

Young / Sommer LLC

ENVIRONMENTAL BREAKFAST CLUB REGULATORY SUMMARY

January 8, 2021

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Final Statutes, Regulations and Guidance

Citation	Summary	Implications	Schedule/Notes
<p>AIR</p> <p>FEDERAL Increasing Consistency and Transparency in Considering Benefits and Costs in the Clean Air Act Rulemaking Process</p> <p>40 CFR Part 83 85 Fed. Reg. 84130 (Dec. 23, 2020)</p>	<p>EPA issued a rule governing the analysis of the benefits and costs associated with significant rulemakings under the Clean Air Act (CAA). Various EPA statutes require or allow EPA to consider relative benefits and costs in deciding whether to adopt a particular rule. Because the statutory provisions differ significantly in terminology and specificity, much of the detail regarding how to perform cost-benefit analyses has been provided by executive orders and agency guidance. According to EPA, this has led to significant variations in the types of costs/benefits considered (direct vs. “social” costs, consideration of reductions in pollutants other than those targeted by the regulation being proposed, etc.). The new rule—set forth at 40 CFR Part 83—establishes best practices/procedures for assessing the benefits and costs of “significant” CAA rules, i.e., rules with an annual impact on the economy of \$100 million or more or that could disproportionately affect a single industry, population, subgroup or geographical area, or are otherwise identified as significant by EPA. The regulation requires EPA to prepare benefit-cost analyses (BCA) using the best available scientific information and in accordance with best practices from the economic, engineering, physical and biological sciences. Key elements of a BCA as set forth in the regulation, include a statement of need, an assessment of regulatory options that would contribute to achieving the stated goals of the CAA, and, to the extent feasible, an assessment of the benefits and costs relative to the baseline scenario. The rule also contains procedural requirements to increase transparency in the presentation of BCA results, including overall benefits and costs and information about the benefits and costs relating to the specific objective of the rule under review.</p> <p>The rule can be found in the December 23, 2020 Federal Register at: www.govinfo.gov.</p>	<p>The rule does not regulate the conduct or determine the rights of any entity or individual outside the agency. However, the rule will affect how the merits of significant CAA rules are assessed and so is of potential interest to entities regulated under the Act. The rule is expected to change the way EPA assesses the costs and benefits of CAA rules. Environmental groups fear that the change will result in a reduction in the relative benefits identified for many CAA rules. EPA planned to adopt other statute-specific rules that outline how consistency and transparency concepts will be implemented in future rulemakings under other programs. The incoming Biden administration is unlikely to pursue these rulemakings.</p>	<p>The rule took effect December 23, 2020 but does not apply to final rules for which a proposal was published prior to the effective date.</p>

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AIR			
<p>FEDERAL Reviews of National Ambient Air Quality Standards for Particulate Matter and Ozone 40 CFR Part 50 85 Fed. Reg. 82684 (Dec. 18, 2020) (particulate matter); 85 Fed. Reg. 87256 (Dec. 31, 2020) (ozone)</p>	<p>EPA retained the existing particulate matter (PM) and ozone national ambient air quality standards (NAAQS) without revision following a comprehensive review. Under the CAA, EPA establishes NAAQS defining what is considered acceptable ambient air quality for certain commonly emitted contaminants. The CAA distinguishes between primary (health-based) and secondary (welfare-based) standards, the latter of which addresses visibility, ecological and other non-health impacts. Once the standards are set, EPA classifies areas of the country based on whether they meet (i.e., attain) the standards. States must then develop implementation plans (known as “SIPs”) identifying the measures they plan to take to ensure they attain/maintain compliance with the NAAQS. The CAA requires EPA to review each NAAQS every five years to ensure it reflects advances in scientific knowledge on the effects of the pollutant on public health and welfare.</p> <p>EPA has adopted standards for both fine PM (PM_{2.5}) and coarse PM (PM₁₀), which were last reviewed in 2012, at which time EPA lowered the primary annual PM_{2.5} standard from 15 to 12 micrograms per cubic meter while retaining the primary 24-hour PM_{2.5} and PM₁₀ standards as well as the secondary standards for PM (with minor changes). Following the recent review, EPA decided to retain each of the 2012 standards. For the primary PM_{2.5} standards, EPA concluded that the available evidence and information do not call into question the adequacy of the current standards, and no revisions to the annual and 24-hour standards are necessary. For the primary PM₁₀ standard, EPA found that while the available health-effects information has expanded, recent studies are subject to the same uncertainties as those underlying the 2012 revisions and so do not justify revising the standard. For the secondary standards, EPA found that the expanded evidence for non-ecological welfare effects was consistent with the last review and that no revisions to the standards are necessary.</p> <p>The current NAAQS for ozone were last reviewed in 2015, at which time EPA lowered the primary and secondary 8-hour ozone standards from 75 parts per billion (ppb) to 70 ppb. With the recent rulemaking, EPA retained the 2015 primary (health-based) standard after finding that it is requisite to protect public health, including the health of at-risk populations, with an adequate margin of safety. With respect to the secondary (welfare-based) standard, EPA addressed a court decision that remanded the standard back to the agency for a more thorough explanation of certain aspects of the rationale for setting the standard. The rulemaking clarifies EPA’s reasons for establishing a secondary standard that is identical to the 8-hour primary standard rather than imposing a standard targeted at addressing the specific environmental impacts associated with cumulative exposure to ozone.</p> <p>The rules can be found in the December 18, 2020 and December 31, 2020 Federal Registers at: www.govinfo.gov.</p>	<p>The decisions are primarily of interest to facilities that emit PM and PM precursors (including sulfur dioxide [SO₂] and nitrogen oxides [NO_x]) and ozone precursors (volatile organic compounds [VOCs] and NO_x). Retaining the existing NAAQS means states will not be required to adopt stricter measures to reduce emissions of PM/ozone and their precursors to meet the new, stricter standards.</p> <p>With one exception, the conclusions reached by EPA with respect to the PM NAAQS were consistent with those of the Clean Air Scientific Advisory Committee (CASAC). However, several CASAC members recommended revising the primary annual PM_{2.5} standard downward to increase public health protections. With respect to the ozone NAAQS, several CASAC members agreed that the evidence supported the existing standard but provided policy advice expressing support for a lower standard.</p>	<p>The final actions took effect December 18, 2020 (PM) and December 31, 2020 (ozone).</p>

