New York Water Environment Association, Inc.

The Water Quality Management Professionals

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Recent Environmental Legislative, Regulatory and Judicial Developments[1]
November 6, 2014 through October 30, 2015

I. NEW YORK

A. Legislation

Microbead Bans

Microbeads have been found in virtually every water body where someone has looked for them. In Lake Ontario, 75% of the 248,000 pieces of plastic found in a square kilometer of water are microbeads. Because neither the federal nor New York State legislatures have yet passed a ban against personal care products with nano-sized plastic particles that pass through wastewater treatment plants, New York municipalities are adopting their own bans. Erie County has already passed a ban. Monroe County, Ulster County, Albany and New York City are all actively considering bans.

B. Regulation and Policy

1. Proposed Regulations Pending (Public Comment Period Closed)

Parts 701 and 703 - Class I and Class SD Waters - This rulemaking is necessary to meet the "swimmable" goal of the federal Clean Water Act.

Source: http://www.dec.ny.gov/regulations/propregulations.html

Parts 750 and 621 - Sewage Pollution Right to Know Act - The purpose of this proposed rulemaking is to implement the Sewage Pollution Right to Know (SPRTK) Act, ECL §17-0826-a, which is intended to benefit the public health and the environment.

Source: http://www.dec.ny.gov/regulations/propregulations.html

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[1] For more information, please contact Libby Ford, QEP at 585-263-1606 (lford@nixonpeabody.com). http://www.nixonpeabody.com/

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.

2. Other

SPDES Permits Now Available to Interested Stakeholders

DEC has posted a number of State Pollutant Discharge Elimination System (SPDES) permits on the internet. Now you can view and print individual permits and Multi-Sector General Permits (MSGP). More permits will be posted in the future. Access the SPDES permits through DEC's SPDES webpage.

Source: What's New in the Division of Water? Web page at http://www.dec.ny.gov/about/661.html

Updated Guidance Available for Regulating Mercury in SPDES Permits

DEC has issued updated guidance for developing SPDES permits that regulate wastewater and stormwater discharges containing mercury, as well as guidance for performing mercury monitoring. The guidance - Technical and Operational Guidance Series (TOGS) 1.3.10 (PDF, 927 KB) Mercury: SPDES Permitting, Multiple Discharge Variance, and Water Quality Monitoring- is an extension of the 2010 issuance of this TOGS.

Source: What's New in the Division of Water? Web page at http://www.dec.ny.gov/about/661.html

WI/PWL Water Quality Assessment Updates

Updates of water quality assessment information for individual WI/PWL waterbodies are announced through DEC's MakingWaves weekly e-publication. Most recently, WI/PWL Fact Sheets for the following waterbodies have been revised/updated:

- Waters of the Genesee/Beards Creek Watershed (PDF, 232 KB), Genesee River Basin.
- Waters of the Lower Genesee Watershed (PDF, 156 KB), Genesee River Basin.
- Waters of the Black Creek Watershed (PDF, 164KB), Genesee River Basin.

Comments on these (or other) assessments are welcome via email.

Source: What's New in the Division of Water? Web page at http://www.dec.ny.gov/about/661.html

State Issues Green Infrastructure Plan For Coastal Protection in New York City

A range of green infrastructure projects will harness natural systems to add resiliency to coastal areas of New York City affected by climate change, under a research plan issued March 9 by the state Department of Environmental Conservation. The plan, which evaluated current research on six green infrastructure approaches and set a structure for continuing studies, is intended to guide implementation of $17 billion in federally funded resiliency projects along the city's coast and shoreline. The projects were announced by Gov. Andrew M. Cuomo in 2014 as a response to widespread damage from Hurricane Sandy the year before. Coastal green infrastructure (CGI) mimics reefs and other natural features to reduce erosion and mitigate storm surge, wave action and flooding in coastal areas. They also help improve habitat, water quality and ecosystem value, the agency said.

