



New York Water Environment Association, Inc.

The Water Quality Management Professionals

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Recent Environmental Legislative, Regulatory and Judicial Developments¹

May 11, 2011 through October 27, 2011

I. NEW YORK

A. Legislation:

Water Withdrawal Permitting

Authorizes the Department of Environmental Conservation to implement a water withdrawal permitting program to regulate the use of the State's water resources; anyone who maintains the capacity to withdraw 100,000 gallons of water per day must get a permit; all valid water permits remain in effect; exempts from permitting water withdrawals for emergencies and agricultural purposes.

Source: TBC-NY Alert, 10/26/11 Discussing Chapter 401. (S.3798 (Grisanti)/A.5318-A (Sweeney))

B. Regulation and Policy

1. Water

Draft Lake Ontario PCB TMDL

In July, NYSDEC published a draft TMDL for PCBs in Lake Ontario. The scope of this proposed TMDL covers the Lake Ontario shoreline segments as well as an additional ninety one tributaries, bays or ponded waters that were identified in a footnote in the 303(d) list as being impaired for fish consumption due to fish migration from the open waters of Lake Ontario. These segments are assumed to represent Lake Ontario and this document presents the TMDL designed to allow Lake Ontario and its tributaries to fully support their designated uses. The draft TMDL contains point source allocations for 7 SPDES permittees (6 POTWs and one industry) which discharge directly to Lake Ontario and two municipals (MS4) stormwater permittees (Rochester area and Buffalo areas). It also states that NYSDEC will develop and issue a (MDV) a multi-discharger variance to the permit condition.

¹ For more information, please contact Libby Ford, QEP at 585-263-1606 (lford@nixonpeabody.com).
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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 and TBCNY is at 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 LAW360: these are excellent resources for the environmental manager, attorney or consultant.

Source: NYSDEC Website at
http://www.dec.ny.gov/docs/water_pdf/lakeontariopcbtml.pdf

New York Receives Tentative EPA Approval to Initiate Lake Ontario No-Discharge Zone

New York has received tentative approval from the federal Environmental Protection Agency for the first step in establishing a no-discharge zone for sewage from vessels using the New York portion of Lake Ontario, according to a notice published in the *Federal Register*. EPA published a “tentative affirmative decision” saying there are adequate facilities available for the safe and sanitary removal and treatment of sewage from vessels. The determination is subject to a 30-day public comment period. New York has proposed a no-discharge zone encompassing 3,675 square miles of the lake and 326 linear miles of shoreline. “Currently, there are 10 municipal water supplies that draw water from Lake Ontario, serving over 760,000 people in New York State,” the notice said. “But the lake's significance as a water supply goes beyond its current use.” EPA has tentatively determined there is at least one pump-out station available for every 300 to 600 vessels that use the lake, as required by the federal Clean Vessel Act. According to the notice, New York estimates there are 28 pump-out stations available for about 10,050 recreational and small commercial vessels that use the lake. While there are no fixed commercial pump-out stations for the estimated 150 large vessels that use the lake, there are a number of mobile pump-out services available for hire, including pump-out trucks at one of the lake's two large ports, according to the notice.

Source: BNA Environment Reporter, 10/7/11, discussing the notice at 76 Fed. Reg. 61,696 (10/5/11).

EPA Won't Force NYC to Build \$1.6B Reservoir Cap

The U.S. Environmental Protection Agency backed off on enforcing a regulation requiring New York City to build a \$1.6 billion concrete cap to cover a drinking water reservoir, saying it would seek a more cost-effective way to keep the water clean. The regulation, which would have forced the city to build a concrete cover over the 90-acre Hillview Reservoir in Yonkers, N.Y., had been opposed by Mayor Michael Bloomberg, Sens. Charles Schumer, D-N.Y., and Kirsten Gillibrand, D-N.Y., and Rep. Joseph Crowley, D-N.Y., who said it provided few health benefits. In a letter to Schumer, EPA Administrator Lisa Jackson said “[the EPA] should and can find cost-effective ways of achieving these public health protections” and pledged that “science will drive our ultimate decision.”

The EPA regulation was mandated by the 2006 Safe Drinking Water Act, which called for water in reservoirs to be either covered or treated to kill microbiological pathogens before being used for drinking water. New York City officials had argued that the cost of the cap far exceeded its benefits, and would drive up the cost of water. The city is already building an ultraviolet treatment facility north of Hillview to kill bacteria, and Hillview is the only place where water would be exposed after being disinfected. According to DEP, studies have shown that Hillview is not a source of bacteria, and it is not at risk for contamination because it is an elevated man-made structure that receives no runoff from the surrounding environment. While federal rules do not require the Hillview reservoir cover to be built until 2028, the DEP says that the extended time line “simply defers an expenditure that should not be required in the first place.” The DEP said that EPA regulations had forced it to spend \$19 billion spent on water and wastewater infrastructure improvements between 2002 and 2010, more than the city spent on any other social need, including education and public safety. Federal funds paid for just 1.3 percent of the projects, while water bills for New Yorkers rose 117 percent over the same period, the agency said.

Source: Law360 August 22, 2011.

2. Non-water

NYSDEC to Hold Part 201 Air Permit Rule Changes Stakeholder Meeting

NYSDEC is preparing to propose significant changes to its Air Permitting and Registration regulations. It will be holding two stakeholder meetings to discuss the proposed revisions to 6 NYCRR Part 201, Permits and Regulations.

- Wednesday, November 2, 2011 at 9:30 a.m.
- Monday, November 14, 2011 at 1:30 p.m.

Both meetings will be held at the DEC Headquarters at 625 Broadway in Albany. Conference call-ins are also available for both meetings. Contact Mark Lanzafame at (518) 402-8403 or mrlanzaf@gw.dec.state.ny.us for more information.

Source: <http://www.bcnys.org/inside/env/2011/201StakeholderSummary.pdf>

C. Enforcement and Judicial

Appeals Court Refuses to Dismiss Pollution Suit

A New York appeals court has ruled that a lower court did not err in refusing to dismiss a suit alleging that the discharge of toxic chemicals from a former General Electric Co. industrial plant contaminated nearby groundwater. A five-judge panel for the New York Supreme Court, Fourth Judicial Department, affirmed the lower court's Oct. 18, 2010 ruling denying GE's motion for summary judgment dismissing the second amended complaint and the plaintiff property owners' motion for partial summary judgment on the issue of the source of groundwater contamination. The panel determined that GE had failed to meet its burden for a dismissal of the suit seeking property damages and medical monitoring costs for the plaintiffs' alleged exposure to the toxic chemical trichloroethylene, and that the issues between the parties should be resolved at trial.

Before 1968, GE used trichloroethylene to clean metal parts at its GE-Powerex factory in Aurelius, N.Y., and disposed of the waste containing trichloroethylene by placing it in unlined earthen evaporation pits, according to the suit. The parties agreed that plaintiffs' drinking water wells were contaminated with trichloroethylene and its degradation products, while groundwater at the defendant's plant site was also found to contain trichloroethylene, the ruling said. Although the plaintiffs' last exposure to any of these toxins occurred in 2000 and they have not to date manifested any disease as a result of their alleged exposure to toxins, the plaintiffs sought medical monitoring costs due to the possibility that "in a sufficient dose, [trichloroethylene] might pose a carcinogenic risk." The panel agreed with the lower court's decision to uphold this claim, noting that the plaintiffs were not seeking damages for emotional distress based on their fear of developing cancer, but rather "plaintiffs' theory of liability grows out of the invasion of the body by the foreign substance, with the assumption being that the substance acts immediately upon the body, setting in motion the forces that eventually result in disease." The panel also dismissed GE's contention that the lower court improperly refused to dismiss the plaintiffs' negligence, public nuisance and trespass claims, ruling that GE failed to meet its burden of establishing that the contamination of plaintiffs' private water wells did not constitute a special injury beyond that suffered by the public at large. The lower court also correctly rejected the plaintiffs' bid for summary judgment on the issue of the source of the contamination because "the

papers before the court on the issue presented a credibility battle between the parties' experts, and issues of credibility are properly left to a jury for resolution," the ruling said.

Source: Law360, New York (July 11, 2011) discussing *Doris Baity v. General Electric Co.*, case number CA10-02322, in the Appellate Division of the Supreme Court of the State of New York, Fourth Judicial Department.

SEQR Reform

The Cuomo Administration is attempting remove barriers to new investment and job growth as part of its economic development initiatives, and among other things, is an effort at reforms to the state environmental quality review act (SEQRA). As a first step, the DEC last spring proposed updates to the long and short environmental assessment forms for the first time in over two decades. The draft forms are longer and explicitly address several new topics, including environmental justice, traffic impacts, energy use and greenhouse gas impacts. Additionally, DEC has expanded the short form to encourage more use of the short form for unlisted actions. Unlisted actions comprise about seventy-five percent of the actions reviewed under SEQRA. Local governments often use the long form because the existing short form is deemed too cursory to be useful. The DEC believes that the expanded short forms will help streamline the SEQRA process by providing a sufficient overview of additional projects and avoiding the need for environmental impact statements.

This summer NYSDEC sought input on streamlining of SEQRA regulations and implementation. The DEC has shared some initial reform proposals to potentially interested organizations and individuals for early, informal review and comment before DEC proceeds with more formal, fully-noticed public review and comments. Discussions have focused upon amendments to the process that can occur without the need for statutory changes.

Source: TBC-NY Alert, July 29, 2011.

Building Trades, City Win Dismissal of Claims That PLAs Violate State, Federal Labor Law

The U.S. District Court for the Southern District of New York has upheld project labor agreements (PLAs) between New York City and construction industry trade unions in the face of a challenge by building industry trade associations. Judge Robert Patterson ruled. That the six wide-ranging project labor agreements signed in 2009 do not violate the National Labor Relations Act and are not preempted by it. The New York City Law Department, Office of the Corporation Counsel had said the PLAs cover \$6 billion in public infrastructure projects and 32,000 workers. The lawsuit was brought by the Building Industry Electrical Contractors Association and the United Electrical Contractors Association against the city and the Building and Construction Trades Council of Greater New York, following November 2009 announcements that the city would enter into six new PLAs for the renovation and rehabilitation of existing city-owned buildings and for new construction for city agencies. The associations, which represent a total of 40 contractors, 21 of whom perform publicly financed projects for the city, said that the PLAs effectively exclude them from the bidding process for city construction projects and that the claimed cost savings for the PLAs are "illusory and speculative."

The Court stated that the plaintiffs failed to show that the city's decision "to engage in these PLAs with the BCTC was motivated by anything other than its interest in managing its construction projects in an efficient manner and at a manageable cost." As to the associations' contentions that the claimed cost-savings are "illusory," that argument does not bear on whether

an agreement is regulatory or proprietary, according to the decision. “There has been no showing that the City was motivated by any interest other than a proprietor's interest in having his project completed in a timely and inexpensive fashion.” Therefore, the PLAs were adopted on a proprietary basis, or in the best interest of the city's role as a market participant not as a regulator, he said. Under Boston Harbor and subsequent decisions, because the PLAs in this case represent proprietary rather than regulatory conduct by the city, they are not preempted by the NLRA, he said.

Source: BNA Infrastructure Investment & Policy Report 8/15/11 *Building Industry Electrical Contractors Ass'n v. City of New York*, S.D.N.Y., 10 CV-8002, 8/4/11.