Citation	Summary	Implications	Schedule/Notes
CLIMATE CHANGE			
<p>NEW YORK STATE Statewide GHG Emission Limits 6 NYCRR Part 496</p>	<p>DEC set statewide greenhouse gas (GHG) emission limits in fulfillment of a mandate under the 2019 Climate Leadership and Community Protection Act (CLCPA). The CLCPA requires reductions in statewide GHG emissions to 60% of 1990 levels by 2030 and 15% of 1990 levels by 2050. The law also mandates that 70% of electricity come from renewable sources by 2030 and that all energy be generated renewably by 2040. To achieve the GHG emission reduction goals of the Act, the CLCPA calls for establishing a Climate Action Council, which will be responsible for preparing a scoping plan containing recommendations on regulations and other measures to achieve necessary GHG reductions. DEC must then adopt regulations to ensure compliance with the statewide emission reduction limits and assist other state agencies in developing their own regulations, as necessary.</p> <p>In its first major regulatory step toward implementing the CLCPA, DEC set statewide GHG emission limits reflecting the GHG emission reductions mandated by the CLCPA. The limits are 245.87 million metric tons of carbon dioxide equivalent in 2030 and 61.47 in 2050. These numbers reflect the 40% and 85% GHG emission reductions from 1990 levels required by the CLCPA in 2030 and 2050, respectively. Consistent with the CLCPA, these number include both GHG emissions from sources located within the state and certain sources located outside of the state that are associated with in-state energy consumption. In particular, the numbers include GHGs produced outside the state that are associated with the generation of electricity imported into the state and those associated with the extraction and transmission of fossil fuels imported into the state for in-state consumption. Thus, in calculating GHG emissions associated with a natural gas-fired power plant, DEC considered not only the emissions from the combustion of the gas in-state but the methane emissions generated during its extraction and transmission via pipeline into the state.</p> <p>The rule can be found on DEC’s website at: www.dec.ny.gov/regulations/121052.html.</p>	<p>The rule is the first of many rulemakings likely to be adopted under the CLCPA. The rule defines the baseline against which achievement of the goals of the CLCPA will be measured but does not impose any compliance obligations on GHG sources. The documents accompanying the rulemaking describe in some detail how the emission limits were derived.</p> <p>When fully implemented, the CLCPA is expected to transform New York’s economy by reducing the state’s reliance on fossil fuels, improving energy efficiency, and increasing development of renewable energy sources.</p>	<p>The rule took effect December 30, 2020. Following public comment on the proposed rule, DEC slightly revised the emission limits, included a list of specific GHGs (rather than incorporating the list by reference), added nitrogen trifluoride to the list of GHGs, and made other minor changes. DEC rejected many of the comments on the ground that they were outside the scope of the rulemaking, which is limited to setting the statewide GHG limits required by the CLCPA.</p>

