



**The New York Water Environment Association, Inc.**  
***The Water Quality Management Professionals***

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**Recent Environmental Legislative, Regulatory  
and Judicial Developments<sup>1</sup>**

**May 6, 2009 through October 30, 2009**

**I. NEW YORK**

**A. Legislation**

See separate document.

**B. Regulation and Policy**

**1. Water Related**

**NY SPDES Permits for Vessels Can Be More Stringent than EPA's**

The New York State Supreme Court agreed with the state of New York and dismissed a challenge to permit requirements issued by the NYSDEC designed to control discharges of invasive species to the Great Lakes and other waterways by ocean-going vessels. Specifically, the court rejected the arguments of a coalition of large shipping interests claiming that the state had illegally placed further restrictions on an EPA nationwide discharge permit for these vessels.

**Source:** May 29, 2009 Press Release Office of the NYS AG, citing Port of Oswego et al, vs. NYSDEC, NY State Supreme Court, Albany County May 21, 2009.

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The NYWEA GAC thanks Nixon Peabody LLP for its on-going support of this newsletter. It also thanks WEF's Government Affairs Staff, The Business Council of New York and NACWA for much of the information in this newsletter. If you are not already a member of one or all of these organizations, visit their web pages and consider becoming a member. The WEF web page can be reached through the NYWEA web page at <http://www.nywea.org/index.htm>; the NACWA web page is at [www.nacwa.org](http://www.nacwa.org) and TBCNY is at [bcnys.org](http://bcnys.org). NYWEA gratefully acknowledges the following sources of the information contained in this newsletter: BNA Environmental Reporter, EPA Administrative Law Reporter, Water On-Line, Pollution On-Line and Environmental Protection E-News: these are excellent resources for the environmental manager, attorney or consultant.

([http://www.oag.state.ny.us/media\\_center/2009/may/may29a\\_09.html](http://www.oag.state.ny.us/media_center/2009/may/may29a_09.html) and [http://www.oag.state.ny.us/media\\_center/2009/may/pdfs/Port\\_of\\_Oswego\\_Decision\\_Order\\_and\\_Judgment.pdf](http://www.oag.state.ny.us/media_center/2009/may/pdfs/Port_of_Oswego_Decision_Order_and_Judgment.pdf))

### **Draft Report on Recommendations for Implementing the Great Lakes - St. Lawrence River Basin Water Resources Compact**

A draft report entitled *Our Great Lakes Water Resources Conserving and Protecting Our Water Today for Use Tomorrow* has been released. This report was prepared by the Great Lakes Basin Advisory Council (GLBAC) in response to the directive issued to the Council by the New York State Legislature in approving the ratifying legislation of the Great Lakes-St. Lawrence River Basin Water Resources Compact (the Compact) in 2008. Recognizing the complexity of the Compact and the issues the GLBAC was charged to consider, an approach was defined to develop recommendations consistent with the following guiding principles and public input. Those guiding principles included:

- The Council would rely on input from relevant State agencies and non-governmental organizations to the greatest extent possible.
- The report's contents should serve as an initial and continuing source of guidance to the State Legislature in considering future State legislation on water resources.
- The production of this report is an opportunity for the Council to highlight key management and scientific information needs that will promote more effective water conservation and projection of future supply needs.

**Source:** NYSDEC Website at <http://www.dec.ny.gov/lands/56095.html>

### **American Rivers Names Staten Island a "Water-wise City"**

American Rivers recently highlighted eight of the top U.S. "water wise" communities in its report, "Natural Security: How Sustainable Water Strategies Are Preparing Communities for a Changing Climate." Included in the listing was Staten Island, which, according to American Rivers uses streams and wetlands to help transport and treat stormwater runoff.

According to American Rivers, the "listed cities recognize that there is more to water infrastructure than big pipes, dams, and levees. They see the value of natural infrastructure like healthy rivers, forests, and wetlands and they are proving that by helping nature, we actually help ourselves. Green solutions like floodplain restoration and water efficiency are often cheaper, more reliable, and more effective than traditional approaches." The report can be found at <http://www.americanrivers.org/assets/pdfs/reports-and-publications/natural-security-report.pdf>

**Source:** Water and Wastewater News, 9/23/09

### **House Subcommittee Holds Hearing on Long Island Sound; WEF Testimony Supports Nitrogen Trading**

The House Subcommittee on Water Resources and the Environment met on October 6 to review the current state of the Long Island Sound, assess the reasons for continued impairments, and consider policy recommendations to achieve full restoration of the Long Island Sound. Representatives from EPA, New York State Department of Environmental Conservation, and

Connecticut Department of Environmental Protection, and other interested parties provided testimony.

**Source:** This Week in Washington from WEF 10/8/09

## 2. Non-Water

### **Governor Signs Executive Order Establishing Program to Review Environmental Regulations**

Gov. David A. Paterson signed an executive order Aug. 7 to establish a regulatory review program to examine state regulations, rules, and paperwork requirements, including those covering the environment (Executive Order No. 25). The review will be overseen by a five-member committee, which will have authority to order state agencies to alter or repeal regulations. The committee will be comprised of existing appointed officials in the governor's office, including his counsel and his budget director. "The purpose of the review process set forth in this order shall be to reduce the costs, burdens and inefficiencies of rules and paperwork requirements on all regulated entities and the general public, and to eliminate outdated, inadvisable or unwise rules and paperwork," the order says. Under the order, the state Department of Environmental Conservation and other agencies will issue a public invitation for stakeholders to comment on existing regulations. The comments will be reviewed by the agency and the newly appointed committee.

**Source:** BNA Env. Reporter, 8/14/09

### **RGGI Secondary Market Competitive, Volume Up in Second Quarter**

The secondary market for Regional Greenhouse Gas Initiative (RGGI) allowances was competitive and efficient in the second quarter of 2009, according to a report released Sept. 4 by RGGI. The report said trading volumes increased from the first quarter, and prices for futures contracts for RGGI allowances stabilized. The report said the daily closing price for RGGI futures contracts on the Chicago Climate Futures Exchange averaged \$3.49 in the second quarter. The price ranged from \$2.97 on June 24 to \$3.85 on March 16. According to the report, trading in futures contracts increased fivefold from the first quarter of 2009 to the second. The number of participants in the market for RGGI allowance derivatives increased from 26 firms with significant financial positions in the first quarter to 30 in the second quarter, the report said. The report also said transfers of ownership of allowances more than doubled from the first quarter of 2009, "showing that market participants are able to obtain allowances through the secondary market." The next auction of carbon dioxide allowances for the 10 states that are members of the cap-and-trade program occurred on September 9th.

**Source:** BNA Environment Reporter 9/11/09

### **Governor Allocates RGGI Funds for Conservation**

New York Gov. David A. Paterson (D) signed a bill Oct. 13 that will use \$112 million from the auction of carbon dioxide emissions allowances by the Regional Greenhouse Gas Initiative for energy conservation and the creation of so-called green jobs (A. 8901). The bill, which took effect immediately, would create a \$70 million revolving loan fund at the New York State Energy Research and Development Authority for energy audits and retrofitting commercial and residential properties. Loans of up to \$13,000 for residential properties and \$26,000 for commercial properties will be provided under the bill. The goal is to retrofit 1 million homes

over the next five years. The bill also provides another \$4 million to be used for training for green jobs. A summary of the Green Jobs-Green New York Act (A. 8901) and a link to the full text is available at <http://assembly.state.ny.us/leg/?bn=A08901&sh=t>.

**Source:** BNA Environment Reporter, 10/16/09

### **New York Ozone – EPA Proposal Disapproved of Draft Rule**

EPA is proposing action on portions of a State Implementation Plan revision submitted by New York State that are intended to meet some Clean Air Act requirements for attaining the 0.08 parts per million 8-hour ozone national ambient air quality standards. EPA is proposing to disapprove the reasonably available control technology requirement as it relates to the entire State of New York, including the New York portion of the New York-Northern New Jersey-Long Island, NY-NJ-CT and the Poughkeepsie 8-hour ozone moderate nonattainment areas.

In addition, EPA is proposing to disapprove the reasonably available control measure analysis as it relates to the New York portion of the New York-Northern New Jersey-Long Island, NY-NJ-CT 8-hour ozone moderate nonattainment area.

**Source:** Federal Register: August 25, 2009

### **NYC Commissions Study On Readiness for Electric Vehicles/ Begins Use of Hybrid Garbage Trucks**

A study has been commissioned by New York City to evaluate ways of preparing for the introduction of large numbers of electric vehicles and encouraging city residents to use them. In addition, the city Sanitation Department will add to its fleet a first-of-its-kind hybrid garbage truck and that the automaker BMW would lend the city 10 Mini E all-electric cars for patrols that examine street conditions. The steps are part of the city's PlaNYC broad sustainability plan calling for a 44 percent reduction in transportation emissions by 2030. The study, to be conducted by McKinsey & Co. consultants, was launched in anticipation of significant growth in electric vehicles in the next five to 10 years, the city said. The three new hybrid garbage collection trucks at the Sanitation Department are the first of their kind in the United States. The department has also added one hybrid rack truck, used for lot cleaning, snow operations, and hauling of heavy materials.

The 10 BMW mini electric vehicles will be field-tested by the city Parks Department and the city Street Conditions Observation Unit (SCOUT).

**Source:** BNA Env. Reporter 8/28/09

## **C. Regulation and Policy**

### **1. Water**

#### **Hospitals Agree to Cut Carbon Dioxide Emissions**

Thirteen hospital systems will participate in a New York City plan for reducing carbon dioxide emissions. The commitment by the institutions to cut emissions by 30 percent over the next 10 years is part of PlaNYC, a long-term environmental sustainability program launched by Mayor Michael R. Bloomberg (I) in 2007. Hospitals account for an estimated 2 percent of the

total greenhouse gas emissions from New York City buildings, the city said. The reductions to be achieved by the 13 hospital systems would amount to about 285,000 metric tons per year.

**Source:** BNA Environment Reporter, 5/29/09.

### **Governor Paterson Signs Executive Order to Reduce New York's Greenhouse Gas Pollution**

Governor David A. Paterson signed Executive Order No. 24 setting a goal to reduce greenhouse gas emissions in New York State by 80 percent below the levels emitted in 1990 by the year 2050. The Executive Order also creates a Climate Action Council with a directive to prepare a draft Climate Action Plan by September 30, 2010. The Climate Action Plan will assess how all economic sectors can reduce greenhouse gas emissions and adapt to climate change, as well as identify the extent to which such actions support New York's goals for a clean energy economy. The Climate Action Council will consist of the Commissioners of the Departments of Agriculture and Markets, Environmental Conservation, Housing and Community Renewal and Transportation; the President and CEO of Empire State Development; the Chair of the Public Service Commission; the Presidents of the New York State Energy Research and Development Authority, Metropolitan Transportation Authority, Dormitory Authority, the New York Power Authority and the Long Island Power Authority; the Secretary of State; the Director of the Budget; the Director of State Operations; and the Counsel to the Governor. The Director of State Operations shall serve as the Chair of the Council. The Executive Order requires that the Council hold regional public comment hearings on the draft Plan and allow at least 60 days for the submission of written public comment. Thereafter, the Council shall prepare a final Plan which shall be reviewed and, if warranted, adjusted annually by the Council.

