

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Final Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
WATER			
<p>FEDERAL Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes (June 7, 2019)</p>	<p>EPA issued guidance entitled <i>Clean Water Act Section 401 Guidance for Federal Agencies, States and Authorized Tribes</i> for the purpose of clarifying and streamlining Clean Water Act (CWA) requirements and procedures relating to state/tribal water quality certifications (WQC), which are required prior to issuance of certain federal permits. Under CWA § 401, a federal agency may not issue a permit or license to conduct any activity that may result in a discharge to waters of the United States unless the state or tribe where the discharge originates either certifies that the discharge complies with water quality requirements or waives the certification requirements. The guidance addresses the following topics:</p> <ul style="list-style-type: none"> • Statutory and regulatory timelines for review and action on Section 401 certifications. States/tribes must issue WQCs within a reasonable time not exceeding one year; certain agencies have adopted specific timeframes implementing this provision. The guidance clarifies that the time begins to run upon receipt of a certification request and not upon a determination that the application is “complete.” If the agency fails to act on the WQC by the deadline, the WQC requirement is waived. To prevent inadvertent waivers, the guidance recommends maintaining communications in advance of the deadline. • Appropriate scope of Section 401 review and conditions. EPA emphasized that the scope of WQC review is limited to an evaluation of potential water quality impacts (i.e., compliance with effluent limitations and standards of performance, water quality standards and implementation plans, and toxic pretreatment effluent standards). Accordingly, conditions in a WQC should be limited to ensuring compliance with these standards. The guidance specifies the measures that will be implemented if conditions extend beyond the scope of Section 401. • Scope of information relevant to state/tribal Section 401 certification review. After noting that the CWA does not specify what type of information should be submitted with a Section 401 certification request, the guidance declares that states/tribes should generally only need the application material submitted for the federal permit or license to make their decision and addresses the propriety of postponing decision-making pending completion of a National Environmental Policy Act review. EPA also emphasized that outstanding or unfulfilled information requests do not pause or toll the timeline on WQC requests. <p>The guidance can be found on EPA’s website at: www.epa.gov/cwa-401.</p>	<p>The guidance is potentially of interest to anyone required to obtain a U.S. Army Corps of Engineers permit, Federal Energy Regulatory Commission license or any other federal approval for an activity that involves discharge to waters of the United States. In recent years, New York and other states have successfully stopped controversial projects such as natural gas pipelines, by denying them the required WQCs. The guidance appears to be intended, in some measure, to limit state/ tribal authority under the WQC program.</p> <p>The document contains additional guidance emphasizing the importance of early collaboration and clear written communication and offering recommendations for federal permitting agencies and states/tribes.</p>	

