications of certain surface waters in New York Harbor. DEC is accepting comment on the proposed regulations until **June 12, 2018**. Public information meetings and public hearings on the proposed rule are scheduled in early May and early June, respectively, in Long Island and Avon. The proposed rule can be found on DEC’s website at: www.dec.ny.gov/regulations/112962.html.

Implications: According to DEC, there are 41 municipal wastewater treatment plants discharging to coastal recreational waters, 16 of which discharge to the Great Lakes and 25 to marine coastal recreation waters. An additional four private, commercial and institutional facilities discharge sanitary waste to coastal marine waters. DEC estimates that the 16 plants discharging to the Great Lakes are expected to meet the standard without significant adjustments while the remaining plants may require upgrades.

NEW YORK STATE: DEC is accepting comment on a pair of **guidance documents relating to impingement and entrainment associated with cooling water intake structures**. Industrial facilities operating cooling water intake structures in connection with a point source thermal discharge must minimize the environmental impact associated with such structures, including impingement (death of fish/shellfish as a result of being trapped on the outer part of the intake structure) and entrainment (incorporation of fish/shellfish into water that passes through the structure and into the cooling water system). In 2011, DEC issued guidance explaining the criteria for assessing best technology available (BTA) for minimizing impingement and entrainment associated with cooling water intakes. DEC's recent draft guidance clarifies key aspects of the BTA assessment process. The first guidance, entitled *Procedures for Determining Entrainment Survival of Fish at Industrial Facilities Operating Cooling Water Intake Structures*, describes the procedures for allowing DEC to include entrainment survival estimates as a component of BTA rather than assuming 100 percent mortality of the entrained organisms. The second guidance document, entitled *Velocity Cap Efficacy Estimation for Use in Best Technology Available Determinations*, describes the procedure for quantifying the degree of reduction in impingement mortality associated with the use of "velocity caps"—covers that redirect vertical intake flow into horizontal flow, making it more easily detected and avoided by fish. DEC is accepting comment on the draft guidance documents until **April 27, 2018**; they can be found on DEC's website at: www.dec.ny.gov/animals/113024.html.

Implications: The rule is primarily of interest to owners/operators of power plants and other industrial facilities with significant cooling water intake structures.

NEW YORK STATE: DEC Region 4 accepted comment on **protection of waters and freshwater wetlands general permits covering certain minor activities** regulated under Articles 15 and 24 of the New York Environmental Conservation Law. Individuals seeking coverage under the general permits submit an application to DEC accompanied by a project location map and project plans. Assuming the application is granted, the project is then covered by the general permit. The permits cover certain low impact regulated activities that disturb 300 linear feet or less of stream beds or banks and/or are located in freshwater wetlands or the 100-foot adjacent area. Activities authorized by the permit include construction of certain minor structures, minor highway maintenance and repair activities, emergency stream repair, and certain stormwater/drainage system-related activities, among many others. The deadline for submitting comments on the draft general permit has closed; information about the draft general permit can be found on DEC's website at: www.dec.ny.gov/permits/6048.html.

Implications: The general permit covers regulated activities in DEC Region 4, which includes Albany, Columbia, Delaware, Greene, Montgomery, Otsego, Rensselaer, Schenectady, and Schoharie counties.

GENERAL

NEW YORK STATE: DEC is **accepting applications for New York's Annual Environmental Excellence Awards**, which recognize public, private and non-profit entities that have achieved environmental excellence through innovative and environmentally sustainable practices or creative partnerships. Applicants must be in good standing with the Environmental Conservation Law and pertinent local

laws. Competitive applications must include clear, measurable and documented metrics demonstrating success and adhere to specific content and format requirements. Complete applications must include an application cover sheet and application checklist as well as specific project information, including a summary, general description, and information relating to: innovation, sustainability, and/or partnerships; superior practices; measurable environmental, economic and social benefits; commitment and leadership in pursuit of environmental excellence; transferability to other users; funding sources; and other details and supporting documentation. The deadline for submitting applications is **April 13, 2018**; the application form and instructions can be found on DEC's website at www.dec.ny.gov/public/945.html.

Implications: The award program provides a way for businesses, educational institutions, governments, non-profit organizations and individuals to obtain public recognition of their pollution prevention and reduction efforts.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

April 9, 2018: Deadline for submitting comments on DOH's proposed revisions to the drinking water standards to incorporate the revised federal total coliform rule. See the February 7, 2018 State Register at <https://docs.dos.ny.gov/info/register/2018/feb7/toc.html> for details.

April 13, 2018: Deadline for submitting application for DEC's Annual Environmental Excellence Awards. Information about the application can be found on DEC's website at www.dec.ny.gov/public/945.html.

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.

April 23, 2018: Deadline for submitting comments on EPA's proposed withdrawal of the CTG for the oil and natural gas industry. See the March 9, 2018 Federal Register at www.gpo.gov/fdsys for details.

April 27, 2018: Deadline for submitting comments on EPA's proposed rule setting TSCA user fees. See the February 26, 2018 Federal Register at www.gpo.gov/fdsys for details.

April 27, 2018: Deadline for submitting comments on DEC's draft guidance documents relating to completion of BTA assessments for cooling water intake structures. See DEC's website at www.dec.ny.gov/animals/113024.html for details.

April 30, 2018: Deadline for submitting comments on EPA's proposed revisions to the rules governing management of coal combustion residuals. See the March 15, 2018 Federal Register at www.gpo.gov/fdsys for details.

April 30, 2018: Deadline for submitting comments on EPA's proposed residual risk/periodic technology review findings for the leather finishing operations NESHAP. See the March 14, 2018 Federal Register at www.gpo.gov/fdsys for details.

May 4, 2018: Deadline for submitting comments on DEC's repropoed revisions to its SEQRA regulations. See DEC's website at www.dec.ny.gov/permits/83389.html for details.

May 31, 2018: Deadline for submitting comments on DEC's advance notice of proposed general permit for discharges of winery, brewery and hard cidery wastewater to groundwater. See DEC's website at www.dec.ny.gov/docs/water_pdf/wbc2018advnotice.pdf for details.

June 12, 2018: Deadline for submitting comments on DEC's proposal to adopt new standards for enterococci and e-coli to meet the requirements of federal law and protect coastal waters for recreation. See DEC's website at www.dec.ny.gov/regulations/112962.html for details. Public information meetings and public hearings are scheduled in May and June, respectively, in New York City and Avon.