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The Water Quality Management Professionals

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Government Affairs Newsletter¹

October, 2003 to January 28, 2004

I. NEW YORK

A. LEGISLATION AND POLICY

- **FEES** -- SPDES and most other permit-related fees have increased
- **NEWLY ENACTED BROWNFIELDS CLEANUP PROGRAM**

The State Legislature passed, and Governor Pataki signed into law, a bill establishing a comprehensive Brownfields Cleanup Program intended to make redevelopment of brownfield sites in New York State more economically feasible and less likely to result in liability. The bill also authorizes refinancing of the State's Inactive Hazardous Waste Program. The \$168 million appropriated for this bill will be financed with a combination of bond funds, general fund dollars, and industry fees, including \$18 million in new surcharges on generators of hazardous waste, retroactive to April 1, 2003, and doubling of the petroleum bulk storage registration fees. A comprehensive package of tax credits was also established with an estimated annual value of approximately \$135 million to offset costs associated with real property taxes, site preparation, water treatment expenses, and property improvements. As of January 15, 2004, the New York Legislature had not introduced legislation to repeal the remediation project Hazardous Waste Surcharge Fee that was mistakenly included in the 2003 Brownfields bill.

Source: Chapter 1, NY Laws of 2003, Nixon Peabody LLP Summary (contact L. Ford)

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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 and AMSA 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 AMSA web page is at <http://www.amsa-cleanwater.org>; and TBCNY is at <http://www.bcnys.org>. NYWEA gratefully acknowledges the following sources of the information contained in this newsletter: BNA Environmental Reporter, EPA Administrative Law Reporter, Water On-Line, Pollution On-Line and Environmental Protection E-News: these are excellent resources for the environmental manager, attorney or consultant.

Table 1, at the end of this newsletter, lists the status of various New York proposed legislation which NYWEA is following.

B. REGULATORY ISSUES

DOW News

- SPDES permit writers have been re-organized by geography
- RIBS screening sampling will be done in Genesee River and parts of Lake Ontario this year

C. OTHER

NY Chemical Firm Earns New Dual ISO/ACC EMS Certification

Arch Chemicals in Rochester NY, became the second plant in America to achieve certification under the chemical industry's new Responsible Care® -- ISO14001 standard (RC14001). RC14001 was created by the American Chemistry Council (ACC) and the Registrar Accreditation Board (RAB) to help chemical and petrochemical companies receive recognition for incorporating health and safety, product stewardship, environmental quality and outreach communications into their quality management programs. In order to earn this certification, Arch Chemicals, and its consultant (ENSR) undertook program development activities such as implementation planning, gap analysis, and training at the Arch Chemicals facility. The Rochester plant received both its dual certifications (the new RC14001 certification requirements and the more traditional ISO14001 environmental management system) in December 2003 after a rigorous series of audits by an independent registrar.

Source: ENSR Press release, Jan. 15, 2004.

II. FEDERAL

A. LEGISLATION AND POLICY

Senate Passes Consolidated Appropriations Bill for FY 2004

The Senate passed the fiscal year 2004 Consolidated Appropriations Bill (H.R. 2673, H. Rpt. 108-401) by a vote of 65-28. The omnibus package, which includes seven appropriations bills, will provide \$8.4 billion in funding for the U.S. Environmental Protection Agency. The bill includes \$1.35 billion for The Clean Water State Revolving Fund, \$228.5 million for state and local air grants, and \$1.265 billion for the superfund program.

Source: WEF, This Week in Washington, 1/23/04

Duncan Tries to Move Infrastructure Legislation Forward

Rep. John Duncan (R-TN), Chairman of the House Transportation and Infrastructure Subcommittee on Water Resources and Environment, is seeking Republican signatures on a draft letter requesting that wastewater infrastructure legislation move forward during this session of Congress. The letter requests that House leadership help to solve the impasse over Davis-Bacon requirements that local prevailing wages be paid on projects receiving federal funds.

