



SMG Reg Watch

November 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

November is always an interesting time for watching the administrative and legislative branches operate. With elections on the table and the Thanksgiving holidays on the calendar things tend to get slow, but you must be watchful. This is the time of year where crafty agency administrators like to drop some of their more controversial rules because lots of people are not paying attention to the Administrative Branch circus.

The Blue Wave that was going to overrun America was kind of like global warming, lots of media hype but nothing special. In Kentucky, there will be some new legislators primarily because of retirements, but the House and Senate remained in the hands of Republican leadership. The questions in Kentucky relate to who will retain their leadership positions in each chamber and who will run against Governor Bevin? Senator Robert Stivers (R-Manchester) will remain as President of the Senate. Senator Brandon Smith (R-Hazard) has been named the new chairman of the Senate Standing Committee on Natural Resources and Energy. Senator-elect Matt Castlen (R-Owensboro) has assumed Senator Smith's previous role as the vice chairman of the Committee. Rep. David Osborne (R-Prospect) will be Speaker of the House of Representative and David Meade (R-Stanford) will be Speaker Pro-Tempore. Both must still be affirmed by the entire House when it convenes in January, but that is a formality since Republicans hold the majority of seats in the chamber. The House Standing Committee on Natural Resources & Energy will be chaired by Rep. Jim Gooch Jr (R-Providence). All of the Committee Chairs have a good understanding of environmental issues facing Kentucky and are very approachable for questions or input on issues before them.

Kentucky's legislative calendar for 2019 Part 1 begins **January 8 and goes until February 4**. Part 2 begins February 5 and Sine Die (end) occurs March 30. All dates assume no emergency closures for weather or other matters. To give you some idea about how fast this session will be moving, the last day for bill requests is February 8; last day for new Senate bills is February 15 and the last day for new House bills is February 19. This translates into having your legislative business vetted and sponsors identified prior to the start of the session and getting bills filed early in the process.

The [Kentucky Chamber](#) has developed a summary of issues they intend to prioritize. There's not much in the legislative rumor mill that relates to the environment. Expect to see some legislation regarding oil and gas permits and how they are transferred and new processes for permitting and penalties. There are some new ideas relating to how the Petroleum Storage Tank Fund can be used. It's hard to tell at this time if those ideas will see the light of day. From my perspective, it would be good to see a "no more stringent than the federal program" requirement for the Division of Waste Management and the Division for Air Quality. Other branches in the Cabinet have it, why not them? It would be helpful if there was a requirement that the process and information that goes into the development of Kentucky's water quality and other enforceable standards are made public. Hiding behind EPA's process shouldn't cut it. Kentucky's automatic listing of streams because of the presence of an endangered species as an Outstanding Resource Water needs to be reviewed and improved upon. Other states do it differently. Alternative approaches and ideas should be assessed to see if we can do a better job with this aspect of our water program.

At the federal legislative level, the House flipped to Democratic control, but what's new. This routinely happens at mid-term elections following a presidential change. The Democrats will be doing a lot of demagoguing but will offer nothing of substance. One of their primary focus areas will be climate change for no other reason than to counter the President's environmental initiatives. The House will probably bring back the Select Committee on Energy Independence and Global Warming that existed from 2007-2011. I can't remember what that Committee accomplished but it will be back and will receive a lot of attention from the media. Here's there [2011 Committee Report](#).

The media will run with accounts like these, but I'd venture to say none of them or their superiors have even had a chemistry class, much less technical training on climate or have any clue about the economic impacts of these ideas. Buckle up it's going to be an interesting time ahead.

The House will be investigating anything and everything. Anticipate that some of us will get an invitation to have discussions with House Committee Members. Their ability to conduct oversight backed by subpoenas is a powerful tool. Expect them to use this tool and there is nothing the Republicans can do about it. Their broad industry inquiries will represent significant corporate risk. Corporate America would be wise to develop internal strategies so that if this materializes, they have internal mechanisms in place to address them. In the middle of all their investigations, one area of nonpartisanship could be infrastructure. Another area might be revisiting the tax issue. Tweaking the Tax Cuts and Jobs Act is a possibility that could garner support from both parties. The grid should get some attention but the focus in the House will be the ability of renewables and clean energy sources to diversify and modernize the grid. The House Energy and Commerce Committee Energy Subcommittee will probably be looking for opportunities for the federal government to advance battery storage and hydrogen fuel cell technologies. The bottom line to all of this will be lots of noise and finger pointing and not much getting done in Washington in the legislative arena. Expect to see most of the activity in the Executive Branch.

