



SMG Reg Watch

May 2014 / Scott R. Smith and Kori J. Andrews

Reg Watch is a periodic summary of regulations that we are currently tracking. The regulations we watch address energy, environmental, health, safety, educational issues relating to sustainability and public utilities.

This is not an all-encompassing list of all regulations being considered at the state or federal level. Contact me if you want to add additional issues, need copies of the proposed or final regulations or have questions about these or other regulations you've heard about.

DO YOU KNOW SOMEONE WHO WANTS TO RECEIVE THESE UPDATES?

Contact us at scottr.smith@smithmanage.com.

QUESTIONS, COMMENTS, ADDITIONAL INFORMATION

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Scott's Thoughts

If someone would have told me ten years ago that we would have swallowed the global warming/climate change issue the way the current Administration has proposed, I would have said they were crazy. You will see a number of proposed rules in this and recent updates regarding the Administration's Climate Change effort, including the new "[Clean Power Plan Proposed Rule](#)". The final outcomes of these initiatives must be made clear to the public, including the increased costs for electric generation, the explanation of which have been murky at best. One concern is the increased costs and the impact on high energy demand

industries, the poor and families on fixed incomes.

Not to be lost in the recent proclamations of climate change is information released by Platts. [Platts](#) is a leading global provider on benchmark assessments on energy. In their latest report, the U.S. added 50% less new generating capacity in 2013 than the year before. Gas accounted for close to half the new capacity additions. New capacity is expected to be further reduced in 2014. Since economic growth depends upon the availability of power 24/7, it appears that we are heading for a self-inflicted low to no growth period. Accountability needs to be clear and pronounced.

Climate policy is not the only issue being tackled this month. EPA and the Corps recently released their regulations that define [Waters of the U.S.](#) Part of the extremely confusing definition is somewhat comical: Waters of the U.S. that don't even have water in them. So water that's not water? Hmmm. If finalized, more land area will come under the jurisdiction of EPA and the Corps than ever before. Someone call this rule, "the biggest land grab in the history of the United States". My recommendation is to send in a request to extend the public comment period, review the regulation, work with your national organization and submit clear well thought out comments.

When I think about these proposed rules, it's unimaginable how much money will be spent

on bad ideas over the next several years to try to figure this out. For example how do you capture and manage carbon dioxide at a power plant? To really stretch your imagination though, think about how to accomplish the requirements to reduce methane emissions. Think about how you might capture and deal with emissions from the following sources: Landfills, coal mines, agriculture and oil and gas.

In the courts, the [U.S. Supreme Court recently upheld the Cross State Air Pollution Rule](#). I like to read the minority decisions in these cases and there are some sound bites in this one that are priceless. Justice Scalia stated that it “is literally unbelievable” to assert that upwind states can “implement the Good Neighbor Provision without knowing what the Agency considers their obligations to be.” He said the exercise was like playing, “pin the tail on the donkey.”

On a local level, I’ve always been concerned about post-construction stormwater controls. If reason does not prevail, I think they can lead to some practices that will not be in the best interest of the environment. EPA has recently stated that they intend to defer on this issue but don’t be so sure. They intend to provide guidance to cities or MS-4s regarding this idea. While EPA is afraid to address this issue nationally, they fully intend to have the locals implement some of their ideas. Stay involved and engaged on your local stormwater issues

because some of these ideas may be coming to your town.

Last, but definitely not least, the Endangered Species Act and changes being made to those regulations have and will continue to have a significant impact on different types of projects that include the linear variety as well as farming. Be aware that the U.S. Fish and Wildlife Service and National Marine Fisheries Service jointly published two propose regulations and a draft policy concerning critical habitat designations under the Endangered Species Act. There is a [proposed regulation](#) that revises the definition of “destruction or adverse modification of critical habitat. A [second regulation](#) would amend the procedures and criteria for designating critical habitat.

Stay tuned and defend your turf. The fun is just beginning.

