



SMG Reg Watch

February 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

WOTUS

The most significant occurrence in February, was the publishing in the Federal Register of the proposed Waters of the United States (WOTUS) rule on February 14. This occurrence puts the proposed rule on a regulatory track with deadlines and specific requirements. If you recall, the Clean Water Act (CWA) does not define WOTUS but the proposed rule will determine which bodies of water fall under the jurisdiction of the agencies for regulations under various federal programs. These programs include: The National Pollutant Discharge Elimination System Program, National and Local Pretreatment Standards, Dredge or Fill Discharge Permit Program, Sewage Sludge Use and Disposal Program and Water Quality Management.

The proposed rule creates six different categories of regulated waters. These would include: Traditional Navigable Waters, Tributaries that contribute perennial or intermittent flow to traditional navigable waters; certain ditches; certain lakes and ponds; impoundments and adjacent wetlands.

There are 11 exemptions found in the proposed rule: Waters or water features not referred to as a covered WOTUS; ephemeral features and diffuse stormwater runoff; groundwater; all ditches except those that also satisfy the conditions of the tributary definition; prior converted cropland; artificially irrigated areas; artificial lakes and ponds; water filled depressions; stormwater control features; wastewater and recycling structures and waste treatment systems.

There are a couple of areas that I can see that could be clarified and need comments to be submitted. Those would include:

- Better distinguish the types of ditches that are excluded under the proposed rule from natural tributaries that are regulated when they contribute perennial or intermittent flow to a traditional navigable water.

- Include a flow duration that clearly differentiates “intermittent” streams that are regulated from ephemeral features that are excluded under the proposed rule.

Comments have already been received prior to February 14 but the formal comment period opened February 14 and will close April 15. This summary is meant to provide you with a general overview of the proposed rule. If you have the potential to be impacted, read the proposed rule and if you have question or concern contact SMG or submit a comment. Here is an informational link [WOTUS Links](#). I have been reviewing comments filed to date. They are mostly weak and against the rule. I have not seen comments on the specifics of the proposed rule from states or potentially impacted organizations other than those requesting an extension of the comment period. If your company or trade association is impacted, either positively or negatively by this rule, submit your comments.

Green New Deal

One of the most disturbing ideas conjured up in my lifetime was released on February 7. The Green New Deal (GND) is a federal resolution to recognize a “duty of the federal government to embrace a multitude of radical ideas.” The proponents of this idea have cast a dark concept that our country is in a crisis and must make dramatic changes to our priorities to improve our way of life. While climate change is front and center of the resolution other actions well beyond climate are included. Frederick Eames & Marisa Harrilchak have done a great job summarizing this resolution ([Green Deal Summary](#)). You might ask how much would all this cost? A recent study from the American Action Forum ([Green Deal Cost Summary](#)) says it would cost up to \$93 trillion or \$600G per household. Here’s a link to information from the study.

EPA Addresses PFAS The Environment

EPA’s Acting Administrator held a webcast on February 14 to announce the elements of EPA’s plan for PFAS’s. What is a PFAS? In some respect, these chemicals are like PCBs in that they are a family of chemicals. PFAS is shorthand for per-or polyfluoroalkyl substances. These substances have been used in many applications over the years. For example, in consumer products-waterproof clothes and shoes, nonstick cookware, paint and food packaging. Industrial settings-fume and mist suppressants for metal and plastic plating operations and to formulate aqueous film-forming foam (AFFF) a common firefighting material used at airports and refineries to extinguish petroleum-based fires. The widespread use has allowed the chemicals in some communities to find its way into groundwater and drinking water. EPA’s website has considerable information on these chemicals. Their site includes basic information, EPA actions and tools and resources to address this issue. This information can be found at this link <https://www.epa.gov/pfas>

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



What's Going On At OSHA?

OSHA staff has some interesting issues facing them this year. If you recall they continue to operate without an approved leader confirmed by the Senate. While OSHA's enforcement was robust in 2018, expect more in 2019 because their new budget proposes hiring additional OSHA enforcement personnel. Several of their regulatory proposals are working through the system and as a result we may see some new ideas surface in 2019. Some of their initiatives appear to be new rules on tracking workplace injuries and illnesses, also rules relating to beryllium exposure are under consideration and they are considering proposals to update the hazard communication standard to make it consistent with the Global Harmonized System. The silica rule may also get reevaluated in 2019.

Pharma Waste

The recently proposed rule for managing pharmaceutical waste under RCRA for hospitals, medical clinics, pharmacies and others **is now final**. Its effective date is August 21, 2019. While healthcare facilities subject to the new rule will no longer have to maintain a central hazardous waste accumulation area and will be able to store pharmaceutical wastes for up to one year as compared to 90 days under the general Part 262 provisions. The issue facing the industry will be to determine the amount of hazardous pharmaceutical waste they generate. Healthcare facilities generating more than 100 kg of hazardous waste or more than 1 kg of acute hazardous waste per month are subject to the new rule. Facilities generating hazardous waste pharmaceuticals below the threshold amounts are considered very small quantity generators and are largely exempt from the new subpart. For more information see EPA's website ([EPA Pharma Website](#)).

