



SMG Reg Watch

February 2018/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

Bulletin - There is a new sheriff and deputies in charge at EPA. Following is a review of some well-needed adjustment to EPA's programs. Many of the changes address antiquated ideas that need to be refreshed. Others appear to have been put in place to help the Administrative Branch extend their reach and impair the private sector for reasons that have always escaped me.

EPA just issued an Interim Office Environmental Compliance Assurance guidance on EPA and state roles on managing enforcement and compliance assistance. This is worth reading. <https://www.epa.gov/sites/production/files/2018-01/documents/guidance-enhancingregionalstatecommunicationoncompliance.pdf>

Following eight years of the Obama Administration's command and control mentality from Washington DC, we are entering an era where states will have a strong voice in enforcement and compliance issues. Imagine, the men and women that are on the front lines of environmental issues and can see firsthand how these issues impact their states will get to direct their programs to accomplish the intent of environmental laws and regulations. EPA will still have an oversight role, but the initial decisions will be driven by the states. More on this below.

EPA recently has been seeking to emphasize cooperative federalism, (see the first footnote of the Guidance of the Policy referenced above), which makes the states the primary enforcer of environmental laws and provides a secondary role for EPA. Be prepared for the whining that will start as this concept becomes more widely disseminated. We will hear that it will create unlevel playing fields between states, that individual companies will be required to do less and there will be a race to the bottom that will place companies focused on compliance at a competitive disadvantage. Really? This is the 21st century. It's time we quit looking at industry through a 1970's lens and look at the improvements that have taken place over the past 50 years. States have competent employees that are well educated and well intentioned. Let's give the state folks an opportunity to address these environmental issues.

A close look at the Administration's Infrastructure Plan suggests potential legislative changes to the National Environmental Policy Act (NEPA). While this law and others that were authored about the same time were important and well-intentioned, many of the hidden land mines and some later court decisions have rendered this and other documents ripe for review. Here are some anticipated modifications:

- Require an Environmental Impact Statement (EIS) to be completed within two years. Currently an EIS takes three to six years and often much longer;
- Require agencies to analyze only those alternatives that are technically and economically feasible, as opposed to the current, broader standard that requires review of even infeasible alternatives or those outside the reviewing agency's authority;
- Increase the use of categorical exclusions under NEPA by allowing an agency to use a categorical exclusion if it has been adopted by any other agency. A federal action may be "categorically excluded" from a detailed environmental analysis if the federal action does not, "individually or cumulatively have a significant effect on the human environment" ([40 CFR 1508.4](#)). The reason for the exclusion is generally described in [NEPA procedures adopted by each federal agency](#).
- Remove the requirement that EPA review every EIS prepared by any agency.

The Administration also proposed to remove two provisions contained in the Clean Water Act.

- EPA's authority to veto any Section 404 wetlands permit issued by the Corps of Engineers;
- EPA's ability to make final jurisdictional determinations as to what constitutes a regulated wetland.

EPA's "lead in water" rule is expected to be released in August 2018. The rule will state what levels of lead in drinking water will be acceptable and what actions will be required to correct exceedances. The Obama Administration was going to require water providers to replace lead containing service lines within their jurisdictions if they couldn't meet the new standards. The EPA estimates it could cost \$2,500 to \$8,000 to replace the entire service line to a typical home, which includes the portion on public land and the part on the customer's property. On a national level, EPA estimated the range at \$16 billion to \$80 billion. This idea is dead on arrival, I hope.

Administrative law generally gives agencies an advantage when their regulations are written and enforced. After all, the regulations are enforced by the agencies themselves and then can be appealed to an Administrative Law Judge, usually within the same agency. In *Chevron, Inc. v. Natural Resources Defense Council*, the Supreme Court directed courts to defer to agency interpretations of the law on subjects within the agency's expertise. Advantage again to the Administrative Branch. Conservative members of the Supreme Court have expressed questions about the *Chevron* decision. Justice Gorsuch called *Chevron* the "elephant in the room" stating that it permits executive bureaucracies to swallow huge amounts of core judicial and legislative power... Congress has tried to address this issue, but efforts have died in the Senate. *Digital Realty Trust, Inc. v. Sommers* is a case headed to the Supreme Court with significant questions regarding the amount of deference due the SEC. The Court's upcoming opinion in this matter may signal their direction on this issue. We'll be watching this case.

