

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

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Final Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
AIR			
<p>FEDERAL National Emission Standards for Hazardous Air Pollutants Residual Risk/Periodic Technology Review 40 CFR Part 63 85 Fed. Reg. 41276 (July 9, 2020) (paper and other web coating); 85 Fed. Reg. 44752 (July 24, 2020) (rubber tire manufacturing); 85 Fed. Reg. 44960 (July 24, 2020) (lime manufacturing plants); 85 Fed. Reg. 42074 (July 13, 2020) (integrated iron and steel manufacturing); 85 Fed. Reg. 41680 (July 10, 2020) (site remediation); 85 Fed. Reg. 45476 (July 28, 2020) (taconite iron ore processing).</p>	<p>EPA issued the results of its residual risk/periodic technology review of the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the following source categories set forth at 40 CFR Part 63:</p> <ul style="list-style-type: none"> • Paper and Other Web Coating (subpart JJJJ): Applies to facilities that coat paper and other web substrates and are major sources of HAP emissions (excluding those covered by other NESHAPs). • Rubber Tire Manufacturing (subpart XXXX): Applies to major HAP sources that manufacture rubber tires. • Lime Manufacturing Plants (subpart AAAAA): Applies to lime manufacturing plants at major sources except those located at pulp and paper mills or beet sugar factories. • Integrated Iron and Steel Manufacturing (subpart FFFFF): Applies to HAP emissions from major sources that produce steel from iron ore pellets, coke, metal scrap or other raw materials using furnaces or other processes. • Site Remediation (subpart GGGGG): Regulates HAP emissions from active remediation operations at sites that are major HAP sources and have affected facilities that are subject to another maximum achievable control technology (MACT) standard under the NESHAP program. Affected sources covered by the NESHAP include process vents (for in-situ and ex-situ remediation processes), material management units (tanks, surface impoundments, containers etc.), and equipment leaks. • Taconite Iron Ore Processing (subpart RRRRR): Applies to major HAP sources that separate and concentrate iron ore from taconite. <p>In each case, after reviewing the existing major source standard, EPA concluded under 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. With the exception of the site remediation NESHAP, EPA 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 NESHAPs were necessary to address technological improvements. In the case of iron and steel foundries, EPA took final action to establish emission standards for mercury which minimize emissions by limiting the amount of mercury per ton of metal scrap used. As part of these rulemakings, EPA revised the rules relating to startup, shutdown and malfunction consistent with judicial rulings. In addition, EPA required facilities covered by these NESHAPs to submit electronic copies of required performance test results and other reports and made other updates and corrections to the rules.</p> <p>The rules can be accessed in the Federal Registers for the relevant dates at: www.govinfo.gov.</p>	<p>The findings/revisions are primarily of interest to owners/operators of facilities in the listed source categories. EPA estimates that the regulations cover sources in the categories identified as follows: paper and other web coating, 168 facilities; rubber tire manufacturing, 21 facilities; lime manufacturing plants, 35 facilities; integrated iron and steel manufacturing, 11 facilities; site remediation, 63 facilities; and taconite iron ore processing, 8 facilities.</p>	<p>The rules took effect on the date of adoption.</p>

