



SMG Reg Watch

December 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

Regulators never seem to disappoint. In my November column, I mentioned that Regulatory Agencies promulgate some of their most contentious regulations during holidays, especially Thanksgiving and Christmas. We certainly were not disappointed this December when EPA released three important proposed rules. Those include the Pharmaceutical Hazardous Waste Rule, Waters of the US and revisions to the New Source Performance Standards for greenhouse gas emissions from fossil fuel fire power plants.

Please note that the government shut-down can affect webinar dates and the ability to access electronic information in a timely manner. Be patient, stay in touch with agency web sites for their current status.

The [pharmaceutical rule's pre-publication notice](#) for the Federal Register will create a new Subpart P to 40 CFR part 266, which will be specific to hazardous waste pharmaceuticals. The rule will apply to all "healthcare facilities" (for both humans and animals) such as hospitals and retail pharmacies as well as pharmaceutical reverse distributors. Also included will be psychiatric hospitals, physicians' offices, optical and dental providers and vet clinics just to name a few. All facilities subject to this rule will be prohibited from sewerage their wastes. EPA estimates this will save 1,644-2,300 tons of pharmaceutical waste annually from entering our waterways. In addition, under this proposed rule, the FDA approved, over the counter nicotine replacement therapies will no longer be considered hazardous waste when discarded. This proposal reaffirms that non-prescription pharmaceuticals and other unsold retail items that have a reasonable expectation of being legitimately used/reused or reclaimed are not solid waste. The rule also points out that RCRA applies when healthcare facilities send unused, unsaleable prescription hazardous waste pharmaceuticals to reverse distributors to receive manufacturer credit. The entire regulation package is 491 pages long, most of which is the explanatory preamble.

On December 6th, EPA [proposed to revise the New Source Performance Standards for greenhouse gas emissions](#) from new, modified and reconstructed fossil fuel fired power plants. EPA is proposing under the Clean Air Act section 111(b) to revise its determination of the best system of emission reduction (BSER) for these plants. This determination would replace EPA's 2015 determination that partial carbon capture and storage technology was the BSER for new coal units. EPA is also soliciting comment on the proper interpretation of the regulatory language for the "cause or contribute" determination. If you recall, before EPA can regulate, it must find that emissions from the source category, "cause or contribute significantly to air pollution which may reasonably be anticipated to endanger public health or welfare." EPA is requesting input on the proper interpretation of this phrase.

Finally, after a long wait, EPA and the U.S. Department of the Army signed a proposed rule revising the definition of "waters of the United States" to clarify the scope of waters federally regulated under the Clean Water Act. This is an important designation because the jurisdictional scope of the 1972 Clean Water Act is "navigable waters" defined as the "waters of the United States". Many Clean Water Act Programs such as water quality certification programs, pollutant discharge permits and oil spill prevention and planning programs apply only to "waters of the United States." An informational webcast will be held on January 10, 2019 and a public hearing will be held in Kansas City, Kansas on January 23, 2019. More information is available at www.epa.gov/wotus-rule.

Under the proposed rule, the term "waters of the United States" encompasses traditional navigable waters, including the territorial seas; tributaries that contribute perennial or intermittent flow to such waters; certain ditches; certain lakes and ponds; impoundments of otherwise jurisdictional waters and wetlands adjacent to other jurisdictional waters. Each of these waters is addressed in the proposed regulation, explaining how the scope of jurisdiction will be interpreted for each. The proposed rule also clarifies what is not included as a water of the US. For example, certain features are excluded from the proposed rule. Those features that flow only in response to precipitation; groundwater, including groundwater drained through subsurface drainage system; certain ditches; prior converted cropland; artificially irrigated areas that would revert to upland if artificial irrigation ceases; water filled depressions created in upland incidental to mining or construction activity; stormwater control features excavated or constructed in upland to convey, treat, infiltrate or store stormwater runoff; wastewater recycling structures constructed in upland; and waste treatment systems.

Tributary is defined as rivers and streams that flow to traditional navigable waters. These naturally occurring surface water channels must flow more often than just when it rains. Tributaries as proposed must be perennial or intermittent. Ephemeral features would not be tributaries under the proposal.