Source: WEF, This Week in Washington, 1/23/04

B. REGULATION AND GUIDANCE

1. EPA Enforcement Priorities

In late 2003 EPA released for comment its preliminary listing of its upcoming enforcement priorities for Fiscal Years 2005, 2006 and 2007. Within the 4 major media areas the current priorities are:

Safe Drinking Water Act—Microbials Plus

Ensure public water systems provide clean and safe drinking water that pose minimal health risks and are largely free from microbiological, chemical or radiological contamination. Efforts would focus upon microbial rules, nitrate requirements and emergency orders to protect public health from contaminants presenting an imminent and substantial endangerment. The suggested priority would also address situations where multiple violations, at one system or different systems in the same geographic area, present an unacceptable cumulative risk to public health.

Clean Water Act/Wet Weather

Ensure compliance with CWA requirements addressing storm water runoff, overflows from combined and sanitary sewers, and concentrated animal feeding operation (CAFO) discharges. These discharges can contain bacteria, pathogens and other pollutants that may cause illnesses in humans, lead to water quality impairment, including beach and shellfish bed closures and harm our nation's water resources.

Clean Air Act (CAA)/New Source Review/Prevention of Significant Deterioration (NSR/PSD).....

Ensuring that NSR and PSD requirements of the CAA are implemented. Failure to comply with NSR/PSD requirements may lead to the inadequate control of emissions resulting in the release of thousands of tons of pollution to the air each year, particularly of nitrogen oxides, volatile organic compounds, and particulate matter.

Clean Air Act (CAA)/Air Toxics

Reduce public exposure to toxic air emissions by ensuring compliance through directed monitoring and enforcement with the Maximum Achievable Control Technology (MACT) standards. This is the second phase of this priority following four years of compliance assistance and the development of implementation tools.

Some of EPA's suggested New Enforcement Priorities include:

Resource Conservation and Recovery Act (RCRA)/Underground Storage Tanks (UST).

Reduce the potential hazard from UST's that can leak petroleum or other hazardous substances into the soil and contaminate groundwater, the source of drinking water for nearly half of all Americans.

Asbestos Hazard Emergency Response Act (AHERA)/Asbestos in Schools.

Minimize or eliminate exposure to airborne friable asbestos in schools. Asbestos is a known carcinogen, and poses a significant potential health risk if students are in an environment where they inhale asbestos fibers.

Financial Responsibility

Strengthen compliance with financial responsibility requirements found under various environmental laws to ensure that individuals or companies handling hazardous waste, hazardous substances, toxic materials or pollutants have adequate funds to close their facilities, cleanup any releases, and compensate any parties affected by their actions.

Miscellaneous Plastics

Reduce public exposure to hazardous wastes and pollutants released to the land, air, and water by the miscellaneous plastic products manufacturing sector.

Environmental Justice

Ensure that no racial, ethnic or socioeconomic group bears a disproportionate share of negative environmental consequences resulting from industrial, municipal, and commercial activities; or from the execution of federal, state, local and tribal programs and policies. Target one or more areas within each Region for focused attention.

Fuels Management

Potentially large quantities of hazardous pollutants are being emitted to air, surface and ground water, and soil from the storage, distribution and ancillary operations at liquid petroleum and natural gas handling facilities. Ensure compliance across a broad spectrum of environmental statutes to minimize releases.

Significant Noncompliance (SNC) Oversight

Ensure proper management of the enforcement and compliance programs under the CAA, the CWA—National Pollutant Discharge Elimination System, and RCRA by ensuring that instances and patterns of significant noncompliance are identified and addressed by EPA and/or States in a timely manner.

Source: 68 Federal Register 68893 (December 10, 2003).

2. Water

EPA Issues Draft Policy on Blending For Nation's Sewage Treatment Facilities

EPA has issued this draft policy to establish consistent national guidelines on the practice of blending that is used by municipal sewage treatment facilities to manage high flows associated with storm events. Already widely used, blending is a technique to manage high flows that could damage sensitive parts of the sewage treatment system or could lead to overflows of raw sewage into local waterways. The draft policy outlines safeguards and requirements to be followed during blending and restates the requirement that all discharges must continue to meet Clean Water Act permit limits. The draft policy and additional

information can be found at <http://www.epa.gov/npdes/blending> The public comment period has been extended until February 9, 2004. NYWEA will be taking a position generally supportive of this new policy.