Common Sense For Nutrient Standards

We are getting some common sense included in EPA's standards for nutrients. EPA recently approved Missouri's standards for nutrient pollution in lakes and reservoirs. Rather than setting numeric limits for nitrogen and phosphorus as the guideposts for water quality suggest, Missouri's plan calls for assessing the pollutants' effect on waters through response parameters such as morbidity events for fish and other aquatic organisms and observed shifts in aquatic diversity attributed to eutrophication. The rule establishes three regions of lakes and reservoirs and sets forth for each region a combination of nitrogen, phosphorous and chlorophyll a screening values and listed response parameters. If at least one nutrient screening value and at least one response parameter are exceeded in the same year, the waterbody would be deemed impaired.

Environmental Groups Use Battery Storage For BACT

There was a tactic used by environmental groups in California that we could see in our area. Environmental groups previously challenged a final PSD permit for a utility arguing that a new control technology configuration, replacing the combined cycle turbines' duct burners with battery storage, should be used to satisfy Region 9's BACT requirements. The Environmental Appeals Board rejected their argument. While the Board concluded the

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



environmental groups failed to meet their burden of establishing that the Region's analysis was erroneous, the Board issued this clarification, "The Board observes that its decision is based on the record in this matter and its decision should not be taken to suggest that the Conservation Groups' proposal can never be BACT for a particular facility." The takeaway from this decision is, what may not be BACT for purposes of this permit application may be BACT for a future permit application.

Corps Reduces Time Frame for Water Quality Certifications

Section 401 of the Clean Water Act (CWA) provides states with a mechanism by which they may address the impacts of federally issued permits and licenses. Under the CWA states have a maximum of one year to act on Water Quality Certification (WQC) requests. Standard practice by some district engineers has been to give states a full year to act on WQC requests. The US Department of the Army has issued a regulatory policy directive memorandum requiring the Corps to abide by a default time period of 60 days for states to act on WQC requests. According to the Directive, the standard one-year allowance is inconstant with the existing Corps regulations. This could be a big time saving for company's filing for permits with the Corps. It will be interesting to see how states react to this new requirement.

KY's Air Plan Approval Notice By EPA

EPA is proposing to take 4 actions regarding Ky's State Implementation Plan: Approve the state's November 16, 2018 SIP Submittal seeking to change reliance from the Clean Air Interstate Rule to the Cross State Air Pollution Rule; convert EPA's limited approval/limited disapproval of Ky's regional haze plan to a full approval; remove EPA's FIP for KY which replaced reliance on CAIR with reliance on CSAPR to address the deficiencies identified in the limited disapproval of KY's regional haze plan and approve the visibility prong of KY infrastructure SIP submittals for 1997 Ozone, 2010 nitrogen dioxide, 2010 sulfur dioxide and 2012 fine particulate matter.

California Allows Roadkill to Be Consumed

California legislature is considering a bill that would allow drivers to legally eat roadkill. Drivers that fatally strike certain animals can retroactively apply for a wildlife salvage permit and consume the meat. Oregon and Washington both have laws that allow certain roadkill to be salvaged. About 20 other states also allow the consumption of roadkill. "You Kill it, You Grill It", was a headline splashed across many newspapers in California following the bill filing.

KY Administrative Register

The Environmental Cabinet is undertaking substantial modifications to Chapter 42 Underground Storage Tanks and to a lesser degree Chapter 39 Hazardous Waste and Chapter 40 Enforcement and Compliance Monitoring. If you are involved in these programs you should look at the proposed changes. Links are provided below. If you

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



feel like your concerns that have not been addressed, you should engage the Cabinet and if that fails, you can address your concerns before the Legislature's Regulation Review Committee when they call it.

Chapter 39 Hazardous Waste

39:060 General Requirements <https://apps.legislature.ky.gov/law/kar/401/039/060reg.pdf>

39:080 Hazardous waste handlers <https://apps.legislature.ky.gov/law/kar/401/039/080reg.pdf>

39:090 Hazardous Waste Permit Program <https://apps.legislature.ky.gov/law/kar/401/039/090reg.pdf>

Chapter 40 Enforcement and Compliance Monitoring

40 051 Repeal of 401 KAR 40:050 <https://apps.legislature.ky.gov/law/kar/401/040/051reg.pdf>

Chapter 42 Underground Storage Tanks

42:005 Definitions <https://apps.legislature.ky.gov/law/kar/401/042/005reg.pdf>

42:020 UST System Requirements, Notification, Registration and Annual Fees
<https://apps.legislature.ky.gov/law/kar/401/042/020reg.pdf>