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Regulatory activities in the areas such as Waters of the US will occur. See the [Administration's schedule of rules](#). Expect to see the Administration release lots of rabbits for the Democrats to chase.

EPA released its final implementation rule for the 2015 ozone standard on November 8, 2018. New provisions from the 2016 proposal that were retained include a requirement that state agencies consider the impacts of in-state emission sources located outside the nonattainment area and require control measures on those sources if necessary to achieve attainment. This should send a wake-up call to industry that are near nonattainment areas. To date, industry has not paid much attention to nonattainment remedies if they reside outside the nonattainment area.

EPA is developing a [New Owner Clean Air Act Audit Program](#) tailored for the upstream oil and natural gas exploration and production sector.

EPA is currently seeking stakeholder feedback on the Program's Draft Agreement. The incentives are tailored to encourage new owners to self-disclose violations that will, once corrected, yield significant pollutant reductions and public health and environmental protections. EPA has not announced a timeline for finalizing this program.

Part of the President's omnibus spending bill included the Brownfields Utilization, Investment and Local Development Act of 2018 (Build Act). Included in this were some changes to how exceptions to CERCLA liability may be met including clarification on how tenants may establish the Bona Fide Prospective Purchaser (BFPP) liability protection. The BUILD Act provides three paths for a tenant to establish BFPP protections: Rely on the property owner's status as a BFPP; demonstrate that the owner obtained BFPP status by performing all appropriate inquiry (AAI) at the time it acquired the property but then lost it due to failure to comply with subsequent requirements or obtain BFPP status itself by completing the AAI prior to acquiring the leasehold interest and by complying with all additional requirements. The BUILD Act also clarifies that tenancies and leases are considered the type of contractual relationships that are excluded from being considered "affiliated with" a potentially liable party.

Voters recently approved Proposition 12 in California. It pitted members of the Stop the Rotten Egg Initiative (yes this is real) against, of all groups, the Humane Society of the United States. This Proposition establishes new standards for the confinement of certain farm animals. It contains requirements for spacing of egg laying hens and calves raised for veal and for breeding pigs. The standard applies to products produced in California as well as products imported into the state. It is estimated that this Proposition would add between \$.50 to \$1.00 to the price of a carton of eggs.

On November 7 EPA finalized action on its reconsideration of a 2009 action to clarify "[project aggregation](#)" for the major New Source Review (NSR) permitting program. The implementing regulation establishes a two-step process for determining major NSR applicability for projects at stationary sources. To be subject to major NSR permitting requirements the project must result in both a significant emission increase from the project and a

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significant net emission increase at the stationary source considering emissions increases and decreases attributable to other projects undertaken at the stationary source within a specified timeframe. This action also discussed a separate Project Emissions Accounting Memorandum, issued on March 13, 2018 that you might want to become familiar with.

At last, EPA proposes a revision to their Policy on Ambient Air Exclusion!! Persistence pays off! I have raised this issue several times with the administration and EPA Administrators. Finally, EPA has issued a draft guidance document titled [Revised Policy on Exclusions from “Ambient Air”](#) (Draft Guidance).

The Agency revised the 1980 policy on the exclusion of certain areas from the scope of “ambient air” under the Clean Air Act. This could be used to reduce areas that need to be modeled/assessed for air quality compliance. This policy replaces “a fence or other physical barriers” with “measures, which may include physical barriers, that are effective in deterring or precluding access to the land by the general public. The Draft Guidance instructs air agencies to evaluate the effectiveness of a “measure” in precluding public access based on the relevant, specific circumstances and notes that video surveillance, monitoring, clear signage (with or without fencing), routine security patrols, drones, swamps or large tracts of undeveloped land surrounding a facility may adequately preclude public access. EPA will accept public comment on the draft guidance through December 21, 2018.

