



## SMG Reg Watch

February 2016 / 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

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### QUESTIONS, COMMENTS, ADDITIONAL INFORMATION

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### Scott's Thoughts

It used to be that in order to find changes in regulations that would impact our businesses, you would watch new and amended legislation and changes to state or federal regulations. Today, in order to keep up you still need to track the "old" methods but also court decisions and administrative policy changes.

For example, US EPA announced a proposed rule to add a subsurface intrusion (vapor intrusion) component to the Superfund Hazard Ranking System (RIN 2050-AG67)(February 3, 2016). By adding this consideration hundreds of sites that previously would not rank high enough to qualify for listing on the NPS would now likely qualify.

It looks like there are also significant changes to federal hazardous waste generator requirements that we expect to be finalized in 2016. The proposed rules include the "Hazardous Waste Generator Improvements Rule" (80 Fed. Reg. 57918, Sept. 25, 2015), which substantially changes almost every aspect of the generator program. The "Management Standards for Hazardous Waste Pharmaceuticals" rule (80 Fed. Reg. 58014, Sept. 25, 2015), proposed additional substantive changes to the regulatory framework governing the management and disposal of hazardous waste pharmaceuticals.

Further, EPA recently announced seven National Enforcement Initiatives (NEIs) for FY 2017-2019. According to EPA, the NEIs are selected with input from the public and other stakeholders. To me, this translated means "environmentalist groups." There are three new initiatives: cutting hazardous air pollutants, reducing risks of accidental releases at industrial and chemical facilities and keeping industrial pollutants out of the nation's

waters. Continuing points of emphasis are: reducing air pollution from the largest sources, ensuring energy extraction activities comply with environmental laws, keep raw sewage and contaminated stormwater out of our nation's waters and preventing animal waste from contaminating surface and groundwater.

With the addition of risk management and accident prevention added to EPA's Enforcement Initiatives, look for a proposed rule detailing EPA's changes to its Risk Management Program as early as March 2016. Expect this rule to increase enforcement and to significantly broaden its authority under Clean Air Act Section 112(r).

On the judicial side, there is another sue and settle case. On February 16, 2016, the U.S. District Court for Southern District of New York approved a Consent Decree between environmental plaintiff groups and EPA that will likely result in comprehensive new requirements affecting companies that handle, store and transport or process hazardous substances. *Envtl. Justice Health All. For Chem. Reform v. U.S. EPA*, No 15-cv-05705, ECF No. 46 (S.D.N.Y. Feb. 16, 2016). The Decree requires EPA to develop regulations under section 311(j)(9) of the Clean Water Act that will, "establish procedures, methods and equipment and other requirements for equipment to prevent discharges of hazardous substances...from onshore facilities...and to contain such discharges." The Decree requires that EPA issue a notice of proposed rulemaking within 18 months

and take a final action no later than 14 months thereafter.

As you know, the oil and gas industry has been under fire for some time. Anti-frackers have a common script. Typically they offer purported evidence and "expert" testimony related to the alleged harmful effects of hydraulic fracturing. Funded by several anti-fracking foundations the University of Cincinnati conducted a three year study that failed to identify a link between hydraulic fracturing and environmental damage. Environmental groups had previously praised the ongoing study. They are now disappointed in the results and are trying to find ways to discredit it. Is this the definition of hypocrisy?

As for the legislative side, Joint Resolution 22 was a congressional resolution that would have overturned EPA's recently enacted regulations defining the "waters of the United States (WOTUS). President Obama's veto message demonstrates his disconnection from the contents of the rule when he said, "Too many of our waters have been left vulnerable. Pollution from upstream sources ends up in the rivers, lakes, reservoirs, and coastal waters near which most Americans live and on which they depend for their drinking water, recreation, and economic development."

In addition to the above thoughts, SMG provides brief blog updates several times each week. Blogs are written by SMG employees, and can be found on our website. SMG Blog Entries of Note for this month are hyperlinked below:

- [Monitoring Enforcement Activity](#)

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- [The State of America's Water and Wastewater Infrastructure](#)
- [The EPA's New Enforcement Agenda](#)
- [Kentucky Division of Air Quality Sends Emission Inventory Surveys to Permitted Stationary Sources](#)
- [Local Limits: Determination of Suitable Environmental Criteria](#)

As the legislative session continues, watch for our Legislative Updates which are posted on our [website](#).

