



## SMG Regulatory Update

June 2019/ Scott R. Smith

Our Regulatory Update 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](mailto:scottr.smith@smithmanage.com) or Karen Thompson, [karent@smithmanage.com](mailto:karent@smithmanage.com)

### *Scott's Thoughts*

#### **EPA Actions of Interest**

##### **EPA Region 4 Proposed New Startup, Shutdown and Malfunction Policy**

Last month, I brought to your attention that EPA Region 6 had proposed to withdraw their startup, shutdown and malfunction "SIP Call" for Texas. On June 5, Region 4 announced in the Federal Register that they are considering adopting an alternative policy regarding startup, shutdown and malfunction (SSM) exemption provision in SIPS that departs from EPA's 2015 national policy on this subject. Region 4's discussion on the subject in the public notice contains several statements that could be relevant for other states in the southeast. Comments must be received on or before August 5, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-06-05/pdf/2019-11758.pdf>

##### **EPA Updates Freedom of Information (FOIA) Regulations**

On June 26, EPA issued a final rule that takes effect on July 26, 2019 that revises the Agency's regulations by updating the process by which the public may access information about EPA actions and activities.

<https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13290.pdf>

Changes include: Incorporating the definition "Representative of the News Media"; revising where you may submit a FOIA request; the National FOIA Office in the Office of General Counsel will be the point of entry for all requests; the agency revised the regulations regarding when the Agency may toll its time period for responding to requests; legislative Amendments to FOIA require agencies to make the FOIA Public Liaison available to requesters to resolve disputes; EPA removed the list of FOIA exemptions in its regulations at 40 CFR 2.105; clarified when the Agency may charge search fees; EPA now requires that final determinations include information about the right to seek assistance from the FOIA Public Liaison and in the case of an adverse determination, of the existence and role of OGIS in providing dispute resolution services. EPA also extended the time in which a requester is required to file an administrative appeal from 30 calendar days to 90 calendar days.

### EPA Spring Regulatory Agenda

The agenda can be found at [www.reginfo.gov](http://www.reginfo.gov) EPA Agency rule list:

[https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION\\_GET\\_AGENCY\\_RULE\\_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=2000](https://www.reginfo.gov/public/do/eAgendaMain?operation=OPERATION_GET_AGENCY_RULE_LIST&currentPub=true&agencyCode=&showStage=active&agencyCd=2000)

### Selected Highlights

Final Rule Stage	Definition of "Waters of the United States" - Recodification of Preexisting Rule	<a href="#">2040-AF74</a>
Final Rule Stage	Strengthening Transparency in Regulatory Science	<a href="#">2080-AA14</a>
Final Rule Stage	NESHAP: Coal- and Oil-Fired Electric Utility Steam Generating Units-- Reconsideration of Supplemental Cost Finding and Residual Risk and Technology Review	<a href="#">2060-AT99</a>
Final Rule Stage	Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Reconsideration	<a href="#">2060-AT54</a>

### EPA Amends Emergency Release Notification Regulations on Reporting Exemption for Air Emissions from Animal Waste at Farms

EPA amended the release notification regulations under the Emergency Planning and Community Right to Know Act to add the reporting exemption for air emissions from animal waste at farms. EPA also added definitions of "animal waste" and "farm" to the EPCRA regulations. These regulations become effective July 15, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-06-13/pdf/2019-12411.pdf>

### EPA Proposes Approval of Jefferson County, KY Rules for Existing and New VOC Storage Vessels

EPA is proposing to approve a portion of KY's SIP Plan that the Division for Air Quality submitted through a letter dated March 15, 2018. The letter intended to make minor amendments to applicability dates and standards for both existing and new storage vessels for VOC's. Comments must be received on or before July 5, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-06-05/pdf/2019-11757.pdf>

### National Emission Standards-Surface Coating of Metal Cans and Surface Coating of Metal Coil

On June 4, EPA published a proposed rule regarding the surface coating of metal cans and surface coating of metal coil. EPA found the risks due to emissions of air toxics from these source categories under the current standards to be acceptable and that the standards provide an ample margin of safety to protect public health. There are no revisions to the numerical limits proposed. Also noted is that EPA is proposing to amend provisions addressing emissions during periods of startup, shutdown and malfunction.