Proposed Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
<p>AIR</p> <p>FEDERAL Residual Risk and Periodic Technology Review of National Emission Standards for Hazardous Air Pollutants 40 CFR Part 63 84 Fed. Reg. 25904 (June 4, 2019) (subpart KKKK surface coating of metal cans; subpart SSSS, surface coating of metal coil); 84 Fed. Reg. 22642 (May 17, 2019) (subpart VVVV, boat manufacturing; subpart WWW, reinforced plastic composites production); 84 Fed. Reg. 18926 (May 2, 2019) (LLLLL, asphalt processing and asphalt roofing manufacturing); 84 Fed. Reg. 20208 (May 8, 2019) (subpart PPPPP, engine test cells and stands)</p>	<p>EPA proposed the results of its residual risk/periodic technology review of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the following source categories in four separate rulemakings.</p> <ul style="list-style-type: none"> • Surface Coating of Metal Cans (subpart KKKK): Applies to surface coating and related operations involving metal cans and ends (including decorative tins) and metal crowns and closures. • Surface Coating of Metal Coil (subpart SSSS): Applies to processes at coil coating lines, including web unwind or feed stations, coating stations, associated curing ovens, wet sections and quench stations. • Boat Manufacturing (subpart VVVV): Applies to fugitive emissions resulting from HAPs evaporating from the resins, gel coats, solvents, adhesives, and surface coatings used in manufacturing processes at fiberglass and aluminum boat manufacturing sources. • Reinforced Plastic Composites Production (subpart WWW): Applies to the manufacturing of reinforced and non-reinforced plastic composite products and the production of plastic molding compounds used in the production of plastic composite products. • Asphalt Processing and Asphalt Roofing Manufacturing (subpart LLLLL): Applies to blowing stills, asphalt storage tanks and asphalt loading racks at asphalt processing facilities and coating mixers, coaters, saturators, wet loopers, asphalt storage tanks and sealant and adhesive applicators at asphalt roofing manufacturing facilities. • Engine Test Cells and Stands (subpart PPPPP): Applies to apparatuses used for testing uninstalled stationary or mobile engines. <p>In each case, after reviewing the existing standard, EPA concluded under Clean Air Act (CAA) §112(f) that the risks remaining after application of the NESHAP were acceptable and that the standard protects public health with an ample margin of safety. EPA also found under CAA § 112(d)(6) 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. However, EPA proposed to revise the rules relating to startup, shutdown and malfunction consistent with judicial rulings. In addition, EPA proposed to require facilities covered by these NESHAPs to submit electronic copies of required performance test results and other reports and make other updates and corrections.</p> <p>The proposed rules can be accessed at: www.govinfo.gov.</p>	<p>The proposed rules are primarily of interest to owners/operators of major HAP sources in the categories identified. Each proposed rule includes a description of the source category regulated and, in most cases, an estimate of the number of sources in the category.</p> <p>As part of the asphalt processing rulemaking EPA also solicited comment on whether technological revisions to the NESHAP are “necessary” under CAA § 112(d)(6) where EPA has determined pursuant to CAA § 112(f) that the standard provides an ample margin of safety, effectively linking the technology review to the results of the residual risk assessment.</p>	<p>See the Upcoming Deadlines section of this document for the public comment deadline for each rulemaking. Note that the deadline for submitting comments on the asphalt processing and asphalt roofing manufacturing NESHAP has closed.</p>

Citation	Summary	Implications	Schedule/Notes
HAZARDOUS WASTE			
<p>NEW YORK STATE Updated Hazardous Waste Regulations 6 NYCRR Parts 370-374 and 376</p>	<p>DEC proposed revisions to New York’s hazardous waste regulations to incorporate certain changes to the federal regulations adopted from September 30, 1999 through April 8, 2015 and certain conforming changes through November 28, 2016. Revisions include:</p> <ul style="list-style-type: none"> • Deleting language classifying mineral processing characteristic sludges and byproducts being reclaimed as solid waste and deleting five waste streams from the list of K wastes. • Updating the requirements for zinc fertilizers made from recycled hazardous secondary materials. • Amending various testing and monitoring requirements. • Adding mercury-containing equipment to the list of universal wastes. Note: DEC already is implementing this rule pursuant to a Commissioner policy. • Adopting parts of a burden reduction initiative aimed at eliminating certain recordkeeping and reporting requirements. Note: New York will remain more stringent in some respects. • Adopting alternative requirements for hazardous waste determination and accumulation at academic laboratories that, among other things, allow waste determinations to be made in the lab, at an onsite central accumulation area, or onsite treatment, storage and disposal facility. • Adopting streamlined requirements for cathode ray tubes. Note: DEC is already implementing this rule pursuant to a Commissioner’s Policy. <p>DEC also is proposing “state-initiated corrections” that include:</p> <ul style="list-style-type: none"> • Clarifying the definition of “small quantity generator” and conforming to EPA’s revised definition published on November 28, 2016. • Eliminating the requirement to submit so-called “c7 notifications” for the following commonly recycled waste streams: dental amalgam, precious metals, used lead acid batteries and used electronics. • Clarifying that load consolidation must occur in secondary containment. <p>Since regulated entities must comply with the federal hazardous waste regulations to the extent they are more stringent than their state counterparts, the revisions will eliminate some dual federal/state regulation. In addition, the proposal includes certain federal rulemakings, such as those governing mercury-containing equipment and wastes generated by academic labs, that are intended to streamline the hazardous waste management process.</p> <p>Information about the proposed revisions can be found on DEC’s website at: www.dec.ny.gov/regulations/100424.html.</p>	<p>The rule will affect hazardous waste generators and treatment, storage, and disposal facilities. As in the past, DEC is declining to adopt certain federal rules, resulting in state regulations that are stricter than their federal counterparts.</p> <p>As part of this rulemaking, DEC also is proposing to incorporate the NESHAP for hazardous waste combustors into the state’s hazardous waste regulations.</p> <p>In 2015, DEC sought input on revising the state regulations to incorporate federal rules adopted since 2012, including:</p> <ul style="list-style-type: none"> • Revising the definition of solid waste to conditionally exclude solvent-contaminated wipes. • Conditionally excluding carbon dioxide streams injected into underground injection wells for carbon sequestration purposes from the definition of hazardous waste. • Establishing the framework to implement electronic manifests. • Revising the exclusion from the definition of solid waste relating to hazardous secondary materials. <p>DEC took no action on these rules. For the most part, DEC also did not address EPA’s November 28, 2016 rule overhauling the hazardous waste generator requirements.</p>	<p>DEC is accepting comments on the proposed rule until August 26, 2019.</p> <p>A hearing on the proposed rulemaking will be held on August 19, 2019 at 1:00 p.m. at DEC Headquarters, 625 Broadway, Room 129, Albany. An informational webinar is scheduled for August 6, 2019 at 1:00 p.m. Information regarding registration for the webinar will be published shortly in the Environmental Notice Bulletin.</p>