**Source:** [http://www.ny.gov/governor/press/press\\_0806091.html](http://www.ny.gov/governor/press/press_0806091.html) August 6, 2009

### **Electronics Makers Sue New York City to Block Law on Collection, Recycling**

Two trade associations for electronics manufacturers sued New York City July 24 to block implementation of a law requiring collection and recycling of discarded products (Consumer Electronics Ass'n v. New York City, S.D.N.Y., No. 09-6583, 7/24/09). In their complaint, the Consumer Electronics Association and the Information Technology Industry Council called the electronic-waste law and city regulations adopted for it April 15 "arbitrary, capricious, illegal, and unconstitutional." It sought relief from a July 31 compliance deadline, claiming that the law would impose "crushing costs and excessive burdens." Under the law, electronics manufacturers would have to develop and finance e-waste take-back programs and meet phased-in percentage requirements after a three-year grace period. The July 31 deadline is for submission of company take-back program plans for city Sanitation Department approval. The e-waste program exceeds the authority of the city to regulate interstate commerce, the groups said in the complaint. The city rules, the trade associations charged, would "force hundreds of additional trucks onto city streets, needlessly increasing traffic congestion, air and noise pollution, and carbon emissions" for the collection programs. Estimates suggest the requirements will cost manufacturers more than \$200 million annually, resulting in cost increases to consumers and job losses, the associations said. Reportedly the members of the two Trade Associations believe that "the responsibilities and costs for electronics recycling should be shared among all stakeholders, including city and state governments, retailers, recyclers, and consumers."

**Source:** BNA Env. Reporter 7/31/09, citing *United States v. Consultores De Navegacion*, D. Mass., No. 1:08-cr-10274, 7/27/09

## **D. Enforcement and Judicial**

### **Safety Consulting Official Sentenced To Prison Term in False Credential Case**

A second defendant has been sentenced to a prison term in a federal case charging members of an upstate New York consulting firm with conspiring to falsify the qualifications of its employees to serve as safety monitors on New York City Department of Environmental Conservation construction sites. The defendant was sentenced to serve a term of one year and one day by the U.S. District Court for the Southern District of New York. In February, this individual had admitted to participating in a conspiracy to defraud the Department of Environmental Conservation. He was vice president of IMS Safety Inc. of Middletown, N.Y., which offered worker safety and health regulatory compliance services. He had been hired by the Department of Environmental Conservation contractors to provide safety oversight at construction sites under contracts specifying training and experience requirements for the firm's personnel. In December 2008, another IMS vice president, admitted to similar charges, and in June, the company's president and co-owner and the company itself entered guilty pleas. From approximately 2006 through January 2008, the company and these individuals conspired to falsify the qualifications to gain the Department of Environmental Conservation approval of their appointments to safety oversight positions, prosecutors charged. The Department of Environmental Conservation paid more than \$1 million for jobs performed by employees whose qualifications had been misrepresented, they added. In addition to the prison sentence, the Vice President was ordered by the judge to pay \$1.035 million in restitution to the Department of Environmental Conservation and to forfeit the same amount to the United States. The other Vice President was sentenced to 24 months in prison for his role in the scheme. The President and the company are slated to be sentenced on Oct. 27. (United States v. Rotante, S.D.N.Y., No. 09-CR-150, 9/10/09).

**Source:** BNA Occupational Safety & Health Reporter 9/17/09

### **Jury Finds Exxon Mobil Responsible for Contamination**

On Oct. 19, a federal jury found Exxon Mobil Corporation responsible for polluting New York City's groundwater with methyl tertiary butyl ether (MTBE) and awarded \$104.7 million in compensatory damages. The case, brought by the City of New York, was the first MTBE litigation in the country to go trial and reach a verdict. According to the Bloomberg Financial News, the verdict is the 13th largest jury verdict in the nation in 2009. In the action, the City of New York accused Exxon Mobil, the biggest U.S. oil company, of contaminating drinking water wells in the borough of Queens. It sued for the costs of removing MTBE from the water supply. Thirty-three oil companies previously settled similar contamination claims with New York. Exxon Mobil was the lone holdout defendant. According to the [city](#), "The jury found Exxon liable for product liability for failure to warn people about the dangerous nature of its product as well as trespass, public nuisance, and negligence."

**Source:** Water & Wastewater News, Oct 21, 2009

### **Bronx River Strom Water Settlement**

A settlement involving Yonkers, White Plains, Scarsdale, Greenburgh and the Yonkers Raceway will be used to fund \$1.8 million in local efforts to reduce water pollution in the Bronx River -- which runs through its namesake borough as well as southern Westchester County. The funding will be provided to seven entities, including the Bronx River Alliance, THE POINT Community Development Corporation, the New York Botanical Garden, the New York City Parks

Department and the Westchester County Planning Department, for “green infrastructure” - natural systems, like wetlands, or engineered systems that mimic them - that capture and treat polluted stormwater before it reaches the river. These local efforts are a portion of the over \$7 million that the Attorney General’s Office obtained from settlements, completed in 2007, with four local municipalities and the Yonkers Racetrack that ended their illegal discharges of raw sewage to the Bronx River. The remaining settlement funds will be allocated in future years to projects that will further reduce pollution discharges to the river. A principal cause of the Bronx River’s water quality problems is stormwater runoff -- rainwater and snowmelt that flows over impervious surfaces and into waters, picking up raw sewage, litter, gas and oil, pesticides, fertilizers, and other harmful pollutants along its path.

**Source:** Ecopolitics This Week, 9/4/09

([http://www.nylcv.org/ecopoliticsdaily/20090903\\_funds\\_dedicated\\_to\\_bronx\\_river\\_restoration](http://www.nylcv.org/ecopoliticsdaily/20090903_funds_dedicated_to_bronx_river_restoration))

### **Manufacturer to Pay \$130,000 To Settle Hazardous Waste Allegations at New York Facility**

Kawasaki Rail Car Inc. has agreed to pay \$130,000 to settle a hazardous waste complaint stemming from a 2006 inspection of its Yonkers, N.Y., factory. The Southern District of New York Oct. 1 approved the settlement of a complaint alleging violations of the Resource Conservation and Recovery Act. The settlement and complaint were filed simultaneously the same day as the approval. Operations at the 300-employee manufacturing facility include rail car component fabrication and assembly as well as rail car rehabilitation and testing, according to the complaint. In the inspection, EPA found that the company had failed to make hazardous waste determinations, had stored hazardous waste without a permit or permit exemption, and had failed to minimize the possibility of a fire, explosion, or unplanned release of hazardous waste, the complaint said. The inspector saw numerous unlabeled or corroded containers, various puddles of liquid and dried spillage remnants, and evidence that spent mercury-containing fluorescent bulbs were routinely being crushed in a compactor and thrown out with the regular trash, the complaint charged.

After the inspection, Kawasaki identified and properly disposed of the chemical and hazardous wastes stored at the facility, including 3,000 pounds of waste paints and solvents and about 500 gallons of ignitable adhesives, according to the settlement. The company also performed an environmental audit to improve its hazardous waste management and took “all necessary steps” to comply with RCRA, the settlement said.

**Source:** BNA Toxics Law Reporter, 10/15/09 citing *U.S. v. Kawasaki Rail Car Inc., S.D.N.Y., No. 09-Civ.-8093, settlement approved 10/1/09.*

### **Asbestos Removal Convictions for Rochester Work**

A federal grand jury in the Western District of New York, has returned a superseding indictment charging two individuals with committing violations of the Clean Air Act while they were project managers for Gordon-Smith Contracting, Inc., an asbestos removal company owned by Keith Gordon-Smith. The indictment supersedes an earlier indictment returned by the grand jury in June 2009, against the owner of the company, charging him with numerous violations of the Clean Air Act, submitting false statements and obstruction of justice. The superseding indictment now also charges Gordon-Smith's company with the same criminal violations. The charges stem from allegations that Gordon-Smith, Gordon-Smith Contracting, Vega and Rowe directed and caused workers to illegally remove and dispose of asbestos during the demolition of

the Genesee Hospital complex in Rochester, N.Y. The 18-count indictment alleges that at different time periods between June 2007 and April 2009, Gordon-Smith, Vega and Rowe had Gordon-Smith Contracting employees remove asbestos from the Genesee Hospital complex without ensuring that the asbestos was kept adequately wet or properly disposed. The indictment also alleges that Gordon-Smith caused his company's employees to perform illegal asbestos removal at other sites, including schools, and that Gordon-Smith took several steps to hide the illegal asbestos removal from federal agencies. These included failing to provide prior notification to EPA before the asbestos removal projects were performed at the schools and hospital, giving false statements to an inspector from the Occupational Safety and Health Administration, and providing a false notification to the EPA. If convicted, Gordon-Smith, Vega and Rowe could each be punished by up to five years in prison as well as a criminal fine of up to \$250,000 for each count. Gordon-Smith Contracting could be subject to a criminal fine of the greater of \$500,000 or twice the gain obtained by the company or suffered by any victims as a result of the crimes, for each count. The U.S. Attorney's Office for the Western District of New York has established a page on its Web site at <http://www.usdoj.gov/usao/nyw> to provide information for potential victims who may have been harmed as a result of the alleged crimes.

**Source:** LinkedIn, citing a U.S. Department of Justice Press Release

### **Port Chester Ordered to Fix Stormwater System**

The village of Port Chester, N.Y., located in Westchester County near the Connecticut border, has been ordered to improve its stormwater runoff system and correct violations of the Clean Water Act by the Environmental Protection. The action followed EPA sampling that found high levels of fecal coliform and total coliform bacteria in village stormwater in June 2008 and April 2009. Port Chester discharges stormwater into the Byram River, which empties into Long Island Sound. The order requires the village to prepare, implement, and enforce a stormwater management program to identify and correct improper sources of bacteria discharges by the end of 2009. It also calls for monitoring and reporting on stormwater discharges for another six months.

**Source:** BNA Env. Reporter 8/28/09

### **U.S. Supreme Court Declines to Review Filtration Rule Waiver for New York City**

The U.S. Supreme Court June 29 refused to review the EPA waiver of filtration requirements for the Catskill-Delaware water supply. A coalition of towns in upstate New York had sought reversal of a 2008 decision of the U.S. Court of Appeals for the Second Circuit, which dismissed their lawsuit. The towns argued that EPA exceeded its authority under the Safe Drinking Water Act by allowing New York City to protect the safety of its water supply by purchasing tracks of upstate land, instead of constructing a filtration plant as required of most other cities. With New York City spending more than half a billion dollars to buy land in the watershed communities, the towns asserted the large-scale land purchases inherently changed land uses and community character. The towns claimed an adverse impact on businesses, job creation, and industrial tax revenues. The Second Circuit declined to address the merits of the dispute because it found the towns could not establish a case-or-controversy as required by Article III of the Constitution. In other words, the towns failed to establish that they had legal injuries which could be redressed by the courts. The Second Circuit wrote that “any relief this Court could provide is speculative.”