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CLIMATE CHANGE			
<p>NEW YORK STATE Carbon Dioxide Budget Trading Program 6 NYCRR Part 242 Carbon Dioxide Allowance Auction Program 21 NYCRR Part 507</p>	<p>DEC revised its carbon dioxide (CO₂) budget trading program regulations to implement updates required under the Regional Greenhouse Gas Initiative (RGGI). The RGGI states established a multi-state CO₂ cap-and-trade program for power plants in the Northeast. Following a rigorous review process, the ten RGGI states made changes to the program, which took effect January 1, 2021. With the recent rulemaking, DEC revised its RGGI implementing regulations at 6 NYCRR Part 242 to conform to the updated RGGI model rule as follows:</p> <ul style="list-style-type: none"> • Emission cap. The rule reduces the CO₂ budget by nearly 30% for the period 2020 to 2030. The bank of allowances held by market participants will be adjusted over a 5-year period from 2021 through 2025 based on the size of the bank at the end of 2020. • Cost containment reserve (CCR). The CCR is a fixed additional supply of allowances that is available for sale to stabilize the market if allowance prices exceed specified thresholds. Up to 10% of the regional cap of additional CCR allowances will be available for purchase at auction if the CCR trigger price is reached. The trigger price will be \$13.00 in 2021 and will rise 7% each year through 2030. • Emissions containment reserve (ECR). The rule establishes a new ECR—a quantity of allowances that will be withheld from circulation to secure additional emission reductions if prices fall below established trigger prices. The ECR is intended to prevent the potential collapse of the allowance market if emissions are trending significantly below the cap. The ECR trigger price will start at \$6.00 in 2021 and will increase 7% each year thereafter. • Offsets. In general, RGGI participants have not significantly relied on offsets—the generation of CO₂ credits through projects that reduce emissions outside the electricity generation sector. The rule retains only the offset provisions for avoided methane emissions from agricultural manure management operations. <p>In addition, in response to public outreach, DEC expanded the program to include certain units that serve an electricity generator with a nameplate capacity of 15 megawatts (MW) or more located at an existing CO₂ budget source to address concerns that the costs of complying with the RGGI might result in increased operation of smaller units not currently subject to the program. Previously, the program applied only to units with a nameplate capacity of 25 MW or more. In a related rulemaking, the New York State Energy Research and Development Authority (NYSERDA) updated 21 NYCRR Part 507, which establishes the rules for auctioning allowances under the RGGI program.</p> <p>The DEC regulation can be found on its website at: www.dec.ny.gov/regulations/120061.html. The NYSERDA rule can be found in the December 30, 2020 State Register at: www.dos.ny.gov/info/register/2020/123020.pdf.</p>	<p>The RGGI program applies only to power plants. During its early years, the program did not result in significant reductions in CO₂ emissions because actual emissions from participating sources were well below the RGGI cap owing to various factors, including a weak economy and the decision by many utilities to switch from petroleum and coal to natural gas. In 2013, the participating states modified the model rule to lower the emission cap and make other changes designed to improve the efficiency of the allowance market. The recent changes continue that trend and are intended to help the participating states achieve ambitious CO₂ reduction goals. Over the years, the sale of CO₂ allowances has generated billions of dollars for the participating states, much of which has been used to fund energy efficiency and renewable energy programs.</p>	<p>The revisions to Part 242 took effect December 16, 2020. The revisions to Part 507 took effect December 30, 2020.</p> <p>The majority of comments on the proposed rules emphasized the need to ensure alignment of the rules with the CLCPA, discussed above. Many focused on the use of RGGI CO₂ allowance auction proceeds, including the need to dedicate a minimum percentage to disadvantaged communities.</p>

Citation	Summary	Implications	Schedule/Notes
CHEMICAL			
<p>FEDERAL Final Risk Evaluations for Perchloroethylene, n-Methylpyrrolidone, and Chrysotile Asbestos 85 Fed. Reg. 82474 (Dec. 18, 2020) (perchloroethylene); 85 Fed. Reg. 86558 (Dec. 30, 2020) (n-Methylpyrrolidone); 86 Fed. Reg. 89 (Jan. 4, 2021) (chrysotile asbestos)</p>	<p>EPA issued final risk evaluations for perchloroethylene (PCE), n-Methylpyrrolidone (NMP), and chrysotile asbestos under the Toxic Substances Control Act (TSCA) assessing whether the chemical poses health or environmental risks during the normal course of use that must be mitigated. While the original TSCA statute focused on assessing chemicals before they enter the marketplace, the 2016 reforms require EPA to systematically assess existing chemicals. EPA must identify and prioritize chemicals for evaluation and conduct risk evaluations of high priority chemicals to determine if they present an unreasonable risk of injury to health or the environment under the conditions of use, including an unreasonable risk to a potentially exposed or susceptible subpopulation. As part of this effort, EPA identified 10 chemicals for risk evaluation outside the 2016 TSCA prioritization process, including PCE, NMP, and asbestos.</p> <p>PCE is currently used in the production of fluorinated compounds and as a solvent in dry cleaning and vapor degreasing. It is also a component of numerous consumer and commercial products, including adhesives, aerosol degreasers and lubricants, and sealants, among other products. After evaluating 61 conditions of use of PCE, EPA determined that 59 present an unreasonable risk to workers and occupational non-users during industrial and commercial manufacturing, processing and use activities as well as unreasonable risks to consumers from consumer uses, and when exposed to dry cleaned articles and to bystanders for most consumer uses. EPA determined that PCE does not present an unreasonable risk to the environment.</p> <p>NMP is a water-miscible, organic solvent that is often used as a substitute for halogenated solvents. It is widely used in the chemical manufacturing, petrochemical processing, and electronics industries, among others. In the commercial sector, it is primarily used for producing and removing paints, coatings and adhesives and as an ingredient in various products. After evaluating 37 conditions of use of NMP, EPA determined that 26 present an unreasonable risk. With one exception (consumer use in adhesives and sealants), these risks are limited to industrial and commercial conditions of use. EPA determined that NMP does not present an unreasonable risk to the environment and general population.</p> <p>Chrysotile asbestos is the only fiber type currently being imported, processed or distributed for use in the United States; it is used in diaphragms, sheet and other gaskets, and vehicle friction products, among other uses. After evaluating 32 conditions of use, EPA determined that 16 present an unreasonable risk to workers and occupational non-users and to consumers and bystanders during exposures to consumer uses.</p> <p>Notice of the risk assessments can be found in the Federal Register at: www.govinfo.gov.</p>	<p>The risk evaluations are potentially of interest to companies that manufacture, import, or process PCE, NMP, and chrysotile asbestos as well as those generally interested in addressing the health risks of exposure to these substances. Upon determining that a substance poses an unreasonable risk to health, EPA has one year to propose and take comment on a program to address those risks through risk management measures that may include regulations to prohibit or limit the manufacture, processing, distribution in the marketplace, use, or disposal of the substance, as appropriate. It must finalize that program within one year of proposal.</p>	<p>EPA planned to complete risk evaluations by the end of 2020 for each of the 10 chemicals identified for review outside the formal TSCA risk evaluation prioritization process.</p> <p>In response to a court decision, EPA plans to evaluate legacy uses and associated disposal of asbestos. This will cover conditions of use for which manufacture, import, processing, and distribution no longer occur but where use and disposal are still known, intended, or reasonably foreseen to occur. This assessment will cover all six fiber types of asbestos.</p>