Source: EPA Water News 11/12/03, 1/12/04

WEF is Offering a Webcast Series on "Blending: Regulatory Update"

On February 27, 2004 from 12:00pm -2:00pm EST WEF invites you to participate in a webcast event and obtain the latest information on blending from U.S. EPA, technical experts, and POTWs. This cost effective learning option allows you to participate through your telephone, and view the presentation via the web. Program features live Q&A, and includes printed speaker handouts. For additional information call WEF Member Services at 1-800-666-0206 or via email at confinfo@wef.org.

Office of Water Regional Water Reviews- New York

EPA's Office of Water continued its ongoing review of each regional water program. These "reviews" cover both performance measures, and now include a significant policy discussion. This policy discussion -- the states were invited to attend a portion -- focuses on the challenges that each specific region is facing in implementing the national water program. The New York regional review was held on Thursday, Nov. 13, 2003 and Friday, Nov. 14, 2003. (There is no information on the outcome of this meeting available through the web.)

Source: EPA Water News 11/12/03

EPA Issues Decision on Dioxins in Land-Applied Sewage Sludge

On Friday, October 17, 2003 EPA announced that it had decided not to regulate dioxins in land-applied sewage sludge. The Agency has found that dioxins from this source do not pose a significant risk to human health or the environment. The theoretically most highly exposed people are those who apply sewage sludge as a fertilizer to their crops and animal feed and then consume their own crops and meat products over their entire lifetimes. EPA's analysis shows that, even for this theoretical population, only 0.003 new cases of cancer could be expected each year or only 0.22 new cases of cancer over a span of 70 years. The risk to people in the general population of new cancer cases resulting from sewage sludge containing dioxin is even smaller due to lower exposures to dioxin in land-applied sewage sludge than the highly exposed farm family which EPA modeled. A pre-publication version of the Notice is at <http://www.epa.gov/waterscience/biosolids>

Source: EPA Water News 10/23/03

Preliminary Effluent Guidelines Plan for 2004/2005 Published

EPA published its preliminary Effluent Guidelines Plan for 2004/2005 in the Federal Register. The preliminary Plan describes the current status of EPA's planning for the effluent guidelines program, presents the results of EPA's annual review of the effluent guidelines it has already promulgated for industrial categories, and identifies industrial categories that EPA expects to investigate further for the possible development or revision of effluent limitations guidelines. You can view or download the complete text of the Federal Register notice and major supporting documents on the Internet at www.epa.gov/guide/plan.html. The 45-day comment

period closes on Feb. 17, 2004. For further information contact Carey Johnston of EPA at 202-566-1014.

EPA has identified two industrial categories for detailed investigation in the 2004 annual review: Organic Chemicals, Plastics, and Synthetic Fibers and Petroleum Refining. Within these two categories, EPA intends to address data gaps and uncertainties affecting EPA's estimates of the potential risks and hazards posed by two industrial categories: Inorganic Chemicals (part 414) and Nonferrous Metals Manufacturing (part 421). EPA does not anticipate selecting either of these industrial categories for revision of their effluent guidelines in the final Effluent Guidelines Program Plan for 2004/2005. EPA identified seven other industrial point source categories with relatively high estimates of potential hazard or risk based on the screening tools used to evaluate hazard or risk and the information gathered from EPA Regional Offices and stakeholders: fertilizer manufacturing; ore mining and dressing; phosphate manufacturing; pulp and paper (phase II); steam electric power generating; textile mills; and timber products processing. With respect to these latter categories, EPA does not anticipate identifying any of these categories for revision of an effluent guideline in the final Effluent Guidelines Program Plan for 2004/2005.

