



SMG Reg Watch

January 2019/ 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

One good thing about the temporary government shutdown is that the Federal Register has practically nothing in it. I have done some super snooping and have a few things that I thought would be of interest. It's like a cold snap in a swamp. The animals are still there, they still have their traditional instincts, it's just that they are moving much slower than usual.

One of the most bizarre recent rulemakings is the RMP (Accident Prevention/Risk Management Plan) Rule. The way this rule has unfolded reminds me of the old Abbott & Costello baseball skit.

The Obama RMP rule was adopted January 13, 2017 (President Trump took office January 20, 2017). The new EPA received multiple petitions to reconsider and stay the RMP rule. Industry groups and a coalition of eleven states filed three petitions for reconsideration with the new administration. EPA published a series of delay notices including a final delay rule published in June 2017 that announced a delay in the effective date of the RMP Amendments until February 19, 2019. EPA then issued a new rule called the Reconsideration Rule on May 30, 2018 (watch this one). The Administration's delay tactic was challenged, and the D.C. Circuit rebuked EPA on August 17, 2018, vacating the June 2017 rulemaking. On September 21, 2018 the Court of Appeals followed up with their decision which made **the original (January 13) RMP Rule Amendments effective immediately**. On December 3, 2018, EPA published in the Federal Register their most recent action which confirmed that the Court had vacated the Agency's stay of the rule. EPA has adopted the RMP rule Amendments in their entirety into the RMP rule at 40 CFR Part 68 as required by the Court's decision. These Amendments contain staggered implementation dates, so while the rule is now adopted into Part 68, it is not actually fully in effect. Some of the new provisions are effective immediately while others are scheduled to become effective over time.

It is not clear what if any of the RMP provisions that are now in effect will ever become final. Don't forget, the Administration still has the Reconsideration Rule in play. That proposed rule changes the RMP Amendments rule

issued on January 13, 2017 by, among other things, rescinding amendments relating to: safer technology, alternatives analyses, third-party audits, incident investigations, information availability and several other minor changes. It's not clear when the [Reconsideration Rule](#) will become final. So, what appears to be in play at this time is the January 13, 2017 rule. Soon to come will be the Reconsideration Rule. *See what I mean about who's on first?*

There apparently are some RMP eSubmit Webinars scheduled. The webinar will cover the basics of updating, certifying, and submitting RMPs to the EPA through the RMP*eSubmit Software. Each webinar will cover the same material. They want you to attend only one. Here are your links.

- [February 5, 2019 - 2:00 PM – 3:30 PM EST](#)
- [February 20, 2019 - 2:00 PM – 3:30 PM EST](#)
- [March 12, 2019 - 2:00 PM – 3:30 PM EDT](#)
- [April 30, 2019 - 2:00 PM – 3:30 PM EDT](#)

The government shut down may influence the dates and times. I'd check to see if the schedule is accurate.

At a recent speech before the American Bar Association Section of Environment, Energy and Resources, Principal Deputy Assistant Attorney General of DOJ's Environment and Natural Resources Division Jeffrey Wood gave an enlightening summary of DOJ's approach to environmental enforcement. Here are some highlights of his presentation. You should pay attention to his remarks because they may become points of emphasis in state programs. EPA and DOJ continue to focus on and address large scale environmental accidents. Punishing repeat offenders continues to be a point of emphasis. Recognizable companies will continue to be a target for EPA. EPA will continue to focus on violations at companies that have multiple facilities. Repeat offenders will be a target and prosecuting the agency's' enforcement priorities which contain specific types of violations at certain industries and parties will likely get quite a bit of attention. The publicly available enforcement numbers can be misleading. Don't think you will be less likely to get a visit from EPA or your state agency after you review those. As usual, you need to continuously stay on top of your regulatory program to avoid/minimize scrutiny from EPA and the state.

Outside the normal enforcement activities, there is another tool that EPA uses and appears to be using more than they have in the past. EPA's formal information request is a powerful tool. Information provided from these requests can be used to trigger an enforcement action. Environmental Managers should alert plant managers and upper management that if any EPA communication is received, corporate counsel and the appropriate environmental manager should be notified. I've seen these notices be pushed into the junk mail box at some facilities. Time goes by and big trouble usually follows. EPA's Director of the Office of Enforcement has recently

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released a [guidance memo](#) laying out the best practices for compliance and enforcement related information requests.

Also released from the EPA Office of Water, [National Water Program Policy on Use of Clean Water Act Section 308 Letters Issued to Nine or fewer Entities to Support CWA Program Implementation](#).

Not to be outdone, EPA's Office of Civil Enforcement has issued new policies. [Best Practices for Compliance and Enforcement Related Information Requests](#).

A [prepublication notice](#) of new EPA rules relating to hazardous waste pharmaceuticals has been released. EPA's goal is to simplify the management of hazardous waste pharmaceuticals generated at health care facilities. The definition of health care facilities is very broad so you need to check out the new rule and the guidance documents to find out if you will be impacted. The new rule requires hazardous waste management training, creates new labeling and recordkeeping requirements, creates new on-site accumulation and storage requirements and does not distinguish facilities based on the quantities of hazardous waste they generate. The proposed rules will go into effect at the federal level six months after they are published in the Federal Register. States will be required to revise their programs to adopt the new rules. States can add provisions to their rules to make the state program more stringent or broader than the new rules. The ban on flushing hazardous waste pharmaceuticals will become effective in all states six months after publication of the new rules. Also, states may or may not choose to adopt the exemption of FDA approved nicotine replacement therapies from the hazardous waste classification. There are some parts of this proposed rule that the pharmaceutical industry is not happy with and they are working with EPA to get their concerns addressed. I am sure more discussions are taking place before the rule is finalized. Stay tuned.

The Indiana Department of Environmental Management is actively exploring takeover of the Corps Section 404 permitting program. If approved, IDEM would be responsible for most of the CWA Section 404 dredge and fill permits issued in Indiana. As you might expect, there are several impediments to this idea. Cost is probably the main issue. Many of the challenges to this idea could be addressed in the upcoming General Assembly session. Kentucky has also been approached recently to take over their 404 program. Budgetary concerns pushed the initiative to the back burner.

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Dates To Remember

- Pharmaceutical Rule webinar 2/14; 3/4 and 3/13. Registration information: <https://clu-in.org/conf/tio/HazWastePharmaceuticals/>
- Waters of the US. Informational webcast originally scheduled for January 10, 2019 was postponed. A rescheduled date is not available currently. <https://register.gotowebinar.com/register/4823104907576658956>
- 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 (est).
- Standards of Performance for Greenhouse Gas Emissions Electric Utility Generating Units. Comments due February 19, 2019;

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

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

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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>

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 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

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Administrative Register of Kentucky

The January Administrative Register of Kentucky contains a proposed Air Regulation 401 KAR 052:070. This proposed regulation addresses the registration of an air contaminant source. This regulation applies to low emission sources and more clearly describes what these sources need to do to obtain approvals.

<http://www.lrc.ky.gov/kar/401/052/070reg.pdf>

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