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The Water Quality Management Professionals

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Recent Environmental Legislative, Regulatory and Judicial Developments[1]
January 1, 2013 through September 15, 2013

I. NEW YORK

A. Legislation:

See separate document.

B. Regulation and Policy

Water

Lake Ontario Most Stressed Of the Great Lakes

Lake Ontario is the most stressed of the five Great Lakes, a new study that maps environmental threats to the lakes shows. The study by the Great Lakes Environmental Assessment and Mapping Project, led by researchers at the University of Michigan, identifies how "environmental stressors" are shaping the future of the lakes, which account for 20 percent of the world's fresh water. Those stressors, 34 in all, include coastal development, climate change, invasive species and toxic chemicals. For Lake Ontario, the most severe stressors are invasive species such as zebra and quagga mussels, nitrogen runoff and toxic pollution from mercury and PCBs. The runoff and toxic chemicals are transported to the lake from the cities and industries along the Oswego, Genesee and Niagara rivers. Nitrogen specifically flows into these tributaries as a result of spillover from municipal sewage systems.

The GLEAM map shows Lake Ontario colored predominantly red with some areas of orange, the top two levels of environmental stress. There are no areas shaded yellow, green or blue, which indicate less stress. The maps also show that nitrogen, zebra and quagga mussels, and mercury and PCB pollution are prevalent in nearly all areas of the lake. Other stressors show up in smaller places, such as the power plants at Scriba and outside Rochester; charter fishing near the cities; and ballast water pollution in port areas.

According to the GLEAM map, the key stressors, which should not be looked at individually as harmful, but which cumulatively can cause stress to a lake include:

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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: Bloomberg, BNA Environmental Reporter and its other environmental and infrastructure newsletters, EPA Administrative Law Reporter, Environmental Protection E-News LAW360 as well as the other sources cited in this newsletter. These are excellent resources for the environmental manager, attorney or consultant.

Tributary dams
Decreased ice cover
Water temperature warming
Power plants
Charter fishing
Native stocking
Non-native stocking
Invasive species including round goby, sea lamprey and zebra and quagga mussels
Nonpoint nitrogen loading
Nonpoint sediment loading
Toxins including mercury, sediment copper and sediment PCBs.

Source: http://connect.syracuse.com/user/dgroom/posts.html The (Syracuse) Post-Standard January 14, 2013 (http://www.syracuse.com/news/index.ssf/2013/01/lake_ontarios_troubled_waters.html#incart_river), discussing the new GLEAM map which is available at http://greatlakesmapping.org/

EPA Says Muddy Catskills Creek Needs More Protection

The U.S. Environmental Protection Agency has said that existing pollution controls for the Lower Esopus Creek in New York's Catskills region are inadequate to attain and maintain Clean Water Act water quality standards, and the area must be reclassified as an "impaired" waterway. The agency said New York's water quality standard for turbidity is exceeded, making the classification mandatory. New York's Department of Environmental Conservation had opposed the move, saying that evidence of turbidity submitted by the environmental group Riverkeeper focused on conditions during and after significant storms in 2010 and 2011.

But the EPA said that doesn't matter because New York's standard for turbidity includes a component for magnitude only; it does not include components for frequency and duration. "In other words, the magnitude cannot be exceeded at any frequency and for any duration of time, unless an exemption applies. New York's narrative standard does include an exemption for natural conditions, but New York did not define natural conditions nor did it demonstrate that the exceedance was the result of natural conditions," the EPA said in its response to the DEC. The EPA also said the conditions present in the Lower Esopus Creek involve not only the sediment load, but the duration the load was conveyed through the creek. "Comments submitted by NYSDEC specifically state that the duration of turbidity was increased through release channel operations. Submissions from Riverkeeper, including a brief from Ulster County Executive Hein describing elevated turbidity in the creek for several months, and comments from residents living or recreating near the creek, also describe unusually long periods of turbid flow through the creek," the EPA said.

Source: Law360, January 24, 2013

New York Among Cities Facing Climate-Related Water Shortages

New York City, Washington, D.C., Los Angeles, and San Diego are among the cities most likely to face water scarcity due to the potential for drought related to climate change, according to a study released May 15, 2013. Along with the potentially 40 million Americans affected in these cities, several "breadbasket" states such as Nebraska, Illinois, and Minnesota also made the list of vulnerable areas. The report, *America's Water Risk: Water Stress and Climate Variability*, examined how climate could affect "vulnerability to short and long term droughts." The study

by Columbia University Water Center, Veolia Water, and Growing Blue highlighted the increased risk of water scarcity in cities and counties across the United States as climate change increases drought potential. The study also noted that population growth and increased demand for water in the future will further decrease water availability, if precipitation and water use patterns remain largely unchanged. The country's population has increased 99 percent since 1950, while public water withdrawal has increased 50 percent. Total water withdrawals have increased 127 percent in that same time frame, the study found.

Source: Bloomberg BNA Environment Reporter 5/17/2013 discussing *America's Water Risk: Water Stress and Climate Variability*, which is available at http://growingblue.com/wp-content/uploads/2013/05/GB_CWC_whitepaper_climate-water-stress_final.pdf.

DEC releases draft plan for N.Y.'s Great Lakes Basin

A draft of a five-year plan to restore, conserve and sustain development along the Great Lakes has been released by the state Department of Environmental Conservation. New York's Great Lakes Basin: Action Agenda 2013 lists 10 priorities, and six areas of concern, including the Rochester embayment.

The priorities are:
• eliminating the discharge of toxic substances;
• controlling sediment, nutrient and pathogen releases;
• solving issues related to the six areas of concern;
• combating invasive species;
• conserving and restoring fish and wildlife;
• conserving Great Lakes water supplies;
• enhancing coastal resiliency and ecosystem integrity;
• promoting smart growth;
• enhancing recreation and tourism; and
• planning for energy development.

Source: Rochester Business Journal July 30, 2013

Non-water

Governor Vetoes Bottle Deposit Bill

Gov. Andrew M. Cuomo vetoed a bill that would have required the state to put revenues from unclaimed bottle deposits into the state's Environmental Protection Fund. Cuomo said he favored strengthening the fund as part of state budget planning, but he objected to the bill because it was "an ad hoc measure divorced from the state's financial plan." The legislation would have added $10 million to the fund next year and $20 million in 2014. The Environmental Protection Fund, which is primarily supported by a tax on real estate transfers, provides state funding for municipal waste reduction and recycling, water quality, land acquisition, and parks.

Source: Bloomberg BNA Environment Reporter 12/20/2012

C. Enforcement and Judicial

NY Company fined for Clean Water Act violations

A Webster NY plating company and its general manager were fined for Clean Water Act violations. Maracle Industrial Finishers Co. Inc. and the plating firm's general manager, respectively drew fines of $10,000 and $4,000 for discharging water contaminated with industrial waste into area sewers. The corporation and the GM were also each placed on three years' probation and the GM was ordered to do 80 hours of community service. Environmental Protection Agency and Department of Environmental Conservation investigators and village of Webster Department of Public Works officials found that Maracle Finishers violated its zero-discharge permit by repeatedly draining industrial waste water, which included volatile and semi-volatile organic compounds, into a village sewer. The village's sewers go to a treatment plant that discharges into Lake Ontario. During several periodic inspections, the GM denied illegal discharges even though inspectors could easily detect them, officials said. Maracle Finishers was also ordered to establish a company-wide environmental compliance program and provide Clean Water Act training for Maracle employees.