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CHEMICAL			
<p>FEDERAL Regulation of Persistent, Bioaccumulative, and Toxic Chemicals under TSCA Section 6(h) 40 CFR Part 751 86 Fed. Reg. 866 et al. (Jan. 6, 2021)</p>	<p>EPA adopted rules restricting the use of specific persistent, bioaccumulative, and toxic (PBT) chemicals under TSCA. Section 6(a) of TSCA authorizes EPA to restrict the manufacturing, processing or distribution in commerce of chemicals that pose a serious risk to human health or the environment. Section 6(h) specifically requires EPA to issue a proposed rule under Section 6(a) for certain PBT chemical substances identified in EPA’s 2014 update to its TSCA work plan, which outlined the agency’s regulatory priorities. With the recent rulemaking, EPA restricted or prohibited certain activities relating to the following chemicals:</p> <ul style="list-style-type: none"> • Decabromodiphenyl ether (Deca BDE), Chemical Abstracts Service Registry Number [CASRN] 1163-19-5: This chemical is found in wire and cable rubber casings, textiles, electronic equipment casings, and building/construction materials, among other products. The final rule prohibits all manufacture (including import), processing, and distribution in commerce of decaBDE or decaBDE-containing products or articles, with some exceptions. • Phenol isopropylated phosphate (3:1) (PIP [3:1]), CASRN 68937-41-7: This chemical is used as a flame retardant in plastics or functional fluids in aircraft and industrial machinery. The final rule prohibits the processing and distribution of PIP (3:1) and PIP (3:1)-containing products, with specified exclusions, and prohibits the release of the chemical to water during manufacturing, processing and distribution. • 2,4,6-tris(tert-butyl)phenol (2,4,6-TTBP), CASRN 732-26-3: This chemical is an ingredient in certain fuel additives, fuel injector cleaners, and oils and lubricants. The final rule prohibits the distribution of 2,4,6-TTBP and products containing the chemical at concentrations above 0.3% in any container with a volume of less than 35 gallons to prevent use by consumers and small commercial operations. The rule also prohibits the processing and distribution of the chemical or products containing the chemical at concentrations above 0.3% by weight for use as an oil or lubricant additive, regardless of container size. • Pentachlorothiophenol (PCTP), CASRN 133-49-3: This chemical is found in rubber products. The final rule prohibits all manufacturing (including import), processing and distribution in commerce of PCTP and PCTP-containing products or articles for any use unless the concentrations are at or below 1% by weight. • Hexachlorobutadiene (HCBD), CASRN 87-68-3: HCBD is largely produced as a byproduct during the manufacture of chlorinated solvents. The final rule prohibits the manufacturing (including import), processing, and distribution in commerce of HCBD and HCBD-containing products and articles, except for the unintentional production as a byproduct during the production of chlorinated solvents, and the limited processing and distribution of HCBD byproduct for burning as waste fuel. <p>The rules can be found in the January 6, 2021 Federal Register at: www.govinfo.gov.</p>	<p>The rules are primarily of interest to companies that manufacture and use the PBT chemicals covered by the rules.</p>	<p>The final rules take effect February 5, 2021.</p>