Here are SMG’s blog entries of note for May. Blog entries are linked to this Reg Watch:

- [Department of Labor’s Regulatory Agenda Published, Includes OSHA Changes](#)
- [West Virginia’s Aboveground Storage Tank Rule Takes Effect](#)
- [TMDLs Made Easy](#)
- [Local Limits Re-evaluation Submission Document](#)
- [Reevaluation of Pretreatment Local Limits: New Requirements from the Division of Water](#)

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- [Up and Coming: Two New Kentucky Pollution Discharge Elimination System \(KPDES\) General Permits for Coal Mining](#)
- [EPA Seeks Public Comment on Enhancing Transparency for Fracking Chemicals](#)
- [National Climate Assessment](#)
- [Improvements made in the EPA's IRIS Program](#)
- [Kentucky Responds to EPA's Proposed 111\(b\) Rule for Power Plants](#)
- [Supreme Court's Decision could affect Cross-State Air Pollution Rule](#)

State Regulation Review

The following are Proposed Amendments that may be discussed at the June 10, 2014 meeting of the Administrative Regulation Review Subcommittee

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LABOR CABINET: Department of Workplace Standards: Division of Occupational Safety and Health Compliance: Division of Occupational Safety and Health Education and Training: Occupational Safety and Health

[803 KAR 2:300.](#) General.

[803 KAR 2:306.](#) Occupational health and environmental controls.

[803 KAR 2:308.](#) Personal protective equipment.

[803 KAR 2:309.](#) General environmental controls.

[803 KAR 2:314.](#) Machinery and machine guarding.

[803 KAR 2:317.](#) Special industries.

[803 KAR 2:318.](#) Electrical.

[803 KAR 2:400.](#) Adoption of 29 C.F.R. 1926.1-6.

[803 KAR 2:404.](#) Personal protective and lifesaving equipment.

[803 KAR 2:406.](#) Signs, signals, and barricades.

[803 KAR 2:412.](#) Fall protection.

[803 KAR 2:421.](#) Adoption of 29 C.F.R. Part 1926.950-968.

[803 KAR 2:423.](#) Adoption of 29 C.F.R. Part 1926.1050-1060.

[803 KAR 2:500.](#) Maritime employment.

[803 KAR 2:505.](#) Cranes and derricks in construction.

The following was discussed at the May 13, 2014 Administration Regulation Review Subcommittee:

ENERGY AND ENVIRONMENT CABINET:
Department for Environmental Protection:
Division of Water

[401 KAR 10:031.](#) Surface water standards. Peter Goodmann, executive director; Randall Payne, environmental scientist III; and Bruce Scott, commissioner, represented the division. Ted Withrow, Kentuckians for the Commonwealth, appeared in opposition to this administrative regulation.

Federal Regulation Review

Fish and Wildlife, [Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat](#)

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Proposed rule: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services”) propose to amend the regulations, which implements the Endangered Species Act of 1973, as amended (Act). The regulation establishes the procedural regulations governing interagency cooperation under section 7 of the Act. The Act requires Federal agencies, in consultation with and with the assistance of the Secretaries of the Interior and Commerce, to insure that their actions are not likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat of such species. In 1986, the Services established a definition for “destruction or adverse modification” (§ 402.02) that was found to be invalid by the U.S. Court of Appeals for the Fifth (2001) and Ninth (2004) Circuits. The Services propose to amend the regulations to replace the invalidated definition with one that is consistent with the Act and the circuit court opinions. Finally, the proposed amendment is part of the Services’ response to Section 6 of Executive Order 13563 (January 18, 2011), which directs agencies to analyze their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

DATES: The Services will accept comments from all interested parties until July 11, 2014.