**Source:** BNA Env. Reporter, 7/2/09; Citing Coalition of Watershed Towns v. EPA, U.S., No. 08-1420, 6/29/09. Text of the decision is available at [http://www.ca2.uscourts.gov/decisions/isysquery/cfcad4a9-3eb1-4698-a85d-b176d166d668/1/doc/07-2449-ag\\_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/cfcad4a9-3eb1-4698-a85d-b176d166d668/1/doc/07-2449-ag_opn.pdf).

## II. FEDERAL

### A. Legislation

#### **GAO Report on Possible Clean Water Trust Fund**

Several options could generate revenue to finance a clean water trust fund, including a variety of excise taxes, but obstacles to their implementation would have to be overcome, the Government Accountability Office said in a report. GAO prepared the report in response to a congressional request to provide information on issues that would need to be addressed if Congress decided to establish a dedicated clean water trust fund to help meet a potential funding gap between projected future wastewater infrastructure needs and current spending levels. While the report identified a number of funding options, GAO did not endorse any option and did not have a position on whether a trust fund should be established. The Report identified 3 options for funding a Trust Fund:

1. Excise taxes could be placed on beverages; fertilizers and pesticides; flushable products including soaps, detergents, cooking oils, and toiletries; and water appliances and plumbing fixtures. In order to raise \$10 billion, the excise taxes would have to range from 6.4 percent to 39.2 percent, the report estimated.
2. Levy a tax on corporate income. An additional 0.1 percent corporate income tax could raise about \$1.4 billion annually.
3. Levy a water tax, a tax of 0.01 cent per gallon could raise about \$1.3 billion annually, GAO said.

A clean water trust fund would provide a dedicated source of funding for wastewater infrastructure that would be similar to trust funds that Congress has established for other infrastructure and environmental programs, such as highway construction and coastal wetlands restoration. In addition to a trust fund, other approaches could help bridge the funding gap, the report said. Wastewater and drinking water utilities could be encouraged to improve their system management and to charge the full cost for service to their customers. Funding for the clean water state revolving fund could be increased; and a national infrastructure bank could be established to provide financing for a variety of projects. The report said public-private partnerships also could be encouraged and private bond restrictions on wastewater projects could be lifted.

**Source:** BNA Env. Reporter, 7/2/09; the report, *Clean Water Infrastructure: A Variety of Issues Need to Be Considered When Designing a Clean Water Trust Fund* (GAO-09-657), is available at <http://www.gao.gov>.

#### **Antiterrorism Bill Agreement Gives EPA Authority for Water Security**

EPA reached an agreement on September 22 with the Department of Homeland Security (DHS) that EPA should have authority to implement chemical security antiterrorism standards for both publicly owned wastewater treatment works and community-based drinking water systems, an

issue that has drawn concern from utility groups who want to work with one agency, preferably EPA. Current chemical security regulations, which exempt wastewater and drinking water treatment plants, are slated to expire on October 4. Both the House and Senate Homeland Security appropriations bills have provisions that would extend the current DHS authority for one year. Proponents of chemical security legislation are considering the one-year extension a placeholder to give Congress time to fully address the issue.

House Energy and Commerce Committee leaders introduced legislation July 20—the Drinking Water System Security Act of 2009 ([H.R. 3258](#))—that would require the EPA to set standards to regulate the security of public drinking water systems. The legislation would authorize EPA to strengthen security at U.S. drinking water systems under the Safe Drinking Water Act by requiring the establishment of risk-based performance standards for community water systems serving more than 3,300 people and certain other public water systems with security risks. The House Energy and Commerce Committee also is expected to address the broader Chemical Facility Antiterrorism Act of 2009 ([H.R. 2868](#)), approved by the House Homeland Security Committee, which covers chemical facilities and wastewater treatment plants. The House Transportation and Infrastructure Committee, which has jurisdiction over wastewater treatment plants, is expected to take up the issue in late October.

**Source:** WEF's This Week in Washington 9/25/09

### **House Subcommittee Approves Legislation To Curb Harmful Algal Blooms**

The House Science and Technology Subcommittee on Energy and Environment approved legislation on September 30 authorizing \$140 million over five years to reduce the number of harmful algal blooms and low-oxygen dead zones in U.S. waters that kill fish and harm aquatic life. The **Harmful Algal Blooms and Hypoxia Research and Control Amendments Act of 2009** ([H.R. 3650](#)), which the House Science and Technology Subcommittee on Energy and Environment approved by voice vote, would authorize \$35 million for each of fiscal years 2010 through 2014 to establish and maintain a national program to address the problem. Under H.R. 3650, the National Oceanic and Atmospheric Administration would develop and coordinate a strategy on harmful algal blooms and hypoxia and develop and implement comprehensive regional action plans.

**Source:** This Week in Washington from WEF October 2, 2009

## **B. Regulatory and Policy**

### **1. Water**

#### **Obama Appoints Cameron Davis to Head Proposed Great Lakes Initiative**

EPA announced on June 4 that President Obama has appointed the head of the Alliance for the Great Lakes to lead the administration's proposed \$475 million initiative to clean up the Great Lakes. Cameron Davis has served as president and chief executive of the alliance for the past 11 years. The President included the \$475 million investment in a multi-agency Great Lakes initiative as part of his FY 2010 budget proposal. Under the proposed Great Lakes Restoration Initiative, EPA, in partnership with 11 agencies and Cabinet organizations, would lead the development and implementation of programs and projects that target the most significant problems in the Great Lakes ecosystem. The initiative would target five areas: toxic substances and areas of concern; invasive species; near-shore health and nonpoint source pollution; habitat

and wildlife protection and restoration; and accountability, monitoring, evaluation, communication, and partnerships.

**Source:** This Week in Washington from WEF, 6/5/09

### **Inspector General Says EPA Needs Better Cleanup Plan for Great Lakes**

The Environmental Protection Agency needs a broader plan for cleaning up the 31 identified “areas of concern” around the Great Lakes, the EPA Office of Inspector General said in a Sept. 14 report. While EPA is the main agency responsible for cleaning up the areas, it “does not have a regime for coordinating remediation activities across its program offices” or with state and local interests, the report said. “Without improved management, coordination and accountability, EPA will not succeed in achieving the results intended for the AOC program,” the report, *EPA Needs a Cohesive Plan to Clean Up the Great Lakes Areas of Concern*, said. The areas of concern (AOCs) are managed by the Great Lakes National Program Office, which reports to EPA's Region 5 office in Chicago. Cleanups are often complicated by overlapping responsibilities related to superfund jurisdiction, pending Clean Water Act enforcement, contamination removal under the Resource Conservation and Recovery Act, and statutory limitation of the use of funds from the Legacy Act—which funds the AOC program—to clean up superfund sites, the report found. There is also overlap among EPA regions, as the AOCs are located in three different ones.

The report recommended the Great Lakes National Program Manager establish a management plan spelling out each EPA program office's authority and responsibility for cleaning contaminated sediment; assign a lead EPA office to each site and determine the volume of contaminated sediment at each site; and annually measure and publish estimates of volumes, cleanup costs, and progress for each site. The inspector general's office said EPA agreed with some of the report's conclusions, though it did not concur with the idea of designating site-specific leadership authorities. The agency has 90 days to issue a written response to the report. However, the OIG said in a letter to EPA Acting Great Lakes National Program Manager Bharat Mathur that “we do not believe your planned actions meet the intent of the recommendations, and all recommendations are unresolved.”

The inspector general's report is available at <http://www.epa.gov/oig/reports/2009/20090914-09-P-0231.pdf>.

### **Aquatic Ecosystem Simulation Model AQUATOX**

The U.S. Environmental Protection Agency, Office of Science and Technology, has released an enhanced version of the aquatic ecosystem simulation model AQUATOX. AQUATOX is a PC-based ecosystem model that predicts the fate of nutrients and organic chemicals in water bodies, as well as their direct and indirect effects on the resident organisms. AQUATOX Release 3 contains many enhancements that increase the realism and utility of the model. Visit the AQUATOX web site at <http://epa.gov/ost/models/aquatox/> for more information or to download the model and its associated documentation.

### **EPA Launches TMDL Program Results Analysis Web Site**

EPA has developed a new Web site to communicate information about Total Maximum Daily Load (TMDL) Program results to technically specialized audiences, including TMDL developers, state water programs, academia, other federal agency programs, and EPA water quality staff. A TMDL is a calculation of the maximum amount of a pollutant that a waterbody

can receive and still meet water quality standards, and an allocation of that load among the various sources of that pollutant. The TMDL Program Results Analysis Project is a multi-year effort directed at measuring and analyzing programmatic and environmental results of the program. The Web site provides a Clean Water Act Impaired Waters Program Pipeline navigation feature, fact sheets, EPA reports and Web sites, EPA grantee reports and Web sites, publications, and datasets related to this effort.

The TMDL Program Results Analysis Web site is available at <http://www.epa.gov/owow/tmdl/results>

**Source:** EPA's Water Headlines for the week of September 14, 2009

### **EPA Launching Information Collection Request for Water Contaminants Study**

EPA announced in the September 18 Federal Register that it is launching a survey (information collection request – ICR) of drinking water utilities designed to determine the presence of emerging contaminants in source water and treated drinking water. EPA's Office of Research & Development is conducting the survey with the U.S. Geological Survey (USGS) to sample 50 drinking water treatment plants on population, characteristics of the source water, type of treatment performed by the plants, and water quality parameters during the time of sampling. According to the support document accompanying the ICR, the agencies plan to analyze samples for 200 emerging chemical and microbial contaminants, 125 of which are pharmaceutical related chemicals.

EPA is also compiling a literature review on pharmaceutical related chemicals in wastewater, surface water, and groundwater. The literature review and the sampling study overlap on 56 pharmaceutical based compounds. The support document also indicates that the study will be intentionally skewed towards facilities whose sources are known to be impacted by upstream discharges of human waste, thereby increasing the potential for detection in the source water. The project will be subject to the freedom of information act (FOIA).

**Source:** WEF's This Week in Washington 9/25/09 citing September 18 Federal Register

### **EPA Proposes One-Year Extension for NPDES 2008 Construction General Permit**

In an October 19, 2009, Federal Register notice, EPA announced that it is seeking public comment on its proposal to extend the 2008 NPDES general permits for storm water discharges associated with construction activity, the 2008 Construction General Permit (CGP), by one year. The 2008 CGP applies only where EPA is the permitting authority, which is in five states; Washington, DC; most U.S. territories; many federal facilities; and most Indian country lands. The 2008 CGP regulates the discharge of storm water from construction sites that disturb one acre or more of land and from smaller sites that are part of a larger, common plan of development.

