



## SMG Reg Watch

March 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](mailto:scottr.smith@smithmanage.com).

### *Scott's Thoughts*

March was an interesting month to watch the Administration and the courts reduce the impact of actions of the past administration. It appears that EPA is using a very sharp knife to reduce many regulatory impacts. The current approach is definitely a contrast to their initial efforts to try the wholesale elimination entire laws. EPA, under the guidance of Administrator Scott Pruitt, has been especially effective at reducing illegal and unnecessary regulations. For this reason, the "iron triangle", which consists of the press, leaky members of the administrative state and environmental groups, have been trying to find ways to get rid of him.

During March alone, many regulatory and legal changes have been made. I've provided a summary below and links to the regulations in the body of this report. For example, EPA found a common-sense approach for the disposal of aerosol cans. See the details below. Changes to the tax code have resulted in tax deductions related to remediation work and agreements with EPA. EPA's approach to air quality issues related to certain aspects of air emissions from the oil and gas sector is finally getting straightened out. The Brownfield program received a breath of fresh air through the enactment of the BUILD Act of 2018. There is still more work to be done but with the changes we have seen in March it is evident that the butcher knife is out, and things are moving in the right direction.

On March 27, EPA announced a settlement concerning the Black Leaf Chemical Superfund Site in Louisville, Kentucky. The Agency will consider public comments on the settlement until April 26, 2018. Copies of the settlement can be obtained [here](#).

On March 16, EPA published a proposed rule that will add hazardous waste aerosol cans to the universal waste program under the federal RCRA regulations. The proposed change will benefit retail stores and others that discard what has previously been deemed to be hazardous waste aerosol cans. This action will promote the collection and recycling of these cans and encourage the development of municipal and commercial programs to reduce the quantity of these wastes going to municipal solid waste landfills or combustors.

It is estimated that 3.82 billion aerosol cans were filled in the US in 2015 for use by commercial and industrial facilities as well as by households. Many, but not all, generators of aerosol cans identified or listed as a

hazardous waste are subject to the full RCRA subtitle C hazardous waste requirements. This proposed rule will help to clarify and eliminate needless red tape and potential liability for the affected regulated community.

Recent changes to the federal tax code could positively impact accounting for remediation projects. Attorneys and accountants need to look at Section 13306 of P.L. 115-97, which amended 26 U.S.C. Sec.162(f) to provide two exceptions to the former tax code, “for amounts constituting restitution or paid to come into compliance with law.” “Restitution” includes remediation of property for damage or harm that was or may be caused by the violation of any law or the potential violation of any law.” Amounts “paid to come into compliance” include costs “otherwise involved in the investigation or inquiry” as well but do not include “any amount paid or incurred as reimbursement to the government or entity for the costs of any investigation or litigation.” It appears under the new Act, that settlements with the government, expenses associated with defendant-initiated remediation of hazardous substances under CERCLA or RCRA appear to be eligible for deductions as expenses associated with “restitution.” Expenses associated with injunctive relief, which are some of the costliest parts of settlements, generally appear to qualify as deductible expenses incurred “to come into compliance” with the law. Your legal and accounting team should look at these changes and see how they might apply to your situation.

P.L. 115-97 also added new Section 6050X to the tax code, which obligates the governmental entity involved in the enforcement proceeding to file an information return for all cases more than \$600 specifying the amounts that fall into the two exceptions as specifically described in the settlement agreement or order.

The Consolidated Appropriations Act of 2018 included the Brownfields Utilization, Investment and Local Development ([BUILD Act of 2018](#)). While you need to read the Act to make sure you get the details, here are some key provisions. Section 5 extended the definition of a bona fide prospective purchaser and clarifies that states and local governments that acquire properties through seizure or other law enforcement activities are also excluded from CERCLA’s definition of owner and operator. Section 6 of the Act expands the types of entities that are potential recipients of brownfield revitalization funding. Section 9 establishes grants of up to \$1M for an entity to inventory, characterize, assess, plan or remediate one or more brownfield sites. Section 11 adds some new criteria to be considered in evaluating grant applications.