Fish and Wildlife, [Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat](#)

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Proposed rule: The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the “Services”), propose to amend portions of the regulations, which

implement the Endangered Species Act of 1973, as amended (Act). The regulation clarifies, interprets, and implements portions of the Act concerning the procedures and criteria used for adding species to the Lists of Endangered and Threatened Wildlife and Plants and designating and revising critical habitat. Specifically, the Services propose to amend portions of the regulations that clarify procedures for designating and revising critical habitat. The proposed amendments would make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria for designating critical habitat. These proposed amendments are based on the Services’ review of the regulations and are intended to add clarity for the public, clarify expectations regarding critical habitat and provide for a credible, predictable, and simplified critical habitat-designation process. Finally, the proposed amendments are also part of the Services’ response to Executive Order 13563 (January 18, 2011), which directs agencies to review their existing regulations and, among other things, modify or streamline them in accordance with what has been learned.

DATES: We will accept comments from all interested parties until July 11, 2014.

EPA, [Regulation of Fuels and Fuel Additives: 2013 Cellulosic Biofuel Standard](#)

Proposed rule: The Environmental Protection Agency (EPA) is proposing to revise the 2013



cellulosic biofuel standard published on August 15, 2013. This action follows from EPA having granted two petitioners' requests for reconsideration of the 2013 cellulosic biofuel standard. EPA granted reconsideration because one of the two companies that EPA expected to produce cellulosic biofuel in 2013 announced soon after EPA signed its final rule that it intended to produce substantially lower volumes of cellulosic biofuel in 2013 than it had earlier reported to EPA. Since the cellulosic biofuel standard was based on EPA's projection of cellulosic biofuel production in 2013, EPA deemed this new information to be of central relevance to the rule, warranting reconsideration. On reconsideration, EPA is directed to base the standard on the lower of "projected" production of cellulosic fuel in 2013 or the cellulosic biofuel applicable volume set forth in the statute. Since data are available to show actual production volumes for 2013, EPA's "projection" and proposal are based on actual cellulosic biofuel production in 2013. This action only affects the 2013 cellulosic biofuel standard; all other RFS standards remain unchanged. EPA is proposing a revised cellulosic biofuel standard of 0.0005% for 2013. In the "Rules and Regulations" section of this **Federal Register**, we are making this same amendment as a direct final rule. If we receive no adverse comment, the direct final rule will go into effect and we will not take further action on this proposed rule.

DATES: A request for a public hearing must be received by May 19, 2014. If a public hearing request is received, EPA will publish a document in the **Federal Register** indicating the time and place for the hearing. If a public hearing is held,

written comments must be received within 30 days after the date of the hearing. If no public hearing is held then comments must be received on or before June 2, 2014.

EPA, [Regulation of Fuels and Fuel Additives: 2013 Cellulosic Biofuel Standard](#)

Direct final rule: The Environmental Protection Agency (EPA) is taking direct final action to revise the 2013 cellulosic biofuel standard published on August 15, 2013. This action follows from EPA having granted two petitioners' requests for reconsideration of the 2013 cellulosic biofuel standard. EPA granted reconsideration because one of the two companies that EPA expected to produce cellulosic biofuel in 2013 announced soon after EPA signed its final rule that it intended to produce substantially lower volumes of cellulosic biofuel in 2013 than it had earlier reported to EPA. Since the cellulosic biofuel standard was based on EPA's projection of cellulosic biofuel production in 2013, EPA deemed this new information to be of central relevance to the rule, warranting reconsideration. On reconsideration, EPA is directed to base the standard on the lower of "projected" production of cellulosic fuel in 2013 or the cellulosic biofuel applicable volume set forth in the statute. Since data are available to show actual production volumes for 2013, EPA's "projection" and final rule are based on actual cellulosic biofuel production in 2013. This action only affects the 2013 cellulosic biofuel standard; all other RFS standards remain unchanged. EPA is finalizing a revised cellulosic biofuel standard of 0.0005% for 2013.

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DATES: This rule is effective on July 1, 2014 without further notice, unless EPA receives relevant adverse comment by June 2, 2014. If EPA receives relevant adverse comment, we will publish a timely withdrawal of this direct final rule in the **Federal Register** informing the public that this rule will not take effect.