The extension of the 2008 CGP permit is needed to allow the Agency sufficient time to develop a new CGP that incorporates the Agency's soon to be finalized Effluent Limitation Guideline for the Construction and Development Industry. This Guideline will represent a significant advancement in the control of sediment discharges from construction sites, imposing national

requirements on construction activities that disturb one or more acres of land. This Guideline must be completed by the Agency, under court order, by December 2009.

**Source:** EPA's "Water Headlines" for the week of October 19, 2009

### **Deadline Extended (Again) for SPCC Compliance Now November 2010**

The Environmental Protection Agency will extend until Nov. 10, 2010, the deadline for farms and other facilities to comply with a revised Spill Prevention, Control, and Countermeasure (SPCC) rule scheduled to go into effect in January 2010. EPA intends the revised compliance deadline is intended to give farms and other covered facilities additional time to fully understand all the revisions to the SPCC rule and make changes to their facilities and SPCC plans to comply with revised requirements.

The current revision, proposed by the Bush Administration, allowed a number of exemptions to the rule; for example, it exempted hot-mix asphalt equipment and containers, pesticide application equipment and related containers, and heating oil containers at single-family residences from the SPCC rule. Changes in the effective date will continue to allow EPA staff to review the changes in the rule (and give EPA time to revise or eliminate the changes if it concludes the changes are not appropriate.)

**Source:** BNA Environment Reporter 6/19/09

### **EPA Expanding Use of Green Infrastructure in POTW Enforcement**

A recently proposed consent agreement between a Missouri publicly owned treatment works (POTW) and EPA highlights a slowly building effort to include "green" infrastructure stormwater retention projects in enforcement actions against sewage treatment operators while the agency is also pushing to include the techniques in new Clean Water Act (CWA) permits.

EPA reached an agreement with the city of Independence, MO, to make major improvements to its sanitary sewer system and complete \$450,000 of supplemental environmental projects to "enhance [the] Missouri River watershed by improving stormwater detention basins and stabilizing stream banks."

**Source:** Inside EPA, May, 8, 2009

### **Wastewater Plants Relatively Light on Mercury**

Researchers for a recently completed Water Environment Research Foundation (WERF) project on mercury in wastewater treatment plant effluent have determined that bioavailable mercury levels are as low as or lower than those from other common sources such as atmospheric deposition and non-urban runoff, according to WERF.

The research comes at a critical time for wastewater treatment plants, which have been targeted as contributors of mercury, especially bioavailable mercury, to receiving waters. The project, phase two of *Estimation of Bioaccumulation Potential from Wastewater Treatment Plants in Receiving Waters*, was lead by researchers David Dean of ArcTellus and Robert Mason, Ph.D., of the University of Connecticut. Based on mercury bioavailability data captured from seven wastewater treatment plants, the research team found that wastewater effluent typically low levels of methylmercury makes it one of the lowest among the sources evaluated. In addition, the team determined that due to the effluents' low levels of suspended solids (mercury being present

in solids), wastewater treatment plants employing post-secondary treatment should not contribute appreciably to local sediment mercury burdens.

**Source:** Water & Wastewater News (Online) 7/17/09 (<http://wwn-online.com/Articles/2009/07/17/Study-Wastewater-Plants-Relatively-Light-on-Mercury.aspx?Page=1>)

### **NRDC Report Finds Beach Water Quality Improvements in 2008; Serious Problems Remain**

According to a July 29 report issued by the Natural Resources Defense Council (NRDC), beach closings and advisories because of water quality problems declined in 2008 for the second year in a row, but still hit their fourth-highest level in 19 years at U.S. ocean, bay, and Great Lakes beaches. Using information reported by states to EPA, NRDC's annual *Testing the Waters report* said the number of 2008 beach closings and advisories totaled 20,341 days last year, down 10 percent from 2007. According to the report, the major factors leading to the decrease appear to be decreased rainfall in many areas of the country. For 2008, 73 percent of beach closings and advisories were because of elevated bacteria levels, and 22 percent were precautionary because of rain that was expected to carry pollution into coastal waters, and in 62 percent of cases, the causes of the bacteria or other pollution were unknown, the report said. Where the cause was identified, stormwater was the most frequently identified source, human sewage the second-largest reported source, and wildlife third as a source, the report said. Waterfowl gathering in large numbers sometimes cause concern about waste fouling waters, the report said in explaining the citing of wildlife.

**Source:** WEF's This Week In Washington, July 31, 2009. The report can be found at <http://www.nrdc.org/water/oceans/ttw/ttw2009.pdf>

### **Global Water Roundtable to Set Standards on Water Stewardship**

A new initiative launched during the Stockholm World Water Week will establish global standards for water stewardship, with the goal of addressing the threat of water stress, the increasing pollution of rivers, and a decline in fresh water wildlife species. In conjunction with the announcement, World Wildlife Fund (WWF) also accepted a four-year \$1 million grant from JohnsonDiversey, Inc. to support this groundbreaking work, which is being convened through the Alliance for Water Stewardship.

**Source:** Water and Wastewater News, Aug 24, 2009

### **EPA Proposes More Environmentally Friendly Practices for Airport Deicing Discharges**

The U.S. Environmental Protection Agency announced that it is proposing a new rule that would make deicing practices on aircraft and at airport runways more environmentally friendly while maintaining operational safety. Discharges from deicing operations at airports can have major impacts on water quality, causing reductions in wildlife, contamination of drinking water sources, and impacts in residential areas and parkland. EPA is proposing requirements for control of the wastewater associated with the deicing of aircraft and pavement at more than 200 commercial airports nationwide.

EPA estimates that six major airports, which are among the largest users of aircraft deicing fluid, would likely install centralized deicing pads to comply with the proposed requirements. Airports using lesser amounts of deicing fluid would collect 20 percent of the spent fluid with

technologies such as glycol recovery vehicles. The estimated 50 airports that currently use urea to deice runways would use more environmentally friendly deicers, or reduce the discharges of ammonia from continued use of urea. A number of airports in the country already comply with the proposed requirements. EPA and states would incorporate the proposed requirements into storm water permits. The EPA has worked closely with the Federal Aviation Administration which has determined that, if implemented, this regulation would have no impact on the safe operation of airplanes or runways that are treated for snow and/or icing conditions. The proposed rule is open for public comment for 120 days following publication in the Federal Register. For more information on the airport deicing proposed rule:

<http://www.epa.gov/guide/airport/>

**Source:** This is a proposed new categorical standard ([Federal Register Notice \(August 28, 2009 \(PDF\)\)](#).)

### **Proposed Ballast Water Rule Sets Standards for Allowable Discharges of Living Organisms**

Standards for allowable concentrations of living organisms in ballast water discharges to U.S. waters would be established under a proposed Coast Guard rule published Aug. 28 (74 Fed. Reg. 44,632). The Coast Guard said it also is proposing to amend its regulations by establishing an approval process for ballast water management systems. The management systems would be required in the first phase of the program; numeric standards would be imposed in the second phase. The regulations are intended to help control the introduction and spread of nonindigenous species from ships discharging ballast water in U.S. waters, the notice said. Vessels subject to the proposed rule also would be subject to the December 2008 EPA General NPDEC Permit issued under Section 402 of the Clean Water Act. That permit contains limits for a number of discharges incidental to the normal operation of vessels, including ballast water. Under the Aug. 28 proposed rule, all vessels that operate in U.S. waters, are bound for ports or places in the United States, and are equipped with ballast tanks would have to install and operate a Coast Guard-approved ballast water management system before discharging ballast water into U.S. waters. Whether the vessel travels more than 200 nautical miles offshore would no longer be a factor in determining coverage by the rule.

**Source:** BNA Environment Reporter 9/11/09

### **EPA Office of Water New Focus Areas - Nutrient Management, Stormwater Runoff**

Assistant Environmental Protection Agency administrator for water, Peter Silva has determined that nutrient management and stormwater runoff are the two biggest water pollution issues. Mr. Silva recently stated that EPA officials are struggling with how best to address these issues, which have spurred lawsuits and ongoing debate. For example, as the result of a lawsuit, EPA has had to step in to set numeric nutrient standards for the state of Florida. How to set these standards has raised questions, and some have been concerned this might set a precedent for such actions in other states, Silva said (*Florida Wildlife Federation v. Johnson*, N.D. Fla., No. 4:08-cv-324, 8/19/09). The big issue EPA will face regarding nutrients will be whether they should be regulated, and if so, in what form and how much. Should numeric standards for nutrients be set, or should there be best management standards or targets?

**Source:** BNA Environment Reporter 9/11/09

### **EPA Plans to Update Steam Electric Categorical Standard, Focusing on Coal Fired Power Plants**

The Environmental Protection Agency plans to revise 26-year-old standards for wastewater discharges from coal-fired power plants to reduce pollution and better protect the nation's waterways. The agency plans to propose a rule in mid-2012 "to strengthen what's currently in place in an effort to continue to prevent water pollution". Once the new rule for electric power plants is finalized, EPA and states would incorporate the new standards into wastewater discharge permits, the agency said. The announcement came a day after a coalition of environmental groups issued a notice of intent to sue EPA to force the agency to update pollution limits for metals in wastewater from coal-fired power plants. EPA said wastewater discharged from coal-ash ponds, air pollution control equipment, and other equipment at power plants can contaminate drinking water sources, kill fish and other wildlife, and create other detrimental environmental effects.

**Source:** BNA Environment Reporter 9/18/09

### **EPA Releases List of Priority Drinking Water Contaminants for Regulatory Consideration**

EPA announced on September 23 that it is releasing its third list of drinking water contaminants that are known or anticipated to occur in public water systems and may require regulation. EPA will continue to evaluate and collect data on the contaminants, and determine by 2013 for some of them whether or not to propose drinking water regulations. The contaminant candidate list (CCL 3) includes 104 chemical contaminants or groups and 12 microbes. Among them are contaminants, pesticides, disinfection byproducts, pharmaceuticals, chemicals used in commerce, waterborne pathogens and algal toxins. The agency's selection of the contaminants builds upon evaluations used for previous lists and is based on substantial expert input and recommendations from different groups including stakeholders, the National Research Council and the National Drinking Water Advisory Council. EPA will make regulatory determinations for at least five contaminants in accordance with the Safe Drinking Water Act. The agency evaluated approximately 7,500 chemicals and microbes and selected 116 candidates for the final list based on their potential to pose health risks through drinking water exposure. The agency considered the best available health effects and occurrence data and information to evaluate unregulated contaminants.

**Source:** WEF's This Week in Washington 9/25/09

### **Two-Year Stay for Decision Requiring Permits for Pesticide Applications**

On June 8 the U.S. Court of Appeals for the Sixth Circuit has stayed until April 9, 2011, its ruling that will require anyone who applies a pesticide in, over, or near waters of the United States to obtain a Clean Water Act permit. Responding to the court's action, EPA said it will use the time to issue National Pollutant Discharge Elimination System general permits for pesticide applications covered by the ruling. The agency also said it will help states with regulatory authority to develop their own permits and will provide outreach and education to the regulated community, which includes local governments, farmers, and foresters.