The proposed rule also addresses "adjacent" wetlands. In the rule, they are defined as "wetlands that abut or have a direct hydrologic surface connection" to a regulated water "in a typical year."

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The proposed rule more clearly defines and describes critical areas that have been confusing over the past several years. This clarification should reduce the time it takes the agencies to make decisions regarding jurisdiction. Look for the Army Corps and EPA to revert to the pre-2015 regulations which are interpreted by agency guidance on Rapanos.

Before WOTUS or these other rules can become final, they will be subject to a 60-day public comment period. There is also the problem of litigation, which is guaranteed - environmental groups hate these proposals. Unlike earlier EPA proposals, many legal scholars believe that if challenged, WOTUS has a good chance of ultimately being upheld. <https://www.epa.gov/wotus-rule>

Before you get too excited about the proposed WOTUS rule, remember that Kentucky intertwines throughout their regulations the concept of Waters of the Commonwealth. Look for the Division of Water to use this definition to try to soften the impact of EPA's new rule. Waters of the Commonwealth is defined by KRS 224.1-010. The term means and includes any and all rivers, streams, creeks, lakes, ponds, impounding reservoirs, springs, wells, marshes and all other bodies of surface or underground water, natural or artificial, situated wholly or partly within or bordering upon the Commonwealth or with its jurisdiction. Yes, this definition is and will be more stringent than EPA's current and probably future definition of WOTUS. Because it is defined by statute, it will take legislative action to redefine the term.

Common sense appears to be raising its head in some recent endangered species actions. The US Supreme Court recently issued a decision involving the US Fish & Wildlife Service's designation of "critical habitat" for an endangered species known as the "dusky gopher frog". The Court ruled that land cannot be "critical habitat" if it is not habitat to begin with. The Court reasoned that, because "adjectives modify nouns, 'critical habitat' must be a subset of 'habitat' ". The plaintiffs in this case also challenged the USFWS's decision not to exclude their property from critical habitat based on economic considerations. The Court reversed a lower court that held that while the ESA imposes a mandatory and reviewable duty for the USFWS to consider the economic impact of any proposed designation, its ultimate decision whether to exclude an area from critical habitat based on such considerations is committed to agency discretion by law and thus not subject to judicial review. The new Supreme Court decision opens the door to judicial review of decisions not to exclude a particular property from critical habitat on economic grounds.

Heads up, OSHA has released a new national emphasis program on trenching and excavation. In 2017, the regulation governing cave-in protection was cited against more than 500 employers. The National Emphasis Program [mandates the intense new scrutiny of trenching and excavation operations](#). ***It also points out that States like Kentucky with OSHA-approved State Plans are expected to have enforcement policies and***

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procedures in place for their trenching and excavation inspections which are at least as effective as those in this instruction.

The general industry standard for beryllium is being revised. OSHA is proposing to modify the general industry standard to clarify certain provisions and simplify or improve compliance. Proposed changes would maintain safety and health protections for workers and are designated to enhance worker protections overall by ensuring that the rule is well understood, and compliance is more straightforward. Comments must be submitted by February 11, 2019.

It may be that draconian measures, like shutting down the federal government, will be the only way anything of consequence will get accomplished in Washington over the next two years. Look for the legislative branch to become totally dysfunctional during that period. The business community should be concerned and prepared for Congressional oversight. Public statements by House leadership make it clear that businesses will be a target throughout the upcoming months. Both sides will be more interested in generating sound bites than passing needed legislation. While the legislative branch is mired in their circus, look for the action to be on the Executive Branch side. Regulatory activity and Administrative Orders will be the things to keep an eye on.

Certain environmental groups have filed a Notice of Intent to sue EPA over its still draft decision not to establish a program to address potential spills of hazardous substances similar to the existing Spill Prevention, Countermeasure and Control (SPCC) program for oil. The 60-day notice period required by the CWA prior to filing a suit against the agency expired on Christmas Day. The environmental groups contend that, "Despite its duty to issue worst-case hazardous substance spill regulations by August 1992, EPA missed its deadline..."

EPA is modifying the NPDES General Permit for Stormwater Discharges from Construction Activities. This modification is limited to clarifying the intent of several requirements and ensuring consistency with the Standards. The proposed modification, if finalized, would replace several existing conditions in the 2017 CGP and relevant fact sheet sections subject to modification but would not affect any other terms and conditions of the existing permit. Comments must be received on or before January 28, 2019.

