



SMG Reg Watch

December 2017/Scott R. Smith

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? QUESTIONS, COMMENTS, ADDITIONAL INFORMATION: Scott R. Smith, scottr.smith@smithmanage.com.

Scott's Thoughts

2017 marked a decisive turn in environmental policy at the federal level. The recalibration of these policies for those of us who know and understand these issues has been refreshing. I have been told by those who have recently visited DC that 2018 will provide many more changes, so stay tuned and pay attention. I've provided a preview below.

The challenge for states like Kentucky who have primacy in these programs will be to get the regulatory changes promulgated at the state level quickly. It will be up to elected officials in the Administrative and Legislative Branches to ensure that these changes are implemented in a timely fashion.

Recent examples of changes at the federal level include:

- EPA filed a notice of proposed rulemaking regarding the emission guidelines limiting greenhouse gas emissions from existing utility generating units. December 18;
- Department of Interior Solicitor's Office issued a revised interpretation of the Migratory Bird Treaty Act's prohibition on the take of migratory bird species. December 22;
- Contained in the Unified Agenda of the Office of Information and Regulatory Affairs, the Department of Interior announced its intent to revise the US Fish and Wildlife Services' regulations governing interagency cooperation and exceptions to the conservation of endangered and threatened species of fish, wildlife and plants. Fall 2017 Publication;
- The Department of Interior has stated that it intends to revise regulations regarding the listing of endangered and threatened species and the designation of critical habitat; Fall 2017 Agenda of Information and Regulatory Affairs;
- EPA issued a guidance memo, "New Source Review Preconstruction Permitting Requirements: Enforceability and Use of the Actual-to Project-Actual Applicability Test in Determining Major Modification

Applicability, clarifying the agency's interpretation of the Clean Air Act's New Source Review regulations. The memo provides certainty to companies as facilities plan projects that may change or expand their operations. The memo clarifies the EPA's current understanding of certain elements of Clean Air Act's New Source Review (NSR) regulations and when they should apply to projects at facilities that may increase emissions. The primary purpose of the memo is to clarify that so long as a company complies with the procedural requirements of a preconstruction analysis, then EPA will not "second-guess" that analysis. December 7; and

- EPA concluded that financial assurance requirements it had proposed under CERCLA for hard rock mining companies in January 2017 were unnecessary. December 1, 2017.

Neomi Rao, Administrator for the Office of Information and Regulatory Affairs has stated that her agency, "...plans to push against the inertia of steadily expanding regulatory burdens and represent the Administration's commitment to reducing regulations that no longer benefit our society."

The recently published Fall 2017 Unified Federal Regulatory Agenda which tracks future environmental regulatory actions for many departments and agencies are proposing to take bears Ms. Rao's statement out. <https://www.reginfo.gov/public/do/eAgendaMain>

The Office of Information and Regulatory Affairs reports that this administration has withdrawn or delayed 1579 planned regulatory actions from the Fall of 2016 to the Fall of 2017.

Some of EPA's proposed actions scheduled for 2018 include:

- Three separate "Waters of the US" actions;
- An Advanced Notice of Proposed Rulemaking (ANPRM) that will consider new RCRA Subtitle D non-hazardous waste management standards for Municipal solid waste landfills including bioreactor landfills;
- A Notice of Proposed Rulemaking (NPRM) in January 2018 regarding the RCRA Coal Combustion Residuals Disposal rules and issue the final rules in June 2019;
- Issue an NPRM in March 2018 regarding its EPCRA recordkeeping and reporting authority which will provide the agencies interpretation of the term, "used in routine agricultural operations.";
- Issue an NPRM in August 2018 that will reconsider the 2016 oil and gas emissions standards; and
- FEMA announced that by March 2018 the agency will withdraw Their Floodplain Management and Protection of Wetlands rules at 44 CFR part 9.

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Heads up. On 11/16/2017 EPA published Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards (NAAQS). This notice identified areas in the US that were designated attainment/unclassifiable. The non-attainment areas were not listed. On December 20, 2017, EPA identified areas they intend to classify as non-attainment pending a review of additional information the states may submit by February 28. EPA's intended non-attainment counties for Northern Kentucky include Boone (partial), Campbell (partial) and Kenton (partial). In the Louisville area, EPA's intended non-attainment counties include Bullitt County, Jefferson County and Oldham County. The proposed areas in N.KY and Jefferson and their adjacent counties are near communities in Indiana and Ohio that are violating current ozone standards. This will be a factor in determining how KDAQ and, in the case of Jefferson County, the local air agency develop plans to resolve the issue.