New York Contractor Allegedly Served as Front for Set-Aside Fraud

A Roslyn, N.Y., construction supply contractor has been charged with taking money to serve as a front for a scheme to defraud a program for increasing participation of disadvantaged business enterprises on federally funded public works contracts, prosecutors announced Oct. 6. In a mail fraud indictment unsealed in U.S. District Court for the Southern District of New York, the defendant was charged with taking 1 percent of \$6 million in steel supply contracts actually fulfilled by another supplier. The contractor is the president and sole owner of Global Marine Construction Supply, which purported to provide millions of dollars' worth of structural steel on projects along the East Coast, prosecutors said. According to the indictment, to help meet a Transportation Department DBE participation goal of 10 percent of a major construction project on the Cross-Westchester Expressway, the defendant falsely represented from June 2006 to October 2009 that her company had supplied \$6 million in structural steel.

Allegedly, this allowed the general contractor to claim credit toward the DBE goal, they said. But the steel actually was supplied by another, non-DBE company. As part of the scheme, prosecutors said, the contractor arranged for her company to receive approximately 1 percent of the billed amount of the steel it purportedly supplied, instead of the \$6 million claimed. The general contractor, prosecutors charged, regularly issued two checks to pay for installments of the steel: a two-party check, payable to the actual steel Supplier and GMCS, in the amount of approximately 99 percent of the billed cost of the steel; and a separate check payable to GMCS in the amount of approximately 1 percent.

Source: BNA Infrastructure Investment and Policy Report 10/10/11 discussing *United States v. Jimenez*, S.D.N.Y., No. 11-Cr.-857, indictment filed 10/6/11.

EPA, Polluters Agree To Investigate Newtown Creek Pollution

Since at least 1856, New York City's **Newtown Creek** has been a dumping ground for raw sewage, chemicals, oil and metals. More than a century and a half later, BP, ExxonMobil, Texaco, National Grid, Phelps Dodge and the EPA have finally started the Superfund cleanup process of this notorious waterway. The five companies have agreed to finance a full site investigation, which will start this summer and is likely to run in the tens of millions of dollars.

Newtown Creek was added to the Superfund National Priorities List in September 2010. Around one million cubic yards of the creek's sediment are believed to contain contaminants such as PCBs, heavy metals, pesticides and volatile organic compounds. There are two phases of the cleanup, the first being an investigation of contamination and the second will be a study that will help decide the best way to clean it up. The agreement with the five companies makes them financially liable. In addition to paying for the investigation and eventual remediation, each company must pay the EPA \$750,000 for cleanup work the federal government already

performed. A community advisory group of residents of nearby Brooklyn and Queens will also be created.

Source: NYLCV EcoPolitics Daily, 7/15/11.

II. FEDERAL

A. Legislation and Policy

Senate Committee Holds Hearing on Nutrient Reduction Approaches

A hearing was convened by Sen. Ben Cardin (D-MD), chairman of the Senate Environment and Public Works Subcommittee on Water and Wildlife on October 4 - *Nutrient Pollution: an Overview of Nutrient Reduction Approaches* - to document nutrient pollution as a national threat and discuss the causes and impacts of nutrient pollution, in addition to the various mitigation approaches. In his opening remarks, Sen. Cardin stated that “Dead zones with little or no oxygen caused by nutrient pollution are threatening America’s waters and lakes, as well as the jobs and regional economies nationwide that depend on these great water bodies.” In addition, he summarized the growing problem of nutrient pollution, especially in the Great lakes and coastal estuaries such as the Chesapeake Bay, the waters of Florida and the Gulf of Mexico. Sen. James Inhofe (R-OK) described EPA's approach to reducing nutrient pollutants as more like “coercive federalism” than cooperative federalism.

A group comprised of two panels discussed the nationwide growing problem of nutrient pollution including dead zones and algal blooms, its causes, effects, impacts and mitigation approaches. Stormwater was considered to be a major contributor of non-point source leading to nutrient pollution, especially within the Chesapeake Bay watershed. Green Infrastructure was also touted as a promising technique to mitigate nutrient pollution. Mr. George Hawkins of D.C. Water highlighted some of city’s projects that are promoting the use of Green Infrastructure to protect the health of the Chesapeake Bay, and includes construction of rain gardens, green roofs and bioswales along streets to reduce CSOs throughout the District and “The Digester Project” which involves thermal hydrolysis for wastewater treatment, thereby producing clean, green renewable power and a high quality soil product. Many of the witnesses had differing opinions about the extent of the nutrient problem and the best approaches. However, they stressed that states must be given authority and should work on a watershed basis to reduce nutrient pollution and that a one-size fits all (a single state-wide nutrient standard) approach is not practical to implement nutrient pollution reductions. On this issue, Ms. Shellie Chard-McClary (a WEF member with the State of OK) testified that “A single number for nitrogen or phosphorus is not often an accurate indicator of adverse ecological or water quality effects. We have to look at other factors - like biology - and develop with EPA a flexible approach to controlling nutrients in the environment.” The preferred approach by witnesses would involve collaboration between various states and EPA and working towards mitigating nutrient pollution at a watershed scale.

Source: This Week in Washington, 10/7/11.

House Bill Aims to Reduce EPA Role under the Clean Water Act

Legislators in the House, concerned with the impact of environmental regulation on the economy, are considering legislation to curtail EPA’s role under the Clean Water Act (CWA) and give more autonomy to states. The *Clean Water Cooperative Federalism Act of 2011* (H.R. 2018) would significantly reduce EPA’s authority to oversee, overrule, and/or replace state

water quality standards, water quality certifications for certain projects, and permits for wastewater discharges or dredge-and-fill activities. Proponents of the bill argue that EPA is frustrating economic recovery and interfering with state regulation of water quality within their borders, while opponents call the bill a frontal attack on environmental protection. The bill was reported out of committee without a hearing on June 22; the next step at this time is full consideration by the House.

Source: Marten Law News, 7/7/2011.

NACWA Finds That the “Jobs Bill” Would Provide Little Benefit to Wastewater Infrastructure

The nation's aging, deteriorating wastewater utility infrastructure is unlikely to receive a boost from President Obama's recently proposed jobs bill, according to the leading association representing municipal wastewater treatment utilities. In its [*Economic Analysis of the American Jobs Act of 2011*](#), the National Association of Clean Water Agencies said, “NACWA members are likely to be better off under current funding and tax policies.” NACWA's internal memo summarizes the president's proposal for an infrastructure bank in the proposed legislation and addresses the effects of the municipal bond market in the bill's section dealing with tax deductions and exclusions. The White House unveiled the American Jobs Act of 2011 on Sept. 12. Under Title II of the president's proposal, a new American Infrastructure Financing Authority would be established as a wholly owned government corporation. The authority would provide direct loans and loan guarantees to encourage investment in economically viable infrastructure projects of regional or national significance. But of the proposed \$10 billion in funding, “only a small portion would fund wastewater projects,” the analysis said.

According to NACWA, the proposed bank would be funded by eliminating interest deductions for municipal bonds, which could thwart job creation by driving up costs. In addition, it would add another bureaucratic layer. Issuing direct funds for water infrastructure would add jobs more quickly. The jobs proposal does include direct funds for schools (\$30 billion); for transportation infrastructure (\$50 billion); and for rebuilding communities with large numbers of foreclosed homes (\$15 billion). NACWA questions why direct funding is not planned for water infrastructure as well. The document cited a long list of eligible infrastructure bank projects: highways, roads, bridges, mass transit, inland waterways, commercial ports, airports, air traffic control systems, passenger rail, freight rail, wastewater treatment facilities, stormwater management systems, dams, solid waste disposal facilities, levees, open-space management systems, low-pollution energy generation, transmission and distribution of energy, storage of energy, and energy efficiency enhancements for buildings.

Whatever that fraction for wastewater projects might be, “some portion of it will act as a substitute for current financing sources like the state revolving funds and the municipal bond market,” NACWA said in its analysis. In addition, the proposed infrastructure bank appears to be focused on large projects, the analysis said. Other than for rural projects with a minimum cost of \$25 million, the bank would be able to fund only projects above \$100 million, and loans could not exceed 50 percent of project costs. While the bank appears to be a permanent institution, funding is specified only for the first year at \$10 billion. Project funding from the bank in future years would be capped after the second year at \$20 billion annually, and again after the ninth year at \$50 billion annually. NACWA stated that municipal officials also wonder how infrastructure bank funds for water projects would be prioritized. For example, if there are consent agreements requiring sewer upgrades in 35 cities, how would funding be determined? The proposal also is unclear on whether or how the proposed bank would interact with the

existing water and wastewater state revolving funds. In addition, “if this proposal were to pass Congress and be signed into law, it is also unclear whether funding for the infrastructure bank would substitute for or complement current appropriations” for the state revolving funds.

In another Jobs Act provision, the amount of interest that could be deducted for municipal bonds would be limited, which means that municipal bond issuers—including municipal wastewater treatment authorities—are likely to face increased costs, according to NACWA. The result, it said would be “potentially less infrastructure investment and fewer jobs compared to current policy.” “Are these proposals likely to add new capital to the wastewater sector? The short answer is no,” NACWA concluded. “Assuming municipal budgets are fixed (which they most certainly are in the short run), reductions in funding associated with devaluing tax exemption on municipal bonds is likely to more than offset any increase in funding flow through the infrastructure bank.”

Source: BNA Environment Reporter, 10/7/11, discussing NACWA’s [*Economic Analysis of the American Jobs Act of 2011*](#).

Investment in Green Infrastructure Will Yield 1.9 Million Jobs

Investing in more permeable pavement, grassy swales, urban wetlands, and other green infrastructure techniques to manage stormwater and sewer overflows would create close to 1.9 million jobs and add \$265.6 billion to the economy over the next five years, according to a new report. The report, *Water Works: Rebuilding Infrastructure, Creating Jobs, Greening the Environment*, said the new economic activity would stem from direct jobs in the construction and utility sectors and indirect jobs in the manufacturing sector, which would supply equipment and machinery. New activity also would be generated through the income workers in those sectors spend in other parts of the economy. The report was compiled by the nonprofit group Green for All, along with American Rivers, the Economic Policy Institute, and the Pacific Institute. It was funded by the Rockefeller Foundation. The report's capital needs estimate is derived from a 2008 Environmental Protection Agency Clean Water Needs Survey, which projected total capital investments of \$298.1 billion for wastewater control over the next 20 years. Of this total, the *Water Works* report's authors estimated \$188.4 billion to repair pipes, add new pipes; correct combined sewer overflows, and manage stormwater. The estimate excludes operation and maintenance costs.

Source: BNA Infrastructure Investment & Policy Report - Latest Developments 10/4/11 discussing the report, *Water Works: Rebuilding Infrastructure, Creating Jobs, Greening the Environment*, which is available at <http://greenforall.org.s3.amazonaws.com/pdf/Water-Works.pdf>.

