



SMG Reg Watch

July 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

Summer is a great time of year if you are trying to delay new regulations. The staff of the various governmental agencies are taking summer vacations and, as a result, regulatory activity slows down. Although, I'm not sure that's the case as the current administration winds down its federal programs.

President Obama is energized even in his last summer in office. The President is requiring federal agencies to address climate change as part of their NEPA review. I've provided a link as well as my thoughts on this initiative [here](#).

NEPA, in its original form, is a slippery slope and has been used to slow down selected projects since its inception. Addressing climate change will add another meaningless but potentially time consuming layer to the process. Who really knows how to count the climate impact of a project? But it will be a litigated issue from both sides - especially if each "molecule" is not counted like the special interests would like. I haven't looked at NEPA in some time, but some important parts of the Act to remember are:

- First of all, NEPA directly impacts Federal Agencies and their major federal actions. State decisions will not be directly impacted. The first impacts to Kentucky projects will probably be on permits and the allocation of federal funds. Areas that will be impacted the most will include projects receiving highway or other federal funds, Corps of Engineers permits, underground injection permits issued by EPA (oil and gas industry and chemical industry), and airports receiving

funding from the federal government.

- It's interesting to note that the Act says, "All agencies of the Federal Government shall...include in every recommendation or report on proposals for ... major federal actions significantly affecting the quality of the human environment, a detailed statement...on the environmental impact of the proposed action". 42 U.S.C. 4332 (2)(C)(i).
- Court decisions have over time tried to clarify the Act. For example, in the Calvert Cliffs' decision, the D.C. Circuit stated, "Congress did not establish environmental protection as an exclusive goal; rather, it desired a reordering of priorities, so that environmental costs and benefits will assume their proper place along with other considerations".
- Another court-led clarification was set forth in Robertson v. Methow Valley, in which the court stated "it is now well settled that NEPA itself does not mandate particular results, but simply prescribes the necessary process".

There is no doubt that NEPA's gives NIMBYs an opportunity to stop or slow down important projects, at a great cost to the government and society. The regulated community will need to find out what the various agencies will require and their schedule to implement this Order and prepare for the inevitable. How do you fix it? Congress needs to step up, even with the threat of a veto.

Another issue is EPA publication in the June 27th Federal Register of their Preliminary 2016 Effluent Guidelines Program Plan (81 Fed. Reg. 41535). The Clean Water Act requires EPA to biennially publish a plan for new and revised effluent limitations. These national categorical standards restrict discharges of specific pollutants on an industry by industry basis. The limits are incorporated into a point source discharger's water discharge permits as a baseline minimum. Translated, this impacts you if you are a selected industry and have to meet a pretreatment or standard wastewater discharge permit. The following industry categories have been selected for new standards: Iron and steel manufacturing, organic chemicals, plastics and synthetic fibers, pulp, paper and paperboard and battery manufacturing.

EPA has identified three TSCA program areas for which it is taking "immediate action" under the Lautenberg Act. These would include new chemicals, confidential business information and ongoing TSCA Section 6 rulemakings.

Heads up on the enforcement front: federal penalties are going up. The increases are effective for EPA and OSHA on August 1, 2016. OSHA's maximum penalties will increase by 78%. EPA's penalties are smaller because their penalties were adjusted for inflation more recently. EPA will apply the new maximum civil penalties to all statutory civil penalties assessed on or after August 1, 2016 and for violations that occurred after November 2, 2015. This is another reason that you want to make sure the regulatory

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programs in your state are under state control not the federal government.

Bi-partisan legislation has been introduced in the House of Representatives (H.R. 5685) known as the "Farm Regulatory Certainty Act". This bill would amend RCRA definition of "solid waste" to exclude animal waste, manure, fertilizer or constituents derived from such sources. The legislation was developed as a result of a recent U.S. District Court ruling in Washington State. This decision held that manure qualified as a solid waste under RCRA, triggering RCRA's imminent hazard provisions.

It also appears that federal and state authorities are emphasizing enforcement actions against **food and beverage companies** under environmental, health and safety statutes. A company facing \$140,000 following OSHA inspection which was prompted by two amputation injuries. Failure to comply with machine guarding and lockout-tagout programs were the reasons for the penalties. A major beer manufacturer has entered into a multimillion dollar consent decree to resolve alleged violations on the pretreatment requirements for indirect dischargers. A \$500,000 penalty was assessed to a major grocery chain for Clean Air Act violations that were associated with refrigeration equipment that contains the ozone depleting substance R-22. A frozen baker business recently settled several alleged violations of regulations governing the use of anhydrous ammonia in refrigeration equipment. The settlement agreement required the company to pay \$156,000 in civil penalties and undertake a supplemental

environmental project that will provide \$119,000 worth of equipment to local fire department.

In addition to the above "Scott's Thoughts" SMG staff 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:

- [EPA Publishes TSCA Reform First Year Implementation Plan](#)
- [EPA Clarifies RPA Regulations](#)
- [Are Your Spent Solvents Hazardous Waste?](#)
- [EPA Makes Round 2 Final Area Designations for the 2010 1-Hour SO2 NAAQS: Impacts on Kentucky](#)
- [USACE Issues Proposed Changes to NWRPs](#)
- [Pretreatment Program - Dental Amalgam Rule](#)
- [WVDEP Aboveground Storage Tank Rule effective August 1, 2016](#)
- [Wetland Botany and Pokémon: Sharing Public Spaces](#)

Regulation Review

As Amended

ENERGY AND ENVIRONMENT CABINET:
Department for Environmental Protection:
Division of Waste Management:
Identification and Listing of Hazardous Waste

[401 KAR 31:040](#). Lists of hazardous wastes.

