



SMG Reg Watch

October 2017 / Scott R. Smith and Josiah Frey

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 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

Ozone Status

On November 6, EPA began its process of addressing the ozone standard that is currently in place. The Agency listed what

appears to be all but four counties in Kentucky as ozone attainment areas. The remaining four counties, Jefferson, Boone, Campbell and Kenton are not listed as attainment counties, but they have not been listed as nonattainment counties either. There is not currently a nonattainment list. It is not clear at this time what EPA's strategy is or will be, but this is an unusual approach for addressing nonattainment areas. This issue is one to watch carefully. It is apparent that EPA doesn't like the current rule but what they try to do about it will be important to keep an eye on.

Reducing Regulatory Burdens for Manufacturing

Shortly after last year's election, the new leadership at the U.S. Department of Commerce asked Smith Management Group to produce a document outlining regulations, guidance documents and policies that were creating problems for industry and whose technical foundation were questionable. The Commerce Department also reached out publicly to industry and on [October 6, 2017 released a compilation of their findings and several recommendations](#), as part of President Trump's January 24th Memorandum on "Streamlining Permitting and Reducing Regulatory Burdens for Domestic Manufacturing."

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New Silica Standard(s)

Full implementation of the new silica rule for construction began in most states on October 23. There are two silica standards, one for construction and the other for General Industry/Maritime. Federal OSHA delayed enforcement for the Construction Standard from June 2017 until now. Kentucky did adopt the delay of the standard and started enforcing the standard in June 2017. General industry/maritime (including oil and gas industry) has until June 23, 2018 to comply and then until June 23, 2021 to provide mandatory engineering control for overexposures. [Interim guidance for the standard was released on October 19.](#) This document is helpful because it summarizes the new rule and describes in detail what inspectors are expected to look for and enforce. There are specific directives contained in the guidance pertaining to the following:

- Respiratory Protection;
- Housekeeping Practices;
- Written exposure Control Plan or ECP;
- Medical Surveillance;
- Communication of Hazards.

This is a very onerous rule. It is important to review this guidance to see if this rule applies to your employees or subcontractors. Because Kentucky and several other states have their own OSHA program, it will be important to check with specific state rule administrators for further information. We will be issuing a Blog regarding specific information on Kentucky's take on this rule soon.

A summary of the rule found in the interim guidance includes:

- 29 CFR 1926.1153, *Respirable Crystalline Silica* applies to all occupational exposures to respirable crystalline silica in construction work, *except* where employee exposure will remain below 25 micrograms per cubic meter of air (25 $\mu\text{g}/\text{m}^3$) as an 8-hour TWA under any foreseeable conditions.
 - The exemption is based on *total* respirable crystalline silica exposures *from all* sources and must take into account all conditions that may add or contribute to the employee's overall exposure levels.
- 29 CFR 1926.1153, *Respirable Crystalline Silica* establishes an 8-hour TWA PEL of 50 $\mu\text{g}/\text{m}^3$ and an AL of 25 $\mu\text{g}/\text{m}^3$. The standard also contains a unique, flexible option for employers whose employees are engaged in the construction tasks listed in Table 1 of the Interim Guidance at 29 CFR 1926.1153(c)(1). See link below.
- If the employer fully and properly implements the engineering controls, work practices, and respiratory protection listed in Table 1 (see link below) of the interim guidance, it is not required to conduct exposure assessments or otherwise comply with a PEL for employees engaged in those tasks.
- The employer must comply with paragraph (d) (the PEL, exposure assessment, and methods of compliance requirements) for employees who are engaged in tasks not listed on Table 1 or

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where it has not fully and properly implemented the engineering controls, work practices, and respiratory protection listed in Table 1 for all employees engaged in listed tasks.

Table 1 is found [here](#).

Does The Clean Air Act Preempt State Common Law Tort Claims for Damages or Injunctive Relief?