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Keep an eye on the concept of indirect discharges. There are a couple of ideas that are coming together on this issue now. First, the Ninth Circuit issued a decision (*Hawaii Wildlife Fund et al. v. County of Maui*, 881 F .3d 754 (9th Cir.2018), that it is a violation of the CWA to discharge pollutants from injection wells that release pollutants indirectly to the ocean via groundwater without an NPDES discharge permit, although most injection wells must have a permit to operate. This decision has the potential to expand the scope of the CWA liability and the NPDES program.

In what appears to be a related move, EPA is seeking comment on “Discharges of Pollutants via a Direct Hydrologic Connection to Surface Water”. EPA published a Request for Comment in the Federal Register seeking ideas regarding whether the Clean Water Act NPDES should be used to regulate discharge of pollutants to groundwater which have a direct hydrologic connection to surface water. This idea can have some unfortunate outcomes if left to the courts and regulators to interpret. I strongly recommend that you review and comment on EPA’s Request.

It appears that the Trump Administration is taking a page out of Kentucky’s play book when it comes to regulating and enforcement using Agency Guidance. On January 25, 2018 the Department of Justice (DOJ) issued a new policy, “Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases” <https://www.justice.gov/file/1028756/download>. This document prohibits the department from using its civil enforcement authority to compel compliance with agency guidance documents. This document goes beyond an earlier policy that prohibited DOJ from relying on its own guidance in enforcing the law <https://www.justice.gov/opa/press-release/file/1012271/download>. The new DOJ policy states that “guidance documents cannot create binding requirements that do not already exist by statute or regulation”. While this new policy has major implications for civil environmental enforcement actions under new source review issues and Clean Water Act matters, it is less clear how the new policy will apply to CERCLA settlements and other CERCLA issues. Keep an eye on this, especially as it pertains to enforcement actions under the Clean Air Act. EPA relies heavily on guidance to establish requirements.

EPA’s idea that once a facility’s hazardous air pollutant (HAPs) emissions exceeded a certain threshold, the facility was always, as in permanently, a major source of HAPs and was required to comply with Maximum Achievable Control Technology standards. This concept has been referred to as “once in always in”. What I’ve never understood is that the Clean Air Act defines emission levels that constitute major source status. The Act doesn’t point to a requirement that once a facility’s status is determined that it is locked in forever. On January 25, EPA announced that it is withdrawing this requirement.

In other federal actions that are linked below, EPA established an applicability date to the 2015 Clean Water Rule regarding Waters of the US. Northern Kentucky’s long-awaited approval for the removal of reliance on reformulated gasoline was public noticed on February 14 as a proposed rule awaiting comments. EPA announced its decision to not issue final regulations on its proposed regulations for financial responsibility requirements for hard rock mining facilities. EPA also noticed their information collection request regarding their revisions to the RCRA definition of solid waste.

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The Kentucky Division of Water reports that work on the Triennial Review is underway. Public comments and public meetings will be scheduled from April 15-May 30. The target date for filing of regulations will be July 15. The construction Stormwater Permit KYR10 expires in 2019. The Division will start its redraft late 2018. The MS4 General Stormwater Permit (Cities other than Lexington & Louisville) will be issued soon.

Water Issues

ENVIRONMENTAL PROTECTION AGENCY 40 CFR Parts 110, 112, 116, 117, 122, 230, 232, 300, 302, and 401

Definition of “Waters of the United States”— Addition of an Applicability Date to 2015 Clean Water Rule

AGENCY: Department of the Army, U.S. Army Corps of Engineers, Department of Defense; and Environmental Protection Agency (“EPA”). **ACTION:** Final rule. **SUMMARY:** The Environmental Protection Agency and the Department of the Army (“the agencies”) are publishing a final rule adding an applicability date to the “Clean Water Rule: Definition of ‘Waters of the United States’ ” published June 29, 2015 (the “2015 Rule”) of February 6, 2020. On August 27, 2015, the U.S. District Court for the District of North Dakota enjoined the applicability of the 2015 Rule in the 13 States challenging the 2015 Rule in that court. On October 9, 2015, the U.S. Court of Appeals for the Sixth Circuit stayed the 2015 Rule nationwide pending further action of the court. On January 22, 2018, the Supreme Court held that the courts of appeals do not have original jurisdiction to review challenges to the 2015 Rule. With this final rule, the agencies intend to maintain the status quo by adding an applicability date to the 2015 Rule and thus providing continuity and regulatory certainty for regulated entities, the States and Tribes, and the public while the agencies continue to consider possible revisions to the 2015 Rule. **DATES:** This rule is effective on February 6, 2018.