A joint project of the DEC Hudson River Estuary Program and city resiliency and planning agencies, the research plan "is the first comprehensive summary of scientific knowledge about the design and construction of these strategies—examining what strategies work best—so that projects now being designed for New York Harbor can make use of the most effective natural infrastructure. According to NYSDEC, the study found the six strategies effective. The strategies evaluated were constructed wetlands and maritime forests, constructed reefs, constructed breakwater islands, channel shallowing, ecologically enhanced bulkheads and revetments, and living shorelines. It also looked at factors that "could have dramatic impacts" on future design and construction, including sediment movement, wave action and ice formation.

In a discussion of regulatory considerations, the study found that many of the strategies it evaluated "could be incompatible" with current law and regulations and "will therefore be challenging to implement." Specific state regulatory language, for instance, restricts placement of fill in waterways, "which would effectively prohibit most of the CGI strategies discussed in this report," the DEC said. Wetlands and habitat protection rules, Clean Water Act and U.S. Army Corps of Engineers permit requirements, coastal zone management regulations and city waterfront revitalization program requirements all pose problems for the envisioned projects, the study said. Also, it found, better interagency coordination and more permit review staffing would be needed to carry them out. The next step after the study is a joint effort to identify how to move the plan forward in years to come, the DEC said.

Source: BNA, Inc. Infrastructure Investment & Policy Report, 3/16/2015. The report and more information are at http://www.dec.ny.gov/lands/100057.html.

C. Judicial and Enforcement

1. Water

a. Industrial

Tonawanda Coke Agrees to Pay $42 Million

Tonawanda Coke Corp. has agreed to pay $12 million to settle a civil case alleging air and water pollution violations at its plant near Buffalo, N.Y., bringing to $42 million its total payments from enforcement actions that included a landmark criminal prosecution. The proposed settlement, lodged in the U.S. District Court for the Western District of New York simultaneously with a civil complaint, calls for $7.9 million in pollution controls and operational improvements, $2.75 million in federal and state fines and $1.3 million in environmental projects in the area surrounding the Tonawanda, N.Y., plant. Approval of the proposed settlement would establish a compliance schedule based on best pollution detection and control practices, to be overseen through third-party air and water pollution audits. Under the proposed agreement, the company would have to improve monitoring for coke-oven gas leaks, assess key equipment, repair or replace equipment, install new pollution controls and take many other measures

A federal judge sentenced the company in March 2014 to pay $24.7 million in fines and environmental study funding in the outcome of one of the largest criminal air pollution cases to go to trial. The criminal charges stemmed from a long-running enforcement probe into air and

water pollution allegations brought by local residents. EPA also has assessed another $5.7 million in injunctive relief in earlier administrative orders, $3 million for air pollution and $2.7 million for water pollution. The civil penalties include $1.75 million to the federal government to resolve violations of the Clean Air Act, the Clean Water Act, and the Emergency Planning and Community Right-to-Know Act, and $1 million to the state. The State also would get $1 million to fund environmental benefit projects and the nonprofit conservation group Ducks Unlimited would receive $357,000 for wetlands acquisition and preservation.

A third-party audit would be required to resolve Clean Water Act violations cited in the complaint, which have reportedly been largely resolved. The alleged violations included discharging wastewater and other prohibited pollutants to the Niagara River in stormwater; discharging excessive amounts of cyanide, ammonia and naphthalene in process wastewater; and allowing process water holding tanks to decay, pipes to leak and spill containment structures to become ineffective.

The third-party auditing features are consistent with EPA's "Next Generation" approach to enforcement, which relies in part on advanced monitoring techniques and verification of compliance with highly technical provisions of consent decrees. The company also was charged under EPCRA with failing to report manufacture of benzene and ammonia in quantities above the 25,000 pound a year reporting threshold. The agreement would call for the company to submit information about its use and emissions of ammonia and benzene over several years.

Source: BNA Environment Reporter 5/15/2015

2. Water

a. Municipal - Wet Weather

NY High Court Turns Back Challenge to Stormwater Permit

On May 5, 2015 a divided New York high court a state permit program that allows small cities and towns to discharge stormwater runoff, rejecting a challenge from environmental groups who said the public was denied a chance to weigh in on the permits. In a 4-3 decision, the New York Court of Appeals agreed that the 2010 "General Permit" under the State Pollutant Discharge Elimination System didn't run afoul of the Clean Water Act or state law, siding with the state Department of Environmental Conservation in its long-running battle with the Natural Resources Defense Council and others. In 2010, the NRDC sued the DEC over the General Permit that took effect that year, blasting the agency for allowing small cities to gain coverage by simply submitting a "notice of intention," or NOI, that wasn't subject to a public hearing and only reviewed for "completeness," according to the opinion. The permit program amounted to an "impermissible self-regulatory system," the NRDC argued, because it didn't push local governments to limit the discharge of pollutants to the "maximum extent practicable."

