



SMG Reg Watch

August 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

The Affordable Clean Energy proposal should be published in the Federal Register soon. It replaces the Obama Administration's Clean Power Plan that was so legally flawed that the US Supreme Court intervened and set aside the rule. This was the first time in the history of the Supreme Court that they intervened in an environmental matter. The Clean Power Plan never took effect. The Affordable Clean Energy (ACE) rule would establish emission guidelines for states to develop plans to address greenhouse gas (GHG) emissions from existing coal fired power plants. The proposed rule has several components:

- Defines the "best system of emission reduction" for GHG emissions from existing power plants as on-site, heat-rate efficiency improvements;
- Provides states with a list of "candidate technologies" that can be used to establish standards of performance and be incorporated into their state plans;
- Updates EPA's New Source Review Permitting program to incentivize efficiency improvements at existing power plants; and
- Aligns Clean Air Action Section 111(d) general implementing regulations to give states adequate time and flexibility to develop their state plans.

EPA will take comments on the proposal for 60 days after publication in the Federal Register and will hold a public hearing. More information including a pre-publication version of the Federal Register notice and a fact sheet are available at <https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-energy-ace-rule>.

Timing of the plan is interesting especially considering elections to be held in Kentucky and nationally. You could have a different administration finalizing Kentucky's state plan. The criteria used to judge state plans could be different if there is a change of administration in Washington. Here are the deadlines that should be in the proposed regulations.

- State submissions: EPA is proposing to provide states three years to develop state plans. The existing implementing regulations provided nine months.
- EPA action: Under the proposal, EPA would have 12 months to act on a complete state plan submittal. The existing implementing regulations provided four months.

- Federal plan: Under the proposal, EPA would have two years after a finding of failure to submit a complete plan, or disapproval of state plan, to issue a federal plan. The existing implementing regulations provided six months.

While in a recent discussion with me, the EPA Administrator indicated a new Waters of the US rule would be forthcoming in the October/November time frame. I'm betting after the November elections, possibly in December. The Waters of the US Rule however recently had a hiccup. The US District Court for the District of South Carolina rendered a decision to vacate and nationally enjoin EPA's final rule that added an applicability date to the 2015 Clean Water Rule. Because of the Order, the 2015 Clean Water Rule is now in effect in 26 states, the District of Columbia and the US territories. Kentucky is not impacted by the decision, but Ohio, Virginia, Tennessee and Illinois are. In an odd twist, even though the District of South Carolina court rendered the decision, South Carolina is not impacted by the ruling. See a map of specific states impacted using the link below. <https://www.epa.gov/wotus-rule/definition-waters-united-states-rule-status-and-litigation-update>

Jon Maybriar, Director, Ky. Division of Waste Management recently submitted a report on the revenues and expenditures of the hazardous waste management fund. The report states that the Hazardous Waste Management Fund has experienced challenges since 2008 resulting from decreases from exemptions and reductions of general and federal funds available to the cabinet. The Fund's sources of revenue include the hazardous waste generator assessment fees, transfers from the Petroleum Storage Tank Environmental Assistance Fund, Brownfield Redevelopment Program application fees and interest earned on the Fund's account, cost recoveries and returns from investment and capital closeout accounts. The Report states that the Fund is no longer able to sustain and manage all existing and projected superfund backlogs. See the entire report from the following link.

<http://www.lrc.ky.gov/CommitteeMeetingDocuments/262/11434/Aug%206%202018%20Hazardous%20Waste%20Management%20Fund%202018.pdf>

At the August meeting of the Interim Joint Committee on Natural Resources and Energy, the water needs of the Commonwealth were discussed. Deputy Cabinet Secretary Bruce Scott and Division of Water Director Peter Goodmann represented the Cabinet. Mr. Goodman estimated the cost of needed statewide investment for drinking water infrastructure would be \$8.2 billion over the next 20 years. Wastewater infrastructure would be \$6.2 billion over the same period. There is also \$100 million needed for work on the state's dams. Possible funding for these issues includes federal sources like Kentucky Infrastructure Authority loans, Community Development Block Grant funds, Appalachian Regional Commission grants and Abandoned Mine Land grants. State sources may include state general funds, tobacco settlement funds or coal severance funds. Local funding and private funding through a P3 partnership are possibilities. One example of a local problem raised by Bruce Scott is two unforeseen sewer collapses in Louisville that have raised the question of whether the collapses "negatively impact Jefferson County's ability to manage its sewage, stormwater or not".

Publications like Rolling Stone, Newsweek and The Daily Beast should focus their attention on issues they know something about and not the environment. They recently had a lot to say about EPA's "significant new use" rule or SNUR that addresses the commercial uses of asbestos. There was one problem with their reporting, the EPA

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proposed action does the opposite of what they reported. The SNUR would impose substantial new prohibitions on the listed uses of asbestos while giving EPA the ability to restrict or even ban these uses outright.

Dates To Remember

- September 24, 2018 comments due for proposed amendments to portions of regulations that implement section 7 of the Endangered Species Act of 1973, as amended.
- September 24, 2018 comments due for portions of regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act).
- September 24, 2018 comments due for revisions to regulations extending most of the prohibitions for activities involving endangered species to threatened species. Also, under section 4(d) of the Endangered Species Act, to determine what, if any, protective regulations are appropriate for species that the Service in the future determines to be threatened.
- September 27, 2018, Public Hearing for DAQ form and application proposed regulations. Hearing will be held at 10:00, Conference Room 111 at 300 Sower Blvd, Frankfort.
- October 30 deadline for owners and operators to file a Notice of Intent to be covered under Kentucky's New Industrial Stormwater Permit.

Endangered and Threatened Wildlife and Plants -3 Proposed Rules

AGENCY: U.S. Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Proposed rule.

SUMMARY: FWS and NMFS (collectively referred to as the "Services" or "we"), propose to amend portions of our regulations that implement section 7 of the Endangered Species Act of 1973, as amended. The Services are proposing these changes to improve and clarify the interagency consultation processes and make them more efficient and consistent.

DATES: We will accept comments from all interested parties until September 24, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15812.pdf>

AGENCIES: U.S. Fish and Wildlife Service, Interior; National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS) (collectively referred to as the "Services" or "we"), propose to revise portions of our regulations that implement section 4 of the Endangered Species Act of 1973, as amended (Act). The proposed revisions to

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the regulations clarify, interpret, and implement portions of the Act concerning the procedures and criteria used for listing or removing species from the Lists of Endangered and Threatened Wildlife and Plants and designating critical habitat. We also propose to make multiple technical revisions to update existing sections or to refer appropriately to other sections.

DATES: We will accept comments from all interested parties until September 24, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15810.pdf>

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Proposed rule.

SUMMARY: We, the U.S. Fish and Wildlife Service, propose to revise our regulations extending most of the prohibitions for activities involving endangered species to threatened species. For species already listed as a threatened species, the proposed regulations would not alter the applicable prohibitions. The proposed regulations would require the Service, pursuant to section 4(d) of the Endangered Species Act, to determine what, if any, protective regulations are appropriate for species that the Service in the future determines to be threatened.

DATES: We will accept comments received or postmarked on or before September 24, 2018

<https://www.gpo.gov/fdsys/pkg/FR-2018-07-25/pdf/2018-15811.pdf>

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