



SMG Reg Watch

September 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

As I noted in last month's RegWatch, the Affordable Clean Energy (ACE) proposal was scheduled to come out quickly. The proposed regulation made its appearance in the [Federal Register](#) on August 31. There is a 60-day comment period that will close on October 30th. Quite a few issues are ripe for comment. EPA itself identified 75 issues for comment. There are additional potential sub-issues and other issues not identified by EPA.

While many think this rule applies only to coal-fired or gas-fired units, EPA's regulatory approach may be seen in other air programs in the coming years. For example, Section 111(d) of the Clean Air Act applies to all emission units, not just utilities. The section says, "... each state shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant for which air quality criteria have not been issued or which is not included on a list published under section 7412 of this title....." EPA currently believes that this requirement only authorizes EPA to establish the best system of emission reduction based on measures that can be employed within the fence line of a source subject to the rule. EPA's current interpretation of the rule also precludes the use of, "generation shifting", "reduced utilization" or "redefining the source" as part of a Section 111(d) emission guideline. Another important distinction is that the statute points out that states will develop the plans.

Other areas you might want to look at in this proposed rule include:

- The Best System of Emission Reduction (BSER);
- New Source Review (NSR) Reform;
- Rule Benefits and Costs and EPA's delegation to the states for important issues like development of performance standards on unit by unit or source category basis.

Also, states will determine the compliance deadlines associated with the performance standards.

EPA is trying to clarify what should be a simple issue but one that has historically been confusing. They recently announced in a [Memorandum](#) dated September 4, their new interpretation of the term "adjacent" for purposes of permitting sources under the Clean Air Act. EPA is currently saying, "For industries other than oil and gas, EPA interprets the term "adjacent" to mean physical proximity and that the perceived "functional interrelatedness" of

operations is not a relevant consideration". EPA indicates that the terms "adjacent" and "contiguous" are different. EPA states that "Operations that do not share a common boundary or border, or are not otherwise physically touching each other, will be deemed "adjacent" if the operations are nevertheless nearby." EPA goes on to state that operations are "adjacent" only where it is reasonable to conclude that the operations in question are truly in physical proximity to each other. EPA clearly states that this interpretation of "adjacent" is to be applied "from this point forward."

We all need a WOTUS update from time to time. Here's mine for September. On August 16, 2018, the U.S. District Court for the District of South Carolina enjoined the Administration's WOTUS Suspension Rule. Although the South Carolina court issued a nationwide injunction against the Suspension Rule, it only covers a checkerboard of states in just over half of the US. Kentucky is not covered by the decision, but Tennessee and Ohio are. Industry groups and the Justice Department have both appealed the South Carolina order to the U.S. Court of Appeals for the Fourth Circuit and requested a stay of the injunction of the Suspension Rule pending appeal.

Meanwhile back in DC the Corps and EPA have submitted the Administration's WOTUS plan to the White House Office of Information and Regulatory Affairs (OIRA) for review. This is where ideas go before being published in the Federal Register for comment. It's not clear when OIRA will conclude its review. EPA had previously indicated that its new definition will track the late Justice Scalia's plurality opinion in the 2006 Rapanos case. In Rapanos, four justices provided a plurality opinion authored by Justice Scalia, that rejected the argument that the term "waters of the United States" is limited to only those waters that are navigable in the traditional sense and their abutting wetlands. However, the plurality concluded that the agencies' regulatory authority should extend only to "relatively permanent, standing or continuously flowing bodies of water" connected to traditional navigable waters, and to "wetlands with a continuous surface connection to" such relatively permanent waters. If this becomes the direction of EPA and the Corps' rule, it will greatly reduce the number of waters and wetlands that fall under CWA regulation.

On September 7, a jury in California state court found Plains All American Pipeline guilty on 9 criminal counts stemming from a release of 140,000 gallons of crude oil from a Plains pipeline. While the ultimate court decision is complicated there are some lessons learned for pipeline operators around the country. Systems should be closely monitored through maintenance and integrity management activities that meet or exceed minimum federal standards, and operators need to work to make sure that their release reporting obligations, emergency response and legal contingency plans are well established and understood. It's much more cost effective to be in an anticipatory mode when dealing with these matters than reacting after the fact.