Other Recent Developments (Final)

AIR

FEDERAL: EPA adopted changes to **allow gasoline blended with up to 15 percent ethanol (E15) to take advantage of the waiver for volatility that currently applies to E10 gasoline during the summer months.** Under CAA § 211(f)(1), manufacturers are barred from introducing a new fuel or fuel additive into the marketplace that is not “substantially similar” to the fuel used to certify vehicles unless EPA grants a waiver under CAA § 211(f)(4). Several decades ago, EPA granted a waiver for E10 gasoline (i.e., gasoline with up to 10 percent ethanol) and followed up in 2010 with a partial waiver for E15 gasoline. Under a separate provision, manufacturers are generally barred from selling gasoline with a Reid vapor pressure (RVP) of more than 9.0 psi during the high ozone season (i.e., summer). However, CAA § 211(h)(4) provides a 1.0 psi RVP allowance for E10. With the recent rulemaking, EPA extended the 1.0 psi RVP allowance to E15, a change that will allow the marketing of E15 with an RVP of 10 during the summer months. In addition, EPA made various changes to the rules governing renewable identification numbers (RINs) under the renewable fuel standards program that are designed to reduce the potential for fraud. The rule can be found in the June 10, 2019 Federal Register at: www.govinfo.gov.

Implications: The rule is primarily of interest to companies that refine and market gasoline and other transportation fuels.

CLIMATE CHANGE

NEW YORK STATE: DEC revised 6 NYCRR Part 251, which imposes **carbon dioxide (CO₂) emission limits on new and modified major electric generating facilities.** Of particular note, the proposed revisions to Part 251 would for the first time establish CO₂ emission limits for existing power plants. As of December 31, 2020, owners and operators of non-modified major electric generating facilities would be required to meet an emission rate of 1,800 pounds of CO₂ per megawatt hour (MWh) gross electrical output (output-based limit) or 180 pounds of CO₂ per million Btu of input (input-based limit). The owner must specify which limit it will meet, and compliance will be assessed on an annual basis by dividing total CO₂ emissions for the calendar year by either total gross MW generated or annual Btu input for each fuel combusted. The limits for new and modified units are unchanged. The proposed CO₂ emission limits for existing power plants are consistent with the State’s goals of reducing CO₂ emissions 40% by 2030. The rule will prevent the operation of high-carbon sources of energy, such as coal-fired power plants, that do not use carbon capture and storage (CCS). As a practical matter, there are very few coal-fired power plants currently operating in New York and those that remain are not expected to operate beyond December 31, 2020, in part because of the new rule. Oil and natural gas-fired power plants can meet the CO₂ limits for existing sources without CCS. The rules can be found on DEC’s website at: www.dec.ny.gov/regulations/113501.html.