EPA is continuing to address inappropriate provisions that the previous Administration placed on the oil and gas industry. On March 12, the Agency finalized amendments of two provisions of the requirements for the collection of fugitive emission components at well sites and compressor stations. This action addresses requirements for the completion of delayed repairs during unscheduled or emergency vent blowdowns. Owners and operators will still be required to complete repairs during the next compressor station shutdown, well shutdown, well shut-in after a planned vent blowdown or within 2 years, whichever is earlier.

On March 9, EPA addressed another issue related to the oil and gas industry. This is a request for comment on a Notice of proposed withdrawal of Control Techniques Guidelines. These Guidelines provided recommendations for reducing volatile organic compound emissions from existing oil and natural gas industry emission sources in ozone nonattainment areas. Because EPA is reconsidering the 2016 New Source Performance Standard (NSPS) for the Oil and Natural Gas Sector and because the recommendations made in the Control Techniques Guideline

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(CTG) are fundamentally linked to the conclusions in the 2016 NSPS, the EPA believes it is prudent to withdraw the CTG in its entirety.

EPA has recently updated their Formaldehyde Emission Standards for Composite Wood Products. On March 13, 2018, the U.S. District Court for the Northern District of California issued an order addressing the litigation over the [December 12, 2018 compliance date](#) for the formaldehyde standards for composite wood products. Following that court order and joint stipulation document, the relevant compliance date is now June 1, 2018 by which time regulated composite wood panels and finished products containing such composite wood panels that are manufactured (in the United States) or imported (into the United States) must be certified as compliant with either the TSCA Title VI or the California Air Resources Board (CARB) Airborne Toxic Control Measures (ATCM) Phase II emission standards, which are set at identical levels, [by a third-party certifier \(TPC\) approved by CARB and recognized by EPA](#). Previously, these products were required to be TSCA Title VI compliant by December 12, 2018.

EPA Administrator Scott Pruitt's directive to end "sue and settle practices" could be tested on a Kentucky issue. On February 22, the Center for Biological Diversity (CBD) sent EPA a notice of intent to sue letter for failure to approve Kentucky's air quality plan for limiting fine particulate PM2.5 emissions in the Louisville, KY area. Kentucky met their filing deadlines, but EPA had until December 21, 2017 to act on the Kentucky submittal and has not done so. EPA has 60 days (until April 22) to come into compliance by either approving or disapproving Kentucky SIP. If EPA fails to act, CBD could ask the court to grant it relief and force EPA to act on the submittal. I expect EPA to act within the timeframe. I'm surprised they haven't acted already. I recently met with Mr. Pruitt and we discussed "sue and settle". He's adamant about not using that process. It will be interesting to see when he uses it, but I don't think it will be on this issue.

EPA is publishing editorial and technical revisions to EPA's Method 301 "Field Validation of Pollutant Measurement Methods from Various Waste Media" to correct and update the method. This method, as specified in the applicable subpart, is to be used whenever a source owner or operator, sometimes referred to as an "analyst", proposes a test method to meet an EPA requirement in the absence of a validated method. This revision includes procedures for determining and documenting the quality, i.e., systematic error (bias) and random error (precision), of the measured concentrations from an effected source. This method is applicable to various waste media (i.e., exhaust gas, wastewater, sludge, etc.). In addition, EPA is clarifying the regulatory applicability of Method 301 as well as its suitability for use with other regulations. Comments must be submitted on or before May 21, 2018.

In the old EPA, subordinate officers issued substantive legal directives. On March 13, Administrator Pruitt issued the Guidance himself regarding New Source Review reform. New guidance entitled [Project Emissions Accounting Under the New Source Review Preconstruction Permitting Program](#) alters EPA's policy on when preconstruction permits are required under the New Source Review (NSR) program for modifications and construction. Prior to this guidance, facility owners had to estimate emission increases for the proposed project. If the increases met a certain threshold, then the owners would need to undertake an evaluation of whether the project would yield a significant net emissions increase. Under this new guidance a facility can consider contemporaneous emission

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decreases in the initial planning. EPA calls this “project emissions accounting”. The decreases do not need to be enforceable or creditable for consideration in the new analysis.