The court issued the stay. EPA had sought the two-year stay in a motion filed April 9.

**Source:** BNA Environment Reporter 6/19/09; citing (National Cotton Council of America v. EPA, 6th Cir., No. 06-4630, stay issued 6/08/09).

## C. **Enforcement and Judicial**

### **EPA Releases its Clean Water Act Enforcement Action Plan**

On October 15, 2009, the EPA released its new Clean Water Act (CWA) Enforcement Action Plan. The Plan is the result of EPA Administrator Lisa Jackson's July 2, 2009, charge to her Office of Enforcement and Compliance Assurance that it revamp the CWA enforcement program to ensure it is protecting and defending the nation's waters. The goals of the Plan are to target enforcement to the most significant pollution problems, improve transparency and accountability by providing the public with access to better data on the water quality in their communities, and strengthen enforcement performance at the state and federal levels. The main focus of the Plan is discussed in a Nixon Peabody Alert.

**Source:** Nixon Peabody Environmental Alert. If you did not receive a copy of the Alert and would like to read it, please send Libby (lford@nixonpeabody.com) an e-mail or go to: [http://www.nixonpeabody.com/linked\\_media/publications/Environmental\\_Alert\\_10\\_21\\_2009.pdf](http://www.nixonpeabody.com/linked_media/publications/Environmental_Alert_10_21_2009.pdf)

### **EPA Invites suggestions on CWA Enforcement it has established a web page to submit suggestions on this topic**

To help EPA achieve the Administrator's goals, we invite you to share your ideas through our discussion forum. The discussion forum can be found at <http://blog.epa.gov/cwaactionplan>. Submitted ideas will be considered for recommendations to the EPA Administrator about the future direction for EPA's water enforcement program. A has indicated that it "will be mindful of the need to focus on the most important work for protecting water quality and improving compliance with the Clean Water Act, given resource constraints that require us to place a premium on innovation and efficiency."

For more enforcement and compliance news and information, visit <http://www.epa.gov/compliance/>

**Source:** EPA Water Headlines for August 17, 2009

### **State Water Pollution Officials Seek Changes in EPA Enforcement Data Collection System**

State water pollution control officials have raised concerns that Environmental Protection Agency data used to assess water program enforcement and compliance may be inaccurate, incomplete, and inconsistent. The problem is that the agency's data collection system is outdated and needs to be fixed, said Linda Eichmiller, executive director of the Association of State and Interstate Water Pollution Control Administrators. ASIWPCA recently conducted a survey to identify issues that states may have with EPA's release of state revolving fund reports and underlying data. ASIWPCA believes that EPA recently released inaccurate data suggesting that 35 states are not collecting adequate penalties for water pollution violations. In an Aug. 12 letter to EPA, state officials said they want more frequent and regular communication with the agency aimed at improving water management and enforcement, and they want to ensure that performance measures are closely tied to environmental outcomes. The letter comes in response to EPA Administrator Lisa Jackson's July 2 directive that the Office of Enforcement and Compliance Assurance (OECA) develop an action plan to enhance public transparency regarding clean water enforcement. Jackson called for stronger enforcement at the federal and state levels

and a major shift in the agency's Clean Water Act information systems so that data will be readily available.

The agency followed with an announcement that comprehensive reports and data on enforcement of its discharge permitting program under the Clean Water Act in all 50 states are available on the EPA website.

**Source:** BNA Env. Reporter 8/21/09

### **Tyson to Pay \$2 Million Fine over Failure to Comply With Consent Decree**

Tyson Fresh Meats Inc. will pay a \$2 million fine to resolve charges that it violated the terms of a 2002 consent decree that addressed wastewater discharges at a meat-processing plant in Dakota City, Neb. Tyson, a supplier of beef and pork products, had entered into the consent decree with EPA and the Nebraska Division of Environmental Quality in April 2002 to bring wastewater discharges at the facility into compliance with state and federal law, according to an EPA statement. Tyson discharges an average of 5 million gallons of treated effluent from the facility into the Missouri River each day. The consent decree required the company, then doing business as IBP Inc., to build a \$2.9 million nitrification system that was intended to reduce the amount of ammonia in its discharges into the Missouri River. The decree also provided that, upon installation of the nitrification system, EPA would begin to enforce limits contained in a new National Pollutant Discharge Elimination System permit relating to ammonia levels in the discharges from the facility. But according to a proposed stipulation and joint motion of the parties, EPA charged that Tyson failed to properly operate the nitrification system between July 2003 and March 2004 as required by the consent decree, and as a result had numerous discharges of fecal coliform and nitrites in violation of the 2002 NPDES permit. An EPA spokesman said the monetary penalty was triggered by Tyson's failure to meet deadlines contained in the consent decree. EPA and Tyson stipulated to the court that, upon making the \$2 million payment, Tyson will have fully complied with the 2002 consent decree. EPA agreed as part of the joint motion not to take further enforcement action with respect to the consent decree. In a statement, Tyson Foods Inc., the parent company of Tyson Fresh Meats, said it had "worked cooperatively" with regulators to resolve "wastewater issues" at the plant and had improved training and surveillance and added monitoring equipment to enable the treatment system to function properly. Tyson also said it has spent \$27 million over the past nine years to improve wastewater treatment at the plant—\$4 million since 2003. *United States v. IBP Inc.*, D. Neb., No. 8:00-CV-28, proposed stipulation filed 8/20/09

**Source:** BNA Env. Reporter 8/28/09

### **Puget Sound Naval Shipyard Addresses Copper Issue**

Under an agreement with EPA, the Puget Sound Naval Shipyard must reduce the amount of copper in its wastewater and comply with its federal Clean Water Act permit requirements. From May 2003 to July 2008, PSNS frequently violated its permit by discharging copper in excess of allowable levels. The shipyard's wastewater is discharged into Sinclair Inlet. PSNS is the largest naval shipyard on the West Coast. The copper in its wastewater comes from sandblasting and painting of vessels in dry dock at the shipyard. The Navy has already begun taking action to lessen the copper in the wastewater from PSNS including:

- Increasing the effectiveness of its process water collection system;
- Upgrading its sewer system;

- Improving control of ongoing sources of copper to the wastewater (reducing paint overspray); and
- Improving the dry dock cleaning processes.

As a result of this work, the Navy reports it has been in compliance with its current discharge permit for the past several months. In addition, over the past few years, PSNS has been working with other federal, state, and local agencies to better understand and reduce sources of fecal coliform in Puget Sound. As a result of this work, the agencies have been able to reopen several shellfish beds in the area. EPA is in the process of updating the shipyard's NPDES permit. A draft permit is expected to be available this summer and a final permit issued by the end of the year.

**Source:** Water and Wastewater News, 6/2/09

### **Three Companies, Two Individuals Indicted In 2007 Deaths of Workers at Water Plant**

Two individuals and three companies were indicted Aug. 27 on charges of violating occupational safety laws in the 2007 deaths of five workers in a fire at a Georgetown, Colo., hydroelectric plant (U.S. v. Xcel Energy Inc., D. Colo., No. 09-CR-389, 8/27/09). A federal grand jury in the U.S. District Court for the District of Colorado charged Xcel Energy Inc., of Minneapolis; Public Service Co. of Colorado, a subsidiary of Xcel; RPI Coating Inc. of Santa Fe Springs, Calif.; and two RPI officers with criminal violations of Occupational Safety and Health Administration safety and health regulations, according to the indictment. Five men employed by RPI, a specialty coatings application company, died at Cabin Creek Hydro Plant, which is operated by Xcel and Public Service. On October 2, 2007, an employee of Xcel Energy entered a large, drained water pipe called a penstock early in the morning to perform welding repairs. RPI employees were spraying a new epoxy liner onto the steel pipe section and were using methyl ethyl ketone, a common industrial solvent also known as MEK, inside the penstock to clean the application equipment. The men were working inside the penstock when a fire erupted. The workers' escape from the penstock was blocked by the fire. The men survived in the penstock for about one hour before dying from asphyxiation from carbon monoxide produced by the fire. The grand jury charged Xcel Energy, Public Service, and RPI with five counts of violating an OSHA regulation and causing death (29 U.S.C. Sect. 666), which is punishable by a fine of not more than \$500,000 per count, the Justice Department said. The jury also charged the president and vice-president, members of the board of directors of RPI; with five counts of violating an OSHA regulation and causing death. If convicted, the men face sentences of up to six months in prison and fines of \$250,000 per count. In March 2008 OSHA proposed \$1 million in penalties—\$845,100 against RPI and \$189,000 against Public Service—for alleged workplace safety violations in connection with the fire.

**Source:** BNA Occupational Safety & Health Reporter 9/10/09

### **Teck Alaska Pays \$120,000 for Alleged NPDES Violations**

Teck Alaska, Inc., owner and operator of the Red Dog lead and zinc mine near Kotzebue, Alaska, has agreed to pay a \$120,000 civil penalty for alleged Clean Water Act violations.

Alleged violations that include:

- failure to collect representative samples of the effluent discharged,
- exceedances of the facility's NPDES permit's effluent limits, and

- discharges of unpermitted wastewater to the tundra near the port.

**Source:** Water and Wastewater News, Sep 15, 2009

### **Dow, EPA, Michigan Reach Agreement on Cleanup Plan for Contaminated Watershed**

The Environmental Protection Agency, the Michigan Department of Environmental Quality, and Dow Chemical Co. announced a tentative agreement on cleanup plans for a dioxin-contaminated watershed near the company's Midland, Mich., plant. The agreement needs formal approval from senior management at the company and the two environmental agencies. EPA said it expects Dow to sign an administrative consent order by Oct. 15, though the agencies will not make a decision on it until after a public comment period. The negotiated agreement involves potential cleanup options and technologies, though the EPA has said issues such as cleanup levels, the geographic extent of the site and the agency's right to place the site on the National Priorities List are "non-negotiable." A superfund order would not terminate the company's required corrective actions under the Resource Conservation and Recovery Act. The contamination stems from a discontinued chemical manufacturing process, which left dioxins and furans in areas along the Tittabawassee and Saginaw rivers, as well as the Saginaw Bay of Lake Huron.