Implications: The rule is primarily of interest to owners/operators of fossil fuel-fired power plants.

CHEMICALS

FEDERAL: EPA amended the release notification regulations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to **add a reporting exemption for air emissions from animal waste at farms**. Section 304(a) of EPCRA requires reporting of certain releases of listed hazardous substances above specified reporting quantities to local and state emergency response agencies for any area likely to be affected by the release. Because decomposing animal waste at farms can emit pollutants such as ammonia and hydrogen sulfide that are listed as hazardous substances under the EPCRA emergency reporting rule, questions arose about whether releases of such pollutants from farms must be reported. In 2008, EPA issued an administrative reporting exemption for air releases from animal waste at farms under a similar provision of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) that was vacated by a federal court on the ground that EPA could not rely on its general rulemaking authority or a de minimis exception to issue an administrative reporting exemption for this category of releases. In the wake of that decision, Congress adopted a law exempting air emissions from animal waste from reporting under CERCLA, which EPA implemented via an August 2018 rule. With the recent rulemaking, EPA adopted a similar exemption under the EPCRA program. The rule takes effect July 15, 2019; it can be found in the June 13, 2019 Federal Register at: www.govinfo.gov.

Implications: The rule is primarily of interest to large farms that generating significant quantities of ammonia, hydrogen sulfide and other hazardous air emissions from animal waste.

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: The Occupational Safety and Health Administration (OSHA) adopted 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 current 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. The rule takes effect July 15, 2019; it can be found in the May 14, 2019 Federal Register at: www.govinfo.gov.

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

GENERAL

FEDERAL: EPA's General Counsel recently announced the launch of a new online system that provides the public with **notice concerning new litigation against EPA** and access to notices of intent to sue and complaints. The system is part of a larger initiative to promote transparency and public participation in consent decrees and settlement agreements. Members of the public can sign up to receive notice of litigation against EPA at: www.epa.gov/ogc/email-subscriptions-new-litigation-notifications. Information about EPA's efforts to promote transparency and public participation in consent decrees and settlements can be found at: www.epa.gov/ogc/ogc-responsibilities-implement-october-2017-directive-promoting-transparency-and-public.

Implications: The new system provides an easy way to learn about lawsuits challenging EPA's rulemaking and other activities.

Other Recent Developments (Proposed)

AIR

FEDERAL/NEW YORK STATE: EPA proposed to **reject the pollutant transport petition filed by New York State** asking it to find that emissions from over 350 sources in nine upwind states significantly contribute to nonattainment and interfere with maintenance of the 2008 and 2015 ozone national ambient air quality standards (NAAQS) in New York State. CAA § 126(b) authorizes states to petition EPA to find that a major source or group of stationary sources in an upwind state is emitting pollutants that contribute to nonattainment or interfere with maintenance of attainment in the petitioning state. If the petition is granted, EPA must establish emission limitations and compliance schedules designed to address the transport issue as expeditiously as practicable, but not later than three years from the date of the finding. With the notice, EPA proposed to deny New York's petition with respect to the 2008 ozone NAAQS after concluding that the sources identified do not emit pollution in violation of the good neighbor provision. EPA went on to find that New York failed to meet its burden of showing that the sources at issue may be further controlled through implementation of cost-effective measures. Finally, EPA is taking comment on whether to deny the petition on the ground that a large, undifferentiated number of sources located in multiple upwind states does not qualify as a "group of stationary sources" under CAA § 126. EPA is taking comment on the proposal to deny the petition until **July 15, 2019**; the notice can be found in the May 20, 2019 Federal Register at: www.govinfo.gov.

