



SMG Environmental, Health & Safety Regulatory Update

August 2019/ Scott R. Smith and Jami Arnold

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 or Karen Thompson, karent@smithmanage.com

Updates

Vegetarianism Tied to Climate Change?

Bjorn Lomborg is one of my favorite writers regarding climate change and related subjects. He is the president of the Copenhagen Consensus Center and author of "The Skeptical Environmentalist" and "Cool It". He recently commented in the Wall Street Journal on a United Nations report on climate change that was released this summer. Contained in the report is a call for improving global food systems. The report also states that people in rich countries need to change their eating habits. According to Lomborg, this is an "ineffective and unachievable policy response." He points out that, "a seventh of all emissions are food related." Another point he makes is that a 2015 literature review found going vegetarian reduces individual carbon emissions by the equivalent of 1,190 pounds of carbon dioxide per year. That's 4.3% of emissions for the average person in a developed country." He thinks that more spending on agricultural research and development from conventional breeding to genetic modification and even artificial meat is a more plausible choice. His research group estimates that increasing research spending by \$8 billion a year would increase crop yields by 0.4%. While this sounds like a small number it would improve food security, reduce prices and achieve social good worth more than \$30 for every dollar invested.

EPA Updates Methane Rule for The Oil & Gas Industry - The Rest of The Story

When I first read about EPA's proposal regarding methane and the oil and gas industry, I was surprised. They issued a [press release](#) on August 29 but nothing has been published in the Federal Register at this time. When you get past the rhetoric there's some interesting factoids that haven't made it out of your local news outlet. The Wall Street Journal did provide a more balanced perspective in their August 31st edition. First, the Obama Administration ignored the law. Section 111 of the Clean Air Act directs the EPA to list stationary sources that contribute significantly to air pollution. True to form, the Obama administration never determined if methane from gas or oil production endangered public health. They also didn't determine that pipelines or storage vessels

were major pollution sources. The Obama administration has a determination for carbon dioxide but not for methane. Some additional thoughts on the matter: Methane make up only 10% of global greenhouse gas emissions with wetlands the biggest source. Oil and gas make up only 1.2% of U.S. greenhouse gas emissions. Methane is a valuable product and as a result the US oil and gas industry have voluntarily reduced methane emissions 12% since 2005. The Trump EPA is proposing to rescind the Obama methane rule while retaining emissions limits for ozone forming volatile organic compounds. Oh, by the way methane is contained in that suite of chemicals. So, EPA is still looking at methane but in an existing regulatory scheme not the regulatory juggernaut that was previously proposed.

Open Your Eyes - The Clean Air Act and OSHA Provisions Are Colliding and It's an Expensive Collision

Randy Brogdon and Richard Pepper with Troutman Sanders recently provided some insight into how the Clean Air Act and OSHA overlap is causing significant penalties to be assessed to unsuspecting companies. Most of us are familiar with the provisions in the Clean Air Act Section 112(r) which covers two different provisions to promote safety and effective responses to releases of hazardous substances. The Risk Management Plan (RMP) provisions apply to owners or operations with more than a threshold quantity of a regulated substance in a process. What is often overlooked is that there is a general duty clause (GDC) in the Clean Air Act that requires compliance with applicable industry safety standards. Unlike the RMP rules EPA requires compliance with applicable industry safety standards. Unlike the RMP regulations the GDC provisions broadly apply to stationary sources with "extremely hazardous substances," which not only include chemicals listed under the RMP regulations and other environmental statutes but also any other substance that, "in the case of an accidental release, are known to cause or may reasonably be anticipated to cause death, injury or serious adverse effects to human health or the environment." The CAA of 1990 also required OSHA to adopt similar standards on protecting workers from releases of regulated substances. Most of the requirements under the RMP program are identical to OSHA's PSM requirements but compliance with the OSHA requirements do not always translate into compliance with the CAA. EPA added the CAA provisions as an enforcement priority in 2015 and these have remained through the Trump Administration. The broad reach of these requirements has translated into large enforcement assessments. Penalties brought by EPA have ranged between three to 50 times those brought by OSHA for the same event. EPA is bringing both RMP and GDC claims for broader allegations of design or operational failures and assigning significant penalties. To avoid these problems, your environmental and safety professionals should perform a combined assessment of both programs. Applicable processes should be identified and compliance with these programs confirmed.

