

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Final Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
SOLID WASTE			
<p>NEW YORK STATE Enforcement Discretion Letter Relating to Solid Waste Regulations (Jan. 25, 2019)</p>	<p>DEC issued a new letter announcing its intent to exercise enforcement discretion in relation to various aspects of its 2017 revisions to the State’s solid waste regulations, set forth at 6 NYCRR Part 360 et seq. 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. The recent enforcement discretion letter, which replaces an earlier letter issued in March 2018, provides that recognizable, uncontaminated concrete and other masonry products, brick, rock, aggregate and asphalt materials identified in 6 NYCRR § 360.12(c)(3)(viii)-(x) that are under the control of the generator 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 or Part 361. Transporters handling these materials will not require Part 364 waste transporter permits. In addition, these materials are not subject to the solid waste regulations if they have been reviewed, approved and incorporated into a mined land reclamation permit. The letter also: excludes from regulation recycled aggregate from bricks, concrete pavement and/or asphalt pavement provided certain conditions are met; stays the provision requiring permitted C&D facilities to perform certain sampling; clarifies the term “similar material” included in the definition of fill material; allows the acceptance of mixed loads under certain circumstances; and allows use of certain materials for grade adjustment purposes provided specific conditions are met.</p> <p>The letter also announced DEC’s intent to authorize the use of waste tires to secure tarpaulins consistent with 6 NYCRR § 360.12(c)(2)(iv) or BUD 1137-0-00, dated December 4, 2014, and require that sharps and regulated medical waste (RMW) containers be removed to central storage when the container has reached its fill line, is otherwise filled, or generates odor or other evidence of putrefaction. (The current regulation requires containers of untreated RMW be removed from patient care areas every 24 hours and from lab areas every 72 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. In settlement of litigation brought by representatives of the construction industry, DEC agreed to exercise its enforcement discretion as set forth in the letter and compile and post any clarifications to the Part 360 regulations on its website pending revisions to the regulations.</p>	<p>The enforcement discretion memorandum will remain in effect until the regulations are amended or May 3, 2020, whichever occurs first.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>NEW YORK STATE CWA SPDES General Permit for Concentrated Animal Feeding Operations Permit No. GP-0-19-001</p>	<p>DEC revised its general permit under the State Pollutant Discharge Elimination System (SPDES) program to address wastewater associated with concentrated animal feeding operations (CAFOs). The revisions are necessary to address a pair of court decisions that concluded that the current permit did not provide an opportunity for public comment on mandatory nutrient management plans (NMPs) and so violated the Clean Water Act (CWA). Under the CWA, CAFO permits are required for large-scale animal farming operations that discharge waste to surface waters. Owners/operators of CAFOs must prepare NMPs, submit a notice of intent (NOI) to DEC seeking coverage under the applicable general permit, and comply with their plans and with the terms and conditions of the general permit. The NMPs cover all areas under the control of the CAFO where nutrient sources are produced, land applied or stored on or for use by the CAFO and must contain detailed best management practices to ensure proper management of manure and mortalities, divert clean water from production areas, prevent direct contact of confined animals with surface water, ensure that chemicals are properly managed, identify practices to control runoff, and implement numerous other measures.</p> <p>DEC has two general permits for CAFOs—one for facilities that discharge nutrients to surface waters and therefore are regulated under the CWA and one for facilities that do not discharge and so are regulated solely by DEC. In April 2018, a state court concluded that the predecessor to GP-0-19-001 violated the CWA because the plan explaining how the CAFO would comply with the law was not made available for public comment. With the new permit, NMPs for CWA CAFOs must be reviewed and approved by DEC and publicly noticed. Subsequent to obtaining coverage under the general permit, revisions to the NMP must be submitted to DEC and any substantial changes made available for public comment. DEC is continuing to allow CAFOs that do not discharge wastewater to seek coverage under GP-0-16-001, the so-called “ECL General Permit.”</p> <p>The revised CAFO general permit and related materials can be found on DEC’s website at: www.dec.ny.gov/permits/55373.html.</p>	<p>Coverage under the general permit is required for large, medium and small CAFOs as defined in the permits. The classification depends largely on the number and type of animal. For example, a large veal calf CAFO houses 1,000 or more veal calves while a medium CAFO houses 300 to 999 veal calves. Small CAFOs require coverage under the general permits only if specifically designated by the Department using criteria spelled out in the permit (number of animals, amount of waste, potential for discharge, etc.).</p> <p>Coverage under the new general permit is required for CAFOs that discharge nutrients to surface waters. CAFOs that do not discharge wastewaters may remain subject to the existing ECL General Permit. In response to public comment, DEC revised the draft permit to increase the public comment period for substantial revisions from 14 to 30 days and make other changes.</p>	<p>New General Permit GP-0-19-001 takes effect July 8, 2019. Operations seeking coverage under the permit must submit their NOI and NMP at least 60 days before the effective date.</p>