Kentucky has several regulatory issues on the burner in December. Several initiatives are listed in the Administrative Register of Kentucky for December 2018. One of the most interesting is proposed regulations that describe how the Office of Kentucky Nature Preserves will identify and designate state threatened and endangered plant species. These proposed regulations and the referenced information need a close look. The process for listing or delisting T&E species is very important, not only for plants but also for animal species. There are several statutory references to these proposed regulations that I find very interesting. For example, KRS 146.600 states, “It is the policy of the General Assembly that all plants covered by KRS 145.600 to 146.619 shall not impede the development or use of public or private lands.” KRS 146.615 says, “Lists promulgated under KRS 146.610 shall not serve to impede the development or use of public or private lands, including but not limited to, the normal and accepted operations of agriculture; forestry; mining; development, construction, and maintenance of oil and gas resources and appurtenances; development, construction and maintenance of utility facilities and appurtenances; construction and maintenance of pipeline right-of-way; construction activities; equine activities; transportation or development activities.”

Kentucky Regulations listed in the State Register include:

- Amended regulations found at 401 KAR 005:006 Wastewater planning requirements for regional planning agencies;
- Amended regulations after comments-401 KAR 052:050, Air Quality Permit application forms;
- 401 KAR 052:070 Registration of air contaminant sources;

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- 400 KAR 003:010, Rare Plant Recognition, definitions;
- 400 KAR 003:020, Criteria for identifying and designating endangered or threatened species of plants;
- 400 KAR 003:010; 020;030 & 040, Procedures for inclusion, removal or change of status of plant species on the state endangered or threatened list.

Dates To Remember

- Municipal Solid Waste Landfills. Adopting subpart Ba Requirements in Emission Guidelines. Comments must be received on or before December 14, 2018;
- Oil & Gas Sector: Emission Standards for New, Reconstructed and Modified Sources Reconsideration. Comments must be received on or before December 17, 2018;
- Ambient Air Exclusion comments due December 21, 2018;
- Draft Guidance on Ambient Air Exclusion. Comments due December 21, 2018;
- KY Procedures for inclusion, removal or change of status of plant species on the state endangered or threatened list. Public hearing December 27, 2018, 5:00 PM Training Room C of Energy and Environment Cabinet, 300 Sower Blvd., Frankfort, KY, if Agency is notified of a request. Written comments accepted through December 31, 2018.

Oil & Gas Sector Part 60, subpart 0000a

Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: This action proposes reconsideration amendments to the new source performance standards (NSPS) at 40 Code of Federal Regulations (CFR) part 60, subpart 0000a (2016 NSPS 0000a). The Environmental Protection Agency (EPA) received petitions for reconsideration on the 2016 NSPS 0000a. In 2017, the EPA granted reconsideration on the fugitive emissions requirements, well site pneumatic pump standards, and the requirements for certification of closed vent systems by a professional engineer based on specific

objections to these requirements. This action proposes amendments and clarifications as a result of reconsideration of these issues. The proposed amendments also address other issues raised for reconsideration and make technical corrections and amendments to further clarify the rule.

DATES: Comments. Comments must be received on or before December 17, 2018

Integrated Science Assessment for Particulate Matter

Integrated Science Assessment for Particulate Matter (External Review Draft)

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of public comment period.

SUMMARY: The Environmental Protection Agency (EPA) is announcing a public comment period for the draft document titled,

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“Integrated Science Assessment for Particulate Matter (External Review Draft)” (EPA/600/R-18/179). The draft document was prepared by the National Center for Environmental Assessment (NCEA) within EPA’s Office of Research and Development (ORD) as part of the review of the primary (health-based) and secondary (welfare-based) National Ambient Air Quality Standards (NAAQS) for particulate matter. The welfare-based effects evaluated consist of non-ecological effects, specifically visibility impairment, climate effects, and effects on materials. The Integrated Science Assessment (ISA), in conjunction with additional technical and policy assessments, provides the scientific basis for EPA’s decisions on the adequacy of the current NAAQS and the appropriateness of possible alternative standards. EPA is currently developing a separate ISA to support the secondary NAAQS review for ecological effects for oxides of nitrogen, oxides of sulfur, and particulate matter. EPA is releasing this draft document to seek review by the Clean Air Scientific Advisory Committee (CASAC) and the public. In addition, the date and location of a public meeting for CASAC review of this document will be specified in a separate Federal Register notice. This draft document is not final and it does not represent, and should not be construed to represent, any final Agency policy or views. When revising the document, EPA will consider any public comments submitted during the public comment period specified in this notice.