On March 6, the D.C. Circuit Court of Appeals modified its 2017 ruling in *American Petroleum Institute v. EPA*, No. 09-1038 concerning EPA’s Definition of Solid Waste (DSW) Rule under RCRA. This clarification expands the scope of the DSW Rule exclusions under the Federal hazardous waste program. Authorized states like Kentucky will need to adopt the DSW Rule exemptions into the state program before hazardous secondary material recyclers can take full advantage of the changes.

The Kentucky Division of Water reports that work on the Triennial Review is underway. Public comments and public meetings have been scheduled from April 15-May 30. Listening session dates, times, and locations are: Tuesday, May 15, 2018, Laurel County Public Library, 6:00 p.m. Eastern Time, Community Room, 120 College Park Drive, London, KY 40741; Thursday, May 17, 2018, Energy & Environment Cabinet, 6:00 p.m. Eastern Time, 300 Sower Blvd., Training Room B, Frankfort, KY 40601; Thursday, May 24, 2018, Warren County Public Library, 6:00 p.m. Central Time, Bob Kirby Branch, 175 Iron Skillet Court Bowling Green, KY 42104.

The target date for filing of Triennial Review regulations will be July 15.

The construction Stormwater Permit KYR10 expires in 2019. The Division will start it’s redraft late 2018. The MS4 General Stormwater Permit (cities other than Lexington & Louisville) was signed April 10. Comments will be included in our April document. Also, the Division of Water will begin to reexamine 401 KAR 5:090, Control of Water Pollution from Oil and Gas Facilities sometime in 2018 or early 2019.

#### Dates To Remember

- Aerosol can comments due by May 15, 2018;
- Oil & Gas Withdrawal of Control Techniques Guidelines comments due April 23;
- Comments on Black Leaf settlement April 26;
- Effective date Analytical, Validation of Pollutant Measurements..., Method 301 March 20, 2018
- Leather Finishing NESHAP comments due April 13
- KY Triennial Review listening sessions. Tuesday May 15, 6:00 PM, Laurel Co. Public Library; Thursday May 17, 6:00 PM, Training Room B Energy Environment Cabinet, Frankfort, KY and Thursday May 24, 6:00 Warren County Public Library.

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## Universal Waste Regulations-Aerosol Cans

### Increasing Recycling: Adding Aerosol Cans to the Universal Waste Regulations

**AGENCY:** Environmental Protection Agency (EPA). **ACTION:** Proposed rule.

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**SUMMARY:** The Environmental Protection Agency (EPA or the Agency) is proposing to add hazardous waste aerosol cans to the universal waste program under the federal Resource Conservation and Recovery Act (RCRA) regulations. This proposed change, once finalized, would benefit the wide variety of establishments generating and managing hazardous waste aerosol cans, including the retail sector, by providing a clear, protective system for managing discarded aerosol cans. The streamlined universal waste regulations are expected to ease regulatory burdens on retail stores and others that discard hazardous waste aerosol cans; promote the collection and recycling of these cans; and encourage the development of municipal and commercial programs to reduce the quantity of these wastes going to municipal solid waste landfills or combustors.

**DATES:** Comments must be received on or before May 15, 2018. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before April 16, 2018. <https://www.gpo.gov/fdsys/pkg/FR-2018-03-16/pdf/2018-05282.pdf>