**Source:** BNA Toxics Law Reporter 10/1/09

### **ExxonMobil to Pay \$6.1 Million for Oil Spill in Massachusetts**

A federal court has ordered ExxonMobil Pipeline Co. to pay more than \$6.1 million in fines and community service contributions in connection with a January 2006 oil spill into the Mystic River from its oil terminal in Everett, Mass. The company, a subsidiary of ExxonMobil, was also sentenced to three years of probation and to have the oil terminal monitored by a court-appointed observer. The company was charged with criminal violations of the Clean Water Act and agreed to the terms of the plea agreement in late 2008. The charges against ExxonMobil Pipeline stem from the 2006 incident in which approximately 15,000 gallons of diesel oil were spilled into the Mystic River from the oil terminal, which includes an inland "tank farm" where oil products are stored. Allegedly, the company's "negligent" failure to provide adequate resources for and oversight of the maintenance and operation of the Everett terminal was a direct cause of the spill. In addition, allegedly the company also negligently allowed the spill to continue after it should have been discovered by failing to adequately monitor the transfer operations. ExxonMobil has agreed to pay the maximum possible fine of \$359,018—twice the cost of the cleanup—as well as clean up costs of \$179,634. The company also agreed to make a community service payment of \$4.6 million to the North American Wetlands Conservation Act fund to be used to restore wetlands in Massachusetts and a \$1 million payment to the Massachusetts Environmental Trust to improve water quality in the Mystic River. Further, for the next three years, the Everett facility will be monitored by a court-appointed official and will be subject to a rigorous environmental compliance program. (United States v. ExxonMobil Pipeline Co., D. Mass., No. 08-cr-10404, 4/30/09.

**Source:** BNA, Inc. Environment Reporter 5/8/09

### **California Grower Awarded \$8.5 Million in Suit over Degraded Ground Water**

A California jury June 5 awarded a cotton grower more than \$8.5 million in a trespass claim involving contaminated ground water. Handed down in Kern County Superior Court, the award represents the "reasonable" economic benefits Aera Energy LLC reaped from waste water

storage practices that allowed contaminants to migrate from its oil field into an aquifer beneath the grower's property. California's Court of Appeals, Fifth Appellate District, rejected Aera's argument that the trespass alleged in the suit was "permanent" and, therefore, barred by a three-year statute of limitations. The trespass is "continuing" because Aera could alter its waste water storage practices to end its intrusion, the appellate court said. Filed in 2001, the suit alleged that the cotton grower's ground water supplies have been degraded by two unlined evaporation ponds Aera has used for years to store production waste water that is pumped out when oil is extracted. Appellate court documents indicated Starrh and Starrh was seeking between \$10 million, its estimated value of the ground water if cleaned up, and \$2.2 billion, the estimated cost to restore the ground water.

**Source:** BNA Toxics Law Reporter 06/25/2009, citing *Starrh and Starrh Cotton Growers v. Aera Energy LLC*, Cal. Super. Ct., Kern County, No. CV245287, 6/5/09.

### **EPA Enforcement Against Ammonia Use, Storage Violations**

The Environmental Protection Agency announced administrative settlements in Oregon and Idaho over violations involving the use and storage of ammonia. Under the agreements two companies will pay an estimated \$100,000 each, including penalties, the expense of purchasing additional equipment, and the cost of other preventive measures. In the Oregon case, EPA alleged Dyno Nobel Inc. failed to report the release of 448 pounds of ammonia from its Oregon plant in a timely manner on Sept. 29, 2008. The settlement includes \$17,000 in penalties; \$56,000 to install an ammonia monitoring system for improved leak detection; and \$16,000 to purchase emergency response equipment for the Columbia River Fire & Rescue. In the Idaho settlement, Nonpareil Corp. failed to properly report the storage of ammonia at its Teton Valley Ranch facility located at Mountain Home, Idaho, a violation of the Emergency and Planning and Community Right-to-Know Act (EPCRA). Nonpareil failed to file Emergency and Hazardous Chemical Inventory Forms with local emergency response entities in Idaho, according to an EPA statement. The settlement includes \$18,281 in penalties for violating EPCRA. In addition, the company agreed to spend \$77,000 to replace five refrigerant recirculation pumps with leak-free hermetically sealed pumps. The replacement of the pumps is expected to improve the integrity of the system and reduce the risk of ammonia releases into the environment.

**Source:** BNA Environment Reporter 9/18/09

### **EPA Fines 3 Bulk Storage Facilities for SPCC Issues**

The U.S. Environmental Protection Agency fined three bulk storage facilities in Louisiana for violating federal Spill Prevention, Control and Countermeasure (SPCC) regulations outlined under the Clean Water Act. EPA fined Marina Del Rey of Madisonville \$900 because its SPCC plan did not conform to federal requirements, had inadequate or no description of the physical layout of the facility, inadequate or no information and procedures for reporting an oil spill, and inadequate or no description and procedures to use when oil spills occur. The inspection also found the SPCC plan had inadequate or no discussion of site security, the facility was not fully fenced, and entrance gates were not locked or guarded when the site was unattended. The agency fined Seaway Marina of Lafitte \$2,250 because its facility had no SPCC plan, inadequate secondary containment of bulk storage areas as well as problems with containment bypass valves and valves used for drainage from diked storage areas. EPA fined Carlo Ditta, Inc. of New Orleans \$2,250 for violating SPCC regulations at two facilities. Inspection revealed their SPCC plans did not conform to federal requirements, had inadequate or no information and procedures for reporting an oil spill, inadequate or no description and procedures to use when oil spills

occur, and inadequate or no prediction of equipment failure which would result in discharges. In addition, personnel working at the sites had no training on the operation and maintenance of equipment to prevent discharges or on discharge procedure protocols, and spill prevention briefings were not scheduled and conducted periodically. The plans also lacked appropriate provision for site security, site drainage, or bulk storage tanks.

All three companies, though Expedited Settlement Agreements with EPA, provided certification that all identified deficiencies have been corrected.

**Source:** Environmental Protection, 10/1/09

### **Former Industrial Vice President Pleads Guilty to CWA Violations**

A former vice president of a Connecticut manufacturing company pleaded guilty in federal court to two counts of violating the Clean Water Act and will face up to two years in prison when sentenced later this year. He pleaded guilty in U.S. District Court for the District of Connecticut to charges related to a failure to report environmental violations that occurred while he was vice president of now-defunct Atlantic Wire Co. According to prosecutors, the individual was hired by Atlantic Wire in Branford as vice president for finance in May 2005. Atlantic Wire was engaged in the cleaning and manufacturing of wire, and used sulfuric and hydrochloric acid and highly alkaline materials as part of its processes. Atlantic Wire's waste water was collected and treated on-site in the facility's waste water treatment system before being discharged into the Branford River under the terms of a National Pollutant Discharge Elimination System (NPDES) permit. Shortly after being hired by Atlantic Wire, the Vice President was asked to assume additional responsibilities for supervising environmental compliance. His new duties made him the principal and designated point of contact with the Connecticut Department of Environmental Protection, which issued the NPDES permit. The U.S. attorney's office cited a number of occasions during which the company's waste water treatment system did not meet permit limits but said the company failed to properly report the violations. The office also specifically cited two occasions alleging failing to ensure that violations were reported in a timely manner. Atlantic Wire agreed to pay the state \$1.5 million in January 2009 to settle charges that it repeatedly discharged toxic waste water into the Branford River over a nearly three-year period (24 TXLR 44, 1/8/09). Atlantic Wire also pleaded guilty in December 2008 in U.S. District Court for the District of Connecticut to two counts of violating the federal Clean Water Act and one count of submitting false statements to the Connecticut DEP.

**Source:** BNA Toxics Reporter, July 23, 2009. Citing U.S. v. Meyer, D. Conn., No. 3:09-cr-00133, 7/21/09).

### **Spanish Company to Pay \$2 Million Fine in Ocean Dumping/ Record Falsification Case**

The operator of the oceangoing chemical tanker M/T Nautilus, who had pleaded guilty earlier this year to criminal charges related to the dumping of oil-contaminated bilge waste, was sentenced in federal court July 27 to pay a \$2.08 million fine and serve three years probation. The company, Spanish-based Consultores De Navegacion, pleaded guilty in U.S. District Court for the District of Massachusetts in April to charges of conspiracy, falsification of records, false statements, obstruction, and two violations of the Act to Prevent Pollution from Ships for failing to maintain an accurate oil record book. According to federal prosecutors, the improper handling and disposal of oil-contaminated waste from the tanker took place from at least June 2007 until March 2008. Along with imposing the \$2.08 million fine, the court ordered the company to implement a comprehensive environmental plan to prevent future violations. The government

said its investigation began in March 2008, when inspectors from the U.S. Coast Guard conducted an examination of the M/T Nautilus, following the ship's arrival in St. Croix, U.S. Virgin Islands, and subsequently in the Port of Boston. The inspections uncovered evidence that crew members aboard the ship had improperly handled and disposed of the ship's oil-contaminated bilge water and had falsified entries in the ship's official oil record book to conceal these activities. Two of the ship's engineers had also pleaded guilty earlier to false records charges related to the improper discharges from the tanker.

**Source:** BNA Env. Reporter 7/31/09, citing *United States v. Consultores De Navegacion*, D. Mass., No. 1:08-cr-10274, 7/27/09

### **Engineers Charged With Concealing Tanker Discharge**

Two crew members of an oil tanker were indicted on charges involving discharges of oily water into the ocean and concealing those discharges. The chief engineers on the oil tanker Georgios M, were charged by a federal grand jury with making false statements, violating the Act to Prevent Pollution from Ships (Pub. L. 96-478), making material false statements to the U.S. Coast Guard, and obstruction of justice. They are being accused of falsifying oil record books as the oily discharges from the tanker were knowingly released into the ocean. The Act to Prevent Pollution from Ships requires that discharges containing more than 15 parts per million of oil be treated by an oil separator and that all discharges be recorded in a record book. Mylonakis and Argyropoulos were allegedly in charge of the oil records when the tanker docked in several ports in Texas between 2006 and 2008. (*United States v. Mylonakis*, S.D. Texas, No. 4:09-cr-492, 8/20/09).

**Source:** BNA Env. Reporter 8/28/09

### **Town's Public Works Director for Failing to Report Discharge**

A former public works director for a city in Missouri was sentenced to three years of probation Aug. 25 for failing to report the discharge of sewage into a large resort lake. The former public works director of the city of Lake Ozark, Mo., pleaded guilty in July 2008 to one count of failing to report the discharge of pollutants into a lake to the state Department of Natural Resources and will pay a \$5,000 fine. In a related case, the city of Lake Ozark pleaded guilty in August 2008 to repeatedly discharging sewage directly into the Lake of the Ozarks from several collection stations. Allegedly, City officials knew that repairs were needed at the collection stations, but failed to make them. Records maintained by the city showed that there had been numerous complaints by city residents concerning overflow events and discharges into the lake, it said. City officials routinely failed to notify DNR when discharges occurred, despite being required by its permit to report discharges. Under the terms of the city's plea agreement, the city was required to pay a \$50,000 fine, upgrade its wastewater treatment system, and report all overflow events to DNR, the statement said. The charges arose from a discharge of between 10,000 and 15,000 gallons of sewage into the Lake of the Ozarks in September 2007, which was reported by a citizen to the Environmental Protection Agency. DNR staff noted at the time that the sewage caused a dark plume in the water at the lake, and reported the event to the city. Allegedly, City officials proceeded to stop the discharge, but failed to conduct a cleanup, and failed to provide written notification of the discharge to DNR. The prosecution was the first to arise from information received through EPA's "Report an Environmental Violation" website, the statement said. Reportedly, EPA has opened 19 criminal cases as a result of tips provided through the

website, and has taken two of the cases to criminal prosecution. *United States v. Sturgeon*, W.D. Mo., No. 2:08-CR-04032, sentenced 8/25/09.