In an interesting but not yet published Opinion rendered September 28, the Kentucky Supreme Court in *Brown-Forman Corp. v. Miller* dealt with whether the Clean Air Act preempts state common law tort claims for damages or injunctive relief where harm is alleged to result from air pollutant emissions authorized by a permit issued by a regulatory authority. The court held that even though the CAA did not preempt injunctive relief, it was not available for imposing higher standards of control than the CAA requires. It appears that the same reasoning might apply to water discharge permits. A clearer distinction can be drawn with respect to the management of hazardous wastes because the Statutes direct the Cabinet to promulgate criteria and lists by which wastes may be determined to be hazardous to be identical to EPA. This would indicate strong support for precluding claims for injunctive relief that seek to impose more stringent practices for managing hazardous waste than required by Kentucky permits.

Federal Budget Riders

Usually keeping up with the federal budget is like watching grass grow. Not very interesting. This year there are things in the

budget that go beyond dollars. Watch for riders. Riders are additional provisions added to a bill that have little connection with the subject matter of the bill. Riders are created as a tactic to pass a controversial provision that would not pass as its own bill. For example, H.R. 3354 will make appropriations for the Department of Interior, environment and related agencies for the fiscal year ending September 30, 2018. (Other departments have their own bills.) There are several riders in H.R. 3354 that impact EPA. For example, Section 432 relates to the implementation of the ozone standard. States shall designate areas not later than October 26, 2024 and EPA shall promulgate final designations for all areas in all states not later than October 2025. Other riders limit implementation of certain threatened or endangered species. Section 431 authorizes the EPA and the Army Corps to withdraw the Waters of the United States rule without any regard to any provision of statute or regulation. This Bill passed the House of Representatives and has been placed on the Senate Legislative Calendar.

HUD Wants Higher Standards For Loans Regarding Safe Water

US Department of Housing and Urban Development (HUD) Office of Inspector General has suggested, for a second time, that lenders making Federal Housing Administration (FHA) insured loans should be held to a higher level of accountability in ensuring that FHA borrowers have a safe and potable water supply. In a report dated September 29, 2017, the OIG stated concerns are twofold: first HUD may be endorsing loans for properties with water

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contaminants that affect their occupants' health, and second, property values may decrease due to water quality issues, there by posing an increased risk of loss to both HUD and homeowners.

EPA Begins To Ditch The Clean Power Plan

on October 10, the U.S. Environmental Protection Agency (EPA) Administrator Scott Pruitt issued a Notice of Proposed Rulemaking, to repeal the so-called "Clean Power Plan". While this is a good thing, we can't forget that there are a few other issues related to this that we shouldn't lose sight of. First the repeal proposal does not provide a replacement which the courts may require in the future. There is also an appeal pending at the U.S. Court of Appeals for the District of Columbia. The DC Court is not a friend to this Administration. I would bet they will rule against the Administration on this one in some form or fashion. Two of the Judges have recently reminded EPA that they have an "affirmative obligation to regulate greenhouse gases". EPA will probably issue an Advance Notice of Proposed Rulemaking to solicit information on systems of emission reduction that will be consistent with EPA's legal interpretation of its scope of authority. This is going to get interesting.

Ohio Begins TCE Cleanup Initiative

Ohio EPA will be sending letters to hundreds of sites throughout the state requesting that property owners act to evaluate trichloroethylene (TCE) contamination. In August 2016, they issued a new guidance document titled, "Recommendation Regarding Response Action Levels and

Timeframes for Common Contaminants of Concern at Vapor Intrusion Sites in Ohio". Based upon the toxicity assessment update, the guidance now includes "accelerated", "urgent" and "imminent hazard" response action levels for TCE in indoor air, ground water and sub-slab soil gas. If Ohio EPA follows through on this issue, many property owners are going to be surprised because notices will be going to people who believed their sites were cleaned up years ago. Some letters will be sent to sites that completed all work under the VAP and already received a Covenant Not to Sue from Ohio EPA.

Reminder-Start Working Early On Your ISO 14001 EMS

Our ISO readers understand that when new ISO programs arrive, you need to start early and finish early to avoid unforeseen problems. While the deadline to recertify your ISO 14001 EMS is September 15, 2018 there are many changes in the new standard ISO 14001:2015 that won't be easy to implement at the last minute. Examples of new and difficult implementation procedures include formulating an approach for including your interested parties and stakeholders in its contextual analysis (how, where and with whom does it operate) and in its life cycle thinking. Other significant issues include the consideration of strategic threats and opportunities and integrating EMS functionality into business operations.