The administrative state continues to expand. Over 350 cities and towns have enacted similar ordinances as part of the growing push for consumers to bring reusable bags when shopping. Typical ordinances prohibit retailers from providing single use plastic bags to customers at checkout and require retailers to charge customers a fee for each paper or reusable bag provided. Another tactic is to allow retailers to provide single use plastic bags for a fee and require retailers to give customers the option to select paper or reusable bags, either for a fee or at no charge. Some of this thinking could bleed over to how you package your products or how your supplier will package raw materials coming into your facility.

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Kentucky's Division for Air Quality is working their [new amended regulation](#) regarding registration of air contaminant sources through the Administrative Regulation Process. This proposed regulation cleans up what has been a rather confusing part of DAQ's program, small emission sources.

Kentucky's legislature is scheduled to convene Part I on January 8th and end January 11th. Part II is scheduled to begin February 5th and end March 29th. Stay tuned. Here are the pre-filed environmental/energy related bills you might expect to see discussed:

- Hazardous waste facilities, notices of violation, notification of county officials - [BR 481](#)
- Water well driller's assistants, requirements, certification, fees, requirements for - [BR 382](#)
- Affordable rates and service, distinction between base rates and surcharges - [BR 28](#)

Dates To Remember

- [Pharmaceutical Rule webinar](#) January 9th
- Waters of the US [Informational webcast](#) on January 10, 2019
- EPA Policy on Ambient Air Exclusion. Comments accepted through January 11, 2019
- Waters of the US listening session will be conducted on the proposed rule in Kansas City, KS on January 23, 2019
- Modifications to NPDES General Permit for Stormwater Discharges From Construction Activities. Comments due January 28, 2019
- Revising Beryllium Standard for General Industry. Comments to proposed regulation, hearing requests and other information must be submitted by February 11, 2019
- Waters of US comment period closes February 11, 2019 (est)
- Standards of Performance for Greenhouse Gas Emissions Electric Utility Generating Units. Comments due February 19, 2019

EPA Policy on Ambient Air Exclusion

EPA will accept public comment on the draft guidance through January 11, 2019.

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>

Standards of Performance for Greenhouse Gas Emissions from New, Modified and Reconstructed Stationary Sources

Review of Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units

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AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing amendments to the rulemaking titled “Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units (EGUs),” which the EPA promulgated by notice dated October 23, 2015 (i.e., the 2015 Rule). Specifically, the EPA proposes to amend its previous determination that the best system of emission reduction (BSER) for newly constructed coal-fired steam generating units (i.e., EGUs) is partial carbon capture and storage (CCS). Instead, the EPA proposes to find that the BSER for this source category is the most efficient demonstrated steam cycle (e.g., supercritical steam conditions for large units and subcritical steam conditions for small units) in combination with the best operating practices. The EPA proposes to revise the standard of performance for newly constructed steam generating units as separate standards of performance for large and small steam generating units that reflect the Agency’s amended BSER determination. In addition, the EPA proposes to revise the standard of performance for reconstructed steam generating units to be separate standards of performance for reconstructed large and small steam generating units, consistent with the proposed revised standards for newly constructed steam generating units. The EPA also proposes separate standards of performance for newly constructed and reconstructed coal refuse-fired EGUs. In addition, the EPA proposes to revise the maximally stringent standards for large modifications of steam generating units to be consistent with the standards for reconstructed large and small steam generating units. The EPA

is not proposing to amend and is not reopening the standards of performance for newly constructed or reconstructed stationary combustion turbines. The EPA is also proposing to make other miscellaneous technical changes in the regulatory requirements.

DATES: Comments. Comments must be received on or before February 19, 2019.

Public Hearing. The EPA is planning to hold at least one public hearing in response to this proposed action. Information about the hearing, including location, date, and time, along with instructions on how to register to speak at the hearing, will be published in a second Federal Register notice.

<https://www.govinfo.gov/content/pkg/FR-2018-12-20/pdf/2018-27052.pdf>

Proposed Modification to National Pollutant Discharge Elimination System (NPDES) General Permit for Stormwater Discharges From Construction Activities

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice of proposed modification to the general permit for construction stormwater discharges and request for public comment.