**Source:** BNA Env. Reporter 8/28/09

### **President of Pesticide Firm Sentenced To Prison for Illegal Discharge of Pesticides**

A federal trial court sentenced the president of a Missouri pesticide company to six months in prison for violating the Clean Water Act by discharging pesticide wastes into the sewer system of St. Joseph, Mo. The president of HPI Products Inc. pleaded guilty to discharging a pollutant into the city's sewer system without a permit and to violating federal water pollution pretreatment standards. In addition to the prison sentence, the U.S. District Court for the Western District of Missouri ordered the president to serve six months of home confinement and to pay a \$100,000 fine. HPI also pleaded guilty in January 2009 to the same charges, as well as a charge of storing hazardous waste without a permit, a violation of the federal Resource Conservation and Recovery Act. The court delayed sentencing of the company. According to a statement issued by the Justice Department, the President admitted in his plea that he instructed employees at HPI production facilities to wash spills, wastes, and equipment rinses down floor drains that were connected to the city's sewer system. HPI's practice of using the city's sewer system for disposal of pesticide wastes continued until inspections by the Environmental Protection Agency and the Missouri Department of Natural Resources in 2007.

In a related case, HPI's vice president, pleaded guilty Aug. 31 to two criminal misdemeanor counts of violating the Federal Insecticide, Fungicide and Rodenticide Act (*U.S. v. Nielsen*, W.D. Mo., No. 4:09-CR-00189, plea entered 8/31/09). The Vice President admitted in his plea that he failed to notify state or federal regulatory agencies concerning the illegal storage of pesticides by the company, and failed to maintain records of the storage. He faces a maximum possible sentence of up to 12 months in prison and a fine of up to the greater of \$100,000 or twice the loss he caused. (*U.S. v. Garvey*, W.D. Mo., No 4:09-CR-00023, sentenced 9/1/09).

**Source:** BNA Toxics Law Reporter, 9/10/09

### **Shipping Company Fined For Falsifying Records in Ocean Oil Dumping**

A federal judge ordered a South Korean shipping company to pay \$2.2 million for falsifying environmental compliance records in the overboard dumping of oily waste. In addition to the fine, the Court ordered STX Pan Ocean Co. Ltd. to serve four years of probation and to implement an environmental compliance plan that includes monitoring fleetwide operations, training for crew members, and engineering alterations. In April, STX pleaded guilty to four felony offenses, including conspiracy, falsifying records, and making false statements, in connection with actions of crew members aboard the M/V Ocean Jade. Charges stemmed from two incidents. In July 2008, the ship's chief engineer, ordered crew members to dump approximately 10 barrels containing oily wastewater overboard into the ocean. In September 2008, a Chief Officer instructed crewmen to dispose of oily wastewater into the ocean using a flexible plastic hose draped over the ship's side. Engineering officers made entries into the vessel's oil record book "by applying a pre-established formula, rather than recording the actual amounts of oily waste water and sludge transferred, burned, or discharged." The federal Act to Prevent Pollution from Ships requires crew members to record accurately each transfer or disposal of oily waste water and sludge in the ship's oil record book. Disposals of garbage also are to be recorded in the vessel's garbage record book. The officers both pleaded guilty to felony charges in connection with the records falsifications and were sentenced to probation.

**Source:** BNA Env. Reporter 6/12/09, citing *United States v. STX Pan Ocean Co.*, M.D. Fla., No. 8:09-CR-163, 6/5/09

### **Tank Farm Must Pay \$2.5 Million in Settlement for False Reports**

A federal court has ordered the owner and operator of a Selby, Calif., tank farm to pay \$2.5 million for submitting annual reports that falsely certified compliance with its Clean Air Act operating permit. Shore Terminals LLC admitted it had provided regulators with false emissions data. The company pleaded guilty to four felony counts of making false statements to government officials. In a plea agreement with prosecutors, the Delaware-based company admitted experiencing problems with the vapor recovery unit at the Selby facility, located in the San Francisco Bay Area, between 2003 and 2006. As a result, workers had repeatedly shut down the equipment when loading petroleum products and ethanol onto fuel trucks, causing the release of volatile organic compounds in violation of its Clean Air Act Title V permit. Annual emissions data the company provided the Bay Area Air Quality Management District and the Environmental Protection Agency, however, showed the facility was in compliance with its permit requirements. The court ordered Shore Terminals to pay a \$1.75 million fine and spend another \$750,000 on air quality projects in Contra Costa and Alameda counties. Shore Terminals also must implement an environmental compliance plan at the bulk fuel terminal to prevent future violations of environmental laws, prosecutors said. The prosecution resulted from a three-year investigation by EPA and BAAQMD officials. Citing *United States v. Shore Terminals LLC*, N.D. Cal., No. CR 09-395 SI, 7/14/09

**Source:** BNA, July 17, 2009

### **NY Towns Petition Supreme Court to Review Waiver of Filtration Rule for New York City**

A coalition of towns in upstate New York has asked the U.S. Supreme Court to review an EPA waiver of filtration requirements for the Catskill-Delaware water supply, the world's largest unfiltered water system (*Coalition of Watershed Towns v. EPA*, U.S., No. 08-1420, 5/14/09). The towns seek reversal of a 2008 decision of the U.S. Court of Appeals for the Second Circuit, which dismissed their lawsuit, holding they lacked constitutional standing and had not established that their injuries could be redressed by the courts (*Coalition of Watershed Towns v. EPA*, 552 F.3d 216 (2d Cir. 2008)). In their petition to the Supreme Court, the towns argued that EPA exceeded its authority under the Safe Drinking Water Act by allowing New York City to purchase tracts of upstate land to protect the water supply as opposed to constructing a filtration plant that the city says could cost billions of dollars. The towns also have challenged an EPA requirement for the city to spend another \$300 million to acquire more environmentally sensitive lands. In their petition, the towns said EPA never studied or analyzed the "potential adverse social, economic, or community character impacts" of requiring New York City to spend half a billion dollars on land in "economically depressed communities." They said it could take toll on businesses, job creation, and industrial tax revenues.

**Source:** BNA Environment Reporter, 5/29/09. *Towns v. EPA* is available at [www.ca2.uscourts.gov/decisions/isysquery/283d4257-4f45-4e04-bc32-2b1ef09a7aec/1/doc/07-2449-ag\\_opn.pdf](http://www.ca2.uscourts.gov/decisions/isysquery/283d4257-4f45-4e04-bc32-2b1ef09a7aec/1/doc/07-2449-ag_opn.pdf).

### **Water, Waste Treatment Businesses indicted by Grand Jury in Louisiana**

A federal grand jury in Louisiana has indicted an executive and his public water and waste water treatment businesses for improperly operating and maintaining facilities and failing to report monitoring results to state regulators, a violation of the Clean Water Act. In a 17-count criminal

indictment unsealed June 4, the executive and his companies, Louisiana Land & Water Co. and LWC Management Co., allegedly failed to properly operate water and waste water treatment facilities for seven residential subdivisions in Ouachita Parish from January 2006 to the present. Louisiana Land & Water Co. and LWC Management Co. operate more than 30 water and waste water treatment systems in northeastern Louisiana. The defendants allegedly allowed a waste water treatment facility to overflow in several residential subdivisions, discharging effluent on the ground without proper tertiary treatment, allowed suspended solids and fecal coliform to exceed effluent limitations in state discharge permits, and discharged raw sewage into several residential neighborhoods, according to the indictment. The businesses also allegedly violated state permits by allowing a waste water treatment facility to discharge treated sanitary waste water from an outfall into waters of the United States, among other charges.

**Source:** BNA, Inc. Toxics Law Reporter 6/11/09, citing U.S. v. Pruett, W.D. La., No. 09-00112, 6/4/09

### **U.S. Sues Scranton Sewer Authority for Untreated Discharges**

The U.S. Department of Justice has filed a complaint asking a federal court to order the Scranton Sewer Authority to stop discharges of untreated sewage into the Lackawanna River. The complaint alleges numerous illegal discharges of untreated sewage, discharging more than a billion gallons of untreated sewage in 2008. The complaint asks the court to issue an order to the Scranton Sewer Authority to eliminate or minimize the risk to human health and water quality posed by the discharges, and come into compliance with federal requirements and its state-issued pollution discharge permit. The complaint also seeks financial penalties for the violations.

**Source:** Water and Wastewater News, 10/1/09

### **Water District's Labor Costs Recoverable As Response Costs**

A water district's labor costs incurred addressing a perchlorate release are recoverable under the superfund law, a federal trial court ruled Aug. 31. While the issue is unresolved in the Ninth Circuit, the U.S. District Court for the Northern District of California said, "the weight of authority," has held that such indirect costs are recoverable. The ruling comes eight days after the court held that the water district's costs to replenish the water supply are not recoverable as response costs.

**Source:** BNA Toxics Law Reporter, 9/10/09

### **Court Says Sewer May Constitute 'Facility,' City May Be Liable as Owner/Operator**

A city sewer is not excluded from the definition of "facility" under the superfund law, a federal trial court ruled Sept. 8. The owner of a contaminated site can therefore pursue a municipality for the cost of cleaning up contaminants that leaked from city sewer pipes, the U.S. District Court for the Eastern District of California said.

The court declined to read into the superfund law an exception for sewers that would shield a city from liability as the owner or operator of a "facility" under the superfund law. Adobe Lumber Inc. is the owner of a property in Woodland, Calif., on which a dry cleaning business operated for nearly 30 years. The dry cleaner routinely dumped perchloroethylene (PCE) in a drain that led directly to the city sewer system. In 2001, Adobe learned that the soil and ground water on the property were contaminated with volatile organic compounds, including PCE.

Adobe ultimately filed suit against the city under CERCLA, alleging that the PCE reached the soil and ground water via leaking sewer pipes. The city moved for summary judgment, arguing

that CERCLA's "express terms" exempt the sewer from the definition of "facility." The court disagreed, citing the statutory definition. "[T]here is no dispute that sewers could easily be encompassed within the meaning of 'structure,' 'equipment,' 'pipe,' or 'pipeline,'" the court said. The court also rejected the city's contention that it is not an owner or operator because it is not the owner or operator of the "entire area of land to be remedied." The court found no precedent to "suggest that, when confronted with several facilities, a court must conceive of them as a single site to determine the relevant owners and operators." Citing *Adobe Lumber Inc. v. Hellman*, E.D. Cal., No. 05-1510, 9/8/09).