B. Regulatory

1. Water

a. Watersheds and Specific Waters

EPA-Supported On- Site Water Purification Eco-Center Demonstration Project

On June 16, 2011, the Rodale Institute held a ribbon-cutting ceremony to celebrate the opening of its new Water Purification Eco-Center located on its research farm in Kutztown, PA. The center, supported in part through a \$695,000 grant from the U.S. Environmental Protection Agency (EPA), will serve as a model on-site wastewater treatment system. The system incorporates an experimental wetland-based treatment and reuse facility that captures rainwater

and reuses it several times before returning it to the soil as clean water. The system, which serves as an alternative to standard septic and sand mound on-lot sewage systems, is scalable and can be used in sustainable landscapes for residential and small commercial entities. This project will help promote the adoption of wetlands-based residential and institutional wastewater treatment systems to help encourage homeowners and businesses to seek out more sustainable and water-efficient wastewater treatment options. For additional information, visit the Rodale Institute website at: <http://www.rodaleinstitute.org/water-purification-eco-center>. For additional project information, please contact Bob Bastian, EPA Office of Wastewater Management, by phone at (202) 564-0677 or via e-mail at bastian.robort@epa.gov.

Source: EPA Water Headlines for the week of June 6, 2011.

EPA Announces the Healthy Watersheds Initiative National Framework and Action Plan

On September 26th the U.S. Environmental Protection Agency announced the release of the *Healthy Watersheds Initiative (HWI) National Framework and Action Plan*. The HWI is intended to protect the nation's remaining healthy watersheds, prevent them from becoming impaired, and accelerate restoration successes. The HWI National Framework and Action Plan aims to provide a clear consistent framework for action, both internally among EPA's own programs and externally in working with the Agency's partners. EPA will work with states and other partners to identify healthy watersheds at the state scale and develop and implement comprehensive state healthy watersheds strategies that set priorities for protection and inform priorities for restoration. Healthy watersheds provide many ecological services as well as economic benefits. If successfully implemented, the HWI promises to greatly enhance our nation's ability to meet the Clean Water Act Section 101(a) objective of restoring and maintaining the chemical, physical, and biological integrity of the nation's waters. The HWI National Framework and Action Plan is available at www.epa.gov/healthywatersheds.

Source: USEPA's Water Headlines for the week of September 26, 2011.

New EPA Summary of Fish Advisories Across the U.S. in 2010

The U.S. Environmental Protection Agency has published a fact sheet summarizing the National Listing of Fish Advisories for 2010. As in previous years, states continued to increase their monitoring and assessment activities related to contaminants in noncommercial fish. EPA believes the increase in monitoring—rather than changes in contaminant levels—is the main reason for the continued upward trend in the amount of U.S. waters placed under advisory. EPA also encourages states to issue safe eating guidelines when providing advice. Safe eating guidelines are in effect in 21 states and the total number has increased since 2008. The guidelines identify fish that are safe to consume, and promote enjoyment of recreational fishing. *The National Listing of Fish Advisories*, which was initiated in 1993, is a compilation of fish advisory information provided to EPA by states, tribes, territories, and local governments. The data are voluntarily submitted to EPA in an effort to provide a central repository of fish consumption advisory information for the United States.

Source: USEPA Water headlines for the Week of October 11, 2011 discussing the EPA report which is available at http://water.epa.gov/scitech/swguidance/fishshellfish/fishadvisories/advisories_index.cfm.

Excessive Nutrients, Invasive Mussels Blamed For Ecosystem Breakdowns in Great Lakes

A combination of excessive nutrients and invasive zebra and quagga mussels are causing ecosystem breakdowns in the Great Lakes, the National Wildlife Federation said in an Oct. 4 report. The report, *Feast and Famine in the Great Lakes: How Nutrients and Invasive Species Interact to Overwhelm the Coasts and Starve Offshore Waters*, claims that the combination is causing two distinct crises in the lakes. The excessive nutrients are causing large-scale algal blooms in near-shore waters, creating multiple threats to aquatic species. The invasive mussels, meanwhile, are depleting plankton and other nutrients in the water column that otherwise would support shrimp-like crustaceans that form an essential link in the food chain, causing a reduction in fish populations.

The excessive nutrients are being consumed, for the most part, by quagga and zebra mussels. She said the more beneficial forms of algae are being eaten by mussels, while the more toxic forms are being left behind to bloom. One result was the worst toxic algal bloom in recorded history on Lake Erie this summer. The bloom was worse than when the lake was declared dead in the 1960s, she said. It extended across almost the entire western basin of the lake and into the central basin. In some places the bloom was up to two feet thick. A secondary effect of the mussels is that their consumption of nutrients appears to be reducing the amount of nutrients that can make their way into the middle of the lakes, where they form part of the food chain. As a result, fish numbers are decreasing. Hinderer said it is estimated that there are 400 trillion mussels in Lake Michigan alone. Andy Buchsbaum, regional executive director of NWF's Great Lakes Regional Center, said the prey fish (small fish consumed by predator fish) biomass in the open waters of Lake Huron has declined by about 95 percent over the past 15 years. Populations of tiny freshwater shrimp in Lake Michigan have decreased by about the same number over the past 10 years, he said. As prey fish numbers decline, so do the numbers of fish that eat them, such as Lake Whitefish and Chinook salmon, the report stated.

Source: BNA Environment Reporter, 10/7/11, discussing *Feast and Famine in the Great Lakes: How Nutrients and Invasive Species Interact to Overwhelm the Coasts and Starve Offshore Waters*, which is available at <http://www.nwf.org/greatlakes>.

Mercury Pollution Declines in Great Lakes, But Wider, More Intense Effects Seen

Mercury contamination across the Great Lakes region has declined by many measures in recent decades, although the effects of mercury pollution are more widespread and greater in intensity than previously thought, according to a report released at a Great Lakes Commission meeting Oct. 11. The report, which summarizes the findings of 35 research papers, also found that efforts to control mercury pollution have been successful, highlighting the need for continued controls. Several studies showed mercury pollution affects a broader range of species than previously known. A study of loons, for example, found that higher levels of mercury are associated with lower birth rates and lethargic behavior. The bulk of mercury contamination in the Great Lakes region comes from coal-fired power plants in the south and west of the area, the report said.

Source: BNA Environment Reporter 10/14/2011 discussing the report at <http://www.briloon.org/mercuryconnections/greatlakes/>

b. Wet Weather and Green Infrastructure

District of Columbia Stormwater Permit Mandates Green Roofs, On-Site Retention

Dynamic stormwater management techniques such as vegetated roofs and rainfall retention on properties for at least 24 hours must be deployed in the District of Columbia, under terms of the

capital city's renewed municipal separate storm sewer system permit approved Oct. 5 by the Environmental Protection Agency.

EPA Region III announced its approval of the permit, which replaces a permit issued in 2004. The agency said the new permit conditions are necessary because impervious surfaces in the city such as roads, rooftops, and parking lots channel stormwater directly into impaired local streams and rivers that flow into the Chesapeake Bay. The permit requires the city to take numerous actions to reduce stormwater pollution, including:

- developing a stormwater retrofit strategy and implementing retrofits over 18 million square feet of impervious surfaces;
- requiring newly developed properties with footprints over 5,000 square feet to have infrastructure to retain on site at least 1.2 inches of rain (1.7 inches for federal property) over a 24-hour period;
- ensuring that green roofs total at least 350,000 square feet;
- developing consolidated implementation plans for restoring the impaired waterways of the Anacostia and Potomac Rivers, Rock Creek, and the Chesapeake Bay on city properties; and
- reducing the amount of trash entering the Anacostia River by at least 103,000 pounds annually.

Source: BNA Infrastructure Investment and Policy Report 10/10/11 discussing the *District of Columbia stormwater permit*, available at http://www.epa.gov/reg3wapd/pdf/pdf_npdes/Wastewater/DC/DCMS4permit2011.pdf.

EPA Urged to Encourage Green Infrastructure in Planned Post-Construction Stormwater Rule

An anticipated EPA proposed rule to reduce stormwater runoff from new development and redevelopment provides an opportunity for the agency to encourage the use of green infrastructure and to address barriers to its use, according to a new report. The Sept. 13 report by the Clean Water America Alliance, *Barriers and Gateways to Green Infrastructure*, said green infrastructure is often less costly than conventional infrastructure and development practices, but local regulations, lack of information about green infrastructure, and other barriers discourage its wider use. Examples of green infrastructure practices include green roofs containing vegetation, rain gardens, and planter boxes, according to EPA. Other examples include riparian buffers and the planting of trees to manage stormwater. According to the report, green infrastructure systems and practices “use or mimic natural process to infiltrate, evapotranspire, or reuse stormwater and runoff on the site where it is generated.” These approaches keep rainwater out of sanitary sewer system, which can lead to sewer overflows and also reduce the amount of untreated runoff discharged to surface waters. Funding from federal programs that could promote green infrastructure, particularly EPA water programs, is limited, and economic incentives are lacking at the regional, state, and federal level for projects that help meet regulatory requirements and restore urban watersheds, it said. It also cited “federal and local requirements and regulations that hinder innovative practices.”

Source: BNA Infrastructure Investment and Policy September 20, 2011. The report, *Barriers and Gateways to Green Infrastructure*, is available at <http://www.cleanwateramericaalliance.org/pdfs/gireport.pdf>.

EPA Releases CSO- Related Planning Tool for Small Communities

The EPA has developed an updated planning tool for small communities to address CSOs through green approaches when developing LTCPs called the LTCP-EZ for Small Communities Template. This document updates the May, 2007 document that focuses on inclusion of green infrastructure practices. There are no comments to be developed on this, and this is not guidance in a regulatory sense – it is simply a tool to help communities.

Source: Email from S. Brown WEF Manager, Public Policy and Stormwater Team Lead to WEF GAC members, August 11, 2011. Information and links are located at the second bullet item at this page: http://cfpub.epa.gov/npdes/whatsnew.cfm?program_id=5.

EPA Withdraws Proposal to Revise Numeric Turbidity Limit for Construction

The Environmental Protection Agency has withdrawn a proposed rule that would have revised the numeric turbidity limit for stormwater runoff from construction sites and plans to seek additional data. According to EPA it withdrew the proposal from review by the White House Office of Management and Budget in order to collect additional data “on treatment performance from construction and development sites.” EPA plans to publish a Federal Register notice soliciting data “in the near future. A final rule with the numeric limit on turbidity for construction runoff was issued Dec. 1, 2009, at C.F.R. Part 450 and became effective Feb. 1, 2010. Under the construction and development rule, discharges associated with construction activity at certain sites disturbing 10 acres or more may not exceed an average turbidity for any day of 280 nephelometric turbidity units. The 2010 rule was the first time EPA had included a numeric limit for stormwater construction runoff. After finalizing the rule, the agency received two petitions for reconsideration that pointed out a potential error in the calculation of the numeric limit. EPA then examined the data and admitted it misconstrued data on stormwater runoff from construction sites. In August 2010, a federal appeals court granted EPA's request for remand of certain portions of the final rule.

Source: BNA Infrastructure Investment, 8/16/11.

c. *Other Water*

Climate Change Risk Assessment Tool for Water, Wastewater Utilities Available

EPA's Climate Ready Water Utilities initiative has developed the Climate Resilience Evaluation and Awareness Tool (CREAT). CREAT assists drinking water and wastewater utilities in conducting climate change risk assessments at their facilities. EPA will be providing free training on the CREAT starting Wednesday, October 12, with an additional eight webinars to follow throughout October and November. Registration will be capped at 50 participants per session, but EPA will try to accommodate preferences for specific dates, and additional webinars will be held as necessary.

Source: This Week in Washington, 10/7/11.