DATES: The public comment period begins on October 23, 2018 and ends December 11, 2018.

Municipal Solid Waste Landfills-Air Quality

Adopting Subpart Ba Requirements in Emission Guidelines for Municipal Solid Waste Landfills

AGENCY: Environmental Protection Agency

ACTION: Proposed rule.

SUMMARY: In this action, the Environmental Protection Agency (EPA) proposes to amend the 2016 Emission Guidelines and Compliance Times for Municipal Solid Waste Landfills (“MSW Landfills EG”). The requirements for state and federal plans implementing the MSW Landfills EG were adopted from 1975 regulations, referred to herein as the “old implementing regulations,” which are cross-referenced in the MSW Landfill EG. In a separate regulatory proposal published in the Federal Register in August 2018, the EPA proposed changes to modernize the old implementing regulations governing emission guidelines under a new subpart. This action proposes to update the cross-references to the old implementing regulations in the MSW Landfills EG to harmonize with the proposed new timing and completeness requirements for state and federal plans.

DATES: Comments. Comments must be received on or before December 14, 2018.

EPA Ambient Air Aggregation Reconsideration Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NNSR): Aggregation; Reconsideration

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final action; lifting of administrative stay and announcement of effective date.

SUMMARY: In this action, the Environmental Protection Agency (EPA) is concluding the reconsideration of an earlier action that the EPA published on January 15, 2009, titled “Prevention of Significant Deterioration (PSD) and Nonattainment New Source Review (NSR): Aggregation and Project Netting.” The 2009

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action—hereafter referred to as “2009 NSR Aggregation Action”—clarified implementation of the New Source Review (NSR) permitting program under the Clean Air Act (CAA or Act) with respect to treating related physical or operational changes as a single “modification” for the purpose of determining NSR applicability at a stationary source. On April 15, 2010, the EPA proposed to revoke the 2009 NSR Aggregation Action. After a review of the public comments received on that proposal, the EPA has now decided to not revoke the 2009 NSR Aggregation Action. The EPA is, therefore, retaining the interpretation set forth in the 2009 NSR Aggregation Action, while not adopting any changes to the relevant rule text. At the same time, the EPA is using this present action to clarify the implications of the 2009 NSR Aggregation Action for EPA-approved permitting programs. This action also lifts the administrative stay and announces the effective date of the 2009 NSR Aggregation Action.

DATES: This action is effective on November 15, 2018

EPA Policy on Ambient Air Exclusion

Links to policy and method to comment on policy can be found by using the following link.
<https://www.epa.gov/nsr/forms/draft-guidance-revised-policy-exclusions-ambient-air>

Kentucky Proposed Regulation Change Links

401 KAR 005:006. Wastewater planning requirements for regional planning agencies, <http://water.ky.gov/KPDES%20Regulations/5%20006.pdf>;

401 KAR 052:050. Permit application forms, <http://www.lrc.ky.gov/kar/401/052/050reg.pdf>

401 KAR 052:070. Registration of air contaminant sources, <http://www.lrc.ky.gov/kar/401/052/070reg.pdf>

400 KAR 003:010-400 KAR 003:040. Criteria for identifying and designating endangered or threatened species of plants.
<http://www.lrc.ky.gov/kar/400/003/010reg.pdf>
<http://www.lrc.ky.gov/kar/400/003/020reg.pdf>
<http://www.lrc.ky.gov/kar/400/003/030reg.pdf>
<http://www.lrc.ky.gov/kar/400/003/040reg.pdf>

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