The Plastics Train Everyone Wants to Get On

Many communities in Kentucky and certain members of the US Congress have concerns about plastics and want to do something about it. US Senator Tom Udall and US Representative Alan Lowenthal plan to introduce legislation in the fall aimed at reducing plastic waste. The proposed legislation will include phase-out

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requirements for certain single use products, extended producer responsibility initiatives and deposit or charge requirements at point of purchase. I wonder if there is a quantitative problem in the US and our communities or are the well-intended actions just the result of our cities trying to emulate or exceed requirements of other larger communities or international standards. In a study done by Trucost, they found that replacing plastics in consumer products and packaging with a mix of alternative materials that provide the same function would increase environmental costs from \$139 billion to \$533 billion annually. That's because strong, lightweight plastics help us do more with less material, which provides environmental benefits throughout the lifecycle of plastic products and packaging. The study also concluded that the environmental costs of alternative materials can be lower per ton of production but are greater in aggregate due to the much larger quantities of material needed to fulfill the same purposes as plastics. Here's the [summary of their report](#). Lesson to be remembered: Look for unintended consequences in every change before leaping on the train.

Pipeline Safety Act Reauthorization

Both the US Senate and House have bills in different stages of review for reauthorization for the Pipeline Safety Act which expires at the end of September. The House version (Democratic controlled) and the Senate version (Republican controlled) are different. Neither version has been brought before their respective chambers for a vote. H.R. 3432 (the House Bill) focuses on changes to civil penalties, criminal liability, rulemaking requirements such as eliminating cost benefit analysis, expanded public awareness and community right to know information. S. 2299 (the Senate Bill) would require the Pipeline and Hazardous Materials Safety Administration (PHMSA) to finalize a gas gathering rule within 90 days, require various rulemaking for distribution pipelines, borrow provisions on distribution pipelines from the Leonel Rondon Pipeline Safety Act, update LNG regulations, add a definition of "idled pipeline" and other clarifications. Don't expect this rule to be completed by the current rule's expiration date of September 30. It may even be a stretch if it gets done by the end of the year.

EPA Shows Cleaner Air and A Growing Economy

EPA has posted a "flyer" on the Status and Trends through 2018 of air quality. It is an interesting presentation. <https://gispub.epa.gov/air/trendsreport/2018/#home>

EPA Proposed Rule-Water Quality Certifications

On August 22 EPA published for public comment a proposed rule providing updates and clarifications to the substantive and procedural requirements for water quality certification under the Clean Water Act Section 401. This proposal is intended to increase the predictability and timeliness of section 401 certification by clarifying timeframes for certification, the scope of certification review and conditions and related certification requirements and procedures. I expect states currently using Section 401 to deny or delay pipeline projects will oppose this rule through comments and possibly litigation. Comments must be received on or before October 21, 2019. Here is the [Fact Sheet](#) and the [Federal Register](#) for the proposed rule.

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Endangered Species Act Final Changes Set Forth

Interior's U.S. Fish and Wildlife Service and Commerce's National Marine Fisheries Service [final rules apply to Endangered Species Act \(ESA\)](#) Sections 4 and 7. Section 4, among other things, deals with adding species to or removing species from the Act's protections and designating critical habitat; section 7 covers consultations with other federal agencies.

The [ESA](#) directs that determinations to add or remove a species from the lists of threatened or endangered species be based solely on the best available scientific and commercial information, and these will remain the only criteria for which listing determinations will be based. The proposed regulations retain language stating, "The Secretary shall make a [listing] determination solely on the basis of the best scientific and commercial information regarding a species' status."

The revisions to the regulations clarify that the standards for delisting and reclassification of a species consider the same five statutory factors as the listing of a species in the first place. The requirements ensure that all species proposed for delisting or reclassification receive the same careful analysis to determine whether they meet the statutory definitions of a threatened or endangered species as is done for determining whether to add a species to the list.

FAQs for Respirable Crystalline Silica in General Industry

Finally, some assistance for compliance in general industry. The original FAQs, posted in 2016 after the new rule was published, were very broad and offered little assistance with compliance efforts. New FAQs released in July are arranged by category and provide more instruction and guidance on compliance requirements. If you have been among the many who needed clarification, check out the new [FAQs](#). If you still have questions or need contact SMG.