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>FEDERAL National Pollutant Discharge Elimination System Applications and Program Updates 40 CFR Parts 122, 124, and 125 84 Fed. Reg. 3324 (Feb. 12, 2019)</p>	<p>EPA updated its National Pollutant Discharge Elimination System (NPDES) regulations to eliminate regulatory and application form inconsistencies, improve permit documentation, transparency and oversight, clarify existing regulations, and remove outdated provisions. Major changes include:</p> <ul style="list-style-type: none"> • Definitions. Adding definitions of discharges to waters of the United States from pesticide applications and pesticide residue. • Application requirements. Revising application requirements to include EPA’s current data standards and the NPDES Electronic Reporting Rule and make numerous other changes/updates. • Industry codes. Require applications to include both North American Industry Classification System and Standard Industrial Classification system codes. • Cooling water. Require applicant to indicate whether the facility uses cooling water and the source of that water. • Public notice. Allowing permitting authorities to provide public notice of NPDES permits online in lieu of newspaper publication. <p>The rule can be found in the February 12, 2019 Federal Register at: www.govinfo.gov.</p>	<p>The regulations update key federal NPDES implementing regulations, which have not been significantly revised/updated in several decades. DEC must now revise its own SPDES regulations to conform to the federal changes to the extent the federal rule is now stricter than its state counterpart. EPA deferred final action of the following proposed revisions:</p> <ul style="list-style-type: none"> • Antidegradation. Adding a reference to 40 CFR § 131.12 as a reminder that states must consider state antidegradation policies when developing water quality-based effluent limits. • Dilution allowances. Specifying that any allowance for dilution must comply with applicable dilution and mixing zone requirements and be supported by data or analyses quantifying or accounting for the presence of each assessed pollutant in the receiving water. • Reasonable potential determination. Clarifying the types and quantities of data/information that must be considered when analyzing whether discharges of a pollutant have a “reasonable potential” to cause an excursion above water quality standards. • Objection to administratively continued permits. Giving EPA the authority to designate certain administratively continued permits as “proposed permits” and thus ensure that permits reflect statutory and regulatory updates and contain appropriate effluent limits. 	<p>The final rule takes effect June 12, 2019.</p>

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
AIR			
<p>FEDERAL Reconsideration of Supplemental Finding Regarding Whether to Regulate Power Plants under National Emission Standards for Hazardous Air Pollutants Program; Results of Residual Risk and Periodic Technology Review 40 CFR Part 63, subpart UUUUU 84 Fed. Reg. 2670 (Feb. 7, 2019)</p>	<p>EPA proposed to reverse its 2016 supplemental finding that it is appropriate and necessary (A&N) to regulate coal and oil-fired power plants under the National Emission Standards for Hazardous Air Pollutants (NESHAP) program while retaining the standard itself. After reviewing the environmental and health impacts of hazardous air pollutant (HAP) emissions from power plants, EPA concluded in 2011 that it was “appropriate and necessary” to regulate these emissions under the NESHAP program and followed up with the Mercury and Air Toxics Standards (MATS) for power plants. However, the Supreme Court concluded that EPA improperly failed to take cost into account when it made its A&N finding. To address the Supreme Court’s decision, EPA issued a supplemental finding in 2016 that weighed the various costs associated with regulating HAPs from power plants against other relevant considerations and concluded that they did not alter its determination that regulation of HAP emissions from power plants is A&N. EPA also concluded based on a formal cost-benefit analysis that the benefits of the MATS outweighed the costs. In the recent notice, the Trump administration EPA reversed this conclusion after finding that the agency improperly considered the co-benefits of reducing particulate matter emissions in assessing the benefits of a reduction in HAPs. Once these co-benefits are omitted, EPA concluded that the regulation of HAPs from power plants is not A&N because the costs of compliance far outweigh the benefits.</p> <p>Despite this conclusion, EPA announced that it would not remove power plants from the list of source categories regulated under the NESHAP program, citing an appeals court decision which rejected EPA’s earlier reversal of its decision to regulate power plants after finding that the agency failed to meet the criteria for delisting a source under Clean Air Act (CAA)§ 112(c)(9). Because power plants will remain on the CAA § 112(c)(1) list, the MATS standards will continue to apply. However, EPA is taking comment on alternative interpretations that would allow it to delist the source category and/or rescind the MATS.</p> <p>Notice of EPA’s MATS supplemental cost finding can be found in the February 7, 2019 Federal Register at: www.govinfo.gov.</p>	<p>The notice is specifically of interest to owners/operators of fossil fuel-fired power plants that are subject to the MATS rule. Although the rule will not result in changes to the currently applicable power plant standards it may affect how those standards are set in the future. More generally, it reflects an approach to assessing the costs and benefits of rules that could create additional obstacles to showing that future regulations are worth the costs of compliance.</p> <p>As part of the rulemaking, EPA also announced the results of its residual risk and periodic technology review under CAA § 112. 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.</p>	<p>EPA is accepting comment on the MATS rule finding until April 8, 2019.</p>