### Federal Regulation Review

#### EPA, [Additions to List of Categorical NonWaste Fuels](#)

**Final rule.** The Environmental Protection Agency (EPA or the Agency) is issuing amendments to the Non-Hazardous Secondary Materials rule, initially promulgated on March 21, 2011, and amended on February 7, 2013, under the Resource Conservation and Recovery Act. The Non-Hazardous Secondary Materials rule generally established standards and procedures for identifying whether non-hazardous secondary materials are solid wastes when used as fuels or ingredients in combustion units. In the February 2013 amendments, the EPA listed particular non-hazardous secondary materials as “categorical non-waste fuels” provided certain conditions are met. Persons burning these non-hazardous secondary materials do not need to evaluate them under the general case-by-case standards and procedures that would otherwise apply to non-hazardous secondary materials used in combustion units. This action adds three materials to the list of

categorical non-waste fuels: Construction and demolition wood processed from construction and demolition debris according to best management practices; paper recycling residuals generated from the recycling of recovered paper, paperboard and corrugated containers and combusted by paper recycling mills whose boilers are designed to burn solid fuel; and creosote treated railroad ties that are processed and then combusted in the following types of units: Units designed to burn both biomass and fuel oil as part of normal operations and not solely as part of start-up or shut-down operations, and units at major source pulp and paper mills or power producers subject to 40 CFR part 63, subpart DDDDD that combust CTRT and had been designed to burn biomass and fuel oil, but are modified (e.g. oil delivery mechanisms are removed) in order to use natural gas instead of fuel oil, as part of normal operations and not solely as part of start-up or shut-down operations.

**DATES:** This rule is effective March 9, 2016.

#### U.S. Fish and Wildlife Service (FWS), [Policy Regarding Implementation of Section 4\(b\)\(2\) of the Endangered Species Act](#)

**Notice of final policy.** The U.S Fish and Wildlife Service and the National Marine Fisheries Service, (jointly, the “Services”) announce their final policy on exclusions from critical habitat under the Endangered Species Act. This non-binding policy provides the Services’ position on how they consider partnerships and conservation plans, conservation plans permitted under section 10 of the Act, Tribal lands, national-security and

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homeland-security impacts and military lands, Federal lands, and economic impacts in the exclusion process. This policy complements the Services' implementing regulations regarding impact analyses of critical habitat designations and is intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical-habitat-exclusion process.

**DATES:** This policy is effective March 14, 2016.

**U.S. Fish and Wildlife Service.** [Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat](#)

**Final rule.** The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the "Services"), amend portions of their regulations that implement the Endangered Species Act of 1973, as amended (Act). The revised regulations clarify, interpret, and implement 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 amendments make minor edits to the scope and purpose, add and remove some definitions, and clarify the criteria and procedures for designating critical habitat. These amendments are based on the Services' review of the regulations and are intended to clarify expectations regarding critical habitat and provide for a more predictable and transparent critical habitat designation process. Finally, the 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:** Effective date: This rule is effective March 14, 2016. Applicability date: This rule applies to rules for which a proposed rule was published after March 14, 2016.

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

**Final rule.** The U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), collectively referred to as the "Services", revise a regulatory definition that is integral to their implementation of the Endangered Species Act of 1973, as amended (Act or ESA). The Act requires Federal agencies, in consultation with and with the assistance of the Services, 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. On May 12, 2014, the Services proposed to revise the definition for "destruction or adverse modification" in the regulations as this definition had been found to be invalid by two circuit courts. In response to public comments received on the proposed rule, the Services have made minor revisions to the definition. This rule responds to section 6 of Executive Order 13563 (January 18, 2011), which directs agencies to analyze their existing regulations and, among

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other things, modify or streamline them in accordance with what has been learned.  
**DATES:** Effective March 14, 2016.

**EPA, [Allocations of Cross-State Air Pollution Rule Allowances From New Unit Set-Asides for the 2015 Compliance Year](#)**

**Final rule; notice of data availability (NODA).** The Environmental Protection Agency (EPA) is providing notice of emission allowance allocations to certain units under the new unit setaside (NUSA) provisions of the CrossState Air Pollution Rule (CSAPR) federal implementation plans (FIPs). EPA has completed final calculations for the second round of NUSA allowance allocations for the 2015 compliance year of the CSAPR NOX Annual, SO2 Group 1, and SO2 Group 2 Trading Programs. EPA has posted spreadsheets showing the second-round 2015 NUSA allocations of CSAPR NOX Annual, SO2 Group 1, and SO2 Group 2 allowances to new units as well as the allocations to existing units of the remaining CSAPR NOX Annual, SO2 Group 1, and SO2 Group 2 allowances not allocated to new units in either round of the 2015 NUSA allocation process. EPA will record the allocated CSAPR NOX Annual, SO2 Group 1, and SO2 Group 2 allowances in sources' Allowance Management System (AMS) accounts by February 15, 2016.