Source: 68 Federal Register, December 31, 2003, Page 75515-75531; EPA Water News 1/12/04

National Recommended Water Quality Criteria for the Protection of Human Health

EPA announced availability of updated national recommended water quality criteria for the protection of human health for the following fifteen pollutants: chlorobenzene; cyanide; 1,2-dichlorobenzene; 1,4-dichlorobenzene; 1,1-dichloroethylene; 1,3-dichloropropene; endrin; ethylbenzene; hexachlorocyclopentadiene; lindane; thallium; toluene; 1,2-transdichloroethylene; 1,2,3-trichlorobenzene; and vinyl chloride. EPA's recommended criteria do not impose legally binding requirements.

Source: 68 Federal Register, December 31, 2003, Page 75507-75515

Watershed-Based NPDES Permitting Implementation Guidance Now Available

A guidance document describing EPA's recommendations for watershed-based permitting under the National Pollutant Discharge Elimination System (NPDES) program is available online. This approach is aimed at achieving new efficiencies and environmental results through the NPDES program. The watershed approach to permitting provides a process for considering all stressors within a hydrologically defined drainage basin, rather than addressing individual pollutant sources on a discharge-by-discharge basis. The Guidance is available online at: www.epa.gov/npdes/watersheds.

Source: EPA Water News, 1/13/04

Grumbles Named Acting Assistant Administrator for Water

On December 29, 2003 Benjamin Grumbles was named the Acting Assistant Administrator for Water. Mr. Grumbles served as the Deputy Assistant Administrator under Assistant Administrator G. Tracy Mehan III, as well as serving as the Acting Associate Administrator for Congressional and Intergovernmental Relations.

Source: EPA Water News, 1/6/04

EPA and Army Corps Issue Wetlands Decision

The Environmental Protection Agency (EPA) and the Army Corps of Engineers (Corps) reiterated the Administration's commitment to the goal of "no net loss" of wetlands in the United States. EPA and the Corps announced that they would not issue a new rule on federal regulatory jurisdiction over isolated wetlands. The Supreme Court's 2001 decision in the case of *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* (commonly referred to as "SWANCC") overturned the Corps' assertion of federal jurisdiction over certain isolated wetlands based on the presence of migratory birds. After soliciting public comment to determine if further regulatory clarification was needed, EPA and the Corps have decided to not issue revised regulations.

Source: EPA Water News, 12/17/03

EPA Approves More Than 9,000 Total Maximum Daily Loads (TMDLs)

EPA announced that the Agency has approved more than 9,000 TMDLs, which provide information about what pollution reductions are needed to meet water quality standards under the Clean Water Act. Of the more than 9,000 TMDLs approved to date, over 4,000 have been approved since January 2001.

Source: EPA Water News, 11/18/03

Permitting for Environmental Results Launched

EPA has launched a major initiative to strengthen its core wastewater permitting program under the Clean Water Act. On August 15, 2003, then Assistant Administrator G. Tracy Mehan III announced the Permitting for Environmental Results ("PER") Strategy in recognition of the numerous challenges facing the National Pollution Discharge Elimination System (NPDES) permitting program - including continuing impairment of the nation's waterways, a backlog of expired NPDES permits, and legal challenges to state permitting programs.

The PER Strategy describes an ambitious partnership between EPA permitting and enforcement authorities, and their state counterparts, to improve the environmental effectiveness, efficiency, and fundamental integrity of the NPDES program. It has three key components:

- Permit prioritization: Giving priority to issuance of the most environmentally significant permits in a watershed
- Permit streamlining: Encouraging practices that improve the efficiency of permit issuance
- Program integrity: Using a management system to continuously assess and improve the performance of state and EPA permitting programs.

In an October 9, 2003 memorandum, Mr. Mehan addressed the program integrity component of the PER Strategy by initiating the Program Integrity Management System - a set of tools that will enable EPA and states to assess the integrity of the NPDES program, identify strengths and shortfalls, and promote continuous improvement.