Citation	Summary	Implications	Schedule/Notes
ENVIRONMENTAL REVIEW			
<p>FEDERAL National Environmental Policy Act Regulations 40 CFR Part 1500 et seq. 85 Fed. Reg. 43304 (July 16, 2020)</p>	<p>The Council on Environmental Quality (CEQ) adopted major changes to the National Environmental Policy Act (NEPA) regulations with the purported goal of modernizing and clarifying the regulations to facilitate more efficient, effective and timely NEPA reviews. NEPA—found at 42 USC §§ 4321 to 4370h—requires federal agencies to incorporate environmental considerations into planning, decisionmaking, and permitting. Federal agencies must prepare detailed statements assessing the environmental impact of, and alternatives to, major federal actions that significantly affect the environment. With the recent rulemaking, CEQ adopted its first major update to the NEPA rules since 1978. Key changes include:</p> <ul style="list-style-type: none"> • Scope and applicability. The CEQ: added a new section entitled “Thresholds” identifying considerations to assist agencies in determining whether NEPA applies; changed the definition of “major federal action” to clarify that actions with minimal federal funding or involvement are not major; deleted the terms “direct,” “indirect,” and “cumulative” and added a provision expressly declaring that analysis of cumulative impacts is not required; and defined “effect” or “impact” as changes to the human environment that are “reasonably foreseeable” and have a “reasonably close causal relationship to the proposed action or alternatives.” These changes will narrow the types of effects that require NEPA review. • Environmental assessments. If it is unclear whether an action is likely to have significant environmental impacts, an Environmental Assessment (EA) must be prepared. The agency will then issue Findings of No Significant Impact or require completion of an Environmental Impact Statement (EIS). With this rulemaking, the CEQ imposed a 75-page limit and a one-year timeframe for completing an EA. In addition, the CEQ focused project approval in a single lead agency rather than allowing any involved agency to veto or delay a project. • Environmental impact statements. Major or controversial projects must prepare an EIS. The CEQ: recommended that scoping for the EIS (i.e., the preliminary identification of significant issues) begin early in the review process; imposed a two-year time frame for completing an EIS; updated the production/distribution provisions to reflect technological and other developments; and clarified when supplemental statements are required. • Significance/segmentation. The CEQ deleted the definition of “significantly” and added a new section entitled “Determine the appropriate level of NEPA review” addressing significance. It also replaced the detailed list of significance criteria found in the definition with a more general discussion of significance. To address issues of segmentation (breaking projects into small component parts to avoid NEPA review), the new rule contains language specifying that agencies should consider connected actions when determine significance. <p>The rule can be found in the July 16, 2020 Federal Register at: www.govinfo.gov.</p>	<p>The rule represents the first major overhaul of the NEPA regulations in more than 40 years. Although many actions requiring federal permits or approvals are subject to categorical exclusions, certain major federal permits, funding and other approvals require NEPA review. The changes reflect court decisions, CEQ policy and other developments as well as changes designed to streamline and simplify the NEPA process. While most of the changes have been applauded by industry groups, environmentalists contend that the changes—particularly the deletion of the requirement to consider indirect and cumulative impacts—will remove any obligation for the federal government to consider the change impacts of projects. More generally, environmentalists are concerned the revised regulations weaken the NEPA review process.</p>	<p>The rule is a major rule subject to congressional review. It will take effect September 14, 2020 unless Congress exercises its authority to change the effective date or terminate the rule.</p>

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WATER			
<p>FEDERAL Clean Water Act Section 401 Certification Rule 40 CFR Part 121 85 Fed. Reg. 42210 (July 13, 2020)</p>	<p>EPA updated and clarified its requirements and procedures relating to state/tribal water quality certifications (WQC). Under Clean Water Act (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 requirement. The applicable WQC regulations—set forth at 40 CFR Part 121—have not been updated in decades. According to EPA, the revisions are intended to “increase the predictability and timeliness of CWA section 401 certification actions by clarifying timeframes for certification, the scope of certification review and conditions, and related certification requirements and procedures.” Key changes include:</p> <ul style="list-style-type: none"> • Pre-filing meeting request. The new rule requires all project proponents to request a meeting with the certifying authority at least 30 days prior to submitting a WQC request. • Statutory and regulatory timelines for review and action on Section 401 certifications. Under the CWA, states/tribes must issue WQCs within a reasonable time not exceeding one year, although certain agencies have adopted shorter deadlines. The rulemaking 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 by the deadline, the WQC requirement is waived. There is no tolling provision authorizing agencies to stop the clock. • Scope of information required for certification request. The regulations specify that certification requests must be in writing and must include specific information relating to the permit/approval sought and nature of the discharge. • Appropriate scope of Section 401 review and conditions. EPA emphasized that the scope of WQC review is limited to considerations of water quality. In particular, the certifying authority’s review extends only to assessing whether potential discharges from a point source to a water of the United States will comply with water quality requirements. • Certification actions. The regulations identify four potential actions in response to a certification request—grant, grant with conditions, denial or waiver. If the certification is denied, the agency must explain why the proposed project will not comply with water quality requirements and identify the data/project changes needed to comply. If the certification is imposed with conditions, the certifying state must explain why the condition is necessary to ensure that the discharge complies with water quality requirements and cite to the applicable law. EPA dropped a provision that would have allowed it to reject a decision to deny a WQC or impose conditions if it concluded that the agency had exceeded its authority or failed adequately to explain its decision. <p>The regulation can be found in the July 13, 2020 Federal Register at: www.govinfo.gov.</p>	<p>The revised regulation 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 a discharge to waters of the United States. In recent years, New York and other states have stopped controversial projects, such as natural gas pipelines, by denying them the required WQCs. The regulation limits state/tribal authority under the WQC program by confining state/tribal review under Section 401 to whether point source discharges from a federally approved project comply with applicable CWA standards rather than allowing consideration of the water quality or other impacts from the project as a whole. Critics contend that the rule improperly limits the statutory role of states/tribes in overseeing the impacts of federally permitted projects on water quality.</p>	<p>The rule takes effect September 11, 2020.</p>