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WATER			
<p>NEW YORK STATE Mercury – SPDES Permitting & Multiple Discharge Variance Program Policy DOW 1.3.10 (Dec. 30, 2020)</p>	<p>DEC revised and reissued Department of Water (DOW) Program Policy 1.3.10, entitled <i>Mercury – SPDES Permitting & Multiple Discharge Variance</i>, which provides guidance to DEC staff developing State Pollutant Discharge Elimination System (SPDES) permits that regulate wastewater and stormwater discharges containing mercury. DOW 1.3.10 contains an overview of water quality issues relating to mercury, together with a detailed discussion of the permitting procedures for surface and ground water discharges. Because the water quality-based standard (WQS) for surface water is largely unattainable (0.70 nanograms/liter (ng/l)), DEC has determined that a multiple discharge variance (MDV) is necessary. The discharge limit and monitoring required under the MDV depend on various factors including—most importantly—whether a facility has a significant mercury source based on criteria spelled out in the guidance. Facilities that trigger the MDV program must implement one of four Mercury Minimization Programs (MMPs) depending on the type of facility (industrial, municipal, or other) and whether they are discharging to the Great Lakes Basin. The MMPs set forth the periodic monitoring, discharge control, reporting, and other requirements that dischargers must implement to help them reduce mercury effluent levels and make progress toward achieving the 0.70 ng/l WQS. The Program Policy also spells out the process for setting effluent limitations for inclusion in SPDES permits based on the MDV. Permittees that refuse authorization under the MDV may seek an individual discharge variance in accordance with the procedures and standards spelled out in the guidance.</p> <p>Program Policy 1.3.10 can be found on DEC’s website at: www.dec.ny.gov/regulations/2384.html.</p>	<p>DOW 1.3.10 is of potential interest to facilities with mercury limits in their SPDES permits or that discharge any quantity of mercury.</p> <p>Mercury is ubiquitous in the environment. Past studies show that the vast majority of mercury load to surface waters is the result of atmospheric deposition, with the remainder due to wastewater discharges. To meet the 0.70 ng/l WQS, the total maximum daily load governing mercury calls for New York to implement various mercury reduction efforts, including establishing mercury limits in SPDES permits.</p>	

Other Recent Developments (Final)

CLIMATE CHANGE

NEW YORK STATE: DEC issued its **value of carbon guidance**, which provides values for use by State agencies in assessing the benefits of GHG emission reductions. The CLCPA requires DEC, in consultation with NYSERDA, to establish a “social cost of carbon,” i.e., a monetary estimate of the value of not emitting a ton of GHGs. The recent guidance—entitled *Establishing a Value of Carbon: Guidelines for Use by State Agencies*—“establishes a value of carbon that can be used by State entities to aid decision-making and used as a tool for the State to demonstrate the global societal value of actions to reduce greenhouse gas emissions.” The CLCPA directed DEC to consider two approaches to the value of carbon, a damages-based approach that focuses on the social cost of carbon and a marginal abatement cost approach that establishes a value of carbon with reference to a specific emission reduction goal. The guidance calls for a damages-based approach to establishing a value of carbon after noting, among other things, that this approach is already in use by federal agencies. It goes on to establish guidelines for applying a damages-based value of carbon, addressing when the guidelines apply and the recommended procedure for determining values. Per DEC, the guidance “does not impose a compliance obligation or fee on any entity; the imposition of any such new compliance obligation or fee on any entity would require a separate State action.” However, the guidance declares that DEC may consider the value of carbon in evaluating a variety of decisions, including permitting. The guidance and supporting documents can be found at: www.dec.ny.gov/energy/99223.html.

Implications: The guidance is primarily of interest to State agencies, who will be expected to analyze the social cost of carbon as part of rulemakings, environmental assessments, and other decisions.

REMEDICATION

FEDERAL: EPA **lowered the post-abatement dust-lead clearance levels (DLCLs) under the lead-based paint (LBP) hazards rule** found at 40 CFR Part 745. The rule establishes detailed requirements for managing LBP hazards during renovation or remediation of target housing and child-occupied facilities. After lead-paint abatement, the contractor must sample to ensure that the cleanup was successful and that no dust-lead hazards remain. Surface dust is collected via dust wipe samples that are sent to a laboratory for analysis. The post-abatement dust-lead levels must be below the clearance levels in the regulations. With the recent rulemaking, EPA lowered the DLCLs from 40 to 10 micrograms/square foot (ug/ft²) on floors and from 250 to 100 ug/ft² on windowsills. No changes were made to the standards for window troughs. The new DLCLs correspond to the dust-lead hazard levels (DLHL) established by EPA in 2019. The DLHLs identify whether LBP paint hazards are present and are used to help decide where to require lead paint abatement. The final rule takes effect **March 8, 2021**; it can be found in the January 7, 2021 Federal Register at: www.govinfo.gov.

Implications: The rule is primarily of interest to owners of target housing and child-occupied facilities and individual/entities engaged in LBP-related activities or who provide training to those engaged in LBP activities.