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WATER			
<p>FEDERAL Revised Definition of Waters of the United States 84 Fed. Reg. 4154 (Feb. 14, 2019)</p>	<p>EPA and the U.S. Army Corps of Engineers (ACOE) proposed a new definition of “waters of the United States”—a term that establishes the scope of waters federally regulated under the CWA. The CWA prohibits the discharge of pollutants into “navigable waters” except in compliance with specific CWA requirements. Navigable waters, in turn, is defined as “waters of the United States” or WOTUS. Over the years, many questions have arisen about the scope of CWA jurisdiction in light of this definition. These developments culminated in a controversial 2015 rulemaking defining the term “waters of the United States” to include specific categories of jurisdictional waters and allowing other waters to be included on a case-by-case basis. The controversial rule was stayed in certain states by a federal appellate court shortly after it was enacted.</p> <p>With the current rulemaking, EPA and the ACOE have proposed a new definition of WOTUS which they contend will increase CWA program predictability and consistency. The regulation specifies what waters are (and are not) considered WOTUS. Under the proposal, the following water bodies are WOTUS: traditional navigable waters; tributaries to those waters, including non-traditional surface waters that convey perennial or intermittent flow downstream; ditches (i.e., manmade channels used to convey water) that are traditional navigable waters such as the Erie Canal or that meet the definition of tributary or are built in adjacent wetlands; certain lakes and ponds; impoundments of jurisdictional waters; and wetlands adjacent to jurisdictional waters (i.e., wetlands that physically touch other jurisdictional waters). The following water bodies are <i>not</i> WOTUS under the proposed rule: features that contain water only during or in response to rainfall (i.e., ephemeral features), groundwater, many ditches (including most roadside or farm ditches), prior converted cropland, stormwater control features, wastewater recycling structures, and waste treatment systems.</p> <p>Notice of EPA’s rule defining WOTUS can be found in the February 14, 2019 Federal Register at: www.govinfo.gov.</p>	<p>The definition of “waters of the United States” implicates virtually all CWA programs, including ACOE § 404 permits, NPDES/SPDES wastewater discharge permits, and CWA § 401 water quality certifications. Although the 2015 rule was intended to clarify the scope of the CWA, representatives of various industries, including agriculture, oil and gas, and residential development, strongly objected to the change, arguing that it significantly expanded the agencies’ jurisdiction. In February 2017, President Trump issued an executive order directing the agencies to review the 2015 rule for consistency with certain policies and propose rescission, if appropriate. EPA previously proposed to rescind the 2015 joint rule redefining the term “waters of the United States” and recodify the pre-2015 rule, which is currently in effect in certain states pending adoption of a new definition.</p>	<p>EPA is accepting comment on the proposed rule until April 15, 2019.</p>