**Source:** Sep. 17 -- BNA, Inc. Toxics Law Reporter

### **California Industrial Firms to Pay \$300,000 in Stormwater Penalties**

Two San Francisco Bay area waste management companies will pay more than \$300,000 to resolve alleged Clean Water Act violations. California Waste Solutions agreed to pay \$261,400 to settle allegations involving its two facilities in Oakland and another in San Jose. In 2007, EPA cited the firm for violating the terms of its permit by illegally discharging waste and other pollutants into nearby waterways over a five-year period. American Metal and Iron Inc., a scrap metal recycler, agreed to pay a \$45,000 penalty to settle an enforcement action EPA filed in 2008 for alleged violations at its two San Jose locations. EPA alleged the facilities discharged stormwater without a permit and, once it obtained a permit, failed to monitor discharges and implement controls to prevent discharging pollutants to Coyote Creek.

**Source:** BNA Environment Reporter, 5/29/09.

### **Ready-Mix Concrete Producer to Pay \$2.75 Million for Stormwater Violations**

A ready-mix concrete producer has agreed to pay a \$2.75 million fine and implement a regional evaluation and compliance program to settle charges that it violated federal clean water rules at 23 facilities located in two New England states, under the terms of a consent decree filed in federal court Aug. 6. The agency noted that the fine is the largest ever assessed against a nationwide ready-mix concrete company for stormwater violations under the Clean Water Act. Under the terms of the consent decree, the company agreed to implement a number of pollution control measures, such as a closed-loop water recycling system designed to eliminate discharges into surface waters.

**Source:** BNA Env. Reporter, 8/14/09 citing *United States v. Aggregate Industries-Northeast Region*, D. Mass., No. 1:09-cv-11321, 8/6/09.

### **Nine New England Towns Face Fines for Violating Storm Sewer Standards**

The Environmental Protection Agency has proposed penalties ranging from \$40,000 to \$177,500 against nine communities in Massachusetts and New Hampshire for failing to meet permit requirements designed to ensure that sewage and other pollutants stay out of storm sewers that drain to local rivers, ponds, and coastal waters. The agency said the complaints and proposed penalties are part of a new integrated effort by EPA to combat illegal sewer connections. As part of this effort, EPA said it is offering training and other support to communities to help them detect and eliminate illegal sewer conditions. EPA said that since 2003, nearly 300 cities and towns in Massachusetts and New Hampshire have been subject to an EPA general permit that sets requirements for reducing pollution discharges from storm sewers. The permit requires the communities—primarily urban areas—to produce maps of their storm sewers, pass an ordinance or bylaw prohibiting non-stormwater discharges to the storm sewers, and implement a plan to

locate and remove improper connections to storm sewers. The fines were, reportedly, based on the Size of the municipality and the severity of the problem. EPA said its compliance assistance initiative, designed to help cities and towns identify and eliminate illegal storm sewer connections, includes such activities as workshops and webinars; a GPS Unit Training and Loan Program to help communities meet critical sewer outfall mapping requirements; and the EPA National Stormwater Web Page, which provides information specifically addressing municipal storm water compliance needs.

**Source:** BNA Env. Reporter 8/21/09

### **Three Firms to Pay \$225,000 for Failure to Prepare, Maintain Spill Plans**

Three oil storage facilities in Connecticut and Massachusetts have agreed to pay more than \$225,000 in penalties for failing to take adequate precautions to prevent and contain oil spills. The three companies allegedly failed to adequately prepare and maintain spill prevention, control, and countermeasure plans and facility response plans. DDLC agreed to pay a \$75,000 penalty for deficiencies in its plans and for its inability to adequately respond to a simulated oil spill, the company subsequently corrected the shortcomings and passed a second drill. Taylor Energy, which has the capacity to store 1.5 million gallons of oil, agreed to pay \$70,000 to address its failure to maintain and implement a spill prevention plan, failure to update its response plan, and failure to implement an adequate spill response training and drill program. Northeast Products, which operates a bulk oil farm and a commercial warehouse used for processing and packaging lubrication oils, agreed to pay a \$81,132 penalty for failure to develop a response plan with evidence of approved means of ensuring availability of personnel and equipment in event of a spill.

**Source:** BNA Env. Reporter 8/28/09

### **11th Circuit Reverses Ruling on Pumping Water from Canals into Lake Okeechobee**

A federal appeals court reversed a Florida trial judge's 2006 ruling that pumping polluted water from canals in the Everglades into Lake Okeechobee without a permit violates the Clean Water Act. The U.S. Court of Appeals for the 11th Circuit in Atlanta cited a June 2008 final rule by the Environmental Protection Agency that held water transfers are not subject to regulation under the National Pollutant Discharge Elimination System (NPDES) permitting program. The appellate court cited EPA's "unitary waters" theory that movement of water from one federally jurisdictional water body to another did not trigger NPDES permit requirements even if the water being transferred was polluted and the receiving water was not. In the opinion, the 11th Circuit said the Clean Water Act's language regarding "any addition of any pollutant to navigable waters from any point source" was ambiguous. "The EPA's regulation adopting the unitary waters theory is a reasonable, and therefore permissible, construction of the [Clean Water Act] language. Unless and until the EPA rescinds or Congress overrides the regulation, we must give effect to it." In 2004, the Supreme Court remanded a similar pumping case to the 11th Circuit for a determination as to whether the transfer occurred within one water body or between separate and distinct water bodies (*South Florida Water Management District v. Miccosukee Tribe*, 541 U.S. 95, 58 ERC 1001 (2004)). The Supreme Court said that, because the reservoir and the canal both were navigable waters, to accept the "unitary waters" concept would mean a pump could be operated without an NPDES permit. In the opinion the appellate court acknowledged the canal water was polluted, stating it contained "a loathsome concoction of chemical contaminants including nitrogen, phosphorus, and un-ionized ammonia." It also noted

the water in the canals was “full of” suspended and dissolved solids and had a low oxygen content. But the court also noted that the pumps at issue did not increase pollutant loads.

**Source:** BNA Env. Reporter 6/12/09, citing Friends of the Everglades Inc. v. South Florida Water Management District, No. 07-13829, 11th Cir., 6/4/09.

### **U.S. Supreme Court Determines That Filling Requires a Corp Permit, Not a NPDES Permit**

Mining waste discharged into a lake is regulated under the Clean Water Act as fill material, not a pollutant, the U.S. Supreme Court ruled June 22. The Supreme Court ruled that because the mining waste, called slurry, is defined by regulation as fill material, discharges into navigable waters of the United States fall under the jurisdiction of the U.S. Army Corps of Engineers under Section 404 of the act. In its 6-3 decision, the Supreme Court reversed a ruling by the U.S. Court of Appeals for the Ninth Circuit that found mining discharges are subject to stricter regulation by the Environmental Protection Agency as pollutants under the National Pollutant Discharge Elimination System permit requirements of Section 402 of the act (Southeast Alaska Conservation Council v. U.S. Army Corps of Engineers, 486 F.3d 638, 64 ERC 1581 (9th Cir. 2007)). The Supreme Court also ruled that the U.S. Army Corps of Engineers properly issued a dredge-and-fill permit to Coeur Alaska Inc. to discharge gold mining slurry directly into a lake in Southeast Alaska.

**Source:** BNA Toxics Reporter, 6/25/09, citing Coeur Alaska Inc. v. Southeast Alaska Conservation Council, U.S., No. 07-984, 6/22/09.

### **Court Rejects Wisconsin Highway Expansion, Orders Agencies to Reconsider Alternatives**

A federal district court in Wisconsin ruled Sept. 14 that state and federal authorities must reconsider a highway expansion project because Clean Water Act permits were wrongly issued after an inadequate evaluation of project alternatives (Highway J Citizens Group U.A. v. U.S. Transportation Department, E.D. Wis., No. 05-C-212, 9/14/09). The U.S. District Court for the Eastern District of Wisconsin vacated a 2002 administrative decision and U.S. Corps of Engineers permits from 2005 and 2006 regarding the dredging and filling of wetlands. The court remanded the case to highway agencies to cure deficiencies in the environmental impact statement and reconsider construction decisions. Two plaintiffs brought suit in 2005. The Planning started in 1999 for the County J/Highway 164 corridor in Waukesha and Washington counties, and officials decided that the best approach would be to make the corridor four lanes instead of two. Pursuing this plan, the environmental impact study was concluded on Dec. 11, 2001, and the Record of Decision was issued March 6, 2002.

The federal lawsuit included allegations that the project was contrary to the National Environmental Policy Act, the Federal Aid Highway Act, the Administrative Procedure Act, and Section 404 of the Clean Water Act. Section 404 restricts dredging and filling of wetlands.

**Source:** BNA Environment Reporter 9/18/09

### **Federal Court Affirms EPA Definition of “Spent Material”**

The Environmental Protection Agency's focus on a material's initial use in determining whether it later becomes “spent material” subject to handling, shipping and treatment regulations under the Resource Conservation and Recovery Act is neither arbitrary nor capricious, a federal district court held Sept. 23 (Howmet Corp. v. EPA, D.D.C., No. 07-1306, 9/23/09). The U.S. District Court for the District of Columbia rejected a manufacturer's argument that a \$309,000 penalty

imposed against it for RCRA shipping violations should be tossed because the federal agency's interpretation of what constitutes "spent material" is unreasonable and too broad.

In enforcement actions filed against the Howmet Corp. in 2003, two EPA regional offices said the company, which makes precision investment casings for aerospace and industrial gas turbines, improperly shipped used cleaner solutions from plants in New Jersey and Texas to a fertilizer company without following RCRA shipping requirements. The cleaners, which consisted of solutions of liquid potassium hydroxide (KOH), were used to clean Howmet's metal casings until they became too contaminated. They were sometimes then sent to a fertilizer maker, for use in its fertilizers. In response to the enforcement actions, Howmet argued to an Administrative Law Judge that it didn't have to follow RCRA regulations when it transported the cleaners because KOH is also manufactured for use as a fertilizing ingredient. Howmet said that because KOH's use in fertilizing was a "purpose for which [the material] was produced," it could not be a "spent material" under RCRA.

The federal hazardous and solid waste law defines a "spent material" as "any material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing." But the ALJ, and then the EPA's Environmental Appeals Board, both sided with the EPA, holding that the agency's focus on the "initial use" of the used material as the critical factor for determining whether it was a "spent material" was reasonable and entitled to deference. In the EPA's view, because the KOH was first used as a cleaner, that was the "purpose for which it was produced," and since it was being sent to the fertilizer maker for a different use, i.e. as a fertilizer ingredient, it met the definition of a RCRA "spent material." The EPA indicated that if the used KOH had been shipped for a similar purpose as its original purpose, i.e. as a cleaner, it would not fall under the definition. The federal district court agreed with the ALJ and the EPA's Environmental Appeals Board and rejected Howmet's argument that the administrative penalty against it was arbitrary and capricious under the Administrative Procedure Act. In upholding the \$309,000 penalty against the company, the district court acknowledged that RCRA's definition of "spent material" is ambiguous and could be read in more than one way.

**Source:** BNA Toxics Law Reporter 10/1/09