Implications: If the petition is rejected, DEC must implement measures to reduce emissions of ozone precursors to compensate for emissions from the upwind states.

WATER

FEDERAL: EPA is seeking public input on a draft report, entitled *Study of Oil and Gas Extraction Wastewater Management Under the Clean Water Act*, which reviews current regulation and management of wastewater from the oil and gas industry and assesses the potential for beneficial reuse. The extraction of oil and gas generates large quantities of wastewater, most of which is managed by

injecting it deep underground. Arid states, in particular, have expressed an interest in beneficially reusing produced water from the oil and gas sector. The draft study provides background information about the characteristics of produced water and how it is managed and regulated. It also summarizes the “major themes” arising from outreach to specific stakeholder groups, including state agencies, tribes, oil and gas industry members, non-governmental organizations, academia, and other entities. The report concludes that while there is support in some communities for expanding opportunities for discharging produced water, others were concerned about the potential environmental and human health implications of this practice. EPA is accepting input on the draft report until **July 1, 2019**; it can be found on EPA’s website at: www.epa.gov/eg/study-oil-and-gas-extraction-wastewater-management.

Implications: The draft report is primarily of interest to those in the oil and gas industry.

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: OSHA is seeking information about **possible updates to the lockout/tagout standard**. The current OSHA standard, set forth at 29 CFR § 1910.147, requires all sources of energy, including energy stored in the machines themselves, to be controlled during servicing and maintenance of machines and equipment using an energy isolating device (EID). Currently, control circuit type devices are specifically excluded from OSHA’s definition of EID and thus are not an acceptable method of controlling hazardous energy during service and maintenance activities. OSHA’s recent request for information (RFI) is seeking feedback concerning the circumstances under which circuit type devices could safely be used to control hazardous energy in light of recent technological advances. OSHA also is considering changes to the lockout/tagout standard to address hazardous energy control for new robotics technologies. The RFI includes background information about the changes under consideration followed by a series of questions seeking specific information about each proposed change. The deadline for submitting information in response to the RFI is **August 19, 2019**; it can be found in the May 20, 2019 Federal Register at: www.govinfo.gov.

Implications: The RFI is primarily of interest to operations subject to the OSHA lockout/tagout standard.

GENERAL

FEDERAL: EPA sought comment on a draft **document addressing the relationship between EPA and the states on environmental enforcement and compliance**. The guidance—entitled *Enhancing Planning and Communication Between the EPA and the States in Civil Enforcement and Compliance Assurance Work*—sets out expectations and procedures for enhancing civil enforcement and compliance assurance work between EPA and delegated states. The document addresses the following subjects: (1) periodic joint work planning, including joint planning participants, strategic planning, joint inspection planning, and joint enforcement planning; (2) roles of EPA and the states in implementing authorized programs; and (3) the process for elevating disputes. Of perhaps greatest note, the memorandum declares that EPA “will generally defer to a state as the primary implementer of inspections and enforcement in authorized programs,” except in specific situations spelled out in the memorandum (e.g., emergency situations or situations in which there is substantial risk to human health or the environment, situations where state lacks adequate equipment, resources or expertise, significant

noncompliance that the state has failed to address, etc.). Where the EPA region and state disagree on a particular enforcement matter, the matter will be elevated according to procedures spelled out in the guidance. Notice of the draft guidance was published in the May 13, 2019 Federal Register at: www.govinfo.gov; it can be found at: <https://www.epa.gov/sites/production/files/2019-04/documents/guidance-enhancingregionalstatecommunicationoncompliance-190422.pdf>. The deadline for submitting comments has closed.

Implications: The guidance marks a 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.