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WATER			
<p>FEDERAL National Primary Drinking Water Regulations for Perchlorate 40 CFR Parts 141 and 142 85 Fed. Reg. 43990 (July 21, 2020)</p>	<p>EPA withdrew its 2011 determination to regulate perchlorate in drinking water after a lengthy review process. Under the Safe Drinking Water Act (SDWA), EPA must publish a Contaminant Candidate List (CCL) every five years containing contaminants that are known or anticipated to occur in public water systems and are not currently subject to EPA’s drinking water regulations. EPA then collects data on the listed chemicals and issues a determination whether or not to regulate at least five of the chemicals on the CCL. EPA also issues a separate list every five years of unregulated chemicals to be monitored by public water systems. In 2011, EPA published a determination to regulate perchlorate in drinking water after concluding that it may have an adverse effect on human health and is known to occur in drinking water systems with a frequency and at levels that present a public health concern. After delays in developing the standard, a federal court ordered EPA to propose a drinking water rule by May 28, 2019. EPA followed up with a proposal to set an enforceable maximum contaminant level (MCL) and a maximum contaminant level goal (MCLG) for perchlorate at 56 micrograms/liter (µ/l), while taking comment on higher and lower alternative levels as well as on the possible withdrawal of the 2011 determination to regulate perchlorate.</p> <p>With the recent rulemaking, EPA withdrew its determination to regulate perchlorate in drinking water under the SDWA after finding that the substance “does not occur ‘with a frequency and at levels of public health concern’ within the meaning of the SDWA” and that “regulation of perchlorate does not present a ‘meaningful opportunity for health risk reductions for persons served by public water systems.’” According to EPA, while the agency has never withdrawn a regulatory determination under the SDWA, its decision is supported by the legislative history underlying the 1996 SDWA amendments and is consistent with Congress’ direction to rely on the best available public health information in making its decision. New data and analysis developed by EPA as part of the 2019 proposal purportedly demonstrate that the occurrence and health effects information that provided the basis for the 2011 determination is no longer accurate.</p> <p>The final rulemaking rule can be found in the July 21, 2020 Federal Register at: www.govinfo.gov.</p>	<p>Perchlorate is a chemical commonly used as an oxidizer in solid fuels to power rockets, missiles and fireworks; it enters the environment from both natural and manmade sources and is naturally occurring in some fertilizers.</p> <p>The final action is primarily of interest to owners/operators of public water systems who would have been required to monitor their water systems for perchlorate, report the results to the public, and take measures to reduce perchlorate levels if they exceeded the MCL. According to EPA, not more than 15 public water systems would have needed to take action to reduce levels of perchlorate if it had adopted the lowest MCL under consideration (18 µg/l).</p>	<p>The notice took effect July 21, 2020.</p>