Source: Rochester Business Journal September 11, 2013

Second Circuit Upholds $104.7 Million Decision against Exxon Mobil for MTBE in City Water

A federal appeals court July 26 upheld a $104.7 million damage award against Exxon Mobil Corp. for pollution of New York City water resources with the gasoline additive methyl tertiary butyl ether. The U.S. Court of Appeals for the Second Circuit ruled that the Clean Air Act did not preempt New York tort law. The court also said the case against Exxon Mobil was not undermined by the low level of detected MTBE pollution or the fact that the city was not yet trying to make use of the affected waters.

Exxon Mobil had argued, among other things, that the Clean Air Act obligated its use of MTBE because the New York City region lacked sufficient supplies of alternatives, primarily ethanol. But the court said the jury at the lower court level determined guilt not solely because MTBE was used but because of other additional factors, such as failure to exercise ordinary care in preventing spills. The ruling upheld a decision finalized in 2010 in the U.S. District Court for the Southern District of New York in a case brought against the company by New York City, the New York City Water Board, and the New York City Municipal Water Finance Authority.

Source: Bloomberg BNA Environmental Reporter 7/26/2013 Breaking News discussing *In Re: Methyl Tertiary Butyl Ether ("MTBE") Products Liability Litigation*, 2d Cir., Nos. 10-4135, 10-4329, 7/26/13)

Prison Time Imposed in New York Asbestos-Waste Case

A New York man was sentenced to three years in prison in connection with the dumping of thousands of tons of asbestos-contaminated construction waste along the Mohawk River, and an associate was sentenced to probation and home confinement. Donald Torriero was sentenced to 36 months in prison followed by three years of supervised release, and Julius DeSimone was sentenced to five years' probation, including six months of home confinement, for violating the Clean Water Act, the Comprehensive Environmental Response, Compensation, and Liability

Act, and several other federal statutes by dumping 400 truckloads of debris at a site in Frankfort, N.Y. Both men will also pay $492,000 in restitution, some of which will be used to clean up the site. The men, and two other associates, allegedly dumped 60 million pounds of asbestos-contaminated material at the Frankfort, N.Y., property, which contained federally regulated wetlands, according to the Justice Department.

The Justice Department said Torriero and DeSimone conspired over five years to fill the entire 28-acre piece of property on the Mohawk River with pulverized construction and demolition debris that contained asbestos. According to the DOJ, the men then fabricated a New York State Department of Environmental Conservation permit and forged the name of an official to cover up the illegal dumping. The sentences for these two individuals are related to the guilty pleas and sentences associated with Eagle Recycling, Mazza & Sons Inc., Dominick Mazza, Cross Nicastro and Jon Deck.

Source: Bloomberg BNA Toxic Law reporter, 8/5/2013 discussing *United States v. DeSimone,* N.D.N.Y., No. 11-cr-00264, *sentencing* 7/31/13).

Westchester County Allegedly Failed To Treat Water For Parasite

The federal government has alleged that the county of Westchester, N.Y., failed to comply with a Safe Drinking Water Act rule that requires municipal drinking water suppliers to treat all unfiltered surface water for a microscopic parasite. The suit, filed in New York federal court, alleges that since April 2012, Westchester, through its Water District No. 1, has failed to treat all unfiltered surface water for cryptosporidium. Water District No. 1 supplies water to residents of municipalities, including Scarsdale, White Plains and Yonkers. According to the suit, Westchester has failed to treat a significant portion of the water supplied to customers especially in the northern part of the water district.

The government seeks to compel Westchester to comply with the mandatory treatment requirements and ensure the delivery of properly treated drinking water to all households served by Water District No. 1. The complaint also seeks civil penalties for the county's violations.

Source: Law 360, 8/7/2013 Discussing *U.S. v. County of Westchester*, case number 13-cv-05475, in the U.S. District Court for the Southern District of New York.

II. FEDERAL

A. Legislation and Policy

Draft Legislation Would Require EPA to Modify Rules on Sanitary Sewer Overflows

The National Association of Clean Water Agencies has developed draft legislation that would require the Environmental Protection Agency to set modified water quality standards and permit limits for sanitary sewer systems during heavy rains. The purpose of the draft language in the *Wet Weather Community Sustainability Act* is to enable publicly owned wastewater utilities to manage wastewater flows during heavy rains from sanitary sewers in the most cost-effective and environmentally sustainable manner. Specifically, the draft language would enable the EPA administrator to work with states to allow publicly owned wastewater utilities with approved wet weather management plans to modify effluent limits for pollutants using techniques and guidelines approved and developed by the agency for sanitary sewers during heavy rains. Also, the draft language would allow states the option of developing peak wet weather-related water

quality standards. The language would then enable EPA to consult with states in publishing guidance to develop water quality standards to accommodate peak wet weather discharges. The language would amend sections 301, 303, and 304 of the Clean Water Act. EPA sets technology-based standards and effluent limits for discharges under Section 301 of the Clean Water Act, while 303 gives states the authority to set water quality standards based on criteria developed by EPA and Section 304 (d) deals with publication of guidelines on the technologies used to meet effluent limits. The draft language notes that wastewater flows during heavy rains can overload a municipal sanitary system and combined sewer systems that convey both stormwater and wastewater. That is because stormwater enters the sewer systems through infiltration and inflow that occur when groundwater enters collection systems through broken pipes or defective joints or "inappropriate connections." Moreover, NACWA noted in the discussion draft that the added challenge of climate change will further result in communities facing increasingly unpredictable and intensive precipitation events that will overwhelm sewer systems, including treatment plant processes, and increasingly result in unwanted system overflows. While there is language in EPA regulations to deal with combined sewer overflows, NACWA said there is no such language for sanitary sewer overflows.

Source: Bloomberg BNA Infrastructure Investment & Policy Report, 2/11/2013

A. Regulatory

1. Water

EPA Inspector General to Review Regulation of Waste Discharges at Treatment Plants

The Environmental Protection Agency inspector general announced plans March 14 to audit how the agency oversees and regulates hazardous waste discharges to and from publicly owned waste water treatment plants. The purpose of the study is "to evaluate the effectiveness of EPA's programs in preventing and addressing contamination of surface water from hazardous wastes passing through publicly owned treatment works", the Inspector General plans to ask the agency:

- whether it regulates hazardous waste discharges to and from publicly owned treatment works,
- whether POTWs monitor discharges for hazardous waste, and
- whether EPA taken actions to address discharges of hazardous wastes to and from POTWs.

Source: Bloomberg BNA Toxics Law reporter, 3/18/2013. Discussing http://www.epa.gov/oig/reports/notificationMemos/newStarts_03-13-13_Hazardous_Waste_POTWs.pdf.

EPA's Nonpoint Source Guidance Gives States Monitoring Flexibility

Under final guidance for state nonpoint source programs released April 12, the Environmental Protection Agency will not require states to use limited nonpoint source program grants to monitor the quality of all waters that have been identified for priority attention by the Agriculture Department because of nutrient runoff. That is a change from the draft version of the guidelines issued in November 2012 in which EPA stated its intention to require use of those funds for monitoring all priority waters. In the final *Nonpoint Source Program and Grant Guidelines for States and Territories*, EPA allows states more flexibility. States will still have to monitor in at least one watershed to be selected from among the priority areas identified by USDA in its

National Water Quality Initiative. The agency said it would issue separate guidance and technical information, proposing criteria to help states determine which watersheds to monitor. The final nonpoint source guidelines, which have not been revised since 2003, spell out the conditions and circumstances in which Clean Water Act Section 319 grants can be used and leveraged with other federal, state, and local programs to address impairments to water quality from nonpoint sources. The guidelines take effect in fiscal year 2014 for all activities and programs funded by Section 319 nonpoint source grants.

Source: Bloomberg/BNA Environmental reporter 4/19/2013. The final Nonpoint Source Program and Grant Guidelines for States and Territories is available at http://water.epa.gov/polwaste/nps/upload/319-guidelines-fy14.pdf.