The New York Supreme Court's Appellate Division, however, disagreed and threw out the NRDC's federal and state law challenges to the 2010 permit. In upholding that decision the majority said the NRDC and its allies "blur the distinction" between SPDES General and Individual permits, which represent "alternative ways" for local governments to get clearance for stormwater discharges. If the court were to force DEC to subject both to the same scrutiny, it

would compromise the "resource-conserving benefits" that State lawmakers had in mind when they passed a law allowing for general permits in 1988, according to the decision.

The majority added that the DEC had determined that reviewing the NOIs for completeness was sufficient, as was the public's limited participation in the process, which included notices in an agency bulletin when NOIs were submitted and a 28-day public comment period. NRDC has stated that it will also continue to push a related appeal before the Ninth Circuit seeking to force the U.S. Environmental Protection Agency to "modernize" its own stormwater regulations.

Source: Law360 5/5/ 2015 discussing *Natural Resources Defense Council et al. v. New York State Department of Environmental Conservation et al*., case number 48, in the Court of Appeals of the State of New York.

b. Other Municipal

Ex-NJ Water Agency Official Gets 3 Years For Rigged Tests

A former high-ranking official with a New Jersey water agency has been sentenced to three years in prison for manipulating water quality tests and issuing false information to conceal contamination from a probable carcinogen that exceeded state standards. A former assistant executive director and engineer with the East Orange Water Commission, pled guilty to scheming with the former EOWC Executive Director to falsify testing of the agency's water supply to obscure elevated levels of tetrachloroethene, an industrial solvent used in dry cleaning. The Executive Director died after an indictment was handed down in the case in February 2013, but the assistant director acknowledged plotting to engage in a pattern of official misconduct, tamper with public records and violate the state's Safe Drinking Water Act and Water Pollution Control Act. As part of the sentencing, the former assistant director will also pay a $5,000 fine.

The EOWC, which supplies drinking water to East and South Orange, pumps the water from various wells in Morris and Essex counties before blending the water at its treatment plant, authorities said. The state Department of Environmental Protection mandates that annual average tetrachloroethene levels do not exceed one microgram per liter or part per billion, but the EOWC had experienced problems with elevated tetrachloroethene levels in its wells, according to authorities. As part of his plea, the former assistant director admitted to taking water samples for testing after contaminated wells has been turned off for several days, knowing that it would skew the results, authorities said. Between March and April 2011, the director and his assistant also directed that water from the most contaminated well, which was contaminated more than 25 times as permitted under the state Safe Drinking Water Act, be pumped to a pipe that ultimately discharged onto the bank of the Passaic River in an attempt to flush the contaminant out of the well, authorities said. When the DEP required the commission to issue a public notice about its tetrachloroethene levels, the director and his assistant 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. In reality, the Director and Assistant Director only temporarily reduced pumping from the EOWC's contaminated wells, and its tetrachloroethene levels exceeded the State limit, authorities said. By manipulating the testing results, these two individuals hoped the EOWC could avoid the cost of an expensive "air stripper" treatment unit to remove tetrachloroethene and other volatile organic compounds from the water. The EWOC is now moving forward with plans for that type of facility.

Independent testing of the EOWC's system has shown that the water quality is safe, though the DEP is continuing to monitor the situation, according to authorities.

Source: Law360, December 12, 2014.

3. Other/Non-Water

Settlement Reached On Contaminated Fill by New York Reservoir

An upstate New York property owner will clean up an illegal landfill that discharged contaminants into a New York City reservoir and pay $245,000 in fines, under an agreement with the State. The civil settlement, approved by the state Supreme Court for Putnam County, requires the defendant property owner to follow a detailed, expedited schedule for investigating and cleaning up pollution at the site, including affected areas of the city's Croton Falls Reservoir. Of the penalties, $225,000 will go to the state and $20,000 to the city. In a July decision, Grossman had held the property owner liable for the cleanup of more than 40,000 cubic yards of contaminated construction and demolition debris he used as landfill on a hilltop site beside the reservoir.