The processes related to the designation of ozone non-attainment areas and developing an implementation plan by the state to obtain the appropriate reductions will take time and the public and regulated community will have opportunities for comment and input. It will be important to track this issue. It will be far better and more cost effective for you to be in an anticipatory mode rather than a reactionary mode in dealing with this issue.

These developments will be interesting to watch unfold in 2018. Practicing in the environmental arena has never been boring. I think next year will continue to be entertaining.

Federal Regulation Review

Community Right To Know

Community Right-to-Know; Adopting 2017 North American Industry Classification System (NAICS) Codes for Toxics Release Inventory (TRI) Reporting; Withdrawal

AGENCY: Environmental Protection Agency (EPA).

ACTION: Direct final rule; withdrawal.

SUMMARY: In the Federal Register of August 17, 2017, EPA published both a direct final rule and a proposed rule to update the list of NAICS codes subject to reporting under the TRI to reflect the Office of Management and Budget (OMB) 2017 NAICS code revision. As noted in the direct final rule, if EPA received relevant adverse comment on the proposed update, the Agency would publish a timely

withdrawal of the direct final rule in the Federal Register informing the public that the direct final action will not take effect. The Agency did receive a relevant adverse comment on the proposed update, and is therefore withdrawing the direct final rule and will instead proceed with a final rule based on the proposed rule after considering all public comments. DATES: Effective November 14, 2017 the direct final rule published in the Federal Register of August 17, 2017 (82 FR 39038) (FRL-9964-77) is withdrawn

<https://www.gpo.gov/fdsys/pkg/FR-2017-11-14/pdf/2017-24633.pdf>

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Air Quality**Air Quality Designations for the 2015 Ozone National Ambient Air Quality Standards (NAAQS)****AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Final rule.

SUMMARY: This rule establishes initial air quality designations for most areas in the United States, including most areas of Indian country, for the 2015 primary and secondary national ambient air quality standards (NAAQS) for ozone. In this action, the Environmental Protection Agency (EPA) is designating 2,646 counties, including Indian Country located in those counties, two separate areas of Indian Country, and five territories as Attainment/Unclassifiable and three counties as Unclassifiable.

DATES: This final rule is effective on January 16, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2017-11-16/pdf/2017-24640.pdf>

State Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units**AGENCY:** Environmental Protection Agency (EPA).**ACTION:** Advance notice of proposed rulemaking.

SUMMARY: An advance notice of proposed rulemaking (ANPRM) is a notice intended to solicit information from the public as the Environmental Protection Agency (EPA) considers proposing a future rule. In this ANPRM, the EPA is considering proposing emission guidelines to limit greenhouse gas (GHG) emissions from existing electric utility generating units (EGUs) and is soliciting information on the proper respective roles of the state and federal governments in that process, as well as information on systems of emission reduction that are applicable at or to an existing EGU, information on compliance measures, and information on state planning requirements under the Clean Air Act (CAA). This ANPRM does not propose any regulatory

requirements.

DATES: Comments must be received on or before February 26, 2018.

<https://www.gpo.gov/fdsys/pkg/FR-2017-12-28/pdf/2017-27793.pdf>

EPA responds to State and Tribal Recommendations for the 2015 Ozone Standards

On December 21, 2017, EPA responded to state and tribal recommendations by indicating the anticipated area designations for the portions of the country not already designated for the 2015 ozone standards. These responses will start a 120-day period for states and tribes to provide additional information before EPA determines the final designations. EPA will also be opening a 30-day comment period for the public to provide input on these designations before they are finalized. For next steps, EPA will continue to work closely with their partners at the state, tribal, and local levels to finalize these area designations and improve ozone air quality.

Read EPA's responses to [states](#) and [tribes](#) as well as accompanying technical support documents.

<https://www.epa.gov/ozone-designations/epa-responds-state-and-tribal-recommendations-2015-ozone-standards>

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