$384 Billion in Drinking Water Infrastructure Needs Through 2030

EPA released results of a new survey documenting $384 billion in needed capital investment for U.S. drinking water infrastructure through 2030. This total includes capital costs for compliance with Safe Drinking Water Act (SDWA) regulations as well as continued provision of safe drinking water to 297 million Americans. The 2011 Drinking Water Infrastructure Needs Survey and Assessment (DWINSA) estimates investments needed over the next two decades. The national total of $384 billion includes the needs of 73,400 public water supply systems in the United States, including American Indian and Alaska Native Village systems.

Source: WEF This Week in Washington 6/10/2013.

EPA Proposed Rule Would Require Holders of NPDES Permits to File Electronic Reports

All holders of National Pollutant Discharge Elimination System permits would be required to file permit information electronically under a proposed rule developed by the Environmental Protection Agency. The agency said the rule would reduce the reporting burden borne by states, tribes, and permit holders; streamline permit renewals; and promote full exchange of NPDES data among states, EPA, and the public. The proposed e-NPDES reporting rule would apply to all NPDES permit holders, including power plants, industrial facilities, and municipally owned wastewater treatment plants. It also would apply to states and tribes that have to submit permit compliance data to EPA. EPA would have to maintain the data in a coherent, easily readable fashion.

WEF and NACWA, along with the National Rural Water Association, plan to hold a joint webinar in early September on the upcoming e-NPDES rule. EPA asked that comments identified by Docket I.D. No. EPA-HQ-OECA-2009- 0274 be submitted to http://www.regulations.gov

Source: Bloomberg BNA Environment reporter 7/26/2013

NY and other Chesapeake Bay States May Enter Into Agreement to Delineate Federal-State Authority

A planned new partnership agreement between the Environmental Protection Agency and six states could give two high-level Chesapeake Bay Program committees authority to change restoration policies and goals for the bay. EPA and the six states sharing the 64,000-square-mile watershed are developing a new Chesapeake Bay Watershed Agreement. It will be the first

accord since the mandatory bay restoration program launched in 2010 and the fourth since formal federal-state voluntary restoration efforts began in 1983. The planned agreement would allow the Chesapeake Executive Council—the EPA administrator and the governors of the six states and the mayor of the District of Columbia—to delegate bay restoration executive authority to the Chesapeake Bay Program's management board and CBP's Principals' Staff Committee. The PSC is a panel made up of state agency directors, top staff from EPA and other federal agencies, and a representative for the state legislatures. According to recent congressional testimony by an EPA Senior Manager involved in the Bay cleanup the management board would have authority to employ adaptive management and modify bay restoration efforts as necessary to respond to under-performing states, land use changes, new scientific understandings, technology breakthroughs, the impacts of climate change, and other factors while the Principals' Steering Committee would have authority to modify the "specific outcomes" of the restoration effort. The Total Maximum Daily Load for the Bay requires major reductions in nitrogen, phosphorus, and sediment loading to the bay. It requires Delaware, Maryland, New York, Pennsylvania, Virginia, West Virginia, and the District of Columbia to have in place by 2025 all the policies and practices necessary to restore the bay. The TMDL also requires that 60 percent of the policies and practices be in place by 2017. In its testimony EPA said a narrative explaining the proposal will be released for public comment in September.

Source: Bloomberg BNA Environmental Reporter 9/6/2013.

EPA Planning More Stringent Standards for Stormwater at Newly Developed Sites

The Environmental Protection Agency is planning to propose greater retention of stormwater at new developments as compared to redeveloped sites, Christopher Kloss, green infrastructure and stormwater coordinator in the EPA Office of Water said April 30. According to the Bloomberg/BNA Infrastructure Investment & Policy Report, Kloss stated, "We will have differential standards" in the upcoming proposed rule on post-construction stormwater. The purpose of proposing more stringent standards for stormwater at newly developed sites versus relatively relaxed standards at redeveloped sites is to create an incentive for businesses to invest in redevelopment projects in cities, he explained. EPA is under a 2010 consent agreement with the Chesapeake Bay Foundation to propose a post-construction stormwater rule by June 10 and to finalize the rule by Dec. 10, 2014 (*Fowler v. EPA*, D.D.C., No. 1:09-cv-5, 5/11/10). Kloss said he expects the agency will set at least a 90-day period for comments because of the complex nature of the rulemaking.

Kloss reportedly stated that EPA was considering performance standards to retain stormwater discharges at sites between one and five acres. He said the agency is yet to decide on a threshold for performance standards. Moreover, Kloss said EPA would give local governments flexibility in meeting the performance requirements to retain stormwater on sites. For instance, Kloss said, a locality could comply with national standards if it already has a mix of green infrastructure, such as porous pavements and grassy swales, and gray infrastructure practices in place to retain stormwater.

Source: Bloomberg BNA Infrastructure Investment & Policy report. 5/6/2013.

EPA to Clarify Financial Capability for Clean Water Act Requirements

Many cities face a costly process and unrealistic timelines when required under the Clean Water Act to eliminate sewer overflows. However, due to continuing dialogue with local governments,

the U.S. Environmental Protection Agency (EPA) signed a memo Jan. 18 agreeing to clarify its method for analyzing a municipality's financial capability when developing compliance schedules for sewer overflows. The agency plans to continue use of the *1997 Combined Sewer Overflow Guidance for Financial Capability Assessment and Schedule Development*, which has been criticized by the U.S. Conference of Mayors and the wastewater industry. Much of the criticism is focused on the guidance that 2% of median household income be used to determine affordability of rate or tax increases required to meet Clean Water Act requirements. This figure is not necessarily representative of the amount all ratepayers can afford. However, the memo states that the 2% guidance should be only one of many considerations and that a full range of financial indicators should be used to determine the most appropriate compliance schedule. EPA also writes that it will work with regional offices to facilitate consistent policy implementation across the U.S. Additionally, EPA writes that the agency will consider benchmark indicators beyond household, utility, and community affordability, such as increasing arrearages, late payments, disconnection notices, service terminations, and uncollectable accounts. EPA will also focus on the limitations and opportunities inherent in rate structures, additional municipality obligations, and innovative financing tools. The agency's integrated planning effort also emphasizes prioritization of Clean Water Act responsibilities.

Source: *The Stormwater Report*, WEF 2/7/2013.

Survey Shows Most States Use TMDLs, Discharge Permits to Reduce Nutrient Runoff

A survey by the Association of Clean Water Administrators released Dec. 14 shows that most states are using Clean Water Act permits, best management practices, and pollution reduction plans to control nitrogen and phosphorus runoff. The states are using a variety of tools such as state-level effluent standards, technology requirements, total maximum daily load plans, and water quality trading to reduce nutrient runoff from farms, ranches, and concentrated animal feeding operations, according to the report. The survey, *State Water Programs: Nutrient Reduction Programs and Methods*, found that 44 states relied mostly on TMDLs, National Pollutant Discharge Elimination System permits, best management practices such as planting trees near streams, and nutrient management plans to address runoff.

The report found that 26 states and the District of Columbia have programs in place to cut nutrient runoff, while 12 states, including California, are in the process of developing their programs, and 12 states have no programs.

Source: Bloomberg BNA Environment Reporter, 12/20/2012 Toxics Law Reporter. The ACWA report, State Water Programs: Nutrient Reduction Programs and Methods, is available at http://op.bna.com/env.nsf/r?Open=smiy-933pb5.