The reservoir, part of the city's Croton water supply system east of the Hudson River, normally serves more than 1 million people and provides 10 percent of the city's drinking water. It's temporarily out of commission during construction of a filtration plant ordered by the Environmental Protection Agency. The judge found that the two defendants in 2010 had violated several state environmental laws in filling in waterfront property to add a pool house and garage to a barn, a horse ring, a small putting green and a driving range on the 27-acre estate. The debris contained brick, asphalt pavement, concrete, tile, electrical wiring, plastic and other waste materials, including coal, coal ash and coal slag, which contain polycyclic aromatic hydrocarbons and other carcinogens. Contents in a trail of debris that had migrated down the landfill slope into the reservoir suggested that other components of demolished buildings, including asbestos, lead paint and plumbing, also were present.

In October 2012, the Property owner’s co-defendant pleaded guilty to charges of dumping the debris on watershed property without a permit. He was sentenced to four months in jail and five years on probation.

Source: BNA Toxics Law Reporter, 12/17/2014 discussing New York v. Prato, N.Y. Sup. Ct., No. 3177/2010, settlement announced 12/15/14.

II. FEDERAL

A. Legislation

WEF/NACWA CALLS-TO-ACTION – Prohibition of the use of CSOs or Blending in the Great Lakes

The bipartisan 2-year budget agreement recently hammered out by the Obama Administration and Congressional leaders paves the way for Congress to finalize an omnibus appropriations package for Fiscal Year (FY) 2016 by December 11, the date by which a current Continuing

Resolution expires. A key sticking point in this next round of negotiations will be what to do with several environmental policy riders the Republican majority inserted into a Senate proposed appropriation package for the EPA, including a policy rider prohibiting combined sewer overflows to the Great Lakes.

The Senate's FY16 appropriations bill for the Environmental Protection Agency (EPA) contains a policy rider entitled *"Prohibition of Sewage Dumping in the Great Lakes"* (Sec. 428 of S. 1645) requiring all Water Resource Recovery Facilities (WRRF) that discharge directly or indirectly to the Great Lakes to eliminate all combined sewer overflows (CSO), including overflows discharged in compliance with a CSO Long Term Control Plan (LTCP) or consent decree. The rider would also require WRRFs to eliminate discharges of blended effluent that otherwise meet standards established in a WRRF's National Pollution Discharge Elimination System (NPDES) permit during peak wet weather events.

The cost implications to New York Municipalities within the Great Lakes basin is huge. For example, Monroe County estimates that the cost to separate its collection system within the City of Rochester in order to try to eliminate CSO events would be $3.8 billion. This after the $550 Million the County (with significant federal and State monetary support) expended in the 1980s to install its 30 mile deep-rock tunnel system. This sytem has reduced the average number of overflow events a year from over 100 to 5. The environmental benefit of this expenditure likely would not be measurable. (see, http://www.nacwa.org/images/stories/public/2015-08-27monroe-schumer.pdf).

WEF and NACWA are urging their members and all stakeholders to contact Congress to remove it from the bill.

Actions You Can Take Today

- Write your Member of Congress asking Sec. 428 to be removed from the bill.
- Contact your professional colleagues to also take action to oppose Section 428.

Source: WEFCom at http://wefcom.wef.org/communities/community-home/digestviewer/viewthread?GroupId=673&MID=5960&tab=digestviewer and http://www.nacwa.org/index.php?option=com_content&view=article&id=2284&Itemid=158#three

House Approves Extension of Surface Transportation Programs and Positive Train Control Deadline

The House of Representatives approved bipartisan legislation that funds and extends the authorization for federal highway and transit programs through November 20th, and that prevents a shutdown of the U.S. rail transportation system by extending the deadline for implementation of Positive Train Control technology. The Surface Transportation Extension Act of 2015 (H.R. 3819) was introduced by Transportation and Infrastructure Committee Chairman Bill Shuster (R-PA), Ways and Means Committee Chairman Paul Ryan (R-WI), and Transportation and Infrastructure Committee Ranking Member Peter DeFazio (D-OR). If this extension had not been passed the concern was that railroads would have to stop shipping important chemicals critical to manufacturing, agriculture, clean drinking water, and other industrial activities. A

PTC-related rail shutdown would have pulled $30 billion out of the economy in the first quarter and lead to 700,000 jobs lost in just one month.