EPA Issues Report on the National Characteristics of Drinking Water Systems Serving 10,000 or Fewer People

The U.S. Environmental Protection Agency has updated a report entitled *National Characteristics of Drinking Water Systems Serving 10,000 or Fewer People*. EPA first published this report in 1999, after the 1996 Amendments to the Safe Drinking Water Act, to serve as a source of information for small drinking water systems and stakeholders that work

with small systems. The central purpose of generating this report is to share characteristics of small public drinking water systems to better understand their challenges and better target technical assistance to improve their technical, managerial and financial capacity. This report updates the data on small systems based on the new information drawn from the 2006 Community Water System Survey, the 2007 Drinking Water Infrastructure Needs Survey and Assessment, the Safe Drinking Water Information Systems (SDWIS), the Drinking Water State Revolving Fund National Information Management System and the Bureau of Labor Statistics.

Source: EPA Water headlines for the week of 8/22/11. The report is available on EPA's website at http://water.epa.gov/type/drink/pws/smallsystems/state_guidance.cfm

2. Non-Water

President Releases Detailed Budget Reduction Recommendations; Plan Promotes Higher EPA Program Fees and Infrastructure Spending

On September 19 President Obama released budget reduction recommendations that includes boosting fees that EPA collects through various program and more details about the establishment of a national infrastructure bank and other non-water related infrastructure spending proposals. The budget reduction plan - *Living within Our Means and Investing In the Future* - includes three EPA-specific efforts that are designed to save millions of dollars by increasing fees pesticide registrants must pay, lifting a cap on fees from chemical manufacturers seeking to market new chemicals, and establishing a Resource Conservation & Recovery Act hazardous waste electronic manifest system. The budget plan also promotes accelerating the permitting process for infrastructure projects. Significantly, the President's budget savings plan does not propose further cuts to EPA's discretionary spending. The House EPA appropriations bill proposes cutting the agency's existing FY 2011 funding from \$8.6 billion, down from \$7.1 billion for FY 2012.

Source: WEF's This Week in Washington from WEF, 9/23/2011.

Five Chemicals Added to List of Substitutes for Ozone-Depleting Substances

The Environmental Protection Agency has approved five new substances as acceptable alternatives for ozone-depleting refrigerants, fire suppressants, and solvent cleaners in a notice to be published Oct. 4. The substances are being approved for use under the Significant New Alternatives Policy (SNAP) program, which determines acceptable substitutes and transitional substitutes for ozone-depleting substances such as Freon® and other chlorofluorocarbons. EPA said it approved the use of three new refrigerants as substitutes for ozone-depleting substances, including Hot Shot 2, which it said is acceptable for use in commercial ice machines, cold storage warehouses, ice skating rinks, vending machines, and residential dehumidifiers as a substitute for chlorofluorocarbon (CFC)-12, CFC-11, CFC-113, CFC-114, R-13B1, R-500, R-502, hydrochlorofluorocarbon (HCFC)-22, and other HCFC blends. Hot Shot 2 is a blend of HFC-134a, HFC-125, and R-600. The component R-600 is regulated as a volatile organic compound, thereby subject to regulations under the Clean Air Act's state improvement plans.

EPA also has approved the use of R-407F as an acceptable substitute for HCFC-22 and HCFC blends that are used for industrial process refrigeration, ice skating rinks, cold storage warehouses, refrigerated transport, retail food refrigeration, commercial ice machines, and vehicle air conditioners. The refrigerant R-507A is also an acceptable substitute for ozone-depleting substances, such as R-13B1, in very low temperature refrigeration, according to EPA.

For solvent cleaners, EPA also approved use of perfluorobutyl iodide (PFBI) as an acceptable substitute for CFC-113 for cleaning metals and electronics, among other things. PFBI is defined as a volatile organic compound under the Clean Air Act and has a global warming potential of less than five relative to carbon dioxide and an atmospheric lifetime of a few days. As a fire suppressant, EPA also approved the use of Firebane® all-weather 1115 and Firebane® 1115 as an acceptable substitute for halon 1211 to be used as streaming agents. Both these products have zero global warming potential.

Source: BNA Environment Reporter, 10/7/11.

EPA Seeks To Require Notice of New Glyme Uses

EPA has proposed rules that would require manufacturers to report new uses of chemicals called glymes in consumer products, citing concerns about harmful reproductive and developmental health effects. Glymes, a set of 14 chemicals, are already used in printing ink, paints and coatings, adhesives, household batteries and motor vehicle brake systems, for example. But the EPA said that there are concerns that use of the chemicals in new products could lead to health risks.

The agency said the proposed action is part of EPA Administrator Lisa P. Jackson's effort to strengthen its chemical management program. With the new rule, the EPA would have 90 days to evaluate potential risks of using glymes in new products and block its use, if necessary. The agency proposal was issued through a procedure called the significant new use rule under the Toxic Substances Control Act.

The EPA is concerned about the health effects of three chemicals known as monoglyme, which is used in lithium batteries; diglyme, used in printing inks; and ethylglyme, which has no consumer uses but has been found in water sources. While consumers have limited exposure to the three chemicals in their current usage, the EPA said the agency should have the opportunity to review the chemicals if humans and the environment are increasingly exposed to them through new consumer products. The 11 other glymes attracted EPA attention because of the lack of available use, exposure and toxicity information. Health concerns over glymes were detailed in a 2008 EPA report on two chemicals that are used in consumer products — monoglyme and diglyme. Studies on these two chemicals indicated adverse effects on reproductive and developmental toxicity, as well as on blood and blood-forming organs, the EPA said.

Source: Law360, New York (July 11, 2011). The proposed rule is open to public comment until Sept. 9.

ASTM Issues Guidance on Continuing Obligations for Contaminated Properties

ASTM International has published a new standard that provides guidance on continuing obligations for contaminated property. The [*Standard Guide for Identifying and Complying with Continuing Obligations*](#) (E2790-11) informs property purchasers of some of the things they must do to protect against liability under the Comprehensive Environmental Response, Compensation, and Liability Act. The standard picks up where guidance for the Phase I standard ends, which is at the point of purchasing brownfields. ASTM is a consensus organization that develops voluntary standards on a range of issues.

The ASTM guide addresses continuing obligations in commercial real estate and forestland and rural property, with respect to hazardous substances within the scope of CERCLA, as well as petroleum products, which generally are not covered by CERCLA, according to information on ASTM's website. It identifies procedures that, if completed, would help protect owners from

legal liability. The guide focuses only on certain continuing obligations, namely those pertaining to land use restrictions, institutional controls, and taking reasonable steps with respect to releases of chemicals of concern, ASTM said.

The new guidance starts with consideration of Phase I findings, which identify environmental conditions before contaminated property is bought. It seeks to guide a new landowner with steps to maintain health and environmental protectiveness when the property is owned. For example, a landowner might discover in a Phase I finding he has an institutional control, or a recognized environmental condition, and the guide helps inform him what to do next, the Chair of the ASTM working group which authored the standard has stated. The guide uses a four-step process to help a prospective purchaser identify and organize the continuing obligations, take any initial steps after purchasing the property, and monitor and maintain these obligations through the term of ownership.

Source: BNA Toxics Law Reporter, 7/11/2011.

3. Judicial and Enforcement

a. Wet Weather

Calif. City Settles Water Board's Sewer Overflow Claims

San Bruno, Calif., reached a tentative \$621,100 settlement made public May 27 with the San Francisco Bay Regional Water Quality Control Board over more than 1.9 million gallons in sewer overflows. The settlement agreement is in regards to a February 2010 administrative complaint the board filed against San Bruno, accusing it of water code violations related to 148 sanitary sewer overflows that occurred between December 2004 and December 2009 and entered surface and ground waters. The city's money will go to state cleanup funds as well as various environmental projects. Some of the most severe overflows were caused by inadequate capacity and excessive inflow and infiltration, according to case records.

Under the proposed agreement, San Bruno will pay \$325,550 into the state water resources board cleanup and abatement account. The remaining \$295,550 of the settlement amount will go toward specific environmental improvement projects. One such project calls for reducing inflow and infiltration into the city's collection system from defective private sewer laterals in a particular basin. The work, valued at \$199,622, would decrease the number and volume of spills from the system during wet weather, benefiting water quality, according to settlement documents.

As part of another project under the settlement, the city will contribute \$95,928 to a marine mammal center's rebuilding project to assist in the rescue and rehabilitation of such animals that have been adversely impacted by human activities. The city's funds will be used to a construct a shade structure over three new inground pools that are part of the center's intensive care and quarantine unit, according to settlement documents. Under the tentative cease and desist order accompanying the settlement, the city will have to achieve full compliance by 2020 with prohibitions barring any sanitary sewer overflows that result in the discharge of untreated or partially treated wastewater into U.S. waters or that create a nuisance.

San Bruno and the City of South San Francisco own and operate a wastewater treatment plant in San Mateo County and a related collection system, according to case documents. San Bruno's system includes about 77 miles of gravity sewers and forced mains, 83 miles of laterals and six pump stations. Of about 83 miles of laterals, San Bruno is responsible for about 41 miles, according to case information. The city's system services a population of 43,444, mostly

consisting of residential customers.

<http://www.law360.com/articles/249085/print?section=environmental>

Source: Law360, New York (June 3, 2011).

St. Louis Sewer District to Spend \$4.7 Billion to Settle Suit over Sewage Discharges

The Metropolitan St. Louis Sewer District will spend \$4.7 billion on system upgrades over the next 23 years to settle an Environmental Protection Agency lawsuit over discharges of untreated sewage from the 150-year-old system, according to a summary of the settlement prepared by the sewer district. Under the proposed consent decree, the district will eliminate from its separate sanitary sewer system all overflow outfalls—points in the system where sewage can escape by December 31, 2033. Spending on the separate sanitary sewer system would total around \$2.7 billion. In addition, the district is required to implement a system-wide control program aimed at its combined sewer system, which collects sanitary sewage and stormwater runoff together in a single system. Spending on the combined sewer system will total around \$2 billion. MSD also plans to spend around \$100 million to make use of so-called green infrastructure as part of the combined sewer system control program, and \$230 million to mitigate the effects of basement backups, street flooding, and overland flooding from the system.

The district would pay a \$1.2 million fine and make a payment of \$116,000 to the Missouri Coalition for the Environment. The consent decree requires approval by the U.S. District Court for the Eastern District of Missouri.

The MSD summary indicated the state of Missouri, which also is a plaintiff in the lawsuit, has decided not to sign the consent decree.

Source: BNA Environment Reporter 6/10/11, discussing *United States v. Metropolitan St. Louis Sewer District*, summary released 6/2/11.

Sioux Falls Settles Sewer Overflow Suit for \$2M

<http://www.law360.com/articles/254926/print?section=environmental> The city of Sioux Falls, S.D., agreed to pay nearly \$2 million from its public insurance to settle a class action over property damage caused by a 2004 sewage overflow, ending seven years of litigation. The \$1.95 million settlement will be distributed to pay for damage at 159 properties, and the money will be drawn from the South Dakota Public Assurance Alliance.

The property owners had fronted about \$60,000 of their own money to hire an expert hydrologist to perform computer modeling on the city's drainage basin and sewer systems. The case was launched in the wake of sewer overflows in 2004, after heavy rains caused the failure of Sioux Falls' storm and sanitary sewer systems. The city turned over the claims handling to its insurer, which mostly denied the claims. When property owners sued, the city claimed sovereign immunity and said that it wasn't responsible for the flooding. The expert's report, along with documents obtained during discovery proved that the city had known that an overflow was likely, at least since 1995, according to Hughes.