Proposed Rule for Beryllium Exposure in Construction

OSHA announced a teleconference/WebEx meeting of [ACCSH](#) on September 9, 2019 to consider a proposed rule on occupational exposure to beryllium and beryllium compounds. This rule would retain the new lower permissible exposure limits in construction and shipyard industries but "[revoke the ancillary provisions](#)" for monitoring, training, control methods, PPE, medical surveillance, definitions, and what constitutes a "beryllium work area." Controversy began when OSHA issued final rules in 2017. Trump froze effective dates of regulations not already in effect and revoked portions of the final rules in 2017 and 2018. Labor unions and other stakeholders have raised concerns that the revocations compromise worker safety. OSHA is hoping to issue final rules on all three beryllium standards for general industry, construction, and shipyards by the end of the year.

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Dates to Remember

- August 21, 2019 - Formaldehyde emission standards for composite wood products becomes effective;
- September 6, 2019 - Effective date repeal of Clean Power Plan, Finalized American Clean Energy Guidelines; Finalized Regs for State plans implementing emission guidelines;
- September 9, 2019 – Teleconference for proposed rule on Beryllium/Beryllium compounds in construction;
- September 30, 2019 - Pipeline Safety Act expires;
- October 8, 2019 - PSD Project Emission Accounting comments due, Aviation industry whistleblower stakeholder meeting;
- October 15, 2019 - Coal Combustion Residual comments due, Comments due to update Table 1 on control methods for Respirable Crystalline Silica;
- October 21, 2019 - Comments due Water Quality Certifications.

KENTUCKY REGULATIONS

Ordinary Administrative Regulations In Process

Office of the Secretary (EEC)

400 KAR 001:110. Administrative hearings relating to matters brought under KRS Chapter 350 or KRS 351.310 through 351.357

Department for Environmental Protection
Regulations

<https://apps.legislature.ky.gov/law/kar/title401.htm>

Division of Water

401 KAR 008:030 Water treatment plant and water distribution system classification and staffing

401 KAR 008:050. Drinking water program fees

401 KAR 011:001. Definitions Chapter 011

401 KAR 011:030. Wastewater treatment and collection system operators; classification and qualifications

401 KAR 011:040. Water treatment and distribution system operators; classification and qualifications

401 KAR 011:050. Operator and training provider certification

401 KAR 011:060. Operator and training provider certification fees

Division for Air Quality

401 KAR 058:005. Accreditation of asbestos professionals

FEDERAL REGULATIONS

PSD and Nonattainment New Source Review (NNSR): Project Emissions Accounting

AGENCY: EPA

ACTION: Proposed rule.

SUMMARY: The EPA is proposing to revise certain New Source Review (NSR) applicability regulations to clarify the requirements that apply to sources proposing to undertake a physical or operational change (i.e., a project)

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under the NSR preconstruction permitting program. Under this program, an existing major source proposing to undertake a project must determine whether that project will constitute a major modification following a two-step applicability test and thus be subject to the NSR preconstruction permitting requirements. The first step is to determine if the proposed project will cause a “significant emissions increase” of a regulated NSR pollutant (Step 1). If the proposed project is projected to cause such an increase, the second step is to determine if there is a “significant net emissions increase” of that pollutant (Step 2). In this action, we are proposing to revise our NSR applicability regulations to make it clear that both emissions increases and emissions decreases that result from a given proposed project are to be considered at Step 1 of the NSR major modification applicability test. In addition, this proposal replaces and withdraws the agency’s 2006 Project Netting Proposal.

DATES: Comments must be received on or before October 8, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-08-09/pdf/2019-17019.pdf>

Disposal of Coal Combustion Residuals from Electric Utilities; Enhancing Public Access to Information; Reconsideration of Beneficial Use Criteria and Piles

AGENCY: EPA.

ACTION: Proposed rule.