Source: WEFCom at http://wefcom.wef.org/communities/community-home/digestviewer/viewthread?GroupId=19&MID=6194&tab=digestviewer#bm7

B. Regulatory and Policy

1. Water

WEF Submits Comments to Federal Trade Commission On Wipes And Claims Of "Flushability"

On June 17, the Water Environment Federation (WEF; Alexandria, Va.) submitted comments to the U.S. Federal Trade Commission (FTC) concerning wipe manufacturers' claims of their product's "flushability" and about how these products should be labeled. The comments were related to a proposed FTC consent agreement with Nice-Pak Products Inc. (Orangeburg, N.Y.). WEF's comments support the proposed consent agreement's requirement that flushability claims be supported by "competent and reliable" evidence that includes the expertise of professionals in the plumbing and wastewater treatment sectors. Testing must be objective, reliable, and transparent, and wipes that are not designated as flushable must be clearly and prominently labeled, according to the FTC.

Source: WEF Highlights August 28, 2015 at http://news.wef.org/wef-submits-comments-to-federal-trade-commission-on-wipes-and-claims-of-flushability/

National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule

On September 24th, EPA finalized the Clean Water Act National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule, which requires electronic reporting of NPDES information rather than the currently-required paper-based reports from permitted facilities that discharge to waters of the United States. EPA received 170 public comments on the proposed rule from a variety of stakeholder groups and most commenters were supporting of electronic reporting. Some reports will have to be submitted electronically within the first year, those required by federal issued General Permit's, within 2 years.

Source: WEF GAC Regulatory Status Spreadsheet Sept. 2015.

National Pollutant Discharge Elimination System (NPDES) Application and Program Updates Rule

EPA plans to propose regulations that would update specific elements of the existing National Pollutant Discharge Elimination System (NPDES) in order to better harmonize regulations and application forms, improve permit documentation and transparency and provide clarifications to the existing regulations. EPA plans to address application, permitting, monitoring and reporting requirements that have become obsolete or outdated due to programmatic, technical or other changes that have occurred over the past 35 years. Specifically, EPA plans to focus on revising the NPDES permit application forms to include all final Agency data standards, improving the consistency between the application forms, updating the applications to better reflect current

program practices, and specifically incorporate new program areas into the forms (e.g., Clean Water Act section 316(b) requirements for cooling water intake structures). EPA also plans to address other program elements including permit documentation, EPA state permit objection, and public participation procedures to improve the quality and transparency of permit development. EPA is considering whether to revise the public notice requirements to allow a State to post notices of draft NPDES permits and other permit actions under the Clean Water Act on its State agency websites in lieu of a traditional newspaper posting. The Notice of Proposed Rule Making is expected in early 2016. Final Rule 11/00/2016.

Source: WEF GAC Regulatory Status Spreadsheet Sept. 2015.

Water Quality Standards Regulatory Revisions

The proposed rule addresses the following six key areas: 1) Administrator's determination that new or revised WQS are necessary, 2) designated uses, 3) triennial review requirements, 4) antidegradation, 5) variances to water quality standards, and 6) compliance schedule authorizing provisions. These revisions will allow the EPA, States and authorized tribes to better achieve program goals by providing clearer more streamlined requirements to facilitate enhanced water resource protection. Final Rule 8/5/2015.

Source: WEF GAC Regulatory Status Spreadsheet Sept. 2015.