The individual property damage claims ranged from \$570 to \$51,000. In 2006, the city spent \$40 million to upgrade its sewer system, but heavy rains this summer again caused overflows, this time discharged into a nearby river. Sioux Falls announced Thursday that it plans ambitious construction upgrades on its sewer system, expected to cost \$27 million in 2011.

Source: Law360, 6/30/11, discussing *Arneson et al. v. Sioux Falls*, case number 05-cv-1713, in the Second Judicial Circuit of South Dakota.

Source: Environmental Law360, July 1, 2011.

City Immune from Residents' Suit for Sewer System Overflow Into Basements

An Ohio state high court refused May 25 to hear residents' appeal of a ruling that a city is immune from suit for flooded basements caused by the city's overflowing sewer system. After reviewing the parties' memoranda on whether the case presents questions of public and great general interest, the Supreme Court of Ohio declined to exercise its jurisdiction to consider the case.

In 2005, a school district with boundaries that include the City of Trotwood, Ohio, hired South Central Construction LLC to demolish a high school. The contract required South Central to cap any holes in the sewer lines created by the demolition. South Central allegedly failed to adequately cap a sewer lateral outside the building even though a city employee had visited the demolition site and reminded the contractor to cap all sewer lines. During a heavy rain in March 2006, the basements of residents living near the high school flooded.

In July 2006, *the city sued the residents*, among others, seeking a declaratory judgment that it was entitled to political-subdivision immunity from liability for any losses caused by the flooding. A trial court entered summary judgment in its favor, and the residents appealed.

The Ohio Court of Appeals noted that Ohio Rev. Code establishes a three-tiered test for immunity: (1) as a general rule, a political subdivision is not liable for property loss caused by an act in connection with a governmental or proprietary function; (2) courts must analyze whether one of the exceptions contained in the statute applies; and if so, (3) whether the subdivision can restore immunity by showing that one of the defenses listed in the act applies. Here, the residents argue that the city's general immunity is abrogated by the exception for property loss caused by the negligent performance of acts by their employees regarding proprietary functions. The residents assert that, having made the decision to conduct an inspection of the demolition site, the city's act of carrying out the inspection was a proprietary function, the negligent performance of which subjected it to tort liability.

Assuming that the city employee's site visit amounted to an "inspection," the court said, the act states that the provision of inspection services of all types is a governmental function. Even if the city acted negligently by merely reminding the contractor to cap the sewer lines, such negligence did not remove its immunity. The court also rejected the residents' argument that the city is liable for negligently maintaining its sewer system. Acknowledging that maintenance of a public sewer system is a proprietary function, the court said it was unconvinced that the case involves a maintenance issue. The city knew nothing about the inadequate cap until after a heavy rain caused water to run through the lateral and overload the city's main sewer line, the court stated. Once informed of the flooding, the city located the source of the problem and stopped it.

The residents contend that the city had a duty to maintain the inadequately capped line even though it was a lateral rather than a main because the line was put to public use, and that the duty was non-delegable. Case law generally holds that a principle generally is not responsible for the negligence of an independent contractor when it retains no right to control the way the contractor carries out the work, the court said. The court observed, the city was not even a party to the contract, which was between the school district and South Central. The court affirmed the judgment of the trial court, and the residents filed a notice of appeal. Ohio's high court subsequently rejected the residents' appeal.

Source: BNA Toxics Law Reported, 6/10/11 discussing *City of Trotwood v. South Central Construction LLC*, Ohio, No. 2011-0363, 5/25/11).

Newport, R.I., Agrees to Spend \$25 Million to Upgrade Wastewater Treatment System

The city of Newport, R.I., has agreed to spend approximately \$25 million to eliminate illegal discharges of sewage into the Narragansett Bay from its wastewater treatment plant and wastewater collection system, under terms of a [proposed consent decree](#) filed in federal court. In addition to the facilities upgrades, the city will also pay a \$170,000 penalty to be split between the state and federal governments. The proposed consent decree, which was filed in U.S. District Court for the District of Rhode Island, would settle charges that Newport violated the Clean Water Act, including allegations of illegal discharges of sewage and stormwater containing bacteria and other pollutants that pose threats to human health and the environment. Under the settlement, Newport is required to develop a comprehensive, systemwide plan to address discharge violations at its wastewater treatment plant and eliminate overflows from its wet weather sewage treatment facilities.

According to EPA, planned actions include identifying and removing extraneous sources of water from the collection system by eliminating stormwater connections and repairing or replacing leaky pipes. The city is also required to take measures to reduce the levels of bacteria in discharges from its storm sewer system to Easton's Beach.

Source: BNA Infrastructure Investment & Policy Report 8/15/11 discussing *Environment Rhode Island v. City of Newport*, D. R.I., No. 1:08-cv-00265, proposed consent decree filed 8/11/11.

West Virginia City to Spend \$4.2 Million to Upgrade and Complete Sewer Projects

The city of Elkins, W.Va., will spend about \$4.2 million to upgrade and complete sewer system projects to reduce overflows during wet weather as part of a proposed consent decree to resolve alleged Clean Water Act violations. (Under the proposed settlement, which was lodged Aug. 8 in the U.S. District Court for the Northern District of West Virginia and published Aug. 16, the city also will pay civil penalties of \$64,800, split equally between the state and federal governments. According to the civil complaint filed by the Environmental Protection Agency, Elkins violated Section 301 of the Clean Water Act by discharging pollutants, including sewage, into navigable waters.

The proposed consent decree requires Elkins to take steps to eliminate dry-weather overflows and reduce combined sewer overflows by March 2023 by completing sewer-separation projects and sewer system upgrades. The upgrades are expected to cost about \$4.2 million.

It also would require the city to establish a yard waste pickup and recycling program for residents, provided as a part of Elkin's regularly scheduled municipal solid waste management and disposal program. The Mayor of Elkins Duke said in a prepared statement that the city has been working on the settlement with EPA "for a long time," noting that previous administrations failed to address Clean Water Act violations for more than a decade, causing the West Virginia Department of Environmental Protection to turn the case over to EPA.

Source: BNA Toxics Law Reporter discussing *U.S v. Elkins*, N.D. W.Va., Docket No. 2:11cv61, 8/10/11.

Ohio City Settles Suit Over Lake Erie Pollution

The City of Euclid in northern Ohio will pay a \$150,000 civil penalty and make extensive sewer systems improvements to cut overflows into Lake Erie. Under the settlement, Euclid, Ohio, must implement a plan to reduce or eliminate untreated sanitary sewage and stormwater overflows from its combined sewer system and sanitary sewage overflows from the city's separate sanitary sewer system. The agreement resolves alleged violations of the Clean Water Act, and the U.S. and Ohio will split the \$150,000 civil penalty. Sewage and wastewater discharges from the city flow directly into Lake Erie or connecting creeks and streams.

Euclid, which borders Cleveland, will continue investigating the best way to control the discharges, and regulators plan to review the results of those efforts and require the city to make appropriate improvements at different milestones going forward. The regulators said they anticipated full operation by the end of 2026 at the latest. Critical to the plans is an expansion of Euclid's wastewater treatment plant. That work will expand the plant's capacity, allowing it to treat tens of millions of gallons of wastewater and stormwater. The city, over the next nine years, is expected to completely eliminate discharges of sanitary sewage from its sanitary sewer system and “engage in comprehensive capacity, maintenance and operation programs to improve sewer system and wastewater treatment plant performance.”

Source: http://www.law360.com/about/rights_and_reprints?article_id=267240 Law360 August 25, 2011 discussing *United States of America et al. v. City of Euclid, Ohio*, case number 1:11-cv-01783, in the U.S. District Court for the Northern District of Ohio.

Judge Adopts Special Master's Report Recommending Tight Phosphorus Limit for Stormwater

A federal judge in Miami has adopted a [special master's report](#) that included a recommendation for a 10 part-per-billion phosphorus “outflow limit” be established for water from man-made stormwater treatment areas (called STAs) in the Everglades. In a [30-page order](#) Judge Federico A. Moreno of the U.S. District Court for the Southern District of Florida also agreed with the Jan. 4 findings by Special Master John M. Barkett that phosphorus pollution flowing into the Loxahatchee National Wildlife Refuge in the Everglades had exceeded compliance levels between 2005 and 2009. The report was the latest by the special master, who in 2006 recommended the court sustain a ruling that interim phosphorus levels in surface water in the Everglades exceeded those called for in a consent decree governing the federal-state restoration project. At the same time, Barkett noted in the 2006 report to Moreno that the South Florida Water Management District (SFWMD) had made “considerable progress” in reducing phosphorus levels in the Everglades.

Currently, the state phosphorus rule has four parts with phosphorous limits ranging from 10 ppb to 15 ppb. In the order, Moreno noted that parties involved in the Everglades cleanup disagree on whether the state phosphorus rule applies to the federal consent decree.

Source: BNA Environment Reporter, 10/7/11, discussing *United States v. South Florida Water Management District*, S.D. Fla., No. 88-1886, *order* 9/28/11.

Ninth Circuit Reissues Opinion Requiring NPDES Permits for Stormwater Discharges from Logging Roads

The Ninth Circuit affirmed an earlier decision that will effectively require many timberland owners and logging companies to obtain permits for stormwater runoff from logging roads in the western U.S. The case, [11](#) involved two Oregon logging roads where stormwater runoff is

collected in systems of ditches, channels, and culverts, and then discharged into adjacent rivers. The Ninth Circuit initially issued its decision in August 2010. The defendant-appellees then petitioned for rehearing or rehearing en banc. On May 17, the court withdrew its earlier opinion and reissued a revised version. In the reissued opinion, the Ninth Circuit reiterated that the stormwater collection systems at issue unambiguously constitute “point sources” under the Clean Water Act (CWA), and that such discharges therefore require permits under the CWA’s National Pollutant Discharge Elimination System (NPDES) program. In so holding, the court significantly limited a decades-old regulation that had historically been viewed as excluding logging road runoff from the NPDES program and charged EPA with developing a general permit to handle the discharges. The court also inserted a justification for its exercise of jurisdiction over the case that may well have impacts beyond the context of logging roads in the west. Generally, challenges to EPA’s CWA regulations must be lodged in federal appellate courts within 120 days of when the regulations are issued. Based on the United States’ position in an amicus brief, however, the court held that the citizen suit plaintiffs could challenge the application of the Silvicultural Rule in this instance, despite the statutory limitations periods for challenging agency rulemaking, because the regulation was purportedly “ambiguous.” Under this standard, the court may have opened a backdoor that could allow both environmental and industry groups to challenge environmental regulations long after they have been issued on the theory that they are “ambiguous.”

Northwest Environmental Defense Center (NEDC) v. Brown, (2011 WL 1844060 (9th Cir. May 17, 2011)).

Source: Marten Law News - May 20, 2011.