<https://www.govinfo.gov/content/pkg/FR-2019-06-04/pdf/2019-10068.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



## Federal OSHA Update

### Standards Improvement Project Phase IV

To comply with President Trump's Executive Order, "Improving Regulations and Regulatory Review", OSHA is removing or revising outdated, duplicative, unnecessary and inconsistent requirements in its safety and health standards. The current review, the fourth in their ongoing effort reduces regulatory burden while maintaining or enhancing worker safety and health. There are 14 revisions to existing standards in the recordkeeping, general industry, maritime and construction standards. The revisions include an update to the consensus standard incorporated by reference for signs and devices used to protect workers near automobile traffic; a revision to the requirements for rollover protective structures to comply with current consensus standards; updates for storage of digital x-rays and updates to requirements for pulmonary function testing. These rules are effective on July 15, 2019. A summary of the previous 3 revisions can be found in the footnotes of this final rule. <https://www.govinfo.gov/content/pkg/FR-2019-05-14/pdf/2019-07902.pdf>

## Pharma Standard

### Ohio Begins Rulemaking

The new federal Pharma rule establishes a set of industry specific requirements for the management of pharmaceutical wastes that constitute "hazardous waste", meaning those that either are specifically listed as hazardous pursuant to regulation or exhibit certain designated hazardous characteristics. Because the new federal rule is more stringent than Ohio's existing regulatory scheme, the state must adopt updated requirements by August 21, 2019. Draft versions of the regulations will be made available for comment in late summer 2019. This will give the regulated industry limited time to review the proposed rule. In order to prepare for the new rule, it would be prudent for affected facilities to familiarize themselves with the current federal standard.

## Court Case to Watch

### *Atlantic Richfield Company v. Christian*

Crowell & Moring LLP reports that the US Supreme Court has agreed to hear arguments regarding the *Atlantic Richfield Company v. Christian* case involving state law claims related to environmental contamination at a Superfund site in Montana. Atlantic Richfield Co. has been working with EPA since 1983 to remediate arsenic contamination at the site. In 2008 a group of private landowners sued ARCO seeking state-law "restoration damages" for cleanup activities beyond those that EPA had ordered under CERCLA. The plaintiffs wanted soil arsenic levels reduced to 30 times lower than EPA's target; 33% more topsoil removed than EPA ordered, and several thousand feet of underground trenches built, which EPA had considered but decided against due to concerns that the trenches might cause increased contamination. A win for the plaintiffs could open the door for private individuals to select and pursue their own remedies at Superfund sites around the country, despite any

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existing remedial plans or settlement agreements, potentially exposing defendant companies to a whole new set of unforeseen costs. Stay tuned, this one is going to get interesting.

### **KY Reevaluates Their Water Quality Standards**

If you are a regulated industry in Kentucky and have permits or interactions with the Division of Water, you need to pay attention to these proposed regulations. Every 3 years these water quality standards are opened for discussion and formal comment. The Clean Water Act is clear, the development of water quality standards is the state's responsibility. Sure, there can be disagreements with EPA but there are usually ways to work those out. We are in the era of federal and state partnerships. The courts are itching to minimize deference provided to the Administrative Branches of Government. Now is the time to question the direction we have gone and appear to be going with respect to water quality. For example, different states in our area have different approaches for establishing designated uses of surface waters. Is our approach the best for Kentucky? Our surface water standards have been, for the most part, established by EPA. Wouldn't it be interesting to find out the basis for those standards? EPA is currently working on regulations that should improve the transparency in the development of their standards. We may see these regulations in December. In the meantime, we have been promised a work group of environmental scientists and toxicologists to review some of these standards. It was discussed last fall but to date nothing has happened. Now is the time to ask that this workgroup be formed and work on this project to begin.

## **Kentucky Regulatory Changes-Status**

### **Kentucky Water Quality Standards Proposed Changes**

401 KAR Chapter 10 Definitions

<https://apps.legislature.ky.gov/law/kar/401/010/001reg.pdf>;

401 KAR Chapter 26 Designation Uses of Surface Waters,

<https://apps.legislature.ky.gov/law/kar/401/010/026reg.pdf>;

401 KAR Chapter 29 Water Quality Standards General Provisions

<https://apps.legislature.ky.gov/law/kar/401/010/029reg.pdf>

401 KAR Chapter 30 Antidegradation Policy Implementation Methodology

<https://apps.legislature.ky.gov/law/kar/401/010/030reg.pdf>

401 KAR Chapter 31 Surface Water Standards

<https://apps.legislature.ky.gov/law/kar/401/010/031reg.pdf>

### **401 KAR Chapter 58 Accreditation Asbestos Professionals**

<https://apps.legislature.ky.gov/law/kar/401/058/005reg.pdf>

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#### **Louisville**

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### Dates to Remember

- Comments must be received on or before July 5, 2019 for proposed approval of Jefferson County, KY rules for existing and new VOC storage vessels;
- Reporting exemption for air emissions from animal waste at farms become effective July 15, 2019;
- 14 revisions to existing OSHA standards in the recordkeeping, general industry, maritime and construction standards become effective July 15, 2019. The revisions include an update to the consensus standard incorporated by reference for signs and devices used to protect workers near automobile traffic a revision to the requirements for rollover protective structures to comply with current consensus standards, updates for storage of digital x-rays and updates to requirements for pulmonary function testing.
- July 26, 2019 EPA's new FOIA rules take effect;
- July 29, 2019, Updates to NPDES e-Rule Data Elements to Reflect MS4 General Permit Remand Rule, comment period closes;
- August 5, 2019, comments due for Region 4's startup, shutdown/malfunction policy;
- Pharmaceutical Rule effective August 21, 2019

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