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Amended after Comments

**ENERGY AND ENVIRONMENT CABINET:
Department of Environmental Protection:
Division of Air Quality: Attainment and
Maintenance of the National Ambient Air
Quality Standards**

401 KAR 51:010. Attainment status designations.

Federal Regulation Review

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AIR

EPA, [Air Quality Designations for the 2010 Sulfur Dioxide \(SO2\) Primary National Ambient Air Quality Standard—Round 2](#)

Final rule. This rule establishes the initial air quality designations for certain areas in the United States (U.S.) for the 2010 primary sulfur dioxide (SO2) National Ambient Air Quality Standard (NAAQS). The Environmental Protection Agency (EPA) is designating the areas as either nonattainment, unclassifiable/attainment, or unclassifiable, based on whether the areas do not meet the NAAQS or contribute to a nearby area that does not meet the NAAQS; meet the NAAQS; or cannot be classified on the basis of available information as meeting or not meeting the NAAQS, respectively. The designations are based on the weight of evidence for each area, including available air quality

monitoring data and air quality modeling. The Clean Air Act (CAA) directs areas designated nonattainment by this rule to undertake certain planning and pollution control activities to attain the SO2 NAAQS as expeditiously as practicable. This is the second round of area designations for the 2010 SO2 NAAQS.

DATES: The effective date of this rule is September 12, 2016.

EPA, [Oil and Natural Gas Sector: Request for Information, Emerging Technologies](#)

Notice; request for information. The Environmental Protection Agency (EPA) is issuing this request for information to the public to obtain information about monitoring, detection of fugitive emissions, and alternative mitigation approaches in the oil and natural gas sector.

DATES: Responses must be received on or before November 15, 2016.

EPA, [National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry](#)

Direct final rule. The Environmental Protection Agency (EPA) is taking direct final action to amend the National Emission Standards for Hazardous Air Pollutants for the Portland Cement Manufacturing Industry. This direct final rule provides, for a period of 1 year, an additional compliance alternative for sources that would otherwise be required to use an HCl CEMS to demonstrate compliance with the HCl emissions limit. This compliance alternative is needed due to the current unavailability of a calibration gas used for quality assurance purposes. This direct final rule also restores regulatory text requiring the reporting of

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clinker production and kiln feed rates that was deleted inadvertently.

DATES: This rule is effective on September 8, 2016 without further notice, unless the EPA receives significant adverse comment by August 24, 2016. If the EPA receives significant adverse comment, we will publish a timely withdrawal in the Federal Register informing the public that the rule will not take effect.

WATER

[EPA, Decision Not To Regulate Forest Road Discharges Under the Clean Water Act; Notice of Decision](#)

Decision. The Environmental Protection Agency (EPA) is providing notice of the Agency's decision that no additional regulations are needed to address stormwater discharges from forest roads under Section 402(p)(6) of the Clean Water Act (CWA) at this time. This document responds to the remand in *Environmental Defense Center, Inc. v. U.S. EPA*, 344 F.2d 832 (9th Cir. 2003) that requires EPA to consider whether the CWA requires the Agency to regulate stormwater discharges from forest roads.

DATES: This decision shall be considered issued for purposes of judicial review at 1 p.m. Eastern time on July 11, 2016.

OTHER

[EPA, Agency Information Collection Activities; Submitted to OMB for Review and Approval; Comment Request; TSCA Section 5\(a\)\(2\) Significant New Use Rules for Existing Chemicals](#)

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

Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA): "TSCA Section 5(a)(2) Significant New Use Rules for Existing Chemicals" (EPA ICR No. 1188.13, OMB Control No. 2070-0038). This is a request to renew the approval of an existing ICR. EPA received two comments in response to the previously provided public review opportunity issued in the Federal Register on September 2, 2015 (80 FR 53151), which are addressed in this ICR. With this submission, EPA is providing an additional 30 days for public review.

DATES: Comments must be received on or before August 25, 2016.

OSHA, Occupational Exposure to Respirable Crystalline Silica; Approval of Collections of Information.

Final rule. Office of Management and Budget's (OMB) approval of collections of information. This rule is a technical amendment announcing that OMB has approved the collections of information contained in OSHA's standards for Occupational Exposure to Respirable Crystalline Silica and revising OSHA's regulations to reflect that approval. The OMB approval number is 1218-0266.

DATES: Effective July 26, 2016.

[US Fish & Wildlife. Methodology for Prioritizing Status Reviews and Accompanying 12-Month Findings on Petitions for Listing Under the Endangered Species Act](#)

Notice. The U.S. Fish and Wildlife Service (Service), announce a final methodology for prioritizing status reviews and accompanying 12-month findings on

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petitions for listing species under the Endangered Species Act. This methodology is intended to allow the Service to address outstanding workload strategically as the Service's resources allow and to provide transparency to the Service's partners and other stakeholders as to how the Service establishes priorities within the Service's upcoming workload.

DATES: The Service plans to put this methodology in place immediately in order to prioritize upcoming status reviews and develop the Service's National Listing Workplan.

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