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WATER			
<p>NEW YORK STATE Maximum Contaminant Levels for PFOA, PFOS, and 1,4-Dioxane 10 NYCRR Subpart 5-1</p>	<p>The New York State Department of Health’s (DOH) Public Health and Health Planning Council approved maximum contaminant levels for perfluorooctanoic acid (PFOA), perfluorooctanesulfonic acid (PFOS) and 1,4-dioxane under its public drinking water regulations set forth at 10 NYCRR Subpart 5-1. In recent years, PFOA/PFOS contamination of drinking water has been reported at several locations in New York, including Hoosick Falls, Petersburg, and Newburgh; problems with 1,4-dioxane contamination have been reported across the State but are focused on Long Island. In early 2019, New York’s Drinking Water Quality Council (DWQC)—which was formed to address the problem of emerging contaminants in drinking water—recommended establishing MCLs of 10.0 parts per trillion each for PFOA and PFOS and 1.0 parts per billion for 1,4-dioxane for public water systems (PWS). Following a lengthy review process, the Planning Council approved the MCLs recommended by the DWQC and proposed by DOH, together with initial monitoring and ongoing sampling requirements. PWS that exceed the MCLs must implement compliance measures in accordance with the standards and criteria set forth in the regulations. In addition, the Planning Council approved provisions proposed after the initial public comment period allowing PWS to ask the state to defer actions for determining MCL violations for up to 24 months while the PWS complies with a corrective action plan, with the potential for an additional 12-month extension. DOH and the Planning Council rejected calls for stricter MCLs after finding that the levels approved provide a strong margin of protection and are consistent with the DWQC’s recommendations.</p> <p>The rule and related documents can be found on the DOH website at: www.health.ny.gov/facilities/public_health_and_health_planning_council/meetings/2020-07-30/docs/mlc.pdf.</p>	<p>The MCLs are of interest to owners/operators of PWS. The term “public water system” encompasses both publicly and privately owned drinking water systems that serve 25 year-round residents. According to DEC, there are approximately 7,200 privately owned PWS in the State. DOH estimates that approximately 21% of all PWS will have levels above the MCLs for PFOA and PFOS; numerous additional systems are expected to exceed the MCL for 1,4-dioxane. The costs of installing the equipment needed to treat contaminated drinking water is expected to run from several hundred thousand to many millions of dollars depending on the size of the PWS.</p>	<p>The regulations will take effect after they are published in the State Register. PWS seeking to defer actions for determining MCL violations must make such requests in writing within 90 days of the effective date of the standards. The request must document that the deferral period is necessary for the system to implement corrective actions to achieve compliance with the MCL and include a timeline with specific milestones.</p>

Other Recent Developments (Final)

CHEMICALS

FEDERAL: EPA made **corrections to its existing Toxic Release Inventory (TRI) regulations**. According to EPA, the corrections maintain previous regulatory actions and do not alter existing reporting requirements or impact compliance burdens or costs. Under Section 313 of the Emergency Planning and Community-Right-to-Know Act (EPCRA), certain facilities that manufacture, process or otherwise use listed hazardous chemicals in amounts above specified thresholds must report the amount of the chemical released to air or water or disposed of on land on an annual basis. With the recent rulemaking, EPA revised the TRI implementing regulations at 40 CFR Part 372 to: (1) remove chemical names that have been delisted or moved to other listings; (2) make lists organized by Chemical Abstracts Service (CAS) Registry Number and chemical name consistent; (3) correct inaccurate CAS numbers; (4) correct other errors in the chemical lists; and (5) revise the chemical lists to include only the primary chemical name and any secondary names found on EPA's Substance Registry Service. In addition, the TRI excludes from regulation mixtures containing a de minimis concentration of listed chemicals (1% for chemicals generally and 0.1% for carcinogens). The current de minimis exemption cross-references an Occupational Safety and Health Act (OSHA) regulatory provision relating to carcinogens that no longer exists. With this rulemaking, EPA incorporated the previous definition from the OSHA regulations into the TRI regulations. The rule took effect July 14, 2020; it can be found in the Federal Register issued on that date at: www.govinfo.gov.

Implications: The rule is potentially of interest to companies required to submit TRI reports; however, the changes proposed are comparatively minor.

WATER

FEDERAL: The U.S. Department of Justice (DOJ) issued a memorandum announcing its intention to **defer to the states in most Clean Water Act civil enforcement matters**. The memorandum, entitled *Civil Enforcement Discretion in Certain Clean Water Act Matters Involving Prior State Proceedings*, reviews the key enforcement provisions of the CWA and declares that “as a matter of enforcement discretion—civil enforcement actions seeking penalties under the CWA will henceforward be strongly disfavored if a State has already initiated or concluded its own civil or administrative proceeding for penalties under an analogous state law arising from the same operative facts.” According to DOJ, this approach “ensures a healthy respect for federalism” and defers to Congress’ policy against double recovery. Going forward, where a State has already initiated a civil enforcement action for penalties, DOJ staff must obtain written approval from the Assistant Attorney General for the DOJ’s Environment and Natural Resources Division before proceeding. The memo lays out criteria that must generally be met before approval will be granted. The memorandum can be found online at: www.eenews.net/assets/2020/07/27/document_gw_03.pdf

Implications: The memorandum reflects an increasing emphasis by the Trump administration on state enforcement of delegated environmental programs.