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In addition to “Scott’s Thoughts” SMG staff provide brief blog updates several times each week. Blogs can be found on our website. SMG Blog entries of note for this month are hyperlinked below:

- [Proposed KY Regulations out for Public Comment \(DAQ\)](#)
- [Can Kentucky Expedite Permits: An Introduction to Louisiana's Program](#)
- [FY 2018 Brownfield Assessment Grants](#)
- [Small Distillers Environmental Permitting Guide](#)
- [USFWS Kentucky Office Mitigation Policy Change](#)
- [Best Management Practices for Stormwater](#)
- [EPA Settlement with Retailer over Hazardous Waste Regulations](#)

State Regulation Review

On October 13, the Kentucky Department for Natural Resources filed proposed amendments to administrative regulations after receiving comments on [405 KAR 7:001](#), [405 KAR 8:001](#), [405 KAR 8:010](#), [405 KAR 16:001](#), [405 KAR 18:001](#), and [405 KAR 20:001](#). These administrative regulations are scheduled to be heard at the November meeting of the Administrative Regulations Review Subcommittee.

Federal Regulation Review

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AIR

EPA, [National Emission Standards for Hazardous Air Pollutants for Chemical Recovery Combustion Sources at Kraft, Soda, Sulfite, and Stand-Alone Semichemical Pulp Mills](#)

Final Rule. This action finalizes the residual risk and technology review (RTR) conducted for the chemical recovery combustion sources at kraft, soda, sulfite, and stand-alone semichemical pulp mills regulated under the national emission standards for hazardous air pollutants (NESHAP). We are finalizing our proposed determination that risks from the source category are acceptable and that the standards provide an ample margin of safety to protect public health. We are also finalizing amendments to the NESHAP based on developments in practices, processes, and control technologies identified as part of the technology review. These final amendments include revisions to the opacity monitoring provisions and the addition of requirements to maintain proper operation of the electrostatic precipitator (ESP) automatic voltage control (AVC). Additional amendments are also being finalized including the requirement to conduct 5-year periodic emissions testing, and submit electronic reports; revisions to provisions

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addressing periods of startup, shutdown, and malfunction (SSM); and technical and editorial changes. These amendments are made under the authority of the Clean Air Act (CAA) and will improve the effectiveness of the rule.

DATES: This final rule is effective on October 11, 2017.

EPA, [Air Plan Approval; KY; Miscellaneous Source Specific Revisions for Jefferson County](#)

Final rule. The Environmental Protection Agency (EPA) is taking final action to approve revisions to the Kentucky State Implementation Plan (SIP), submitted by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ), on March 21, 2011, October 29, 2013, October 28, 2016, and March 24, 2017. The revisions were submitted by KDAQ on behalf of the Louisville Metro Air Pollution Control District, which has jurisdiction over Jefferson County, Kentucky. The revisions include changes to Jefferson County Regulations regarding Reasonably Available Control Technology (RACT) for two major sources of nitrogen oxides (NOx) and the removal of a volatile organic compounds (VOC) bubble rule.

DATES: This rule will be effective November 13, 2017.

EPA, [Air Plan Approval; Kentucky; Regional Haze Progress Report](#)

Final rule. The Environmental Protection Agency (EPA) is finalizing approval of a State Implementation Plan (SIP) revision submitted by the Commonwealth of Kentucky through the Kentucky Energy and Environment Cabinet, Division of Air Quality

(KDAQ) on September 17, 2014. Kentucky's September 17, 2014, SIP revision (Progress Report) addresses requirements of the Clean Air Act (CAA or Act) and EPA's rules that require each state to submit periodic reports describing progress towards reasonable progress goals (RPGs) established for regional haze and a determination of the adequacy of the state's existing SIP addressing regional haze (regional haze plan). EPA is finalizing approval of Kentucky's determination that the Commonwealth's regional haze plan is adequate to meet these RPGs for the first implementation period covering through 2018 and requires no substantive revision at this time.

DATES: This rule will be effective November 13, 2017.