A decision relating to discharges to groundwater has a Kentucky connection. The US Court of Appeals for the Sixth Circuit rejected a Kentucky Waterways theory that groundwater itself is a "point source" capable of discharging to navigable waters. The majority of the court explained that groundwater is too diffuse and difficult to trace with precision to make it a "discernible, defined and discrete conveyance". Therefore, neither groundwater nor the medium through which it flows is a point source subject to the CWA. Other courts have ruled differently, therefore the issue will ultimately end up in the Supreme Court soon.

Lexington

1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville

1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax



If you use refrigerants, EPA's October 1 proposed [ozone depletion revision rule](#) should be of interest to you. The proposed rule rescinds the November 18, 2016 rule that extended leak repair provisions to appliances using substitute refrigerants. The Agency is also seeking comment on rescinding other provisions that were applied to substitute refrigerants.

EPA took an unusual step on September 13 by adding a contaminated site to the [Superfund List](#) based solely on the risk to human health posed by indoor air vapor intrusion at the site. The site is the former Rockwell International Wheel & Trim facility located in Grenada, MS.

EPA filed notice of proposed revisions to the [emission standards for the oil and natural gas sector](#) on September 11, 2018. The proposed revisions address several general areas, including fugitive emission requirements at well sites and compressor stations, pneumatic pump standards and professional engineer certifications. This issue will appear in the Federal Register later.

Kentucky's authorization of their State Hazardous Waste Management Program Revisions was in the September 21, 2018 [Federal Register](#). What is interesting to note is the number of provisions where Kentucky was more stringent (22) and broader in scope (9) than the federal requirements. Kentucky's mining and water programs are required to be no more stringent than their federal counterpart. Why shouldn't the legislature make the same requirement apply to waste and air programs? Interesting idea if you are part of the red tape reduction cadre. Comments are due October 22, 2018.

The Kentucky [Division of Enforcement](#), [Air Quality](#) and [Water](#) recently released their Annual Reports for State Fiscal Year 2018. These are very informative documents that you might want to look at. Your patience is required to allow for the loading of information.

The September 1 and October 1, 2018 [KY Administrative Registered](#) contained the following regulations that were amended after comments (September 1) and Amended (October 1):

Department for Environmental Protection: Water

- 401 KAR 005:002. Definitions for 401 KAR Chapter 5
- 401 KAR 005:005. Permits to construct, modify, or operate a facility
- 401 KAR 005:015. Releases to be reported to the division
- 401 KAR 005:037. Groundwater protection plans
- 401 KAR 005:045. Treatment requirements, compliance, biochemically degradable wastes
- 401 KAR 005:055. Scope of applicability of the KPDES program and pretreatment requirements
- 401 KAR 005:075. Cabinet review procedures for KPDES permits and permit timetables for 401 KAR Chapter 5
- 401 KAR 005:320. Wastewater Laboratory Certification Program

Changes are noted in the electronic version of Title 401 Chapter Water Quality Regulations.

Lexington

1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville

1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax



Dates To Remember

- Ky. Authorization of Hazardous Waste Management Program Revisions comments due October 22.
- Venting or Releasing Ozone Depleting & Substitute Refrigerants comments due November 15.
- Affordable Clean Energy proposed rule comments due October 30.
- October 30 deadline for owners and operators to file a Notice of Intent to be covered under Kentucky's New Industrial Stormwater Permit.

Green House Gas Emissions from Existing Electric Utility Generating Units Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing three distinct actions, including Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units (EGUs). First, EPA is proposing to replace the Clean Power Plan (CPP) with revised emissions guidelines (the Affordable Clean Energy (ACE) rule) that inform the development, submittal, and implementation of state plans to reduce greenhouse gas (GHG) emission from certain EGUs. In the proposed emissions guidelines, consistent with the interpretation described in the proposed repeal of the CPP, the Agency is proposing to determine that heat rate improvement (HRI) measures are the best system of emission reduction (BSER) for existing coal-fired EGUs. Second, EPA is proposing new regulations that provide direction to both EPA and the states on

the implementation of emission guidelines. The new proposed implementing regulations would apply to this action and any future emission guideline issued under section 111(d) of the Clean Air Act (CAA). Third, the Agency is proposing revisions to the New Source Review (NSR) program that will help prevent NSR from being a barrier to the implementation of efficiency projects at EGUs.