Citation	Summary	Implications	Schedule/Notes
ENFORCEMENT/COMPLIANCE			
<p>FEDERAL National Compliance Initiatives for Fiscal Years 2020-2023 84 Fed. Reg. 2848 (Feb. 8, 2019)</p>	<p>EPA is accepting comments on its national compliance initiatives (NCI) for fiscal years (FY) 2020-2023, identifying the issues on which it plans to focus its enforcement/compliance resources during the next four years. Of the seven initiatives from the FY 2017-2019 cycle, EPA is proposing to retain the following three: (1) cutting hazardous air pollutants (with a focus on leaks, flares and excess emissions from refineries, chemical plants and other industries that emit HAPs); (2) reducing toxic air emissions from hazardous waste facilities; and (3) reducing risks of accidental releases at industrial and chemical facilities with a focus on the most serious situations and attention to vulnerable populations. In addition, EPA is proposing to modify the following two initiatives: transition “keeping industrial pollutants out of the nation’s waters” to “National Pollutant Discharge Elimination System significant noncompliance (SNC) reduction” to focus on the goal in EPA’s recent Strategic Plan of reducing significant NPDES noncompliance by 50% by the end of FY 2022; and transitioning the “ensuring energy extraction activities comply with environmental laws” to the more general goal of reducing emissions of volatile organic compounds without regard to industry sector. Finally, EPA is proposing two new NCIs: increasing compliance with drinking water standards and reducing children’s exposure to lead.</p> <p>EPA also announced plans to return the following two initiatives from the FY 2017-2019 cycle to the core program: reducing air pollution from the largest sources; and keeping raw sewage and contaminated stormwater out of the nation’s waters. In the former case, EPA concluded that the agency’s long-standing new source review enforcement program and related initiatives had resulted in significant reductions in emissions from large emitters in key sectors. Likewise, with respect to wastewater/stormwater, EPA concluded that federal and state agencies had taken enforcement actions against the largest municipal sewer systems and had obtained significant improvements in compliance and major reductions in water pollution, justifying the return of this initiative to EPA’s core program.</p> <p>EPA’s notice concerning the draft NCI can be found in the February 8, 2019 Federal Register at www.govinfo.gov.</p>	<p>Although the NCI tends to focus on larger facilities/polluters, it is generally of interest to anyone regulated by EPA either directly or through a state-delegated program such as the Clean Air or Clean Water Acts.</p> <p>In August 2018 EPA published a memorandum entitled <i>Transition from National Enforcement Initiatives to National Compliance Initiatives</i> that announced a shift in its enforcement strategy from enforcement to compliance, including plans to enhance reliance on compliance assurance tools, focus enforcement away from specific industrial sectors, and shift enforcement authority toward the states.</p>	<p>EPA is accepting comment on the draft NCI until March 11, 2019.</p>

Other Recent Developments (Final)

AIR

FEDERAL: EPA **finalized the results of its residual risk/periodic technology review of the NESHAP for the friction materials manufacturing facilities (40 CFR Part 63, subpart QQQQ) and leather finishing operations (subpart TTTT) source categories.** 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. After reviewing the existing standards, EPA concluded that the risks remaining after application of the NESHAPs 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 made no revisions to the NESHAPs' numerical limits. However, EPA revised the rules to require submission of electronic copies of compliance reports, update the provisions relating to startup, shutdown and malfunction consistent with court decisions, and make other technical corrections and clarifications. The rules, which took effect February 8, 2019 and February 12, 2019, respectively, can be found in the Federal Registers issued on those dates at: www.govinfo.gov.

Implications: The friction materials manufacturing NESHAP applies to major facilities that manufacture friction materials such as automobile brake linings and disc pads using a solvent-based process. According to EPA, there were two facilities in the United States in 2017 that were subject to the friction materials manufacturing standard. The leather finishing operations NESHAP 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. According to EPA, there are four facilities in the country subject to the leather finishing NESHAP, one of which is in New York.

WATER

FEDERAL: EPA issued a **new water quality trading policy memo** to supplement a 2003 policy that has been deemed too prescriptive by the Trump administration EPA. The document outlines the general process for facilities with water quality-based effluent limitations in their NPDES permits to meet their compliance obligations by reaching out to other sources, including nonpoint sources, to implement measures to reduce their discharges of pollutants. The trading program is based on the premise that pollutant sources in a watershed face different pollution control costs and that it may be more cost effective for one source to pay other sources to reduce their pollution, rather than achieving the necessary reductions themselves. With the recent memo, EPA reiterated its strong support for water quality trading and articulated a series of market-based principles with the goal of clarifying and expanding the range of policy options available. The six principles are: (1) states, tribes and stakeholders should consider implementing water quality trading and other market-based programs on a watershed scale (rather than using a municipal or jurisdictional boundary) on the theory that it may facilitate greater

market opportunities; (2) EPA encourages the use of adaptive management strategies (i.e., more flexible measures for measuring/predicting pollutant reductions); (3) water quality credits and offsets may be banked for future use (to encourage early adoption of pollution reduction practices); (4) EPA encourages simplicity and flexibility in implementing baseline concepts (to facilitate entry into market-based programs); (5) a single project may generate credits for multiple markets (e.g., a single project that reduces pollution and creates wetlands could receive credits in both markets); and (6) financing opportunities exist to assist with deployment of nonpoint source land use practices. The policy, which can be found at: www.epa.gov/nutrient-policy-data/water-quality-trading-memos, is part of a broad initiative to address nutrient pollution.