BNSF Railway Wastewater Plan Violated CWA

A federal judge in Washington State has ruled that BNSF Railway Co. violated the Clean Water Act by failing to honor the terms of a stormwater runoff permit issued by the state to regulate the discharge of pollutants from its Balmer Yard railway hub into the navigable Puget Sound waterways. The Court found that BNSF violated numerous provisions of its National Pollutant Discharge Elimination System permit by implementing a pair of Stormwater Pollution Prevention Plans that didn't outline a sufficient wastewater monitoring plan. According to the decision, BNSF failed to honor the terms of the NPDES permit by failing to include in its pollution prevention plans information regarding the company's stormwater sampling plan, an accurate inventory of the industrial activities taking place at Balmer Yard, a site map that outlined the rail yard's drainage system and other vital components of a cohesive wastewater and stormwater management plan. BNSF also violated the NPDES permit by failing to respond to a 2008 wastewater sampling that detected elevated pollutant levels in the rail yard's runoff, making no effort to comply with the level of response dictated by the permit, the judge said.

Puget Soundkeeper sued BNSF in July 2009, claiming the railroad owner violated the CWA by allowing wastewater pollutants to filter into various surface waters around the Balmer Yard facility's Interbay neighborhood. Though BNSF had obtained a NPDES permit in 1993, Puget Soundkeeper said Balmer Yard was violating the terms of this permit by leaking heavy metals into its stormwater discharge. After a third-party consultant commissioned by BNSF to investigate the Balmer Yard's wastewater system determined that the rail yard's runoff discharged solely into the county's sanitary sewer system, the rail company terminated its NPDES coverage in October 2009, as the permit applies only to companies that pollute surface waters. BNSF then moved for summary judgment in January 2010, saying it could not have been responsible for pollutants showing up in the waterways and that Puget Soundkeeper's claims were moot. But Puget Soundkeeper countered in February 2010 that a report released by

the Washington Department of Ecology earlier in January determined that “stormwater with an oil sheen has been discharging from the Balmer yard into a Seattle storm drain and into Salmon Bay,” a local inlet.

Based on this new information, the Court consequently reopened discovery and denied BNSF's motion for summary judgment in August 2010, saying Puget Soundkeeper had proven that “there is, in fact, only one relevant facility in the Interbay neighborhood and that the January 2010 oil spill emanated from the Balmer Yard.” After additional discovery, Puget Soundkeeper moved for summary judgment in May 2011, saying BNSF had violated the CWA on 78 individual dates since it terminated its NPDES coverage. The Court found in favor of most of Puget Soundkeeper's claims, saying the company's two pollution prevention plans — issued in 2001 and 2005 — failed to incorporate best management practices in monitoring the Balmer Yard's discharge system. BNSF also violated the wastewater sampling requirements of the NPDES permit by collecting samples in only five of the 19 quarters between the first quarter of 2005 and the third quarter of 2009, the judge said.

He also affirmed the 78 CWA violations alleged by Puget Soundkeeper. BNSF had previously admitted to this claim in June.

Source: Law360 August 19, 2011, discussing *Puget Soundkeeper Alliance v. BNSF Railway Co.*, case number 2:09-cv-01087, in the U.S. District Court for the Western District of Washington.

US Sues CVR Unit for \$2M in Oil Spill Cleanup Costs

The federal government has sued a [CVR Energy Inc.](#) affiliate in Kansas, alleging the company violated environmental laws when it discharged thousands of barrels of oil into a river during a 2007 rainstorm and owes \$1.8 million for cleanup costs. Suing on behalf of the U.S.

[Environmental Protection Agency](#) and the U.S. Coast Guard, the government claims Coffeyville Resources Refining & Marketing LLC violated the Clean Air Act, Clean Water Act and Oil Pollution Act of 1990 by releasing oil from the refinery it owns and operates, and then refusing to reimburse remediation costs shelled out to the EPA by the Coast Guard's oil spill liability fund.

The spill occurred during rapid flooding in June 2007 near the Coffeyville, Kan., refinery, during which rising water from the worst flood in a century overflowed the banks of the Verdigris River and topped the refinery levees by four feet. The refinery itself and the eastern portion of the town were inundated with water, the complaint says. On July 1 of that year, more than 2,000 barrels of oil were discharged from three sources within the refinery into the river floodwaters and caused “a sludge or emulsion to be deposited into Verdigris River or upon adjoining shorelines,” according to the complaint. The government alleges that the discharge violated the Clean Water Act, that Coffeyville Resources is liable for a civil penalty of up to \$1,100 per barrel of oil released and that the government is entitled to injunctive relief preventing further discharges and requiring the company to comply with the CWA. The spill caused the government to incur remediation costs of roughly \$1.8 million, an amount that the suit seeks to recover, plus interest and other costs, under the OPA.

The suit also accuses Coffeyville Resources of violating the CAA by failing to develop and implement a risk management program at its facility, thereby breaching that statute's management system, hazard assessment, prevention program and risk management plan requirements. Specifically, starting in or before March 2006, the company failed to identify and document the names and positions of people responsible for individual requirements at the

refinery, and also failed to use the appropriate data when completing its the toxic worst case scenario analysis, the complaint says. Coffeyville Resources also failed to review and update that worst case scenario analysis at least once every five years as required by the CAA, and did not adequately compile and update written safety information, including proper temperature and pressure levels, for each of its refining processes, according to the suit.

The defendant's other alleged CAA failures include not adequately developing and implementing written operating procedures for an emergency shutdown, and not providing refresher training at least every three years for every employee involved in operating a refining process, among other violations.

Coffeyville Resources entered a consent decree with the EPA after the 2007 flood that laid out the necessary steps for cleanup and remediation. The company has faced several other suits over the oil spill, and in May reached a settlement deal with three businesses that sought \$3.2 million to cover spill-related damage. Coffeyville Resources itself is pursuing a suit against several of its insurers demanding coverage for the accident. The company says it shelled out \$50 million during the cleanup, and in late 2007, purchased more than 90 percent of the 327 properties that were most affected by the flood and spill, at prices equaling 110 percent of the properties' pre-flood appraised value.

Source: Law360, September 23, 2011 discussing *United States of America v. Coffeyville Resources Refining & Marketing LLC*, case number 6:11-cv-01291, in the U.S. District Court for the District of Kansas.

b. *Industrial Water Enforcement*

Trident Seafoods Clean Water Act Violations Leads to Fine and New Investments

Trident Seafoods Corp. agreed to pay a \$2.5 million fine and to spend what the company estimates will be \$30 million to \$40 million on waste management improvements to settle allegations of Clean Water Act violations at 14 onshore and offshore facilities in Alaska. Seattle-based Trident, a major Alaska seafood processor, committed more than 480 violations between 2005 and 2010, according to the proposed consent agreement and civil. Violations included unauthorized discharges of seafood waste leading to large, oxygen-depleting waste piles on the sea floor. Specific violations included discharges without relevant permits, discharges in excess of amounts allowed in permits, discharges in unauthorized locations, and failure to conduct required monitoring and employ best available technology.

Source control improvements that Trident has pledged to undertake include the construction of a fish meal plant in the Bristol Bay community of Naknek with capacity to handle at least 30 million pounds annually. The fish meal plant must be in operation by June 1, 2015. In addition, Trident must expand an existing fish meal plant in Cordova. Those and other improvements will result in an overall 105 million pound-a-year reduction in waste discharges, Justice and EPA officials. Settlement terms also require Trident to start activities to remediate problems caused by piles of waste that the company has deposited at various sites on the sea floor. Remediation activities will include monitoring decomposition rates and at least partial removal of the piles. Reportedly, one of those piles, in Akutan Harbor, covers about 50 acres. The fixes mandated by the consent agreement will result in a major overhaul of management practices at Trident's Alaska seafood processors.

Trident had already been the subject of six past Clean Water Act enforcement actions, four of them in court and two of them administrative complaints. Trident, in a statement, said company officials were surprised when they were notified by EPA in 2010 that they were violating the Clean Water Act. Trident reportedly has restructured its environmental compliance department and is undertaking projects that will recover all feasible protein from the seafood processed at its facilities, a company statement said.

Source: BNA Toxics Reporter, 10/6/11 discussing *U.S. v. Trident Corp.*, W.D. Wash., No. 2-11-cv-1616, 9/28/11.

Meatpacker to pay \$250,000 related to Water and Air Violations

Meatpacker John Morrell & Co. agreed to separate settlements with the U.S., which alleged that a plant in Sioux Falls, S.D., used a refrigerant unsafely, and polluted the Big Sioux River. John Morrell agreed to pay a \$206,000 civil penalty to the federal government and a \$44,079 fine to the South Dakota Department of Environment and Natural Resources.

EPA conducted inspections of the plant in December 2009 and April 2010, finding John Morrell did not take adequate steps to prevent chemical accidents, the complaint said. Among other findings, the EPA discovered John Morrell had failed to have an ASME representative inspect, test or fix safety relief valves in the plant within a required five-year period and failed to note that supports on an accumulator and ammonia storage tank had deteriorated, according to the complaint. As part of the consent decree Friday, John Morrell agreed to comply with industry standards for nameplates and pipe markers on the Sioux Falls plant's piping systems and pressure vessels.

The State, meanwhile, settled with the company for violating its surface water discharge permit as a result of three different incidents since 2009. In the first incident, John Morrell used a disinfectant while cleaning that upset the treatment process at the Sioux Falls plant, leading to the leaking of effluent into the river. In the second incident, the company had trouble disposing of waste during a winter storm. While waste was usually brought off the plant property for disposal, the waste was brought in this instance to the treatment plant, where it interfered with the wastewater treatment process, according to the agency. The third incident stemmed from maintenance at the plant. Under the settlement, John Morrell agreed to improve wastewater treatment at the plant. The company adequately responded to each of the violations, the DENR said. "The notice of violation and compliance agreement requires John Morrell to complete a full evaluation of its wastewater and treatment systems," DENR said in a statement. "John Morrell came forward with a proactive plan to address the violations, and we are pleased with the cooperation we have received from the company." John Morrell admitted to no wrongdoing in the state settlement.

Source: Law360, New York October 11, 2011 discussing *U.S. v. John Morrell & Co.*, case number 4:11-cv-04143, in the U.S. District Court for the District of South Dakota.

Texas Egg Producer to Pay \$1.9 Million Penalty

EPA and the U.S. Justice Department announced on May 18 that Mahard Egg Farm, Inc., a Texas corporation, will pay a \$1.9 million penalty to resolve claims that the company violated the Clean Water Act (CWA) at its egg production facilities in Texas and Oklahoma. The civil penalty is the largest amount to be paid in a federal enforcement action involving a concentrated animal feeding operation (CAFO). The company will also spend approximately \$3.5 million on remedial measures to ensure compliance with the law and protect the environment and people's

health. The CWA complaint, filed jointly with the settlement by the United States and the states of Texas and Oklahoma, alleges that Mahard operated a facility without a permit and discharged pollutants into area waterways. Mahard also allegedly discharged pollutants or otherwise failed to comply with the terms of its permits at six other facilities, including its newest facility near Vernon, Texas, where it also failed to comply with the Texas Construction Storm Water Permit and to ensure safe drinking water for its employees. The states of Texas and Oklahoma also alleged violations of state laws.

As part of this settlement, Mahard has committed to comprehensive, system-wide changes in order to bring each of its seven CAFO facilities into compliance with applicable state and federal laws, permits, and regulations and to restore the lands to prevent future discharges to area waterways. The settlement mandates the performance of specific requirements, such as lagoon closures, groundwater monitoring, and the construction and maintenance of buffer strips along area waterways within the facility boundaries. It also requires on-going land restoration and management measures, such as restrictions on land-application of manure and livestock grazing.

Source: This Week in Washington from WEF, May 20, 2011.