Clean Water Rule: Definition of "Waters of the United States"

After U.S. Supreme Court decisions in SWANCC and Rapanos, the scope of "waters of the U.S." protected under all Clean Water Act (CWA) programs has been an issue of considerable debate and uncertainty. The Act has a single definition for "waters of the United States." As a result, these decisions affect the geographic scope of all CWA programs. SWANCC and Rapanos did not invalidate the current regulatory definition of "waters of the United States." However, the decisions established important considerations for how those regulations should be interpreted, and experience implementing the regulations has identified several areas that could benefit from additional clarification through rulemaking. The rule was finalized in May. It has been challenged by many states, industrial groups and environmental advocates. Its effective date has been stayed by a Federal Circuit Court.

Source: WEF GAC Regulatory Status Spreadsheet Sept. 2015.

Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act; Analysis and Sampling Procedures

This regulatory action would amend "Guidelines Establishing Test Procedures for the Analysis of Pollutants" at 40 CFR part 136 to approve test procedures (analytical methods) for use by testing laboratories for water monitoring. These test procedures must be used in applications for permits and for reporting under the National Pollutant Discharge Elimination System (NPDES) program unless use of an alternate procedure is approved by a Regional Administrator or a State with an EPA-approved NPDES permit program. The **regulation** would also revise, clarify, and correct **errors and** ambiguities in existing methods. Final Rule 3/00/2016.

Source: WEF GAC Regulatory Status Spreadsheet Sept. 2015.

NPDES Regulations to MS4 Stormwater Remand

EPA will propose to use flexible non-permitting approaches under the Clean Water Act to regulate certain discharges of stormwater from forest roads, including logging roads, in order to address water quality impacts from those discharges. EPA recognizes that effective best management practices (BMPs) exist that protect receiving waters and minimize impacts. EPA plans to propose approaches that leverage effective BMP programs. Notice of Proposed Rule Making 12/17/2015. Final Rule 11/2016.

Source: WEF GAC Regulatory Status Spreadsheet Sept. 2015.

Management Standards for Pharmaceutical Hazardous Waste

The EPA Administrator signed the proposed Management Standards for Hazardous Waste Pharmaceuticals Rule on August 31, 2015 and it just extended the comment deadline until December 24, 2015. This rule proposes a tailored, sector-specific set of regulations for the management of hazardous waste pharmaceuticals by healthcare facilities (including pharmacies) and reverse distributors. It will provide standards to ensure the management of hazardous waste pharmaceuticals is safe and workable within the healthcare setting. EPA's proposal is projected to prevent the flushing of more than 6,400 tons of hazardous waste pharmaceuticals annually by banning healthcare facilities from flushing hazardous waste pharmaceuticals down the sink and toilet.

Source: WEF GAC Regulatory Status Spreadsheet Sept. 2015.

C. Judicial and Enforcement

1. Industrial Water Enforcement

RCRA "Solid Waste" Includes Contaminants Deposited by Air, Water and Soil Seepage

A water utility may proceed with a Resource Conservation and Recovery Act suit alleging that emissions from DuPont's smokestacks as well as soil and ground water seepage from its contaminated soils pose a substantial and imminent risk to the environment, a federal court in Ohio ruled March 10. The U.S. District Court for the Southern District of Ohio said the RCRA statute isn't limited to pollutants placed directly onto land. The court also rejected the argument that the Clean Water Act precludes the RCRA claims.

Little Hocking Water Association, Inc., a non-profit public water supplier in Ohio, alleged that E.I. du Pont de Nemours & Co. deposited hazardous solid waste in a variety of ways—through the air, water pathways, storm water runoff and soil seepage. The association sought injunctive relief under 42 U.S.C. §6972(a)(1)(B), which provides a cause of action for "disposal of any solid or hazardous waste which may present an imminent and substantial endangerment to health or the environment." Little Hocking presented evidence that DuPont released perfluorooctanoic acid (C8) into the air from the smokestacks of its West Virginia plant, that a water pathway from the facility allowed contamination of the Ohio River and that hazardous waste at the site seeped through soil into the river, contaminating the utility's public water wells, the court said in ruling on cross-motions for summary judgment.