Source: EPA Water News, 11/4/03

Office of Water Develops New Strategic Plan

EPA adopted a new Strategic Plan for 2004-2008. Key elements of the National Water Program are addressed in Goal 2 (Clean and Safe Water) and Goal 4 (Healthy Communities and Ecosystems). Over the next several years, the new Strategic plan will play a central role in guiding a wide range of program management, budget and policy decisions. The Plan has already contributed to the development of the FY 05 Agency Budget and will continue to support future budget and resource allocation decisions. EPA is working with States and Tribes to develop more detailed implementation plans for FY 05, including defining Regional and State commitments. The Strategic Plan will be a yardstick by which EPA will measure key parts of our environmental and programmatic performance. Information on the new Strategic Plan is at <http://www.epa.gov/water/waterplan/>.

Source: EPA Water News, 10/28/03

EPA Publishes New Guidelines for the National NonPoint Source Program

EPA has published new guidelines for the National Nonpoint Source (NPS) Program implemented under section 319 of the Clean Water Act. These guidelines completely replace all previous NPS grant guidances, guidelines beginning in fiscal year 2004. The guidelines focus approximately one-half of section 319 dollars on the remediation of impaired waters through the development of total maximum daily loads (TMDLs) and the development and implementation of watershed-based plans. These plans provide an analytical framework for assessing the sources of water pollution; estimating the amount of pollutant reduction needed to achieve water quality standards; identifying the management measures whose implementation will enable those reductions to be achieved; and identifying financial and regulatory tools, as appropriate, that will enable the watershed plan's goals to be achieved. These guidelines were published in the Federal Register on October 23, 2003 and are posted on EPA's NPS web site at: <http://epa.gov/owow/nps/>.

Source: EPA Water News, 10/28/03

Water Pollution; Effluent Guidelines for Point Source Categories: Centralized Waste Treatment Industry

The EPA has amended certain provisions of a wastewater discharge regulation for the Centralized Waste Treatment (CWT) Point Source Category. EPA deleted the selenium limitations and standards from certain sections of Subpart A, the Metals Treatment and Recovery subcategory. In addition, it deleted the barium, molybdenum, antimony, and titanium limitations and standards from Subpart B, the Oils Treatment and Recovery subcategory. Further, the final rule deletes the molybdenum, antimony, aniline, and 2,3-dichloroaniline limitations and standards from the Organics Treatment and Recovery subcategory. This action also revises all applicable related sections of Subpart D, the Multiple Wastestream subcategory, to reflect the preceding revisions. Finally, this action increases the maximum monthly average BOC 5 limitation for directly discharging facilities subject to a section of the Multiple Wastestreams subcategory.

Source: Federal Register, December 22, 2003, Page 71014-71026

C. JUDICIAL DECISIONS

Stormwater Pumping

Does a stormwater pumping station constitute a point source needing a S/NPDES permit? A federal court is looking at this issue with respect to a pumping station in South Florida which pours millions of gallons of storm runoff annually into the Everglades, keeping the farms and backyards dry but allegedly filling the wetlands with water often tainted by pollutants, mainly from phosphorus-rich fertilizers. The role of this pumping station in raising the level of phosphorus in the Everglades puts it at the center of a Supreme Court battle that could end up changing the reach of the Clean Water Act. The core question is: Is a stormwater pumping station subject to regulation by the Environmental Protection Agency and state agencies that protect the nation's water supply? Or is it merely a neutral conveyor of water, along with thousands of other water systems, which keeps flood plains dry and reservoirs full? At issue is a lawsuit brought by a small Indian tribe against Florida water authorities. The Court will decide whether the pump is adding pollutants to the Everglades or is simply transferring them between bodies of water that belong to the same large national system of waterways. If the court decides the pump adds pollutants, similar pumping equipment could become subject to a stringent system of permits and pollution controls required under the Clean Water Act. The suit, now before the Supreme Court, pits the Bush administration — which filed a brief in support of the water district — and a broad array of city water planners, Western water districts and 11 Western states, led by Colorado and New Mexico, against 14 mostly Eastern states, led by New York and Pennsylvania, as well as the Association of State Wetlands Managers and environmental groups like the National Wildlife Federation.