SUMMARY: In this action, EPA is proposing the following targeted changes to the April 17, 2015 Coal Combustion Residuals Final Rule based on stakeholder input: Revisions to the annual groundwater monitoring and corrective action report requirements, establishing an alternate risk-based groundwater protection standard for boron, and revisions to the publicly accessible CCR website requirements. The Agency is also proposing to address two provisions of the final

rule that were remanded back to EPA on August 21, 2018 by the U.S. Court of Appeals for the D.C. Circuit. First, EPA is proposing to revise the CCR beneficial use definition by replacing the mass based numerical threshold with specific location-based criteria as the trigger for an environmental demonstration. Second, EPA is proposing to introduce a single approach to consistently address the potential environmental and human health issues associated with piles of CCR, regardless of the location of the pile and whether the CCR is destined for disposal or beneficial use.

DATES: Comments. Comments must be received on or before October 15, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-08-14/pdf/2019-16916.pdf>

TOXICS

Technical Issues; Formaldehyde Emission Standards for Composite Wood Products

AGENCY: EPA

ACTION: Final rule.

SUMMARY: EPA is publishing this final rule to amend the formaldehyde standards for composite wood products regulation. EPA is publishing these amendments to address certain technical issues and to further align the final rule requirements with the California Air Resources Board (CARB) Airborne Toxic Control Measures (ATCM) Phase II program. Addressing these technical issues will add clarity for regulated entities. These revisions to the existing rule will also streamline compliance programs and help to ensure continued smooth transitions for supply chains to comply with the requirements associated with regulated composite wood products.

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

<https://www.govinfo.gov/content/pkg/FR-2019-08-21/pdf/2019-17284.pdf>

OSHA

Occupational Exposure to Respirable Crystalline Silica—Specified Exposure Control Methods

AGENCY: OSHA

ACTION: Request for Information (RFI).

SUMMARY: OSHA is requesting information on the effectiveness of engineering and work practice control methods not currently included for the tasks and equipment listed on Table 1 of the Respirable Crystalline Silica standard for construction. The agency is also requesting information on tasks and equipment involving exposure to respirable crystalline silica that are not currently listed on Table 1, along with information on the effectiveness of engineering and work practice control methods in limiting worker exposure to respirable crystalline silica when performing those tasks. Finally, OSHA is requesting information and comment on whether there are additional circumstances where it would be appropriate to permit employers covered by the Respirable Crystalline Silica standards for general industry and maritime to comply with the silica standard for construction. This RFI requests comment and information, including exposure data, which could assist the agency in assessing whether revisions to the standards may be appropriate.

DATES: Submit comments on or before October 15, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-08-15/pdf/2019-17450.pdf>

Aviation Industry Whistleblower Stakeholder Meeting

AGENCY: OSHA

ACTION: Notice of public meeting.

SUMMARY: The Occupational Safety and Health Administration (OSHA) is announcing a public meeting to solicit comments and suggestions from stakeholders on issues facing the agency in the administration of the whistleblower protection provisions under the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR21). **DATES:** The public meeting will be held on October 8, 2019, from 1:00 p.m. to 3:00 p.m., ET. Persons interested in attending the meeting must register by September 24, 2019. In addition, comments relating to the “Scope of Meeting” section of this document must be submitted in written or electronic form by September 30, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-08-20/pdf/2019-17826.pdf>

Advisory Committee on Construction Safety and Health (ACCSH): Notice of Meeting

AGENCY: OSHA

ACTION: Announcement of a teleconference/WebEx meeting of ACCSH.

SUMMARY: ACCSH will hold a teleconference/WebEx meeting September 9, 2019, to consider a proposed rule on occupational exposure to beryllium and beryllium compounds in the construction industry.

DATES: ACCSH will meet from 10:00 a.m. to 12:00 p.m., ET, Monday, September 9, 2019, by teleconference/ WebEx.

<https://www.govinfo.gov/content/pkg/FR-2019-08-20/pdf/2019-17825.pdf>

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Lead in General Industry Standard; Extension of the Office of Management and Budget's (OMB) Approval of Information Collection (Paperwork) Requirements

AGENCY: OSHA

ACTION: Request for public comments.

SUMMARY: OSHA solicits public comments concerning the proposal to extend OMB approval of the information collection requirements specified in the Lead in General Industry Standard.

DATES: Comments must be submitted (postmarked, sent, or received) by October 28, 2019.

<https://www.govinfo.gov/content/pkg/FR-2019-08-27/pdf/2019-18376.pdf>

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