U.S. Silver Corp. Pays \$87,000

U.S. Silver Corporation, owner and operator of the Coeur and Galena Mines and Mills near Wallace in Idaho's "Silver Valley," has agreed to pay \$87,000 in penalties to settle federal Clean Water Act discharge violations. The agreement, captured in a consent agreement and final order between EPA and U.S. Silver, resolves the company's National Pollution Discharge Elimination System (NPDES) permit violations and unpermitted discharges at the mines and mills that occurred from 2008 to 2010. Allegedly, U.S. Silver's violations included unpermitted discharges of mine tailings and exceedances of the NPDES permit's effluent limits for copper, lead, and mercury. In addition to paying the \$87,000 penalty, U.S. Silver recently made structural improvements to its tailings pipelines to reduce risk of future spills, and it encouraged employees to become more vigilant in preventing and reporting accidental spills.

Source: Environmental Protection, 5/17/11.

GenOn Pays \$5M to End Suit Over Pa. River Pollution

A GenOn Energy Inc. unit has agreed to pay \$5 million and comply with environmental permit limits to resolve a suit claiming its Pennsylvania coal-fired plant discharged potentially toxic metals into the Conemaugh River. PennEnvironment and the Sierra Club hailed the settlement as the largest penalty leveled under the Clean Water Act's citizen enforcement provision in Pennsylvania. GenOn Northeast Management Co. moved to settle the suit after a Pennsylvania federal judge ruled in March that the company had committed 8,684 Clean Water Act violations by discharging illegal levels of five pollutants since 2005. Under the settlement, GenOn must pay a \$250,000 civil penalty to the U.S., provide \$3.5 million to the Foundation for Pennsylvania's Watersheds to fund restoration and preservation projects, and pay \$1.25 million to cover the green groups' attorneys' fees and litigation costs. GenOn must also comply with its permit limits promptly or otherwise pay up to \$1,000 for each violation of a daily maximum limit or \$5,000 for each violation of a monthly average limit.

The environmental groups filed suit in 2007, accusing GenOn of discharging more than 3 million gallons of wastewater per day containing high levels of selenium, manganese, aluminum, boron and iron into the Conemaugh River. PennEnvironment and the Sierra Club claimed the company at times exceeded its permitted pollution limits by more than 10 times allowable levels. GenOn

did not dispute that it was discharging heavy metals into the river, that it was in excess of its permit levels, or even that the plaintiffs had been damaged by pollutants in the river, according to a March order granting partial summary judgment to the plaintiffs. The company contended that the plaintiffs were unable to say the metals caused any of the injuries they mentioned, the order said.

According to the green groups, the Pennsylvania Department of Environmental Protection entered into an agreement with GenOn in 2004 to not enforce the pollution limits until 2011 or later and has already agreed to extend part of that agreement until 2012. The federal court ruled on three separate occasions that this “side agreement” with the agency did not shield GenOn from its obligation to comply with federal law or with the company’s Clean Water Act permit.

Source: Law360 6/7/11 discussing *PennEnvironment et al. v. GenOn Northeast Management Co.*, case number 2:07-cv-00475, in the U.S. District Court for the Western District of Pennsylvania.

Selenium Discharge Citizen Suit Dismissed Due To State Enforcement Action

Pending state enforcement proceedings bar a citizen suit charging a West Virginia coal mining company with illegal selenium discharges, a federal judge ruled June 29, 2011. The U.S. District Court for the Southern District of West Virginia said the Clean Water Act and the Surface Mining Control and Reclamation Act bar citizen suits if, as in this case, the state has already launched and is “diligently prosecuting” an enforcement action to force compliance. He granted the coal company's motion to dismiss. The court dismissed a suit filed in March by the Sierra Club, the Ohio Valley Environmental Coalition, and the West Virginia Highlands Conservancy. The suit charged ICG Eastern LLC with persistent Clean Water Act and SMCRA violations at the Knight-Ink No. 1 Mine in Webster County, as well as failing to meet the conditions of its National Pollution Discharge Elimination System permit issued by West Virginia. The Knight-Ink mine has been discharging excessive levels of selenium into nearby streams for years, according to the environmental groups' complaint, which had asked for declaratory judgment, mandatory injunctive relief, and civil penalties of up to \$37,500 per day for each water act violation on or after Jan. 12, 2009, and up to \$32,500 per day for those before. The Court, however, said it was “undisputed” that the West Virginia Department of Environmental Protection (DEP) was prosecuting an action against ICG in state court at the time the plaintiffs filed their complaint, noting the state agency filed suit against ICG in April 2010, then released a proposed consent decree six months later to resolve the selenium discharge violations. Although the environmental groups argued the DEP acted in bad faith by “using a state court proceeding to preclude a real enforcement action,” the Court said “it cannot convincingly be contended that the Draft Consent Decree between [ICG] and WVDEP is incapable of requiring compliance with the permit limitations.” Environmental advocates also said ICG failed to begin and complete construction of selenium-treatment facilities by the dates set forth in a WVDEP order. The Court, however, said that claim is moot, because the legally binding consent decree establishes a detailed schedule for the company to install remedial technologies. The plaintiffs also had contended that the small civil penalty imposed by the DEP for ICG's past violations shows the consent decree cannot compel compliance. The Court stated that “although the fine is less than plaintiffs would have imposed themselves, that fact alone does not render WVDEP's prosecution lacking in diligence.”

Source: BNA Toxics Law Reporter, July 6, 2011 discussing *Sierra Club v. ICG Eastern LLC*, S.D.W. Va., No. 2:2011cv00023, order 6/29/11).

West Va. Coal Mines to Treat Acid Drainage

West Virginia's environmental department reached an agreement with the Sierra Club and two other advocacy groups Tuesday requiring the agency to treat acid discharges from coal mining sites where operators no longer have permits. The West Virginia Highlands Conservancy, West Virginia Rivers Coalition and Sierra Club filed the consent decree concurrently with a complaint alleging that the state agency had violated the Clean Water Act by allowing acid mine drainage from the mines to leak into public waters. The dispute involves numerous sites in West Virginia where permits were revoked by the West Virginia Department of Environmental Protection, leaving the agency in charge of the treatment systems at those sites. At 89 of the so-called bond forfeiture sites, the agency has allowed acid mine drainage containing pollutants such as zinc, aluminum, sulfates and calcium into CWA-protected waters in the state, according to the suit.

As part of the settlement, the state's DEP will report to a special advisory council on the type of treatment that will be needed at each bond forfeiture site along with cost estimates of treatment. The agency will also prioritize the sites and issue National Pollutant Discharge Elimination System permits with liquid waste limitations to protect the state's water quality standards to 50 sites every year. By December 2015, 171 bond forfeiture sites will have received these permits, the agency said. For their part, the advocacy groups agreed not to fight the initial issuance of the permits or comment on their terms.

Source: Law360,(August 2, 2011), discussing *West Virginia Highlands Conservancy Inc. et al. v. Huffman*, case number 1:11-cv-00118, in the U.S. District Court for the Northern District of West Virginia.

c. *Municipal Water Other than Wet Weather*

No Coverage for Waste Water Agency's Settlement

A public sewerage agency's insurer has no duty to indemnify it for the cost of providing services and assets in lieu of cash payments in settlement of claims against it, a New Jersey high court held. The Passaic Valley Sewerage Commission (PVSC) is a public agency that regulates the collection and disposal of waste water. Spectraserv Inc. is a private hauling and treatment business that discharges waste water into PVSC's system. During years of litigation, PVSC sought to compel Spectraserv to change its plant equipment and issued more than 180 violation notices regarding its monitoring station. Spectraserv charged that PVSC wrongfully withheld renewal of its permit and misused its regulatory authority. The parties reached a settlement in which, rather than paying money, PVSC agreed to drop the violation notices, treat and dispose of sludge from a Spectraserv customer, and assign to the company PVSC's right to dispose of sludge from another entity. PVSC's expert estimated the cost of the agreement to PVSC between about \$6 million and \$17 million. The agency sought indemnification for the settlement from Coregis Insurance Company under a "claims made" liability policy. In a unanimous opinion, the New Jersey Supreme Court said that, under the terms of a policy that defines "loss" as "money damages," an insurer has no obligation to indemnify its insured for the value of a settlement consisting of services and transferred assets.

Source: BNA Toxics Law Reporter, 7/7/11 discussing *Passaic Valley Sewerage Commission v. St. Paul Fire & Marine Insurance Co.*, N.J. Sup. Ct., No. A-97-09, 6/21/11.

d. *Criminal*

Owner and Operator of Louisiana Wastewater Treatment Facilities Sentenced for Violating the Clean Water Act

EPA announced that Jeffrey Pruett, 58, of West Monroe, LA was sentenced on June 9 in the U.S. District Court for the Western District of Louisiana to a total of 33 months incarceration. He received 21 months for seven felony counts and 12 months for one misdemeanor count, which will be served concurrently. Pruett and the two companies he owned and operated - LWC Management Company, Inc. (LWC) and Louisiana Land & Water Company (LLWC) - are also collectively responsible for paying a \$310,000 criminal fine. The violations threatened local drinking water supplies and people's health by failing to meet the required Clean Water Act standards. Pruett and LLWC were found guilty of six felony violations of failure to maintain and provide records pertaining to all of the Monroe subdivisions. Pruett and LLWC were also found guilty of one felony count of effluent violations pertaining to Love Estates subdivision. Pruett was found guilty of one misdemeanor/negligent count of failure to provide proper operation and maintenance pertaining to the Pine Bayou subdivision.

Source: This Week in Washington from WEF, June 10, 2011.

Bottling Plant Manager Gets Prison Time for Falsifying Wastewater Discharge Tests

A former environmental manager at a Coca Cola Co. subsidiary has been sentenced to four months in prison for directing employees to dilute a bottling plant's wastewater samples before sending them to a laboratory for testing. The U.S. District Court for the Northern District of California also ordered the defendant to complete 100 hours of environment-related community service and to give at least four talks to at least 100 other environmental managers explaining the circumstances of his incarceration. The former Plant Manager will begin serving the sentence July 29 and must report back to the court Dec. 6 on the status of his speeches. The criminal case grew out of an investigation started by the city of American Canyon after its wastewater treatment plant began experiencing operational problems in 2007. Investigators discovered discharges from the AMCAN Beverages Inc. plant, a subsidiary of Coca Cola, was discharging high levels of zinc, copper, polymers, petroleum hydrocarbons, and highly concentrated sugars. The investigation also found that the plant's monthly discharge monitoring reports contradicted the city's readings for biological oxygen demand and total suspended solids. In March, the Plant Manager plead guilty to one felony violation of the Clean Water Act, specifically introducing a pollutant to a sewer system. Along with admitting to directing plant workers to add distilled or tap water to wastewater discharge samples, he admitted falsifying monthly reports sent to the city. In addition, AMCAN paid the city \$7.59 million to resolve alleged repeat violations of its Clean Water Act permit in 2009, after linking the illegal discharge to former employees.

Source: BNA Environment Reporter, 6/30/11, discussing *United States v. Patel*, N.D. Cal., No. CR 10-724.