2. Judicial and Enforcement

a. Wet Weather – Municipal

Seattle and King County, Wash. Agree to Upgrade Combined Stormwater Systems to Protect Local Waters from Raw Sewage Overflows

King County and the city of Seattle have agreed to invest in major upgrades to local sewage and combined stormwater collection, piping and treatment under settlements with the Department of Justice and the U.S. Environmental Protection Agency (EPA). The state of Washington was a co-plaintiff and partner in these settlements. According to an EPA Press release, the agreements are

the result of extensive federal and state government cooperation and pave the way for employing more “green infrastructure” projects like green roofs, permeable pavements, and urban runoff gardens, which help reduce demands on local sewer and stormwater systems. Both agreements allow the city and county to use an integrated planning approach, which encourages communities to set their own clean water project priorities and invest in fixing the most pressing problems first. The settlements also require King County and Seattle to develop and implement a joint plan to improve system-wide operations and maintenance, since Seattle conveys the combined sewage it collects to King County’s system for treatment prior to discharge.

Source: EPA Office of Water Press Release

Plan Approved to Cut Cincinnati Sewer Overflows Using Green Infrastructure

An alternative plan to control combined sewer overflows (CSOs) in Cincinnati and surrounding Hamilton County through the use of green infrastructure and other measures has been approved. The ‘innovative” plan for use of green infrastructure and separate sewers for rainwater and sewage was proposed in December 2012 by the Metropolitan Sewer District of Greater Cincinnati. Under the agency's integrated stormwater and wastewater planning approach, the district asked to modify its Clean Water Act consent decree by selecting environmentally sound projects that are more cost-effective than its original plan. The 2010 amended consent decree with EPA required the district either to construct a deep tunnel system under Mill Creek to capture excess flows from combined sewer systems in many neighborhoods or to do further analyses and propose an alternative plan The alternate plan is expected to save more than $150 million, in 2006 dollars, from the original deep-tunnel plan.

A provision of EPA's *Integrated Municipal Stormwater and Wastewater Planning Approach Framework* allows municipalities, for the first time, to modify a plan, a permit, or an enforcement order to comply with Clean Water Act obligations and make changes to ongoing projects and implementation schedules. EPA has stated that through the *Integrated Framework,* it is encouraging “one water management” by forming partnerships to help communities overcome economic and technological barriers, but ultimately every municipality must decide what solutions will work best for its community. When the first phase of the remedial infrastructure projects is completed in 2018, the district expects a 2 billion gallon reduction in annual CSOs. Remediation of CSOs and sanitary sewer overflows and a comprehensive water-in-basement response program are key components of the “global consent decree” that the district presented to the Hamilton County Board of Commissioners and Cincinnati City Council in 2003. Both bodies unanimously approved it. The U.S. District Court for the Southern District of Ohio approved the consent decree June 9, 2004. At that time, EPA directed Cincinnati and Hamilton County to complete long-term remediation projects to reduce their estimated 14 billion gallons-a-year of CSOs and eliminate all SSOs by Feb. 28, 2022.

Source: Bloomberg BNA Infrastructure Investment & Policy Report 06/10/2013 discussing *The Lower Mill Creek Partial Remedy plan.*

Proposed Settlement Requiring $1.1 Billion In San Antonio Sewer Upgrades

Authorities filed a proposed consent decree July 23 in federal court in Texas that would require the San Antonio Water System to make an estimated $1.1 billion in sewer system upgrades during the next decade. Under the proposed consent decree with the Department of Justice and the Environmental Protection Agency, the San Antonio Water System agreed to make significant upgrades to reduce overflows from its 5,100-mile sewer system as part of a plan for which full

implementation is required in 2025. The allegations against the San Antonio system involve violations stemming from illegal discharges of raw sewage. San Antonio said it will invest an estimated $492 million more than what the utility would have spent during the next 10 years to reduce sewer spills and maintain its sewer system infrastructure. In addition, the system will pay a civil penalty of $2.6 million.
Source: Bloomberg BNA Infrastructure Investment and Policy Report discussing the proposed consent decree in *United States v. San Antonio Water System* which is available at http://www2.epa.gov/sites/production/files/documents/saws-cd_0.pdf.

Scranton Sewer Authority to Implement $140 Million Plan to Reduce Overflows

A Pennsylvania municipal sewer authority has agreed to implement a 25-year plan to significantly reduce sewer system overflows to the Lackawanna River and its tributaries at an estimated cost of $140 million. The proposed settlement would resolve a 2009 civil lawsuit filed in the U.S. District Court for the Middle District of Pennsylvania against the Scranton Sewer Authority by the Environmental Protection Agency and the Pennsylvania Department of Environmental Protection.

The Scranton Authority also has agreed to pay a civil penalty of $340,000. In addition to the 25-year control plan, which is estimated to cost $140 million to implement, the proposed settlement requires the installation of a state-of-the-art biological treatment system at the Scranton Sewer Authority's wastewater treatment plant to reduce discharges of nitrogen and phosphorus. The $340,000 civil penalty will be split evenly between the United States and Pennsylvania.

Source: Bloomberg BNA Environment Reporter 12/21/2012.
Discussing *United States v. Sewer Authority of the City of Scranton*, M.D. Pa., No. 09-cv-1873, *proposed consent decree* 12/13/12. The proposed consent decree is available at http://www.justice.gov/enrd/ConsentDecrees/Scranton_Sewer_Authority_Lodged_Consent_Decree.PDF

b. Other Municipal

Miami-Dade Government to Fund $1.6 Billion in Sewage System Improvements

The Miami-Dade Board of Commissioners have approved spending $1.6 billion for capital improvements to its sewage system to settle state and federal claims that it violated the Clean Water Act and other federal and state laws, regulations, and permits. The improvements will be funded over a 15-year period. An additional $15 million will be allocated for implementing maintenance and management programs and $2 million for a supplemental environmental project to be funded in whole or in part using Building Better Communities general obligation bond funds. In addition, $825,000 will be allocated for monitoring by the Florida Department of Environmental Protection and $978,100 for civil penalties.

The case originated on Jan. 13, 1994, when a first partial consent decree was entered by the U.S. District Court for the Southern District of Florida to resolve claims involving compliance with the Clean Water Act, brought by the United States against Dade County. Since then the Miami-Dade government said it has spent about $1.8 billion upgrading its wastewater infrastructure and "achieving significant progress." Aging pipelines, however, have led to numerous sanitary sewer overflows in recent years.

Source: Bloomberg BNA Infrastructure Investment & Policy Report - Latest Developments, 5/21/2013

South Carolina Town Agrees to Transfer Water Utilities in Proposed Settlement

The town of Timmonsville, S.C., has reached a settlement with the Environmental Protection Agency to transfer ownership and operation of its drinking water and wastewater utilities to the neighboring city of Florence. In a proposed consent decree, Timmonsville said it was transferring ownership and operation because it does not have the resources necessary to operate the publicly owned wastewater treatment plant and the public water supply system in compliance with the Clean Water Act and state drinking water and pollution control laws. Timmonsville is a town of about 2,400 residents. Once the Consent Decree becomes effective Florence will become responsible for bringing the wastewater treatment plant and its corresponding sanitary sewer collection and transmission system, as well as the town's public water supply system, into compliance with the laws. The proposed agreement states that Florence will not be responsible for current or ongoing violations but shall become responsible for any future violations, starting with the effective date of the consent decree.

According to the agreement, Timmonsville is responsible for failing to comply with the terms of its National Pollutant Discharge Elimination System permit for its wastewater treatment plant. Between April 2003 and June 2013, the town was cited for 442 effluent monitoring and reporting violations, 482 effluent limit violations and at least 49 releases of untreated or partially treated wastewater, the agreement said. At an Aug. 5 meeting of the Florence City Council, the City Manager said the city had begun to repair the collection system and collapsed sewers in Timmonsville.