OCCUPATIONAL SAFETY AND HEALTH

FEDERAL: The Occupational Safety and Health Administration (OSHA) issued an instruction implementing its *Site-Specific Targeting (SST) inspection program based on employer-submitted calendar year 2017-2019 Form 300A data*. The SST program is OSHA’s main site-specific programmed inspection initiative for non-construction workplaces with 20 or more employees. The program uses injury/illness data submitted by employers under 29 CFR 1904.41 to identify “high-rate establishments” (i.e., establishments with a high rate of injury/illness in 2019, with different categories for manufacturing and non-manufacturing establishments). For the first time, OSHA also will identify establishments with rates above their industry’s national average that have shown an upward trend over a three-year period. The instruction describes OSHA’s plan to use the data from Form 300A to identify high-rate establishments—together with a random sample of low injury rate facilities and facilities that failed to provide the required Form 300A data—to establish a list of facilities that will be subject to inspection. The notice goes on to provide scheduling and inspection procedures, including how to record and track inspections. In a recent addition, the instruction includes a provision allowing a records-only inspection when OSHA determines that the establishment’s inclusion in the program was based on incorrect data. In addition to the SST inspection program, OSHA implements national and local emphasis inspection programs to target high-risk hazards and industries (e.g., combustible dust, lead, logging, scrapyards, etc.). OSHA also conducts inspections following reported incidents and in response to employee complaints. The SST instruction can be found on OSHA’s website at: www.osha.gov/sites/default/files/enforcement/directives/CPL_02-01-062.pdf.

Implications: The instruction is generally of interest to non-construction workplaces with 20 or more employees that are required to submit Form 300A to OSHA.

GENERAL

FEDERAL: EPA adopted a regulation—entitled “**Strengthening Transparency in Pivotal Science Underlying Significant Regulatory Actions and Influential Scientific Information**”—that establishes how EPA will consider the availability of dose-response data underlying pivotal science used in its significant regulatory actions and influential scientific information. Where a significant regulatory action or influential scientific information is driven by the quantitative relationship between the amount of dose or exposure to a pollutant, contaminant or substance and an effect, the rule directs EPA to give greater consideration to studies where the underlying dose-response data are available in a manner that can be independently validated. The rule—which is set forth at 40 CFR Part 30—also requires EPA to identify and make publicly available the science that serves as the basis for informing the significant regulatory action at the proposed/draft stage to the extent practicable; reinforces the applicability of peer review requirements for pivotal science; and establishes criteria for exempting certain studies from the requirements of Part 30. According to EPA, the rule is intended to improve the public’s access to the scientific analyses underlying important EPA actions. The rule took effect **January 6, 2021** and can be found in the Federal Register issued on that date at: www.govinfo.gov.

Implications: Opponents of the rule have expressed the concern that it will reduce the number studies on which EPA can rely in making key decisions and thus limit EPA's ability to regulate.

Other Recent Developments (Proposed)

SOLID WASTE

FEDERAL: EPA requested comment on its *Interim Guidance on the Destruction and Disposal of Perfluoroalkyl and Polyfluoroalkyl Substances and Materials Containing Perfluoroalkyl and Polyfluoroalkyl Substances*, which presents currently available information on destruction and disposal of per and polyfluoroalkyl substances (PFAS) and materials containing them. The 2020 National Defense Authorization Act (NDAA) required EPA to publish the interim guidance within one year of the date of enactment and update it at least once every three years. The NDAA specifically identified the following PFAS-containing waste materials for study: aqueous film-forming foam; soil and biosolids; textiles, other than consumer goods, treated with PFAS; spent filters, membranes, resins, granular carbon and other water treatment waste; landfill leachate containing PFAS; and solid, liquid or gas wastestreams containing PFAS from facilities manufacturing or using PFAS. The guidance summarizes the current state of the science and associated uncertainties for current commercially available disposal and destruction technologies, with a focus on thermal treatment, landfill disposal, and underground injection. After describing in detail the PFAS-containing materials identified in the NDAA, the guidance discusses the various disposal/destruction technologies for PFAS and PFAS-containing materials in each of the three basic categories, including testing/monitoring issues and the uncertainties/unknowns associated with each category. The guidance also addresses considerations for potentially vulnerable populations living near likely destruction or disposal sites and concludes with a discussion of planned research and development on destruction and disposal technologies for PFAS. EPA is accepting comment on the interim guidance until **February 22, 2021**; notice of the guidance can be found in the December 22, 2020 Federal Register at: www.govinfo.gov.

Implications: Concern over the environmental impact of PFAS chemicals in drinking water and other environmental media has exploded in recent years. To date, however, no clear consensus has emerged concerning how PFAS-containing materials should be treated/disposed, and strong opposition has arisen to incineration despite a lack of other treatment/disposal options. The guidance and related initiatives are intended to assemble the information necessary to identify appropriate treatment/disposal options.