**DATES:** February 12, 2016.

**EPA, [Information Collection Request Submitted to OMB for Review and Approval; Comment Request; EPA's ENERGY STAR Program in the Commercial and Industrial Sectors \(Revision\)](#)**

**Notice.** The Environmental Protection Agency has submitted an information

collection request (ICR), "EPA's ENERGY STAR Program in the Commercial and Industrial Sectors" (EPA ICR No. 1772.07, OMB Control No. 2060-0347) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). This is a proposed revision of the ICR, which is currently approved through March 31, 2016. Public comments were previously requested via the Federal Register (80 FR 43770) on July 23, 2015 during a 60- day comment period. This notice allows for an additional 30 days for public comments. A fuller description of the ICR is given below, including its estimated burden and cost to the public. 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:** Additional comments may be submitted on or before March 14, 2016.

**EPA, [Proposed Information Collection Request; Comment Request; Recordkeeping and Reporting—Solid Waste Disposal Facilities and Practices](#)**

**Notice.** The Environmental Protection Agency is planning to submit an information collection request (ICR), Recordkeeping and Reporting—Solid Waste Disposal Facilities and Practices; "(EPA ICR No. 1381.11, OMB Control No. 2050-0122) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (44 U.S.C. 3501 et seq.). Before doing so, EPA is soliciting public comments on specific aspects of the proposed information collection as described in the hyperlinked notice. This is

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a proposed extension of the ICR, which is currently approved through May 31, 2016. 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 April 25, 2016.

**EPA, [Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems](#)**

**Notice of proposed rulemaking; extension of public comment period.**

The Environmental Protection Agency (EPA) is announcing an extension of the public comment period for the proposed rule titled “Greenhouse Gas Reporting Rule: Leak Detection Methodology Revisions and Confidentiality Determinations for Petroleum and Natural Gas Systems.” The public comment period for this proposal began on January 29, 2016. This document announces the extension of the deadline for public comment from February 29, 2016 to March 15, 2016.

**DATES:** The public comment period for the proposed rule published January 29, 2016 (81 FR 4987) is extended. Comments must be received on or before March 15, 2016.

**EPA, [2015 Revisions and Confidentiality Determinations for Data Elements Under the Greenhouse Gas Reporting Rule](#)**

**Notice of proposed rulemaking; extension of public comment period.**

The EPA is announcing an extension of the public comment period for the proposed

rule titled “2015 Revisions and Confidentiality Determinations for Data Elements under the Greenhouse Gas Reporting Rule”. The public comment period for this proposal began on January 29, 2016. This document announces the extension of the deadline for public comments from February 29, 2016 to March 30, 2016.

**DATES:** Comment Due Date: The comment due date of February 29, 2016, for the proposed rule published on January 15, 2016, at 81 FR 2536, is extended to March 30, 2016.

**Fish and Wildlife Service, Interior. [Endangered and Threatened Wildlife and Plants; Removal of Solidago albopilosa \(White-Haired Goldenrod\) From the Federal List of Endangered and Threatened Plants](#)**

**Proposed rule; reopening of comment period.** The U.S. Fish and Wildlife Service (Service), announce the reopening of the comment period on the September 1, 2015, proposed rule to remove the plant *Solidago albopilosa* (white-haired goldenrod) from the Federal List of Endangered and Threatened Plants. The Service is reopening the comment period for 30 days in order to conduct peer review and provide interested parties an additional opportunity to comment on the proposed rule and draft post delisting monitoring plan. Comments previously submitted need not be resubmitted, as they will be fully considered in preparation of the final listing determination.

**DATES:** To allow adequate time to consider comments on the proposed rule,

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the Service must receive comments on or before March 28, 2016.

**EPA, [Regional Monitoring Networks \(RMNs\) To Detect Changing Baselines in Freshwater Wadeable Streams](#)**

**Notice of availability.** Environmental Protection Agency (EPA) is announcing the availability of a document titled, “Regional Monitoring Networks (RMNs) to Detect Changing Baselines in Freshwater Wadeable Streams” (EPA/ 600/R-15/280). The document was prepared by the National Center for Environmental Assessment (NCEA) within EPA’s Office of Research and Development. The document describes the development of the current regional monitoring networks (RMNs) for riffledominated, freshwater wadeable streams. The final document is available via the Internet on the NCEA home page under the Recent Additions and the Data and Publications menus at [http:// www.epa.gov/risk/ecological-riskassessment-products-and-publications](http://www.epa.gov/risk/ecological-riskassessment-products-and-publications).

**DATES:** The document will be available on or around February 29, 2016.

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