Source: Bloomberg BNA Environment Reporter: 09/13/2013 discussing *United States v. Timmonsville,* D.S.C., No. 4:13-cv-01522,9/9/13

Water District Takes EPA Pollution Limit Row to High Court

A municipal water control district is asking the U.S. Supreme Court to hear its challenge of U.S. Environmental Protection Agency phosphorous discharge limits imposed on a Massachusetts sewage treatment plant, arguing that the EPA must design the standard to site-specific factors. The Upper Blackstone Water Pollution Abatement District is appealing a First Circuit ruling in August that found the EPA's decision to tighten the limit from 0.75 milligrams per liter to 0.1 mg/L was supported by the scientific record. The decision conflicts with a D.C. Circuit ruling that requires the agency to tailor the federal standard to circumstances specific to each site, the district said in a petition for writ of certiorari. When issuing the district's National Pollution Discharge Elimination System permit, the EPA selected the 0.1 mg/L figure from federal guidance documents rather than looking at conditions in the Blackstone River, the petition says. That standard requires the district to spend at least $180 million in upgrades to its publicly owned treatment works in order to guarantee compliance, according to the petition.

In asking the high court to hear the case, the district argued that the current circuit split creates confusion and uncertainty for thousands of industrial dischargers, wastewater treatment plants and ratepayers across the nation. The D.C. Circuit interpretation should prevail, the district said,

because the Clean Water Act states that the EPA conduct a case-by-case analysis when determining pollution limits for NPDES permits.

Both Massachusetts and Rhode Island have listed the Blackstone River as impaired under the Clean Water Act. The states requested and recommended to the EPA that nutrient discharges into the river be tightened because, among other reasons, it caused cultural eutrophication — which depletes the available dissolved oxygen in the water and threatens animal and plant life. Because of the particular sensitivity to nitrogen, phosphorous and aluminum in the Blackstone River, the EPA determined that lower discharge limits were necessary to achieve compliance with state water-quality standards, and the First Circuit said those actions were appropriate.

Source: Law 360, January 11, 2013 discussing *Upper Blackstone Water Pollution Abatement District v. U.S. Environmental Protection Agency*, case number 12-797 in the Supreme Court of the United States.

c. Industrial Water Enforcement

Water Act Suit against Scrapper Not Barred; State Enforcement Actions Not Under CWA

The Clean Water Act bar on citizen suits when a state is diligently prosecuting an action did not preclude an environmental group's suit accusing a California scrap metal company of violating its industrial storm water permit, the U.S. Court of Appeals for the Ninth Circuit held July 22. A lower court erred when it found Sec. 1365(b)(1)(B) of the Clean Water Act barred California Sportfishing Protection Alliance's suit because of prior actions by the state to bring Chico Scrap Metal Inc.'s three facilities into compliance with environmental laws, the Ninth Circuit said. None of the state's enforcement actions sought compliance with the Clean Water Act, so the statute precluding citizen enforcement once government civil or criminal action commences was never triggered, the three-member appellate panel concluded. The Ninth Circuit panel also rejected Chico Scrap Metal's argument on appeal that the state's actions in 2007 and 2008 alleging multiple violations of air quality, hazardous waste, waste disposal, and wildlife conservation laws were "comparable'' to the Clean Water Act violations in California Sportfishing Protection Alliance's complaint. "None of those criminal offenses of civil causes of action relates to the Clean Water Act, and none of the government's allegations asserted the Defendants discharged or managed storm water in violation of the Permit,'' the panel said.

California Sportfishing Protection Alliance sued the company in May 2010, following an Environmental Protection Agency inspection of its three facilities that found violations of the National Pollutant Discharge Elimination System permit issued by state water quality officials. The group notified EPA and the state of its plan to sue the company, according to court documents. The complaint alleges Chico Scrap Metal violated provisions of the NPDES permit that prohibit discharges of polluted storm water, that require a storm water pollution prevention plan, require certain pollution control technologies, and require implementation of a storm water monitoring and reporting program. The appeals court decision remands the case to the U.S. District Court for the Eastern District of California for further consideration.

Source Bloomberg BNA Toxics Law Reporter 7/25/2013 discussing U.S. Court of Appeals for the Ninth Circuit in *California Sportfishing Protection Alliance v. Chico Scrap Metal In*c. (9th Cir. No. 11-16959, 7/22/13, available at http://cdn.ca9.uscourts.gov/datastore/opinions/2013/07/22/11-16959.pdf).

Teva to Pay $2M to Resolve Toxic Discharge Suit

Teva Pharmaceuticals USA Inc. agreed on Thursday to shell out a $2.25 million civil penalty to settle allegations that the company illegally discharged hazardous materials from its central Missouri chemical manufacturing facility in violation of several federal and state environmental laws. In a consent decree lodged along with the complaint, Teva agreed to pay the fine in order to avoid litigation over Clean Water Act, Clean Air Act and hazardous waste management violations, with 50 percent of the funds going to the U.S. Environmental Protection Agency and the other half to the Missouri Department of Natural Resources.

The operator of the Mexico, Mo., municipal sewage treatment plant saw Teva releasing a mysterious green liquid from the company's facility in November 2008, leading to subsequent inspections of the plant that uncovered a slew of additional illegal activity, according to the suit. The fluorescent green discharge released by Teva discolored the nearby Salt River for 22 miles, Missouri officials said. Federal and state regulators accused Teva of releasing ammonia, acetone, methylene chloride and other hazardous substances into area waters in violation of the CWA. The drugmaker also failed to control emissions of hazardous air pollutants from its wastewater and never implemented a proper leak detection and repair program at the facility, according to the suit.

Teva is also accused of violating the Resources Conservation and Recovery Act by failing to make proper hazardous waste determinations and by running an illegal treatment, storage or disposal facility without a permit. The company did not comply with Missouri containerization and labeling requirements either, the complaint says. Between at least 1995 and January 2009, Teva generated an average of 1.2 million gallons of wastewater treatment plant sludge containing methylene chloride and then illegally dumped the toxic substance, the suit says. The drug maker discarded other dangerous materials as well, including fluorescent lamps that contained mercury that were thrown in the general trash, according to the suit.

A Teva spokeswoman stated that all of the pollution allegations listed in the agreement have been fixed.

Source: Law360, March 14, 2013 discussing United States et al. v. Teva Pharmaceuticals USA Inc., case No. 2:13-cv-00027, in the U.S. District Court for the Eastern District of Missouri.

Fish Oil Harvester Fined $5.5 Million for Clean Water Act Criminal Violations

A federal trial court imposed a $4 million fine on Omega Protein Inc., one of the nation's largest producers of fish oil supplements, upon the company's plea of guilty to criminal violations of the Clean Water Act. In addition to the fine, the U.S. District Court for the Eastern District of Virginia sentenced the Houston-based company to three years of probation. The sentence was part of a plea agreement that also requires Omega to donate $2 million to the National Fish and Wildlife Foundation for Chesapeake Bay conservation efforts. Omega also must follow a third-party-monitored environmental compliance plan for its fishing operations. Allegedly waste water generated at its fish-processing plant in Reedville from May 2008 through September 2010 contained a caustic substance and other pollutants and was dumped in the Chesapeake Bay less than three nautical miles from shore. The criminal information also charged that from April 2009 through September 2010, Omega's fishing fleet routinely discharged oily waste water directly into the sea. Omega Protein Corp. Chief Executive Officer Bret Scholtes said in a news release on the plea agreement that the company is “committed to ensuring that we operate in compliance with federal and state environmental requirements.”