DuPont contested not only Little Hocking's claim that the water pathways existed, but also argued that it hadn't deposited solid waste, by any means, within the meaning of RCRA. Expert testimony submitted by Hocking, however, raised a genuine issue of fact as to whether there is a water pathway from the contaminated soil surrounding the plant to the Ohio River and then to Little Hocking's wellfield, the court said. The court also cited the expert testimony in allowing Little Hocking to pursue its RCRA claim that C8 seeped through the soil to the Ohio River onward to Little Hocking's wellfields. DuPont's aerial emissions of C8 received similar treatment by the court. Relying on *Citizens Against Pollution v. Ohio Power Co.* (S.D. Ohio, No. 04-cv-00371, 7/13/06), the court held that DuPont's aerial emissions of C8 particulate matter "which fell on the ground, remained there, and contaminated groundwater, constitutes disposal of solid waste under RCRA."

DuPont was unsuccessful in its argument that a provision of the Clean Water Act precluded this action (42 U.S.C. §6903(27)) (40 C.F.R. §261.4). The court said that the storm water runoff and landfill seepage, as opposed to water outlets designated under its permit, was cognizable under RCRA, and noted that the remedial nature of the law would be subverted by a contrary conclusion. The fact that DuPont had a Clean Water Act permit to discharge waste water at designated "point sources" along the river didn't compel the conclusion that *all* discharges from the plant's grounds were covered by the RCRA exclusion, the court said. The court was unpersuaded that an imminent and substantial endangerment to health existed in the case, noting the previous EPA consent orders and the GAC water treatment facility's success in removing C8 from Little Hocking's drinking water. But Little Hocking's similar allegations as to the endangerment of the environment were sufficient for defeat DuPont's motion for summary judgment on that ground, the court said, noting the evidence of other contamination routes and the toxicity of the chemical to "living things" in the wellfields environment.

Source: BNA Toxics Law Reporter, 3/19/2015, discussing *The Little Hocking Water Assoc., Inc. v. E.I. du Pont de Nemours & Co.*, 2015 BL 64422, S.D. Ohio, No. 09-cv-1081, 3/10/15.

$2.3M Penalty Upheld for Pretreatment Violations

A $2.3 million civil penalty will stand against a Nebraska beef rendering plant for violating the Clean Water Act, the Eighth Circuit ruled Aug. 27 (*United States v. STABL Inc.*, 2015 BL 276760, 8th Cir., No. 14-2050, 8/27/15). In January 2014, the U.S. District Court for the District of Nebraska found that from 2008 to 2010 the company caused the city of Lexington's waste water treatment plant to repeatedly violate its National Pollutant Discharge Elimination System permit. It also found that STABL Inc.'s discharges of ammonia, biochemical oxygen demand compounds, oil and grease and total suspended solids exceeded the limits in its Nebraska pretreatment plan permit and that the company failed to comply with monitoring and reporting requirements for its discharges of oil and grease (*United States v. STABL Inc.*, D. Neb., No. 11-cv-00274, 1/10/14).

Source: BNA Toxics Law Reporter 8/31/2015

EPA Requires Metal Finishers to Stop Illegal Waste Releases and Wastewater Discharges

The U.S. Environmental Protection Agency has announced the resolution of a series of enforcement actions at five Southern California metal finishing companies. The companies will collectively pay over $223,700 in civil penalties for illegal hazardous waste releases and Clean

Water Act (CWA) violations. Uncovered during inspections, the violations occurred at facilities in the cities of Compton, Paramount, Ontario, and Sun Valley.

One cited company, the Anaplex Corporation, has agreed to pay a penalty amounting to $142,200 for violations discovered at its Paramount, California facility. In August of 2010, an EPA investigation found that the facility failed to treat pollutants in its industrial wastewater, such as cadmium, nickel, and zinc, before discharging the wastewater into the Los Angeles County Sanitation District sewer system. Discharges from the sewer system enter into the Pacific Ocean, and Anaplex's lack of wastewater treatment violated the CWA. Additionally, the EPA found several hazardous waste violations, including failure to properly label and securely shut hazardous waste containers. Anaplex also failed to meet proper employee training requirements and did not operate the facility in a way to minimize the possibility of hazardous waste being released into the environment. In January 2011, the EPA ordered Anaplex to cease CWA violations, and in August of that year, the agency served Anaplex a Notice of Violations, requiring correction of the hazardous waste violations. The proposed consent decree, filed concurrently with the complaint in the U.S. District Court, is subject to a 30-day public comment period and court approval, and is available to be viewed here.