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: OSHA revised its **beryllium standard for general industry** with the purported goal of clarifying certain provisions and simplifying and improving compliance. In 2017, OSHA lowered the time-weighted permissible exposure limit (PEL) for beryllium from 2.0 micrograms per cubic meter ($\mu\text{g}/\text{m}^3$) of air to 0.2 $\mu\text{g}/\text{m}^3$, and adopted additional work practice, equipment and other requirements designed to protect workers from the adverse health effects of beryllium exposure. With the recent rulemaking, OSHA retained the lower PEL of 0.2 $\mu\text{g}/\text{m}^3$, while adding/modifying several key definitions and making changes to the provisions relating to methods of compliance, personal protective clothing and equipment, hygiene areas and practices, housekeeping, medical surveillance, communication of hazards, and recordkeeping. Of particular note, OSHA made major changes to the definition of beryllium work area, a key term in assessing whether specific activities trigger the standards. EPA made a few changes to the proposed rule in response to public comment. The revised rule takes effect September 14, 2020; it can be found in the July 14, 2020 Federal Register at: www.govinfo.gov.

Implications: According to the original OSHA rule, about 62,000 workers were affected by the beryllium standards. Beryllium is primarily used in specialty alloys and beryllium oxide ceramics and composites with industrial applications such as consumer electronics components and satellite communication modules.

GENERAL

NEW YORK STATE: Governor Cuomo recently signed a law authorizing the **characterization of hydraulic fracturing drill cuttings as hazardous waste** (A.2655). The current hazardous waste regulations exempt “drilling fluids, produced waters, and other wastes associated with the exploration, development or production of crude oil, natural gas or geothermal energy” from regulation as hazardous waste regardless of their hazardous waste characteristics. The new law requires all such waste to be characterized to determine if it is hazardous waste and managed accordingly. DEC must revise the State’s hazardous waste regulations to reflect this change. The new law was enacted to prevent the disposal in landfills of drill cuttings from hydraulic fracturing activities in Pennsylvania. The law follows a provision enacted in April as part of the budget bill that enshrined New York’s ban on hydraulic fracturing into law. In another important development, the budget bill signed in April included the **Accelerated Renewable Energy Growth and Community Benefit Act**, which establishes a new streamlined renewable energy permitting program to replace Article 10, which has been widely criticized for being too complicated and taking too long. In addition to establishing an expedited process for reviewing renewable energy projects, the law establishes a program for identifying build-ready sites for construction and operation of renewable energy facilities; calls for developing uniform permit standards and conditions applicable to classes and categories of renewable energy projects; and requires the State to study its existing distribution and transmission infrastructure and prepare plans to facilitate development of necessary upgrades and identify needed bulk transmission investments. Information about recent New York State legislation can be found at: www.nyasembly.gov.

Implications: These laws are part of a larger effort by New York State to transition away from fossil fuels and toward renewable energy embodied in New York's 2019 Climate Leadership and Community Protection Act.

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

August 11, 2020: Deadline for submitting comments on EPA's vehicle test procedure adjustments for Tier 3 certification test fuel. See the May 13, 2020 Federal Register at www.govinfo.gov for details.

August 17, 2020: Deadline for submitting comments on *White Paper on Clean Energy Standard Procurements to Implement New York's Climate Leadership and Community Protection Act*. The White Paper can be obtained from the DPS website at www.dps.ny.gov by entering Case Number 15-E-0302 in the input box labeled "Search for Case/Matter Number."

August 20, 2020: Deadline for submitting comments on EPA's *Draft Water Quality Criteria Recommendations for Lakes and Reservoirs* (extended from July 21, 2020). See the May 22, 2020 Federal Register at www.govinfo.gov for details.

August 24, 2020: Deadline for submitting comments on EPA's proposed changes to the post-abatement dust-lead clearance levels under the lead-based paint hazards rule. See the June 24, 2020 Federal Register at www.govinfo.gov for details.