Source: Bloomberg BNA Toxics Law reported 6/13/2013 discussing *United States v Omega Protein Inc.,* E.D. Va., No. 2:13-cr-00043, 6/4/13.

d. Other

Builders and Utility Groups Settle Lawsuit with U.S. EPA on Numeric Turbidity Limit

In early January, the U.S. Environmental Protection Agency (EPA) settled a long-standing lawsuit with the Association of Home Builders, Utility Water Act Group, and Wisconsin Builders Association by agreeing to withdraw the numeric turbidity limit for stormwater runoff from construction sites. According to the petitioners, a numeric limit would have cost stakeholders $10 billion per year to comply with a "one-size-fits-nowhere" approach, so called due to the difficulty of finding a limit that works across geographic areas and soil types. EPA will also clarify non-numeric best management practice requirements for the 2009 final effluent guideline rule for the construction and development point source category. Final action will occur by Feb. 28, 2014.

EPA Prioritizing Larger, More Complex Cases While Initiating Fewer Civil Enforcement Cases

The Environmental Protection Agency initiated 3,027 civil enforcement cases in fiscal year 2012, continuing a downward trend that reflects the agency's prioritization of large cases. Cynthia Giles, EPA assistant administrator for enforcement and compliance assurance, told BNA Dec. 17 the agency is initiating fewer smaller cases and instead is prioritizing more complex cases "that are going to make the biggest difference."

By comparison, the agency initiated 3,283 cases in fiscal 2011. The number of new cases in fiscal year 2010 was 3,436 and 3,779 in fiscal 2009. Because of the priority on large cases, Giles said the agency has secured more pollution reductions and larger civil penalties, all while initiating fewer cases.

The agency secured a record $208 million in civil penalties in fiscal 2012. The results were buoyed by a $57.3 million penalty against Volvo Truck Corp. for violating a 1998 consent decree. By comparison, the agency assessed $152 million in fiscal 2011 and $106 million in fiscal 2010. A September agreement with an industrial coke operation, Walter Coke Inc., under the Resource Conservation and Recovery Act, was responsible for 1.4 billion pounds of pollution reduced. Industry paid $9 billion for pollution controls in fiscal 2012, which is down from a record $19 billion the previous year, when EPA entered into a large settlement requiring the Tennessee Valley Authority to retire at least 18 of its 59 coal-fired power plants to resolve alleged violations of the Clean Air Act.

EPA has prioritized some areas that are not reflected in the enforcement results. For example, she said the agency's work on protecting drinking water is not reflected because the drinking water supply does not have significant pounds of pollution to be reduced.

Giles said that during the past three years, the agency has seen a 60 percent decrease in the systems with serious violations.

Source: Bloomberg BNA Environment Reporter, 12/20/2012 Toxics Law Reporter discussing EPA's fiscal year 2012 enforcement and compliance results are available at http://www.epa.gov/enforcement/data/eoy2012/fy2012annualresults-analysistrends.pdf.

Hercules Inc. to Pay $2 Million to Settle Alleged Violations of Agreement with EPA

Hercules Inc. will pay $2 million in penalties to settle alleged violations of its consent decree with the Environmental Protection Agency at the Resin Disposal superfund site in Jefferson Borough in Pennsylvania, EPA said July 8. The settlement under the administrative decree resolves allegations that the company failed to notify EPA about three uncontrolled releases of hazardous substances from the site's leachate treatment system in 2011. One release on April 15, 2011, bypassed the treatment system and resulted in the hospitalization of a worker at the West Elizabeth Sanitary Authority (WESA) treatment plant and a four-day shutdown of the plant. Two other releases bypassed the treatment system March 31 and July 19, 2011. Hercules acquired the Resin Disposal Site in 1973. Under the consent decree with EPA, Hercules is required to operate an on-site system to collect and treat leachate containing resin oils contaminated with naphthalene and other volatile organic compounds from former disposal practices. The treatment system is part of the site-cleanup project that began in June 1995. The cleanup also includes a multi-layer cap for the landfill and a fence around its perimeter.

EPA said the $2 million penalty takes into account the company's failure to notify the agency of the releases. Hercules is working to upgrade the leachate collection and treatment system and has increased its monitoring of the system, according to EPA, which said it is continuing to oversee the site and assess the remedy's effectiveness. The system had operated without issue for nearly 15 years, but prolonged heavy rain, electrical power outages, and other unanticipated events in 2011 contributed to the releases, according to Gary L. Rhodes, a spokesman for Ashland Inc., which acquired Hercules in 2008. The company responded to each release quickly and conducted the appropriate remedial activities, Rhodes told BNA in an email. He said the company reported the releases to state and local authorities and has a system in place to assist the sewer authority if necessary.

Source: Bloomberg BNA, 7/9/2013, see also http://www.epa.gov/reg3hscd/npl/PAD063766828.htm.

Village Can't Get Coverage for Water Pollution Suits

An Illinois appeals court has upheld a ruling that said three insurance Companies owe no coverage to the village of Crestwood and its former mayor in litigation alleging the village knowingly mixed polluted water into the municipal tap water supply to cut costs. A three-judge panel found that pollution exclusions in policies issued by the three excess public entity general liability insurers applied to bar coverage for the more than two dozen underlying suits, including some putative class actions, against the Chicago suburb.

The village had argued on appeal that the underlying suits do not accuse it of "traditional environmental pollution," as the Illinois Supreme Court used that phrase in its American States Insurance Co. v. Koloms decision that limited a pollution exclusion to those types of claims, but the appeals court rejected that stance. The underlying suits allege that sometime around 1985, the Illinois Environmental Protection Agency notified the village that a groundwater well it was using to supply the community's tap water was contaminated with perchloroethylene, a solvent used in dry cleaning that is linked to cancer, liver damage and neurological impairment. Though the IEPA told the village it could only use that well in emergencies, it allegedly began to routinely mix polluted well water with treated water from Lake Michigan that it bought from a neighboring community, then supplied that combination as the village's tap water. The villagers who later sued Crestwood allege that it continued that secret practice for at least two decades and falsely reported the source of the tap water on water quality reports, and that exposure to the

contamination caused death, cancer and other illnesses. An anonymous tip led federal regulators to shut down the well in 2007, the same year Chester Stranczek left the mayoral seat he had held since 1970, according to the underlying suits.

In the coverage appeal, Crestwood argued that for the pollution exclusions to apply, the underlying complaints had to allege "traditional environmental pollution" by depicting the village as an active polluter or one that might be accountable for environmental cleanup for the exclusions to apply. Crestwood said the suits point to a nearby dry cleaning business that was also targeted with villager claims as the only "actual polluter," and that they paint the village as just a passive, negligent distributor of tap water. The appeals court found that all of the underlying complaints against Crestwood are based on its contamination of the municipal tap water supply with "pollutants," as they are defined in the policies, and "thus are within the scope of the exclusion." The panel was also unconvinced that the exclusion was limited only to cleanup costs imposed by environmental laws and rejected Crestwood's attempt to portray itself as just a negligent water distributor, saying the suits allege that by distributing the water, it caused the toxic chemicals to spread through the community and inflict the alleged injuries. Two of the village's other insurers, Scottsdale Indemnity Co. and National Casualty Co., previously sued Crestwood in Illinois federal court alleging that pollution exclusions in their policies precluded coverage for the underlying suits. The federal court sided with the insurers, and the Seventh Circuit affirmed that ruling in March.

Source: Law360, (February 22, 2013) Discussing *The Village of Crestwood et al. v. Ironshore Specialty Insurance Corp. et al.,* case number 120112, in the Illinois Court of Appeals, First District.