Implications: The policy is directly of interest to NPDES permittees and state and local entities responsible for implementing NPDES permits and NPDES permittees. EPA supports trading of nutrients (e.g., total phosphorus, total nitrogen) and sediment load reductions. While EPA recognizes that trading of other pollutants may have benefits, such trades may warrant more scrutiny.

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: The Occupational Safety and Health Administration (OSHA) **rescinded a requirement that employers with 250 or more employees electronically submit OSHA Forms 300 and 301 to the agency.** Covered employers must complete Form 301 (Injury and Illness Incident Report) for each reportable injury/illness and record the incident on Form 300 (Log of Work-Related Injuries and Illnesses). Each year, employers use the information from these forms to complete Form 300A (Summary of Work-Related Injuries and Illnesses). In May 2016, EPA adopted a rule requiring employers with 250 or more employees to electronically submit information from Forms 300, 300A and 301 to OSHA while establishments with 20 to 249 employees in certain designated industries were required to submit Form 300A. With the recent rulemaking, OSHA dropped the requirement to submit Forms 300 and 301 to the agency while continuing to require electronic submission of information from the 300A summary form. According to OSHA, the change will protect worker privacy while reducing the burden on employers; information necessary to identify high hazard establishments for enforcement targeting can be obtained from Form 300A and reports of work-related fatalities and severe injuries. The rule takes effect February 25, 2019; it can be found in the January 25, 2019 Federal Register at www.govinfo.gov.

Implications: The rule is primarily of interest to employers with 250 or more employees, who were required to electronically report the information from OSHA Forms 300 and 301 under the previous rule.

Other Recent Developments (Proposed)

CLIMATE CHANGE

NEW YORK STATE: DEC has **adopted an emergency rulemaking and is taking comment on the companion proposed rule adopting California's low emission motor vehicle greenhouse gas (GHG) emission standards.** Under the CAA, California is authorized to adopt its own motor vehicle emission standards subject to receipt of a waiver from EPA. States may then adopt the

California standards provided they adhere to them precisely and do not thus necessitate production of a “third car.” In recent years, California has adopted increasingly stringent motor vehicle GHG emission standards that have later been duplicated in large part by EPA. Recently, however, EPA announced its intention to roll back its 2016 motor vehicle GHG emission standards, which will result in federal standards that are significantly less stringent than their California counterpart for model years 2021-2025. With the recent notice, DEC adopted the California GHG emission standards for those model years as an emergency rule to ensure that the stricter California standards remain in effect in New York and is taking comment on the companion proposed rule. DEC is accepting comments on the proposed rule until **March 18, 2019**; the emergency rule will expire March 20, 2019 and is likely to be renewed pending adoption of the final permanent rule. The emergency rule/proposed rulemaking can be found on DEC’s website at: www.dec.ny.gov/regulations/115587.html. A public hearing on the proposed rule is scheduled for March 11, 2019 at 1:00 p.m. at DEC’s central office in Albany.

Implications: The rule is primarily of interest to motor vehicle manufacturers and consumers.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

February 22, 2019: Deadline for submitting comments on EPA’s proposal to grant attainment deadline extensions for certain ozone nonattainment areas and reclassify moderate ozone nonattainment areas as serious (comment period reopened by EPA). See the November 14, 2018 Federal Register at www.govinfo.gov for details.

March 11, 2019: Deadline for submitting comments on EPA’s proposed National Compliance Initiatives to be undertaken in fiscal years 2020-2023. See the February 8, 2019 Federal Register at www.govinfo.gov for details.

March 18, 2019: Deadline for submitting comments on EPA’s proposed revisions to the NSPS for CO₂ emissions from power plants (extended from February 19, 2019). See the December 20, 2018 Federal Register at www.govinfo.gov for details.

March 18, 2019: Deadline for submitting comments on EPA’s proposal to adopt California’s motor vehicle GHG emission standards. See DEC’s website at www.dec.ny.gov/regulations/115587.html for details.

March 26, 2019: Deadline for submitting comments on EPA’s ANPR seeking comment on possible revisions to the criteria for disposing of liquids in landfills. See the December 26, 2018 Federal Register at www.govinfo.gov for details.

April 8, 2019: Deadline for submitting comments on EPA’s MATS rule cost finding. See the February 7, 2019 Federal Register at www.govinfo.gov for details.

April 15, 2019: Deadline for submitting comments on EPA’s proposed definition of “waters of the United States” under the CWA. See the February 14, 2019 Federal Register at www.govinfo.gov for details.