The Eastern and Midwestern states that have sided with the Tribe have an abundance of water and of polluting industries, and thus a keen interest in controlling water quality. New York, reportedly, filed a brief in the case arguing that the states needed to ensure that their "finely tuned programs to assess, protect and improve the water quality of each surface water body within their borders are not frustrated."

Source: NY Times January 14, 2004

Court Decision -- Consultant's Documents; Discovery Shield Applies to 'Dual Use' Work

Documents prepared by an environmental consultant for a client threatened with prosecution under hazardous waste laws can be protected from discovery as work product, even when they also serve a non-litigation purpose, a 9th Circuit Court held Nov. 26 (*U.S. v. Torf*, 9th Cir., Nos. 03-30102, 03-30104, 03-30105, 03-30106, 03-30107, 11/26/03).

Source: BNA Environmental Reporter, 12/11/03.

Substantial Continuity Test No Longer Valid For Successor Liability

The "Substantial Continuity" test is no longer valid for determining successor liability in Comprehensive Environmental Response, Compensation, and Liability Act suits, a federal appeals court ruled. The U.S. Court of Appeals for the Second Circuit vacated a decision by the U.S. District Court for the Eastern District of New York finding National Service Industries Inc., a successor to Serv-All Uniform Rental Corporation Inc., under the substantial continuity test in a CERCLA cost recovery suit brought by the state of New York.

Source: *New York v. National Service Industries Inc.*, 2d Cir., No. 02-9227, 12/17/03; BNA Toxic Law Reporter 1/1/04

EPA Proposes Rule to Allow Biosolids As Compost.

EPA proposed a rule that would revise the current compost designation to include compost made from manure or biosolids and designate fertilizers made from recovered organic materials. EPA is also proposing to consolidate all compost designations under one item called "compost made from recovered organic materials." EPA is required to designate items that are or can be made with recovered materials and to recommend practices that procuring agencies can use to procure designated items. Once EPA designates an item, any procuring agency that uses appropriated federal funds to procure that item must purchase the item containing the highest percentage of recovered materials practicable. The proposed action will use government purchasing power to stimulate the use of these materials in the manufacture of new products, thereby fostering markets for materials recovered from solid waste.

Wastewater professionals are invited and encouraged to submit comments in support of the proposed rule. ***EPA will accept public comments on this proposed rule until February 9, 2004.*** To view the 12-10-03 Federal Register notice, visit:

<http://www.epa.gov/fedrgstr/EPA-WASTE/2003/December/Day-10/f30266.htm>.