[EPA, Endangered and Threatened Wildlife and Plants; Designation of Critical Habitat for *Leavenworthia exigua* var. *laciniata* \(Kentucky Glade Cress\)](#)

Final rule: The U.S. Fish and Wildlife Service (Service), designate critical habitat for *Leavenworthia exigua* var. *laciniata* (Kentucky glade cress) under the Endangered Species Act (Act). In total, approximately 2,053 acres (830 hectares) in Bullitt and Jefferson Counties, Kentucky, fall within the boundaries of the critical habitat designation.

DATES: This rule is effective on June 5, 2014.

[EPA, External Peer Review Draft Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2014](#)

Notice of availability. The Environmental Protection Agency's (EPA) recommended water quality criteria provide technical information for states and authorized tribes to adopt water quality standards under the Clean Water Act to protect human health. EPA is announcing the release of the External Peer Review Draft Aquatic Life Ambient Water Quality Criterion for Selenium—Freshwater 2014 (EPA-822-P-14-001) for public comment. Following closure of the public comment period, an EPA contractor will organize and conduct an independent

expert external letter peer review of the draft criterion document. Public comments will be made available to the peer reviewers for consideration during their review. This external peer review draft criterion document does not represent and should not be construed to represent any final EPA policy, viewpoint, or determination.

DATES: The public comment period begins on May 14, 2014 and ends on June 13, 2014. Scientific views should be submitted to the public EPA docket by June 13, 2014. Scientific views postmarked after this date may not receive the same consideration.

[EPA, Hydraulic Fracturing Chemicals and Mixtures](#)

Advance notice of proposed rulemaking. In its response to a citizen petition submitted under section 21 of the Toxic Substances Control Act (TSCA), EPA indicated that as a first step, it would convene a stakeholder process to develop an approach to obtain information on chemical substances and mixtures used in hydraulic fracturing. To gather information to inform EPA's proposal, the Agency is issuing this advance notice of proposed rulemaking (ANPR) and initiating a public participation process to seek comment on the information that should be reported or disclosed for hydraulic fracturing chemical substances and mixtures and the mechanism for obtaining this information. This mechanism could be regulatory (under TSCA section 8(a) and/or section 8(d)), voluntary, or a combination of both and could include best management practices, third-party certification and collection, and incentives for disclosure of this information. In addition, the Agency is

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seeking comment on ways of minimizing reporting burdens and costs and of avoiding the duplication of state and other federal agency information collections, while at the same time maximizing data available for EPA risk characterization, external transparency, and public understanding. Also, EPA is soliciting comments on incentives and recognition programs that could be used to support the development and use of safer chemicals in hydraulic fracturing.

DATES: Comments must be received on or before August 18, 2014.

[EPA, Approval and Promulgation of Implementation Plans; Kentucky; Stage II Requirements for Hertz Corporation Facility at Cincinnati/Northern Kentucky International Airport in Boone County](#)

Final rule: The Environmental Protection Agency (EPA) is taking final action to approve a source-specific State Implementation Plan (SIP) revision submitted to EPA by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ) on January 17, 2014, for the purpose of exempting a Hertz Corporation facility from the Clean Air Act (CAA or Act) Stage II vapor control requirements. The subject Hertz Corporation facility is currently being constructed at the Cincinnati/Northern Kentucky International Airport in Boone County, Kentucky. EPA's approval of this revision to Kentucky's SIP is based on the December 12, 2006, EPA policy memorandum from Stephen D. Page, entitled "*Removal of Stage II Vapor Recovery in Situations Where Widespread Use of Onboard*

Refueling Vapor Recovery is Demonstrated."

This action is being taken pursuant to the CAA.

DATES: This rule will be effective June 23, 2014.