42:060 UST System Release and Corrective Action Requirements
<https://apps.legislature.ky.gov/law/kar/401/042/060reg.pdf>

42:250 Petroleum Storage Tank Environmental Assurance Fund Reimbursement
<https://apps.legislature.ky.gov/law/kar/401/042/250reg.pdf>

42:330 Small Owners Tank Removal Account <https://apps.legislature.ky.gov/law/kar/401/042/330reg.pdf>

42:341 Repeal of Numerous Regulations <https://apps.legislature.ky.gov/law/kar/401/042/341reg.pdf>

Dates To Remember

- KY Regional Haze Plan and Prong 4 (Visibility) for 1997 Ozone, 2010 NO₂, 2010 Sulfur and 2012 PM 2.5 NAAQS comments due March 18, 2018.
- National Emission Standards for Hazardous Air Pollutants: Hydrochloric Acid Production Residual Risk & Technology Review, comments due March 21, 2019
- Waters of The US public comment period closes April 15.
- Pharmaceutical Rule effective August 21, 2018

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



Revised Definition of “Waters of the United States”

AGENCY: 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’ 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. This proposed definition revision 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 April 15, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-02-14/pdf/2019-00791.pdf>

Management Standards for Hazardous Waste Pharmaceuticals and Amendment to the P075 Listing for Nicotine

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: Some pharmaceuticals are regulated as hazardous waste under the Resource Conservation and Recovery Act

(RCRA) when discarded. This final rule adds regulations for the management of hazardous waste pharmaceuticals by healthcare facilities and reverse distributors. Healthcare facilities (for both humans and animals) and reverse distributors will manage their hazardous waste pharmaceuticals under this new set of sector-specific standards in lieu of the existing hazardous waste generator regulations. Among other things, these new regulations prohibit the disposal of hazardous waste pharmaceuticals down the drain and eliminates the dual regulation of RCRA hazardous waste pharmaceuticals that are also Drug Enforcement Administration (DEA) controlled substances. The new rules also maintain the household hazardous waste exemption for pharmaceuticals collected during pharmaceutical takeback programs and events, while ensuring their proper disposal. The new rules codify Environmental Protection Agency (EPA)’s prior policy on the regulatory status of nonprescription pharmaceuticals going through reverse logistics. Additionally, EPA is excluding certain U.S. Food and Drug Administration (FDA) approved over-the-counter (OTC) nicotine replacement therapies (NRTs) from regulation as hazardous waste and is establishing a policy on the regulatory status of unsold retail items that are not pharmaceuticals and are managed via reverse logistics, fulfilling the commitment we made in the Retail Strategy of September 2016.

DATES: This final rule is effective on August 21, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-02-22/pdf/2019-01298.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



National Emission Standards for Hazardous Air Pollutants: Hydrochloric Acid Production Residual Risk and Technology Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing amendments to the National Emission Standards for Hazardous Air Pollutants (NESHAP) for the Hydrochloric Acid (HCl) Production source category. The proposed action presents the results of the residual risk and technology reviews (RTRs) conducted as required under the Clean Air Act (CAA). The proposed amendments address the startup, shutdown, and malfunction (SSM) provisions of the rule, add electronic reporting, and update the reporting and recordkeeping requirements.

DATES: Comments. Comments must be received on or before March 21, 2019. Under the Paperwork Reduction Act (PRA), comments on the information collection provisions are best assured of consideration if the Office of Management and Budget (OMB) receives a copy of your comments on or before March 6, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-02-04/pdf/2018-28322.pdf>

Air Plan Approval; Kentucky; Regional Haze Plan and Prong 4 (Visibility) for the 1997 Ozone, 2010 NO₂, 2010 SO₂, and 2012 PM_{2.5} NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to take the following four actions regarding the Kentucky State Implementation Plan (SIP): Approve Kentucky's November 16, 2018, SIP submittal seeking to change reliance from the Clean Air Interstate Rule (CAIR) to the Cross-State Air Pollution Rule (CSAPR) for certain regional haze requirements;

convert EPA's limited approval/limited disapproval of Kentucky's regional haze plan to a full approval; remove EPA's Federal Implementation Plan (FIP) for Kentucky which replaced reliance on CAIR with reliance on CSAPR to address the deficiencies identified in the limited disapproval of Kentucky's regional haze plan; and approve the visibility prong of Kentucky's infrastructure SIP submittals for the 1997 Ozone, 2010 Nitrogen Dioxide (NO₂), 2010 Sulfur Dioxide (SO₂), and 2012 Fine Particulate Matter (PM_{2.5}) National Ambient Air Quality Standards (NAAQS).

DATES: Comments must be received on or before March 18, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-02-15/pdf/2019-02543.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