Order of W.Va. Environmental Board Reversed on Guidelines for Mountaintop Mining Permit

A West Virginia court reversed an order by the state Environmental Quality Board requiring use of federal water guidelines for a mountaintop removal coal mining permit. The Kanawha County Circuit Court said the board “accorded no deference” to the West Virginia Department of Environmental Protection's interpretation of water quality standards when it directed DEP to include pollution assessments in keeping with federal Clean Water Act standards when issuing new mine permits. The court decision specifically addresses a permit for an Arch Coal subsidiary's mine in Monongalia County but could set a precedent for Department of Environmental Protection reviews of other mining proposals. In July 2012, the EQB-ruling in a case brought by the Sierra Club challenging WVDEP's approval of a water pollution permit for a Patriot Mining Co. site-ordered tougher permit reviews and pollution limits in keeping with U.S. Environmental Protection Agency water quality guidance. The Environmental Quality Board said WVDEP erred in approving the NPDES permit without performing a reasonable potential pollution analysis or setting effluent discharge limitations, based on this analysis, for sulfates, total dissolved solids, and electrical conductivity. WVDEP further erred by not performing a reasonable analysis, and setting effluent discharge limits accordingly, for coal combustion waste like antimony, arsenic, lead, mercury, and selenium, the board said. The board then directed the Department of Environmental Protection to review potential toxic pollution and discharge limits for the mine in keeping with federal guidelines. In its ruling, the EQB said scientific evidence shows mining pollution is damaging water quality downstream from mountaintop removal operations and if WVDEP had performed a “reasonable potential analysis” of the mine's projected runoff, it would have been compelled to strengthen the permit's water pollution limits.

Moreover, the board said, evidence of water quality damage from existing mining in the state's coalfields was “un-refuted” by witnesses from WVDEP or the mining company.

At the time of the EQB ruling, Joe Lovett, an Appalachian Mountain Advocates attorney who represented the Sierra Club in the case, said it was “in alignment with all of the science.“ WVDEP Secretary Randy Huffman, on the other hand, said a determination of “significant” environmental damage is a matter that state policymakers should decide and pledged to appeal the ruling.

In the Feb. 13 ruling, Circuit Court Judge James Stucky agreed with WVDEP's and Patriot's arguments that the EQB “exceeded its statutory authority by attempting to impose *de facto* water quality standards” on the department. Stuckey further said the board was wrong to mandate future permitting decisions based on EPA guidance declared invalid by a federal judge. Calling the EQB's decision “arbitrary and capricious,” the judge concluded that applying EPA's Narrative Guidance to the state permitting process “would infringe on the authority afforded to WVDEP.”

Source: Bloomberg BNA Toxics Law Reporter, 2/22/2013 discussing *Patriot Mining Co. v. Sierra Club*, W.Va. Cir. Ct., No. 11-AA-102, 2/13/13.

Tennessee Scrap Metal Facility Charged With Discharge Violations

Two environmental groups in Nashville, Tenn. April 4 charged a scrap metal facility with discharging contaminated storm water into the Cumberland River. The Tennessee Environmental Council Inc. and Rediscover East! allege that the facility, owned by PSC Metals Inc., discharged storm water containing elevated levels of pollutants—including total suspended solids, copper, lead, iron, and zinc—into the river through its storm drains. The discharges violate the terms of the facility's National Pollutant Discharge Elimination System permit, the groups claim. The organizations say that federal and state regulators have failed to address the violations at the PSC facility and court action is needed to stop the illegal discharges. The environmental groups allege that PSC was issued notices of violation by the city of Nashville in September 2010 and October 2011 for discharging contaminated storm water into its municipal sewer system. The latter violation resulted in a $500 penalty, the groups said. The environmental groups are asking that the court order the facility to stop the illegal discharge of pollutants and pay a civil penalty of up to $37,500 per day of violation, as authorized under the Clean Water Act. The groups had announced their intent to sue in a Jan. 31 letter to the company and federal and state regulators. PSC identifies itself as “one of North America's premier ferrous and non-ferrous scrap processors,” operating 47 facilities, primarily in the Midwest.

Source: Bloomberg BNA Toxics Law Reporter, 4/8/13 discussing *Tennessee Environmental Council Inc. v. PSC Metals Inc.,* M.D. Tenn., No. 3:13-cv-301, 4/4/13.

Supreme Court Denies Petition to Review Use of General Criteria to Set Pollution Limit

The U.S. Supreme Court May 13 denied a request by a Massachusetts waste water utility to review a decision allowing the Environmental Protection Agency to apply general rather than site-specific criteria in setting a water pollution limit. The Upper Blackstone Water Pollution Abatement District, which operates a waste water treatment plant in Millbury, Mass., had asked for a court order to require EPA to consider site-specific criteria before setting an in-stream target for phosphorus under the Clean Water Act. For National Pollutant Discharge Elimination

System permits, EPA can either select in-stream nutrient targets from a range of numbers suggested by national guidance documents or tailor a federal standard to site-specific circumstances. EPA's decision to set a tougher in-stream phosphorus target from a federal guidebook was arbitrary because it did not consider the circumstances of the Blackstone River, the water district told the Supreme Court in a petition filed Dec. 21, 2012.

Upper Blackstone's request for Supreme Court review sought to resolve a conflict between two circuit courts on NPDES permits. A 2012 decision by the U.S. Court of Appeals for the First Circuit upheld EPA's 2008 decision to apply a federal water pollution standard. But the First Circuit's decision conflicts with another decision by the U.S. Court of Appeals for the District of Columbia Circuit that required EPA to tailor federal standards to "any relevant site-specific circumstances" when implementing a state's water quality criteria, the water district argued (*American Paper Institute v. EPA,* 996 F.2d 346, 352 (D.C. Cir. 1993)). The target could cost the company as much as $200 million to meet.

Source: Bloomberg BNA Toxics Law Reporter, 05/16/2013 discussing the U.S. Supreme Court's denial of a writ of certiorari in *Upper Blackstone Water Pollution Abatement District v. EPA* U.S., No. 12-797, *cert. denied* 5/13/13 which is available at http://op.bna.com/env.nsf/r?Open=smiy-97nm4g.

Non-Water

e. ***Criminal***

Ohio Contractor Charged With Illegally Dumping Fracking Fluids into Mahoning River

A Youngstown contractor was indicted by a federal grand jury for violating the Clean Water Act by dumping hydraulic fracturing fluids into a storm water drain that empties into the Mahoning River. The owner of Hardrock Excavating LLC, a service company for the oil and gas industry in Ohio and Pennsylvania, was indicted for knowingly discharging fracking waste into fresh waters without a National Pollutant Discharge Elimination System permit. The criminal indictment, a first for an Ohio business associated with the state's shale drilling boom, said the owner directed an employee to dump collected fracking brine into the storm water drain several times after dark. Discovery of the dumping was triggered by an anonymous tip to the Ohio Department of Natural Resources, according to a criminal affidavit filed with the U.S. Acting on the tip, state and federal investigators witnessed the discharge of black waste water from a holding tank into the drain. Ohio Environmental Protection Agency staff sampled water in the Mahoning River tributary where the storm water drain empties and confirmed the presence of fracking waste pollutants. When confronted by an Ohio EPA representative, the contractor admitted he had told his employee to discharge contents of a 20,000-gallon storage tank into the storm water drain a total of six times, the affidavit said. However, the criminal affidavit said another Hardrock Excavating employee told investigators that Lupo had ordered fracking waste to be dumped into the storm sewer at least 20 times. According to the indictment, the illegal conduct took place between Nov. 1, 2012, and Jan. 31, 2013.

If convicted, each man could receive three years in federal prison and ordered to pay a $50,000 per day fine for each day the violation occurred, or $250,000, whichever is greater. Hardrock could receive a maximum penalty of five years probation and $50,000 per day fine or a $500,000 fine, whichever is greater.

Source: Bloomberg BNA Toxics Law Reporter, 3/7/2013, discussing *United States v. Lupo*, N.D. Ohio, No. 13CR113, 2/28/13.