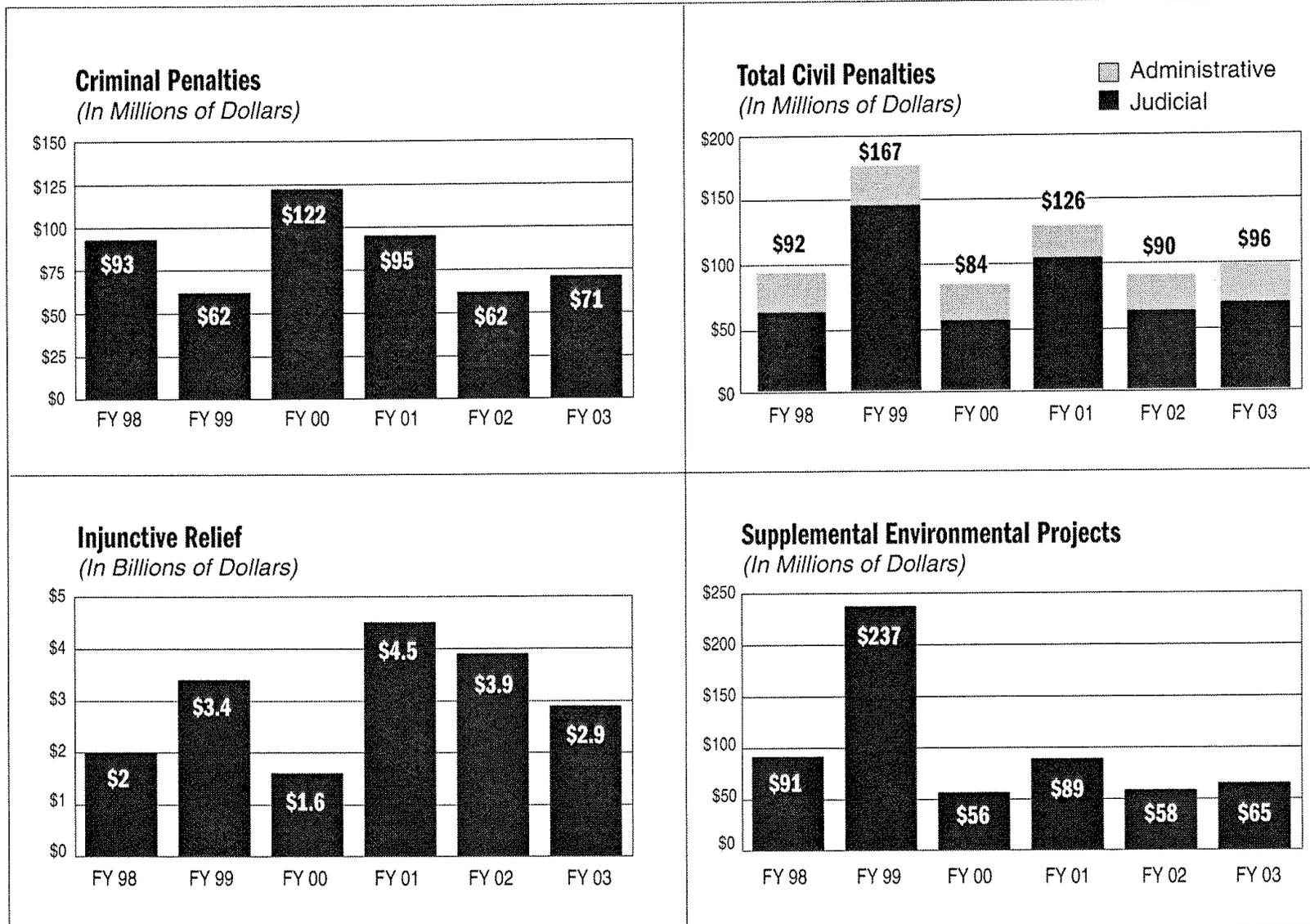
Source: In the 12-10-03 Federal Register

EPA Can Override State in Anti-Pollution Measures

The Supreme Court has ruled that EPA can override state officials and order some anti-pollution measures that may be more costly. The 5-4 decision, found the EPA did not go too far when it overruled a decision by Alaska regulators, who wanted to let the operators of a zinc and lead mine use cheaper anti-pollution technology for power generation. The fight was over whether the Mine must use equipment that would reduce pollution from a new generator by 90 percent. The State wanted to allow the mine operator, a major employer in a particularly rural area of Alaska, to use equipment that would only reduce pollution by 30 percent. The Clean Air Act allows state officials to make some decisions involving facilities within their borders, but still gives the EPA wide authority to enforce the anti-pollution law passed by Congress in 1970. The four justices who dissented said the ruling undercut the states' power to control their environmental policies. The Alaska case was the first of eight environmental cases on the court's docket this term, an unusually high number.

Source: CNN.com 1/22/04 reporting on *State of Alaska v. U.S. Environmental Protection Agency*, 02-658.

EPA Dollar Value of Concluded Enforcement Actions FY 1998 - FY 2003



NOTE: Due to enhanced data quality reviews, minor corrections may have been made to previously reported data. As such, this FY 2003 End-of-Year Report contains updated enforcement and compliance data for prior years. Source: EPA, Integrated Compliance Information System (ICIS), October 29, 2003.

A BNA Graphic/en404g03