WATER

FEDERAL: EPA is seeking comment on **draft guidance on applying a recent Supreme Court decision addressing the regulation of discharges to groundwater under the National Pollutant Discharge Elimination System (NPDES) permit program**. The NPDES statute requires a permit to discharge pollutants from a point source to water of the United States. In *County of Maui v. Hawaii*

Wildlife Fund, 140 S. Ct. 1462 (2020), the U.S. Supreme Court addressed whether a discharge to ground water that eventually reaches a regulated surface water requires a NPDES permit. The court held that a permit is required if the discharge through groundwater is the “functional equivalent of a direct discharge from [a] point source into navigable waters,” and identified seven non-exclusive factors that may be relevant to making the necessary determination (e.g., time and distance, nature of material through which pollutant travels, and amount of pollutant entering navigable waters relative to the amount leaving the point source). EPA’s draft guidance provides a history and summary of the *Maui* case and identifies conditions that must be satisfied before the legal obligation to have a NPDES permit under *Maui* is triggered. First, there must be (or will be) an actual discharge of a pollutant to a water of the United States, and second, the discharge must be from a point source. The guidance goes on to emphasize that only a subset of discharges of pollutants that ultimately reach a water of the United States are the “functional equivalent” of a direct discharge to a water of the United States. Finally, the guidance identifies the design and performance of the system or facility from which the pollutant is released as an additional factor that must be considered when conducting a functional equivalence analysis. EPA is accepting comment on the draft guidance until **January 11, 2021**; notice of the guidance can be found in the December 10, 2020 Federal Register at: www.govinfo.gov.

Implications: The guidance is intended to clarify how EPA will decide whether a discharge to groundwater is the functional equivalent of a discharge to navigable waters and so requires a NPDES permit. New York specifically regulates discharges to groundwater under its SPDES permit program and so will not be significantly affected by the Supreme Court’s decision.

DEC Regulatory Agenda

DEC published its **regulatory agenda for 2021**, identifying the regulatory changes the agency may pursue in the upcoming year. Key items on the agenda are set forth below.

- **6 NYCRR Part 182, Endangered Species, Threatened Species and Species of Special Concern:** Update list of endangered, threatened and special concern species based on best available data.
- **6 NYCRR Part 203, Oil and Gas Sector Emissions:** New rule to reduce criteria pollutant and methane emissions from the oil and gas sector that addresses and expands on EPA’s control techniques guideline issued for the industry.
- **6 NYCRR Part 212, Process Operations:** Repeal existing NOx control requirements at Subpart 212-4 for hot mix asphalt plants and create a new regulation covering additional pollutants.
- **6 NYCRR Subpart 228-3, Motor Vehicle and Mobile Equipment Repair and Refinishing (MVMERR):** Move MVMERR regulations from Subpart 228-1 to new Subpart 228-3 and reduce VOC content limits.
- **6 NYCRR Part 247, Outdoor Wood Boilers:** Amend rule to address revised federal emission standards and emerging certification testing methods.
- **6 NYCRR Parts 321-325, Pesticide Application:** Add rules relating to use of EPA-exempt pesticides (i.e., minimum risk pesticides); incorporate changes to the federal certification and training regulations; and update and reorganize the pesticide use regulations.

- **6 NYCRR Part 327, Use of Chemicals for the Control or Elimination of Aquatic Vegetation:** Amend rule to incorporate relevant provisions of Parts 328 (undesirable fish) and 329 (aquatic insects) and address current statutory requirements.
- **6 NYCRR Part 350, Food Donation and Scraps Recycling:** New rule to implement statute requiring large food scrap generators to donate food and send food scraps to an organics recycler if one is located within 25 miles of the facility (with a waiver option).
- **6 NYCRR Subpart 352-1, 1,4-Dioxane Limits for Household Cleansing, Personal Care, and Cosmetic Products:** Adopt new rule implementing law establishing limits on amount of 1,4-dioxane that can be present in household cleansing, personal care, and cosmetic products sold in New York.
- **6 NYCRR Subpart 351-2, Toxic Chemicals in Children’s Products:** Adopt new rule implementing law regulating chemicals in children’s products that requires manufacturers to report the presence of any chemical of concern as identified by DEC and high-priority chemicals (HPC) as identified in the law or by DEC and provide notice of the presence of HPCs in products to those who sell or distribute the products in the state.
- **6 NYCRR Part 353, Expanded Polystyrene Foam Containers:** Adopt law banning food service providers and stores from selling, offering for sale or distributing disposable food service containers that contain expanded polystyrene foam unless the containers are exempt and prohibiting sale of “packing peanuts.”
- **6 NYCRR Part 360, Solid Waste Regulations:** Revise DEC’s solid waste regulations to: clarify and simplify rules governing construction and demolition (C&D) debris processing facilities, beneficial use, and transport; adjust rules governing beneficial reuse of brine; add new requirements addressing use of waste tires on farms to secure tarpaulins; allow continued use of certain landfills for receipt of C&D debris, uncontaminated soil, and rock resulting from land clearing and other similar activities; and make other changes.
- **6 NYCRR Part 367, Returnable Beverage Containers:** Revise regulation to incorporate statutory changes, address changes in the beverage industry, and make other changes/improvements that will lead to improved compliance and enforcement.
- **6 NYCRR Part 368, Product Stewardship and Labeling:** Rename regulation; conform recycling emblem regulation to national labeling guidelines; and add provisions implementing laws addressing mercury-added consumer products and product stewardship requirements for electronic waste.
- **6 NYCRR Parts 370-374, 376, Hazardous Waste Management:** Incorporate changes to the federal hazardous waste regulations adopted since July 2013, including the new e-manifest requirements, the 2016 “generator improvements rule,” which significantly revised the rules governing hazardous waste generators, and the addition of aerosol cans and paint to the universal waste rule. DEC is also considering making various State-initiated changes and corrections, including adopting new provisions relating to waste solar panels.
- **6 NYCRR Part 375, Environmental Remediation Programs:** Provide additional direction on issues encountered since the rule was adopted; implement changes to the program enacted by the Legislature in 2015, including modifications to the tax credit program; incorporate soil cleanup objective changes; and make other changes and corrections.