EPA, [National Emission Standards for Hazardous Air Pollutants: Nutritional Yeast Manufacturing Residual Risk and Technology Review](#)

Final rule. This action finalizes the residual risk and technology review (RTR) conducted for the Manufacturing of Nutritional Yeast source category regulated under national emission standards for hazardous air pollutants (NESHAP). In addition, we are finalizing other amendments, including revisions to the form of the volatile organic compounds (VOC) standards for fermenters, removal of the option to monitor brew ethanol, inclusion of ongoing relative accuracy test audit (RATA), and revisions to other monitoring, reporting, and recordkeeping requirements.

DATES: This final rule is effective on October 16, 2017.

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EPA, [Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units](#)

Proposed rule. In this action, the U.S. Environmental Protection Agency (EPA) is proposing to repeal the Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units (EGUs), commonly referred to as the Clean Power Plan (CPP), as promulgated on October 23, 2015.

DATES: Comments must be received on or before December 15, 2017.

EPA, [Air Plan Approval; Ohio; Regional Haze Five-Year Progress Report State Implementation Plan](#)

Proposed rule. The Environmental Protection Agency (EPA) is proposing approval of a revision to the Ohio State Implementation Plan (SIP) submitted by the State of Ohio (Ohio) through the Ohio Environmental Protection Agency (OEPA). Ohio's SIP revision addresses the requirements of the Clean Air Act (CAA) and EPA's rules that require states to submit periodic reports describing progress towards reasonable progress goals (RPGs) established for regional haze, and a determination of the adequacy of the state's existing implementation plan addressing regional haze (regional haze SIP). EPA is proposing approval of the Ohio SIP revision on the basis that it addresses the progress report and adequacy determination requirements for the first implementation period for regional haze.

DATES: Comments must be received on or before November 15, 2017.

EPA, [National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing; Flame Attenuation Lines](#)

Withdrawal of direct final rule. Because the Environmental Protection Agency (EPA) received adverse comment, we are withdrawing the direct final rule for the National Emission Standards for Hazardous Air Pollutants for Wool Fiberglass Manufacturing; Flame Attenuation Lines, published on July 27, 2017.

DATES: Effective October 24, 2017, the EPA withdraws the direct final rule published at 82 FR 34858, on July 27, 2017.

EPA, [Voluntary Consensus Standards Update; Formaldehyde Emission Standards for Composite Wood Products](#)

Direct final rule. EPA is taking direct final action on a revision to the formaldehyde standards for composite wood products final rule, published in the Federal Register on December 12, 2016. The revision will update multiple voluntary consensus standards that have been updated, superseded, or withdrawn since publication of the notices of proposed rulemaking on June 10, 2013 and will amend an existing regulatory provision regarding the correlation of quality control test methods.

DATES: This final rule is effective on December 11, 2017 without further notice, unless EPA receives relevant adverse comment by November 9, 2017.

EPA, [National Emission Standards for Hazardous Air Pollutants: Publicly Owned Treatment Works Residual Risk and Technology Review](#)

Final rule. This action finalizes the residual risk and technology review (RTR) conducted

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for the Publicly Owned Treatment Works (POTW) source category regulated under national emission standards for hazardous air pollutants (NESHAP). In addition, we are taking final action addressing revised names and definitions of the subcategories, revisions to the applicability criteria, revised regulatory provisions pertaining to emissions during periods of startup, shutdown, and malfunction (SSM), initial notification requirements for existing Group 1 and Group 2 POTW, revisions to the requirements for new Group 1 POTW, requirements for electronic reporting, and other miscellaneous edits and technical corrections. While we do not anticipate any emission reductions as a result of these revisions, the changes should provide clarity for sources determining applicability and ensuring compliance.

DATES: This final rule is effective on October 26, 2017.

WASTE

[EPA, Significant New Use Rule on Certain Chemical Substances](#)

Final rule. EPA is finalizing a significant new use rule (SNUR) under section 5(a)(2) of the Toxic Substances Control Act (TSCA) for the chemical substance identified generically as bimodal mixture consisting of multi-walled carbon nanotubes and other classes of carbon nanotubes, which was the subject of premanufacture notice (PMN) P-11-482. This action requires persons who intend to manufacture (defined by statute to include import) or process the chemical substance for a use that is designated as a significant new use by this final rule to notify EPA at

least 90 days before commencing that activity. The required notification initiates EPA's evaluation of the intended use within the applicable review period. Manufacture and processing for the significant new use is unable to commence until EPA has conducted a review of the notice, made an appropriate determination on the notice, and take such actions as are required with that determination. The required notification would provide EPA with the opportunity to evaluate the intended use and, if necessary, to prohibit or limit that activity before it occurs.