Regulatory Agenda

The New York State Department of Health (DOH) recently published its **regulatory agenda for 2019**. DOH is considering undertaking the following environment-related regulatory actions:

- Protection Against Legionella (10 NYCRR Part 4): Amend regulation to add/revise definitions, clarify the contents of the maintenance program and plan, and revise the sampling and inspection intervals and certain reporting requirements.
- Public Water Systems (10 NYCRR subpart 5-1): Amend the regulation to incorporate maximum contaminant levels (MCLs) for several emerging contaminants that are not regulated under the federal Safe Drinking Water Act and are the subject of recommendations from the New York State Drinking Water Advisory Council.
- Regulated Medical Waste (10 NYCRR Part 70): Revise the requirements for labeling medical waste that will be transported off-site for treatment consistent with U.S. Department of Transportation and DEC requirements, which do not require the labeling of the primary container if it will be placed in a secondary bulk container used by a single generator.
- Asbestos Safety Training Program Requirements (10 NYCRR Part 73): Amend regulations to incorporate changes by the New York State Department of Labor to 12 NYCRR Part 56 as well as changes that have occurred in the industry.

DOH's Regulatory Agenda can be found in the May 22, 2019 State Register at: <https://docs.dos.ny.gov/info/register/2019/may22/toc.html>.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

June 24, 2019: Deadline for submitting comments on EPA's proposed rule addressing submission of CBI as part of EPA's chemical inventory review under TSCA. See the April 23, 2019 Federal Register at www.govinfo.gov for details.

June 24, 2019: Deadline for submitting comments on EPA's Chemical Data Reporting rule under TSCA. See the April 25, 2019 Federal Register at www.govinfo.gov for details.

June 24, 2019: Deadline for submitting comments on EPA's proposed residual risk/periodic technology findings for the engine test cells/stands NESHAP. See the May 8, 2019 Federal Register at www.govinfo.gov for details.

July 1, 2019: Deadline for submitting comments on EPA's draft *Study of Oil and Gas Extraction Wastewater Management Under the Clean Water Act*. The draft report can be found at www.epa.gov/eg/study-oil-and-gas-extraction-wastewater-management.

July 1, 2019: Deadline for submitting comments on EPA's draft *Discussion Framework for Development of a Draft Water Reuse Action Plan*. The document and other information relating to EPA's water reuse initiative can be found at www.epa.gov/waterreuse/water-reuse-action-plan.

July 1, 2019: Deadline for submitting comments on EPA's proposed residual risk/periodic technology review findings for the boat manufacturing and reinforced plastic composites production NESHAPs. See the May 17, 2019 Federal Register at www.govinfo.gov for details.

July 15, 2019: Deadline for submitting comments on EPA's proposed denial of New York's petition under CAA §126 seeking emission reductions from facilities in upwind states that are interfering with New York's attainment and maintenance of the ozone NAAQS. See the May 20, 2019 Federal Register at www.govinfo.gov for details.

July 19, 2019: Deadline for submitting comments on EPA's proposed residual risk/periodic technology review findings for the metal can/metal coil surface coating NESHAPs. See the June 4, 2019 Federal Register at www.govinfo.gov for details.

August 6, 2019: Webinar concerning proposed amendments to hazardous waste regulations to be held at 1:00 p.m. Registration information will be available shortly.

August 19, 2019: Deadline for submitting information in response to OSHA's RFI concerning possible changes to the lockout/tagout standard. See the May 20, 2019 Federal Register at www.govinfo.gov for details.

August 19, 2019: Public hearing on proposed amendments to hazardous waste regulations to be held at 1:00 p.m. at DEC Headquarters, 625 Broadway, Room 129, Albany.

August 26, 2019: Deadline for submitting comments on DEC's proposed amendments to the hazardous waste regulations. See DEC's website at www.dec.ny.gov/regulations/100424.html for details.

September 27, 2019: Deadline for submitting data in support of DEC's compilation of list of impaired waters under CWA § 303(d). See DEC's website at www.dec.ny.gov/chemical/31290.html for details.