## Oil & Gas Industry

### Notice of Proposed Withdrawal of the Control Techniques Guidelines for the Oil and Natural Gas Industry

**AGENCY:** Environmental Protection Agency (EPA). **ACTION:** Notice of proposed withdrawal; request for comment.

**SUMMARY:** The Environmental Protection Agency (EPA) is requesting public comment on a potential withdrawal of the Control Techniques Guidelines (CTG) for the Oil and Natural Gas Industry. The final CTG provided recommendations for reducing volatile organic compound (VOC) emissions from existing oil and natural gas industry emission sources in ozone nonattainment (NA) areas classified as Moderate or higher and states in the Ozone Transport Region (OTR). The CTG relied upon underlying data and conclusions made in the final rule titled "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources," published in the Federal Register on June 3, 2016 (2016 New Source Performance Standards (NSPS)). On June 5, 2017, the EPA granted reconsideration in regard to additional provisions of the 2016 NSPS. Pursuant to those actions, the EPA is currently looking broadly at the 2016 NSPS. In light of the fact that the EPA is reconsidering the 2016 NSPS and because the recommendations made in the CTG are fundamentally linked to the conclusions in the 2016 NSPS, the EPA believes it is prudent to withdraw the CTG in its entirety. The EPA also believes that the withdrawal will be more efficient for states in revising their state implementation plans (SIPs). The EPA is seeking comment on a potential withdrawal of the CTG.

**DATES:** Comments must be received on or before April 23, 2018.

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<https://www.gpo.gov/fdsys/pkg/FR-2018-03-12/pdf/2018-04431.pdf>

**Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources; Amendments**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** This action finalizes amendments of certain requirements that are contained within the final rule titled “Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources,” published in the Federal Register on June 3, 2016 (2016 Rule). The Environmental Protection Agency (EPA) is finalizing amendments of two narrow provisions of the requirements for the collection of fugitive emission components at well sites and compressor stations: Removes the requirement for completion of delayed repair during unscheduled or emergency vent blowdowns, and provides separate monitoring requirements for well sites located on the Alaskan North Slope.

**DATES:** This final rule is effective on March 12, 2018.

<https://www.gpo.gov/fdsys/pkg/FR-2018-03-12/pdf/2018-04431.pdf>

**Region 4 CERCLA**

**Black Leaf Chemical Superfund Site; Louisville, Jefferson County, Kentucky; Notice of Settlement**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Notice of settlement.

**SUMMARY:** Under 122(h) of the Comprehensive Environmental Response,

Compensation and Liability Act (CERCLA), the United States Environmental Protection Agency has entered into a settlement with ExxonMobil Corporation, Grief, Inc., and Occidental Chemical Corporation concerning the Black Leaf Chemical Superfund Site located in Louisville, Jefferson County, Kentucky. The settlement addresses recovery of CERCLA costs for sampling, removal actions on 10 residential properties and investigation activities performed by the EPA at the Site.

**DATES:** The Agency will consider public comments on the settlement until April 26, 2018. The Agency will consider all comments received and may modify or withdraw its consent to the proposed settlement if comments received disclose facts or considerations which indicate that the proposed settlement is inappropriate, improper, or inadequate.

<https://www.gpo.gov/fdsys/pkg/FR-2018-03-27/pdf/2018-06118.pdf>

**Revisions To Analytical Method**

**Revisions to Method 301: Field Validation of Pollutant Measurement Methods From Various Waste Media**

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Final rule.

**SUMMARY:** The Environmental Protection Agency (EPA) is publishing editorial and technical revisions to the EPA’s Method 301 “Field Validation of Pollutant Measurement Methods from Various Waste Media” to correct and update the method. In addition, the EPA is clarifying the regulatory applicability of Method 301 as well as its suitability for use with other regulations. The revisions include ruggedness testing for validation of test methods intended

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for application at multiple sources, determination of the limit of detection for all method validations, incorporating procedures for determining the limit of detection, revising the sampling requirements for the method comparison procedure, adding storage and sampling procedures for sorbent sampling systems, and clarifying acceptable statistical results for candidate test methods. We are also clarifying the applicability of Method 301 to our regulations and adding equations to clarify calculation of the correction factor, standard deviation, estimated variance of a validated test method, standard deviation of differences, and t-statistic for all validation approaches. We have also made minor changes in response to public comments. Changes made to the Method 301 field validation protocol under this action apply only to methods submitted to the EPA for approval after the effective date of this final rule.

**DATES:** The final rule is effective on March 20, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2018-03-20/pdf/2018-05400.pdf>

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