DATES: This final rule is effective November 2, 2017.

[EPA, Significant New Use Rules on Certain Chemical Substances](#)

Direct final rule. EPA is promulgating significant new use rules (SNURs) under the Toxic Substances Control Act (TSCA) for 29 chemical substances which were the subject of premanufacture notices (PMNs). The chemical substances are subject to consent orders issued by EPA pursuant to section 5(e) of TSCA. This action requires persons who intend to manufacture (defined by statute to include import) or process any of these 29 chemical substances for an activity that is designated as a significant new use by this rule to notify EPA at least 90 days before commencing that activity. The required notification initiates EPA's evaluation of the intended use within the applicable review period. Persons may not commence manufacture or processing for the significant new use until EPA has conducted a review of the notice, made an appropriate determination on the notice, and has taken

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such actions as are required with that determination.

DATES: This rule is effective on December 18, 2017.

EPA, [Mercury; Reporting Requirements for the TSCA Mercury Inventory](#)

Proposed rule: As required under section 8(b)(10)(D) of the Toxic Substances Control Act (TSCA), EPA is proposing reporting requirements for applicable persons to provide information to assist in the preparation of an “inventory of mercury supply, use, and trade in the United States,” where “mercury” is defined as “elemental mercury” and “a mercury compound.” The requirements would be applicable to any person who manufactures (including imports) mercury or mercury-added products, or otherwise intentionally uses mercury in a manufacturing process. Based on the inventory of information collected, the Agency is directed to “identify any manufacturing processes or products that intentionally add mercury; and . . . recommend actions, including proposed revisions of Federal law or regulations, to achieve further reductions in mercury use.” At this time, EPA is not making such identifications or recommendations.

DATES: Comments must be received on or before December 26, 2017.

OTHER

USFWS, [Endangered and Threatened Wildlife and Plants; Proposed Threatened Species Status for the Candy Darter](#)

Proposed rule; 12-month finding. We, the U.S. Fish and Wildlife Service (Service),

announce a 12-month finding on a petition to list the candy darter (*Etheostoma osburni*) as a threatened or endangered species under the Endangered Species Act, as amended (Act), and to designate critical habitat. After review of the best available scientific and commercial information, we find that listing the candy darter is warranted. Accordingly, we propose to list the candy darter (*Etheostoma osburni*), a freshwater fish species from Virginia and West Virginia, as a threatened species under Act. If we finalize this rule as proposed, it would extend the Act's protections to this species. The effect of this regulation will be to add this species to the List of Endangered and Threatened Wildlife.

DATES: Comments must be received by December 4, 2017.

MSHA, [Examinations of Working Places in Metal and Nonmetal Mines](#)

Final rule; stay of effective date; reinstatement of rules. The Mine Safety and Health Administration is staying the effective date of the Agency's January 23, 2017, final rule that amended standards for examination of working places in metal and nonmetal mines to June 2, 2018. MSHA also is reinstating the provisions of the working place examinations standards that were in effect as of October 1, 2017. This stay and reinstatement offers additional time for MSHA to provide stakeholders training and compliance assistance.

DATES: As of October 5, 2017, 30 CFR 56.18002 and 57.18002 are stayed until June 2, 2018, and 30 CFR 56.18002T and 57.18002T are added until June 2, 2018.

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HUD, [Drafting a New Federal Strategy To Reduce Childhood Lead Exposures and Impacts: Request for Information](#)

Request for information. Through this notice, the U.S. Department of Housing and Urban Development (HUD), which co-chairs the Lead Subcommittee of the President's Task Force on Environmental Health Risks and Safety Risks to Children (Task Force) requests public comment on a new federal lead strategy being developed by the Task Force.

DATES: Comments due November 24, 2017.

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