<https://www.gpo.gov/fdsys/pkg/FR-2018-02-06/pdf/2018-02429.pdf>

ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 122

Clean Water Act Coverage of “Discharges of Pollutants” via a Direct Hydrologic Connection to Surface Water

AGENCY: Environmental Protection Agency (EPA).

ACTION: Request for comment.

SUMMARY: The Environmental Protection Agency (EPA) is requesting comment on the Agency’s previous statements regarding the Clean Water Act (CWA) and whether pollutant discharges from point sources that reach jurisdictional surface waters via groundwater or other subsurface flow that has a direct hydrologic connection to the jurisdictional surface water may be subject to CWA regulation. EPA is requesting comment on whether the Agency should consider clarification or revision of those statements and if so, comment on how clarification or revision should be provided.

DATES: Comments must be received on or before May 21, 2018.

<https://www.gpo.gov/fdsys/pkg/FR-2018-02-20/pdf/2018-03407.pdf>

Air issue

ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 52

Air Plan Approval; KY: Removal of Reliance on Reformulated Gasoline in the Kentucky Portion of the Cincinnati Hamilton Area

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State

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Implementation Plan (SIP) revision submitted on September 13, 2017, by the Commonwealth of Kentucky, through the Kentucky Division for Air Quality (KDAQ) in support of the Commonwealth's separate petition requesting that EPA remove the federal reformulated gasoline (RFG) requirements for Boone, Campbell, and Kenton counties in the Kentucky portion of the Cincinnati Hamilton, Ohio-Kentucky-Indiana 2008 8-hr ozone maintenance area (hereinafter referred to as the "Northern Kentucky Area" or "Area"). The SIP revision revises the Commonwealth's maintenance plan emissions inventory and associated motor vehicle emissions budgets (MVEBs) to remove reliance on emissions reductions from the federal RFG program requirements; a program that the Commonwealth voluntarily opted into in 1995. The SIP revision also includes a non-interference demonstration evaluating whether removing reliance on the RFG requirements in the Northern Kentucky Area would interfere with the requirements of the Clean Air Act (CAA or Act). EPA is proposing to approve this SIP revision and the corresponding non-interference demonstration because EPA has preliminarily determined that the revision is consistent with the applicable provisions of the CAA.

DATES: Comments must be received on or before March 7, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2018-02-14/pdf/2018-03078.pdf>

Waste Issue

ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 770

Voluntary Consensus Standards Update; Formaldehyde Emission Standards for Composite Wood Products AGENCY: Environmental Protection Agency (EPA). ACTION: Final rule.

SUMMARY: EPA is publishing this final rule to revise the formaldehyde standards for composite wood products regulations. The revision updates the incorporation by reference of multiple voluntary consensus standards that have been updated, superseded, or withdrawn, and provides a technical

correction to allow panel producers to correlate their approved quality control test method to the ASTM E1333-14 test chamber, or, upon showing equivalence, the ASTM D6007-14 test chamber.

DATES: This final rule is effective on February 7, 2018. The incorporation by reference of certain publications listed in the rule is approved by the Director of the Federal Register as of February 7, 2018.

<https://www.gpo.gov/fdsys/pkg/FR-2018-02-07/pdf/2018-02144.pdf>

CERCLA Issue

ENVIRONMENTAL PROTECTION AGENCY 40 CFR Part 320

Financial Responsibility Requirements Under CERCLA Section 108(b) for Classes of Facilities in the Hardrock Mining Industry

AGENCY: Environmental Protection Agency (EPA). ACTION: Final action.

SUMMARY: The Environmental Protection Agency (EPA or Agency) is announcing its decision to not issue final regulations on its proposed regulations for financial responsibility requirements applicable to hard rock mining facilities that were published on January 11, 2017. This decision is based on the record for this rulemaking. This final rulemaking is the Agency's final action on the proposed rule.

DATES: This final action is effective on March 23, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2018-02-21/pdf/2017-26514.pdf>

RCRA Issue

ENVIRONMENTAL PROTECTION AGENCY

Agency Information Collection Activities; Proposed Collection; Comment Request; Revisions to the RCRA Definition of Solid Waste

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The Environmental Protection Agency (EPA) is planning to submit the information collection request (ICR), Revisions to the RCRA Definition of Solid Waste (EPA ICR No. 2310.04, OMB

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Control No. 2050-0202) to the Office of Management and Budget (OMB) for review and approval in accordance with the Paperwork Reduction Act (PRA). Before doing so, the EPA is soliciting public comments on specific aspects of the proposed information collection as described below. This is a proposed extension of the ICR, which is currently approved through April 30, 2018. 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 27, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2018-02-26/pdf/2018-03845.pdf>

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