NJ Fines Water Agency Over Alleged Rigged Samples

The New Jersey Department of Environmental Protection has fined the East Orange Water Commission $402,000 for purportedly manipulating water samples and tests to hide elevated levels of tetrachloroethene, weeks after two EOWC officials were indicted for falsifying the commission's tests. In two administrative orders, the DEP contends the commission violated several state regulations when it allegedly pumped contaminated water into the Passaic River and cherry-picked water samples to send to the DEP in order to hide that its water system contained above-average levels of tetrachloroethene, which is an industrial solvent and probable carcinogen used in dry cleaning. The EOWC, which supplies drinking water to about 92,000 customers in East and South Orange, pumps its water from various wells in Morris and Essex counties before blending the water at its treatment plant, authorities said. The administrative orders say that between 2010 and 2012, the EOWC selectively submitted water samples to the DEP and refused to give DEP inspectors access to the commission's pumping records. The department also alleges the commission violated state water quality regulations during Hurricane Irene when the commission allegedly failed to notify the DEP that several wells became flooded and that it lost electric power. In February, a state grand jury indicted EOWC Executive Director Harry Mansmann, 58, and Assistant Executive Director William Mowell, 51, on charges including conspiracy, unlawful release of a toxic pollutant and violation of the New Jersey Water Pollution Control Act and New Jersey Safe Drinking Water Act, for altering test results and discharging contaminated water onto the bank of the Passaic River, authorities said. These individuals allegedly shut down contaminated water wells before monthly water tests in order to comply with the DEP's requirement and turned the wells back on after sampling, the indictment said. The indictment charged the duo for specific incidents in November 2010, March 2011 and April 2011. Also in April 2011, the pair also took multiple samples and chose the lowest result to send to the DEP, authorities said. Between March and April 2011, these individuals directed that water from the most polluted well, containing 25 times more contaminants than what's permitted under the New Jersey Safe Drinking Water Act, be pumped to a pipe that ultimately discharged onto the bank of the Passaic River, in an attempt to flush contaminants out of the well, authorities said. When the DEP required the commission to issue a public notice about its tetrachloroethene levels, they allegedly issued a notice in July 2011 falsely stating that the EOWC had reduced its pumping from select wells and that its tests from the first half of the year indicated the commission was in compliance with DEP regulations, according to authorities. It is alleged that, in reality, there was only a temporary reduction in pumping from the EOWC's contaminated wells, and its tetrachloroethene levels exceeded the state limit. The DEP has since conducted independent tests of the EOWC system, and said its most recent testing in February revealed the water system's tetrachloroethene levels were below the state's standards. NJDEP has stated that it will continue to closely monitor the EOWC's water supply.

Source: Law360, 3/6/2013

Water Official Convicted Of Lying About Well

An Illinois federal jury on Monday convicted a former water department employee for a Chicago suburb on charges that she lied to environmental regulators about supplementing the village's water supply from Lake Michigan with water from a well, allowing the village to skirt testing requirements.

The jury found a former water department clerk and supervisor and the current police chief for the village of Crestwood — guilty on all 11 counts of making a false statement that she faced at trial. She could receive up to five years in prison for each count. Prosecutors had accused the former clerk of knowingly working with other officials — including Crestwood's retired certified water operator who pled guilty in the case April 11 — over the course of roughly 20 years to submit false regulatory reports stating that no water from the well at issue was being distributed to the village's drinking water customers and that Crestwood's system only used Lake Michigan water purchased from a neighboring town. The government argued that the clerk hid Crestwood's use of the well in order to save money, and said the allegedly false statements submitted to the Illinois Environmental Protection Agency and water customers allowed the town to avoid having to test its mixed water supply and monitor the water's level of contamination.

Source: Law360, Chicago 4/29/ 2013, discussing *USA v. Scaccia et al*., case number 1:11-cr-00533, in the U.S. District Court for the Northern District of Illinois.

Temple-Inland Fined $3.3M for Mill Discharges into River

A Louisiana federal judge has ordered Temple-Inland Inc. to pay $3.3 million in criminal penalties and serve two years of probation for contaminating the Pearl River with illegal discharges from its Bogalusa, La., paper mill, killing more than 500,000 fish. The sentencing of Temple-Inland followed its guilty plea to one misdemeanor count of negligent violation of the Clean Water Act and one misdemeanor count of negligent violation of the Refuge Act. The August 2011 discharges of “black liquor” wastewater, chemicals and compounds from the mill killed fish in the Bogue Chitto National Wildlife Refuge. According to the US Attorney’s office, Temple-Inland was ordered to pay $1.2 million in restitution and fined $2.1 million "for the harm caused by the negligent discharge to the Pearl River and its tributaries; the loss of Gulf sturgeon (a protected species); and the loss of other aquatic life”. Temple-Inland, a maker of corrugated and packaging products, has been operating the Bogalusa plant since 2002, but it is now owned by International Paper Co. as the result of a $4.3 billion merger. International Paper said in a statement that it had “made significant improvements at the Bogalusa Mill since acquiring the facility from Temple-Inland in February of 2012.”We have invested considerable financial and human resources into improving the mill and correcting the issues that affected it prior to the purchase."

The illegal discharges began Aug. 9, 2011, according to Temple-Inland's guilty plea, when an "evaporator" at the plant became clogged, and "an extremely excessive quantity of liquor overflowed from a tank" and then from a containment area surrounding it. The material then flowed into a wastewater treatment plant and an effluent pond, and ultimately into the Pearl River. The "black liquor" wastewater continued flowing into the river until at least Aug. 13, when the paper plant was shut down. By Aug. 15, it had reached the Bogue Chitto refuge. $900,000 of the restitution amount will be paid to the Trust for Public Land and $100,000 to The Nature Conservancy of Louisiana, both nonprofit organizations, for acquisition and protection of land and waters in the Pearl River basin. Another $200,000 will fund a study of the Pearl River focused on recovery of the Gulf sturgeon. Of the fine amount, $600,000 will be divided between the Louisiana Department of Environmental Quality, the Louisiana State Police emergency services unit and the Southern Environmental Enforcement Network, an alliance of government agencies. In February, a Louisiana judge preliminarily approved a $13.5 million settlement of class actions against Temple-Inland alleging the discharges contaminated properties along the Pearl River.

Source: Law 360 Environmental 6/3/2013 discussing *U.S. v. TIN Inc.*, case number 2:12-cr-00323, in the U.S. District Court for the Eastern District of Louisiana.

Laboratory Owner Convicted For Falsifying Waste Water Reports

The owner of a Mississippi testing laboratory falsified waste water discharge monitoring reports and obstructed a federal investigation, a federal jury serving the U.S. District Court for the Southern District of Mississippi found the owner and operator of Jackson-based Mississippi Environmental Analytical Laboratories Inc., guilty on two counts of making false statements and one count of obstructing justice.

According to the Justice Department, White could face a maximum sentence of five years in prison and a $250,000 fine per count for making false statements while the charges of obstructing proceedings could lead to up to 20 years in prison along with a $250,000 fine. The owner was charged with falsifying waste water discharge monitoring reports that industrial facilities are required to submit under the Clean Water Act to the Mississippi Department of Environmental Quality (MDEQ). These reports are intended to demonstrate compliance with pretreatment standards under the National Pollutant Discharge Elimination System permitting program. According to DOJ, White created three discharge monitoring reports of industrial waste water from BorgWarner, a Delaware-based automobile parts manufacturer located in Water Valley, Miss., that "falsely represented that laboratory testing had been performed on samples when, in fact, such testing had not been done." Moreover, allegedly the owner created a fictitious laboratory report and presented it to Borg Warner to use in preparing another waste water discharge report in January 2009. The indictment also alleged that White made false statements to a federal agent during a subsequent criminal investigation.

Source: Bloomberg: BNA, Inc. Toxics Law Reporter 6/6/2013 discussing *United States v. White*, S.D. Miss., No. 3:12-cr-00126, 5/22/13.