[EPA, Approval and Promulgation of Implementation Plans; Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee; Removal of Obsolete Regulations](#)

Final rule; notice of administrative change. The Environmental Protection Agency (EPA) is approving the removal/ revision to over 30 provisions in the Code of Federal Regulations (CFR) in the Alabama, Florida, Georgia, Kentucky, Mississippi, North Carolina, South Carolina and Tennessee State Implementation Plan (SIP) subparts because they are unnecessary or obsolete. This action makes no substantive changes to these SIPs and imposes no new requirements. Removal of outdated material from the air program subparts for these states is nonsubstantive in nature and is designed to improve cost effectiveness and usability of the CFR. This action also updates certain provisions by correcting state agencies' office addresses and correcting CFR publication errors in two provisions.

DATES: This final rule is effective May 27, 2014.

[EPA, Information Collection Request Submitted to OMB for Review and Approval; Comment Request; Asbestos-Containing Materials in Schools Rule and Revised Asbestos Model Accreditation Plan Rule \(Renewal\)](#)

Notice. EPA has submitted the following information collection request (ICR) to the

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Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*): Asbestos-Containing Materials in Schools Rule and Revised Asbestos Model Accreditation Plan Rule (EPA ICR No. 1365.10, OMB Control No. 2070-0091). EPA did not receive any comments in response to the previously provided public review opportunity issued in the **Federal Register** on August 8, 2013 (78 FR 48431). With this submission, EPA is providing an additional 30 days for public comments. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Submit your comments on or before June 27, 2014.

EPA, [Proposed Information Collection Request; Comment Request; Cooling Water Intake Structures at Existing Facilities \(Final Rule\)](#)

Notice: The Environmental Protection Agency (EPA) is planning to submit an information collection request (ICR), "Cooling Water Intake Structures at Existing Facilities (Final Rule)" to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act. Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a revision of an existing ICR. An Agency may not conduct or sponsor and a person is not required to respond to a collection of information unless it displays a currently valid OMB control number.

DATES: Comments must be submitted on or before July 28, 2014.

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EPA, [Definition of "Waters of the United States" Under the Clean Water Act; Meeting of the Local Government Advisory Committee](#)

Announcement of meeting. The Local Government Advisory Committee's Protecting America's Waters Workgroup is seeking input on its Charge from the Environmental Protection Agency (EPA) to give advice and recommendations on a proposed rule to clarify protection under the Clean Water Act for streams and wetlands that form the foundation of the nation's water resources. The LGAC Protecting America's Waters Workgroup will have a series of meetings to hear from local elected and appointed officials at several geographic field locations. The focus of the workgroup meeting is to hear from local officials on local issues of concern related to Waters of the United States proposed rule published on April 21, 2014 (79 FR 22188). This is an open meeting and state, local and tribal officials are invited to attend. Individuals or organizations wishing to address the workgroup meeting will be allowed a maximum of five minutes to present their point of view.

DATES: The first of the meetings will be held on Wednesday, May 28, 2014, in St. Paul, MN. The Workgroup will hear comments from state, local and tribal officials and the public between 11:20 a.m.-12:25 p.m. on Wednesday, May 28, 2014.

EPA, [Lead; Framework for Identifying and Evaluating Lead-Based Paint Hazards From Renovation, Repair, and Painting Activities in Public and Commercial Buildings](#)



Advanced notice of proposed rulemaking; availability and request for comment on Framework. EPA is making the following document available for public review and comment: “Framework for Identifying and Evaluating Lead-Based Paint Hazards From Renovation, Repair, and Painting Activities in Public and Commercial Buildings” (Framework). The Framework describes an approach for identifying and evaluating hazards created by renovations of public and commercial buildings (P&CBs). The Framework also describes how the analyses under this approach would be performed, and presents results of some preliminary analyses that evaluated the impact of different variables on exposure estimates for young children. EPA will consider these comments as the Agency determines whether hazards are created by P&CB renovations and, if appropriate, develops proposed requirements. **DATES:** Comments must be received on or before June 30, 2014.

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