SUMMARY: All ten Environmental Protection Agency (EPA) Regions today are proposing for public comment a modification to the 2017 National Pollutant Discharge Elimination system (NPDES) general permit for stormwater discharges from construction activities, also referred to as the “2017 Construction General Permit (CGP)” or “2017 CGP” which became effective on February 16, 2017. The EPA is proposing a modification to the 2017 CGP that is limited to clarifying the intent of several requirements and ensuring consistency with the Construction and Development Effluent Limitations Guidelines and New Source Performance Standards. This action is hereafter referred to as the “proposed modification” or

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“draft modified permit.” The proposed modification, if finalized, would replace several existing conditions in the 2017 CGP and relevant fact sheet sections subject to modification, but would not affect any other terms and conditions of the existing permit, including: The eligible coverage area; the number or type of entities eligible to be covered by the permit; nor the five-year permit term of the current 2017 CGP, which will expire on February 16, 2022. The current 2017 CGP remains in effect while the EPA pursues this action. This Federal Register notice describes the proposed modification and where the proposed changes can be found in the 2017 CGP. To assist in the public’s review of this proposed modification, the **EPA has posted a redline strikeout version of the permit and accompanying fact sheet showing all of the proposed changes in context of the documents they would modify at**

<https://www.epa.gov/npdes/stormwater-discharges-construction-activities>; these documents can also be found in the Docket (EPA-HQ-OW-2015-0828).

DATES: Comments on the proposed modification must be received on or before January 28, 2019.

<https://www.govinfo.gov/content/pkg/FR-2018-12-12/pdf/2018-26916.pdf>

Revising the Beryllium Standard for General Industry **AGENCY:** Occupational Safety and Health Administration (OSHA); Labor.

ACTION: Proposed rule; request for comment.

SUMMARY: On January 9, 2017, OSHA issued a final rule adopting a comprehensive general industry standard for occupational exposure to beryllium and beryllium compounds. In this proposed rule, OSHA is proposing to modify the general industry standard to clarify certain provisions and simplify or improve compliance.

Proposed changes would maintain safety and health protections for workers and are designed to enhance worker protections overall by ensuring that the rule is well-understood and compliance is more straightforward.

DATES: Comments to this proposal, hearing requests, and other information must be submitted (transmitted, postmarked, or delivered) by February 11, 2019. All submissions must bear a postmark or provide other evidence of the submission date

<https://www.govinfo.gov/content/pkg/FR-2018-12-11/pdf/2018-26448.pdf>

Revised Definition of “Waters of the United States”

AGENCIES: Department of the Army, Corps of Engineers, Department of Defense; and Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency and the Department of the Army (“the agencies”) are publishing for public comment a proposed rule defining the scope of waters federally regulated under the Clean Water Act (CWA). This proposal is the second step in a comprehensive, two-step process intended to review and revise the definition of “waters of the United States” consistent with the Executive Order signed on February 28, 2017, “Restoring the Rule of Law, Federalism, and Economic Growth by Reviewing the ‘Waters of the United States’” This document is a prepublication version, signed by EPA Acting Administrator, Andrew R. Wheeler, along with Mr. R.D. James, the Assistant Secretary of the Army for Civil Works, on 12/11/2018. EPA is submitting it for publication in the Federal Register. We have taken steps to ensure the accuracy of this version, but it is not the official version. Page 2 of 253 Rule.” This proposed rule is intended to increase CWA program predictability and consistency by increasing clarity as to the scope

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of “waters of the United States” federally regulated under the Act. Today’s proposed definition is also intended to clearly implement the overall objective of the CWA to restore and maintain the quality of the nation’s waters while respecting State and tribal authority over their own land and water resources.

DATES: Comments must be received on or before [insert 60 days after publication in the Federal Register].

https://www.epa.gov/sites/production/files/2018-12/documents/wotus_2040-af75_nprm_frn_2018-12-11_prepublication2_1.pdf

Kentucky Proposed Regulation Change Links
Registration of air contaminant sources
<http://www.lrc.ky.gov/kar/401/052/070reg.pdf>

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