- **6 NYCRR Parts 420, 421, 422, 423, and 425, Mining:** Revise regulations to add/revise key definitions; clarify permitting requirements, including codifying criteria for determining if an excavation is exempt from requiring a mining permit; revise mined land-use plan requirements and add expanded sections addressing dust control, noise control, visual pollution, water resource protection, sediment and erosion control, and blasting; and replace term “bond” with “financial security.”
- **6 NYCRR Part 483, Hazardous Waste Program Fees:** Update the regulation to conform to the statutory fee amounts.
- **6 NYCRR Part 505, Coastal Erosion Management:** Revise regulation, which has not been amended since 1988, to clarify definitions, add new defined terms, and clarify language addressing regulated activities in natural protective features areas.
- **6 NYCRR Parts 596-599, Chemical Bulk Storage (CBS); Parts 610-611, Major Oil Storage Facilities (MOSF); Part 613, Petroleum Bulk Storage (PBS):** As part of phase 2 of its bulk storage rulemaking, DEC plans to: incorporate changes to the federal underground storage tank regulations to ensure federal/State consistency; ensure consistency between PBS and CBS regulations, where appropriate; incorporate MOSF requirements currently found in New York State Department of Transportation regulations; clarify the procedure for MOSF licensing; enhance MOSF monitoring, maintenance, procedures and equipment to prevent leaks and spills; incorporate Navigation Law requirements into the MOSF petroleum remediation regulations; and update the list of hazardous substances and clarify spill reporting requirements.
- **6 NYCRR Part 601, Water Withdrawal:** Revise regulation to clarify permit exemptions, add new defined terms, clarify language regarding regulated activities, and remove outdated references to initial permits.
- **6 NYCRR Part 621, Uniform Procedures Act:** Update main text of Part 621 to reflect changes to other regulations and make clarifications and corrections to address inaccurate references and clarify permitting procedures.
- **6 NYCRR Part 624, Permit Hearing Procedures:** Amend procedures governing issues conferences and interim appeals to the Commissioner from issues rulings, clarify the procedures governing motion practice, and make other changes.
- **6 NYCRR Part 659, Household Cleaning Product Information Disclosure Requirements:** Revise regulation to clarify information manufacturers should provide and method for providing it.
- **6 NYCRR Part 676, Salt Storage:** New rule regulating the private and municipal storage of road salt and road salt/sand mixtures.
- **6 NYCRR Parts 609, 700-706, Water Quality Standards:** Add/revise ambient water quality standards, standard-setting procedures, implementation procedures, and other regulatory provisions.
- **6 NYCRR Part 750, SPDES Permits:** Incorporate new federal SPDES standards and criteria and make other changes.

DEC’s 2021 Regulatory Agenda can be found at: www.dec.ny.gov/regulations/36816.html. As part of the rulemaking, DEC is proposing to delete certain obsolete rules, including the county air quality area classifications set forth at 6 NYCRR Parts 260-317. The Regulatory Agenda does not include various rules proposed in 2020 that have not yet been adopted. These include, but are not limited to: 6 NYCRR Part 225-1 (Fuel Composition and Use—Sulfur Limitations); Part 230, Gasoline Dispensing Sites and Transport Vehicles; Part 231 (New Source Review); and Part 235 (Consumer Products).

Upcoming Deadlines

NOTE: This calendar contains items of general interest.

January 11, 2021: Deadline for submitting comments on EPA's draft guidance addressing the regulation of discharges to groundwater under the NPDES permit program. See the December 10, 2020 Federal Register at www.govinfo.gov for notice of the guidance.

February 22, 2021: Deadline for submitting comments on EPA's *Interim PFAS Destruction and Disposal Guidance*. See the December 22, 2020 Federal Register at www.govinfo.gov for notice of the guidance.

March 19, 2021: Deadline for submitting comments on DEC/OGS's draft specifications for procurement of green products by the State government. See the OGS website at ogs.ny.gov/greeny/executive-order-4-tentatively-approved-specifications for details.