Ex-Oil Refinery Executive Admits to Causing Toxic Gas Leak

The vice president of a Louisiana oil refinery pled guilty to criminal charges under the Clean Air Act for releasing toxic gases from what was allegedly a poorly-run refinery that stored leaked petroleum in children's swimming pools. The vice president of the Pelican Refining Co. pled guilty to negligent endangerment for causing the release of benzene, ethylbenzene, toluene, xylene and hydrogen sulfide from the company's facility in Lake Charles, La. He faces up to one year in prison and a \$200,000 fine for each violation. The VP was accused of negligently

releasing the substances between August and December 2005, and throughout 2006. The charges stemmed from a federal investigation launched in 2006 after the Louisiana Department of Environmental Quality found that Pelican Refining stored crude oil in unrepaired tanks and used plastic swimming pools to contain petroleum leaks.

The probe also found that the company's emissions control equipment was damaged and it had a faulty process for burning off toxic gases and disposing of potentially explosive chemicals. Instead of using a pilot light to burn these gases off the oil, it had been routine practice at the plant for more than a year to use a signal flare. Pelican Refinery had no company budget and no environmental department, and Hamilton controlled operations for processing sour crude oil from an office in Houston, prosecutors said. "Refinery workers reported smelling hydrogen sulfide as well as having their hydrogen sulfide monitors 'go off' from time to time," but Pelican did not have a procedure to record, track, report or mitigate hydrogen sulfide releases, prosecutors said.

Pelican allegedly stored the sour crude oil in an improperly placed tank and kept it there even after the roof sank. The company did not have a scrubber for removing hydrogen sulfide from emissions and a system that was supposed to measure hydrogen sulfide levels was broken.

Source: Environmental Law360 (July 6, 2011) discussing *USA v. Hamilton*, case number 2:11-cr-00130, in the U.S. District Court in the Western District of Louisiana.

US Says Chicago Officials Lied About Suburb Water Source

Two water department officials were indicted on charges that they lied to environmental regulators about supplementing the suburb Crestwood Village's water supply from Lake Michigan with water from a well. The officials allegedly supplemented the Lake Michigan water supply for the 11,000-resident village with water from a nearby well for more than 20 years in order to make up for leaks caused by a faulty water system, according to the indictment. The alleged concealment of the water supplementation allowed Crestwood to avoid regulations requiring that it test the water supply for certain contaminants.

Between January 1987 and 2008, the two officials allegedly submitted reports to the Illinois EPA falsely stating that the well was on "standby status" and that none of its water was distributed to Crestwood customers. The reports identified Lake Michigan water purchased from the Village of Alsip as the primary water source for Crestwood customers, and contained false statements about the reasons for the village's water losses that resulted from leaks, according to the indictment. The two were charged with 22 and 23 counts of making false statements, respectively, and will be arraigned in Illinois federal court. Each count carries a maximum penalty of five years in prison and a \$250,000 fine. The indictment does not claim that the defendants' actions caused harm to Crestwood water customers, but stems from an investigation by the U.S. Environmental Protection Agency in response to reports that residents had been exposed to drinking water contaminated with cancer-causing perchloroethylene, or PCE, that came from a village-operated well. The EPA executed federal search warrants at government offices in Crestwood in April 2009 after Rep. Bobby Rush, D-Ill., said he had asked Attorney General Eric Holder to ascertain if civil or criminal charges were warranted against the municipality after learning that millions of gallons of toxic water were knowingly pumped into citizens' homes over the course of more than two decades.

According to Chicago Tribune reports at the time, state environmental regulators had told village officials at least 22 years before that dangerous chemicals had oozed into the water they then secretly delivered to customers.

Source: Law360, 8/12/11.

Mind Your Contractors - Warrantless Search for Dumping Upheld

A janitorial contractor charged with unauthorized discharge of industrial waste had no privacy interest that would allow a challenge to the search of parking garages at a shopping mall where it allegedly dumped waste water, a Texas appeals court ruled. The court reversed a suppression order applying also to the senior project manager of the janitorial contractor, and an employee of the management company for the mall.

In November 2006, acting on an informant's tip, an investigator with the Houston Police Department took photographs of and waste water samples from parking garages at the Westin Galleria Hotel and the Houston Galleria shopping mall. The state filed charges of unauthorized discharge of industrial waste against the janitorial contractor, the senior project manager for the janitorial contractor, an employee of the management company for the shopping mall, and an entity called Simon Property Group, which the appeals court concluded had an unknown relationship to the mall. Ruling on a motion to suppress, the lower court found the searches unreasonable under the U.S. Constitution, and state law. The state appealed, and the court reversed. The appeals court found none of the defendants had standing to challenge the search and seizure because they lacked a reasonable expectation of privacy in the parking garages. The court reversed the suppression ruling and remanded for further proceedings.

Source: BNA Toxics Law Reporter, 8/22/11 discussing *Texas v. Sepeda*, Tex. Ct. App., No. 14-10-01108, 8/16/11; *Texas v. Simon Property Group Inc.*, Tex. Ct. App., No. 14-10-00773, 14-10-00774, 8/16/11); *Texas v. Bell*, Tex. Ct. App., 14-10-771, 14-10-772 8/16/11.

Ex-Refinery Manager Awarded \$1.7 Million for EPA Malicious Criminal Prosecution

A federal court in Louisiana has ordered the U.S. government to pay \$1.7 million to a former refinery manager based on the Environmental Protection Agency's malicious criminal prosecution for claims that he violated the Resource Conservation and Recovery Act. In a Sept. 30 decision, the U.S. District Court for the Western District of Louisiana held that EPA did not have probable cause that the refinery manager, Hubert Vidrine, was knowingly storing used oil that was considered a hazardous waste at Canal Refinery Co. in Church Point, La. EPA's 1996 search of the facility and the related agency investigation did not yield evidence of RCRA violations, the court said. The Department of Justice charged Vidrine in 1999 with storing hazardous waste without a permit, but dropped all charges in 2003. The district court also found that the EPA official who led the investigation acted maliciously in the case. The Official lied in order to obtain a criminal indictment against Vidrine, the court said and also perjured himself before the grand jury, and "permeated the entire investigation with omissions, half-truths, overstatements, inflammatory language, misstatements, patent falsehoods, and tortured readings of regulations," in order to secure the indictment and continue the criminal prosecution through 2003, the district court said. Vidrine filed an administrative claim under the Federal Tort Claims Act seeking more than \$3 million in damages in 2005. He then filed suit in federal court in Louisiana in 2007 after receiving no response to his claim for damages. The award by the federal court includes \$200,000 for loss of consortium for Vidrine's wife who was also a plaintiff in the case.

Source: BNA Environment Reporter, 10/7/11, discussing *Vidrine v. United States*, W.D. La., No. 07-1204, 9/30/11.

e. *Other Enforcement Topics of Possible Interest*

Oklahoma Driller to Pay \$200,000 for Water Violations after Fracturing Acid Leaks at Well

Integrated Production Services, a Houston-based oil and gas drilling contractor, pleaded guilty Oct. 11 to negligent violation of the federal Clean Water Act in Oklahoma after hydrochloric acid used in hydraulic fracturing leaked from a tank. Under the [plea agreement](#), the contractor will pay \$200,000 in fines and funding for a community project and environmental compliance program.

In addition to serving two years of probation, Integrated Production agreed to pay a \$140,000 criminal fine and make a \$22,000 community service payment to the Oklahoma Department of Wildlife Conservation. The payment will be earmarked for ecological studies and remediation of Boggy Creek in eastern Oklahoma.

Under the plea agreement, IPS further must implement and perform an environmental compliance program, at a cost of \$38,000, to train its employees on proper waste handling and spill response procedures.

The plea follows an investigation that began after a tank at the Pettigrew natural gas well site in Atoka County leaked hydrochloric acid onto a bermed surface of the well that was flooded due to recent heavy rainfall. Rather than taking the necessary steps to remove rainwater from the site, an IPS supervisor drove a company pickup truck through the earthen berm, causing the discharge of the rainwater and an estimated 400 to 700 gallons of hydrochloric acid into Dry Creek, a tributary of Boggy Creek.

The supervisor pleaded guilty to a misdemeanor violation of the Clean Water Act in July 2011, and is awaiting sentencing. He faces up to one year in prison and a \$100,000 fine.

Source: BNA Toxics Law Reporter 10/13/2011 discussing *U.S. v. Integrated Production Services*, E.D. Okla., No. 6:11-cr-00068, 10/11/11.

Telephone Poles Not a Point Source - Case Heads For Appeal

The environmental group Ecological Rights Foundation filed a notice April 26 that it will appeal a federal district court's dismissal of its citizen suit against Pacific Gas & Electric and Pacific Bell Telephone alleging their wooden utility and telephone poles are discharging a toxic chemical into the environment. The foundation's allegation that the pressure-treated poles ooze pentachlorophenol, which is washed off by rainwater and contaminates San Francisco Bay, fails to establish a "disposal" of hazardous waste under the Resource Conservation and Recovery Act or a point source discharge actionable under the Clean Water Act, Judge Sandra Brown Armstrong of the U.S. District Court for the Northern District of California held March 31, discussing *Ecological Rights Foundation v. Pacific Gas & Electric Co.*, N.D. Cal., No. 4:09-cv-03704, 4/26/11

Source: BNA Toxics Law Reporter (6/1/2011).

When Computer Keyboards Become Pesticides

In October 2011, an EPA enforcement case involving a consumer electronic product, resulting in a \$261,000 fine for Logitech Inc., for marketing a computer keyboard as a pesticide. Logitech marketed a wireless keyboard incorporating an antimicrobial compound to prevent the growth of bacteria, mold and mildew. Because bacteria and fungi are "pests" pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), and because the keyboard was marketed

with antimicrobial claims, the EPA took the position that the keyboard itself became a pesticide — an unregistered pesticide that could not lawfully be distributed or sold.

Citing concerns about public health and the danger posed by antibacterial claims, which could encourage lax hygiene practices, the EPA has taken a number of similar actions against consumer electronics companies over the past several years. Samsung settled with the EPA in 2009 for \$205,000 for antimicrobial claims on netbook and notebook keyboards, and IOGEAR computer peripherals were the subject of a similar action that resulted in a settlement for \$208,000 in 2008.

EPA is reportedly concerned with unsubstantiated public health benefits from products marketed with an antimicrobial claim. However, there are some instances where consumer products that are treated with a registered antimicrobial may be lawfully advertised and sold without triggering FIFRA pesticide registration requirements for the product itself. The FIFRA treated article exemption applies to: “An article or substance treated with, or containing, a pesticide to protect the article or substance itself (for example, paint treated with a pesticide to protect the paint coating, or wood products treated to protect the wood against insect or fungus infestation), if the pesticide is registered for such use.” This narrow exception from pesticide registration requirements applies only where the antimicrobial coating is to protect the product itself from microorganisms. By contrast, where the antimicrobial is intended to protect the user, or even a separate product, the EPA’s position is that it has the effect of transforming the consumer product itself into a pesticide — thus a computer peripheral could be an EPA-regulated pesticide when treated with an antimicrobial to protect you from germs. This is true even though the antimicrobial used by the manufacturer to treat the product is a registered pesticide as required by FIFRA. The EPA’s position that consumer electronics labels such as “germ free” and “antimicrobial” are indications that the product itself is a pesticide is consistent with the narrow language of the treated product exemption. It is of no moment that a human health benefit is not explicitly advertised by these terms. In fact, the EPA suggests that products with antibacterial or antimicrobial coatings to protect the products themselves explicitly disclaim any human health benefit.

Source: Law360, 10/6/11.