Dates: Comments must be received on or before October 30, 2018.

<https://www.gpo.gov/fdsys/pkg/FR-2018-08-31/pdf/2018-18755.pdf>

Refrigerant Management

Protection of Stratospheric Ozone: Revisions to the Refrigerant Management Program's Extension to Substitutes

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Clean Air Act (CAA) prohibits knowingly venting or releasing ozone-depleting and substitute refrigerants in the course of maintaining, servicing, repairing, or disposing of appliances or industrial process refrigeration. On November 18, 2016, EPA finalized a rule that updated the existing refrigerant management

Lexington

1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville

1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax



requirements and extended requirements that previously applied only to refrigerants containing an ozone depleting substance (ODS) to substitute refrigerants such as hydrofluorocarbons that are subject to the venting prohibition (i.e., those that have not been exempted from that prohibition). The Agency is revisiting the aspects of the 2016 Rule that apply to equipment containing such substitute refrigerants. This action proposes changes to the legal interpretation that supported that rule and amendments to the regulations based on the revised interpretation. More specifically, in connection with the proposed changes to the legal interpretation, EPA is proposing to revise the appliance maintenance and leak repair provisions, so they apply only to equipment using refrigerant containing a class I or class II substance. Based on this proposed limitation of the leak repair requirements, this document further proposes to revise the list of practices that must be followed in order for refrigerant releases to be considered de minimis to clarify that the reference to following leak repair practices only applies to equipment that contains ODS refrigerant. EPA is also taking comment on whether, in connection with the proposed changes to the legal interpretation, the 2016 Rule's extension of subpart F refrigerant management requirements to such substitute refrigerants should be rescinded in full. Additionally, EPA is proposing to extend by six to twelve months the January 1, 2019 compliance date for when appliances containing only substitute refrigerants subject to the venting prohibition must comply with the appliance maintenance and leak repair provisions.

DATES: Written comments must be received by November 15, 2018. EPA will hold a public hearing on or before October 16, 2018. The hearing will be held in Washington, DC. More

details concerning the hearing can be found at www.epa.gov/section608.
<https://www.gpo.gov/fdsys/pkg/FR-2018-10-01/pdf/2018-21084.pdf>

National Priorities List-Indoor Air

National Priorities List

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA" or "the Act"), as amended, requires that the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP") include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants or contaminants throughout the United States. The National Priorities List ("NPL") constitutes this list. The NPL is intended primarily to guide the Environmental Protection Agency ("EPA" or "the agency") in determining which sites warrant further investigation. These further investigations will allow the EPA to assess the nature and extent of public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. This rule proposes to add six sites to the General Superfund section of the NPL and proposes to change the name of a site previously added to the NPL. **DATES:** Comments regarding any of these proposed listings must be submitted (postmarked) on or before November 13, 2018. <https://www.gpo.gov/fdsys/pkg/FR-2018-09-13/pdf/2018-19878.pdf>

Lexington

1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville

1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax



Kentucky Waste Regulations

Kentucky: Proposed Authorization of State Hazardous Waste Management Program Revisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: Kentucky has applied to the Environmental Protection Agency (EPA) for final authorization of changes to its hazardous waste program under the Resource Conservation and Recovery Act (RCRA), as amended. EPA has

reviewed Kentucky's application and has determined that these changes satisfy all requirements needed to qualify for final authorization. Therefore, we are proposing to authorize the State's changes. EPA seeks public comment prior to taking final action.

DATES: Comments must be received on or before October 22, 2018.

<https://www.gpo.gov/fdsys/pkg/FR-2018-09-21/pdf/2018-20533.pdf>

Lexington

1405 Mercer Road
Lexington, KY 40511
859-231-8936
859-231-8997 fax

Louisville

1860 B Williamson Court
Louisville, KY 40223
502-587-6482
502-587-6572 fax