Barkens Hard Chrome has agreed to pay $28,100 to resolve hazardous waste violations found to have occurred at its facility in Compton, California. An October 2010 EPA investigation, conducted alongside the Lost Angeles Regional Water Quality Control Board and the County of Los Angeles Department of Public Health, discovered that the facility was in violation of federal hazardous waste regulations, including failure to minimize the release of hazardous waste, failure to meet certification requirements for tanks used to transfer, store, and treat waste, and failure to possess proper decontamination equipment. The facility also did not have the proper contingency plan for emergencies, nor could it produce adequate employee training records.

Bowman Plating Company Inc. has agreed to pay a $9,900 penalty to resolve hazardous waste violations found at its Compton facility. The EPA found in its October 2011 investigation that the facility failed to minimize releases of hazardous waste, and did not possess a permit allowing it to store certain hazardous waste streams on-site. Additionally, the EPA documented Bowman's failure to correctly close containers, as well as its lack of adequate aisle space for stored hazardous waste.

The EPA also penalized Alumin-Art Plating Company. Alumin-Art has agreed to pay $28,000 to resolve its facility's hazardous waste violations. In August of 2012, an EPA investigation found that the facility did not have a permit to store and treat hazardous waste. The EPA also found that the company failed to properly shut a container, which is a hazardous waste violation, and also did not meet necessary training requirements for its employees.

Another metal finishing company penalized by the EPA, R.L. Anodizing and Plating, Inc., has agreed to pay a $15,500 fine to resolve hazardous waste violations at its Sun Valley, California facility. The EPA found in June 2011 that the facility was without the proper permit to store and treat hazardous waste. In addition, the EPA discovered several other violations, including improper labeling, storing, and maintenance of hazardous waste containers.

Source: http://www.pollutionequipmentnews.com/cgi-bin/Article/PEN/Number.idc?Number=1401 (6/29/2015).

Coal Mining Co.'s CWA Settlement With Ky. Tossed By Judge

A Kentucky state judge rejected two settlement deals between the state of Kentucky and Frasure Creek Mining LLC over alleged violations of the Clean Water Act, saying that a proposed consent decree isn't in the public interest because its penalties won't deter future violations. The Franklin Circuit Court ruled in favor of environmental group Appalachian Voices, finding that a proposed consent decree — agreed to four years ago by the coal mining company and the Kentucky Energy and Environment Cabinet to settle alleged violations from 2008 to 2010 — is neither fair, reasonable nor in the public interest. The judge denied the regulator and Frasure Creek's motion to enter the proposed consent judgment, saying it is unacceptable because the economic benefit of violating the law outweighs the cost of complying with regulations and the regulator lacks the resources to make sure Frasure Creek complies with the law. Environmental groups had alleged in 2010 that the company committed 10,000 violations of the CWA. The consent decree included 1,520 reporting violations and imposed a penalty of $310,000.

The judge also rejected another deal from 2013 between the state and the coal mining company that proposed to settle additional CWA violations allegedly committed in 2011. Environmental groups, including Appalachian Voices and Kentucky Riverkeeper, had filed a citizen's CWA suit against Frasure Creek in August 2011. The coal company and the state reached a settlement agreement in 2013. The Judge granted the environmentalists' motion for summary judgment over that proposed settlement, finding the Cabinet subverted due process and "acted arbitrarily and outside the scope of its authority" by skipping a public notice or comment period.

The judge remanded both settlements back to the Cabinet. In his order rejecting the pre-2011 CWA violations settlement, the Judge said that numerous pollution reports were submitted with the same data for consecutive quarters, or for different places in the same time period, "indicating that the data recorded on these discharge monitoring reports were most likely copied or reproduced without any pretense of compiling and recording accurate data." The judge said that Frasure Creek economically benefited by hiring a substandard laboratory to submit pollution reports, since the savings outweighed the penalties imposed by the State. The judge found that the Cabinet should have disregarded the data it used to calculate the penalties, since it was produced by the same people who misreported the pollution reports and was "inherently unreliable." The judge also noted that, due to budget cuts, the Cabinet lacks the personnel and resources to fully investigate the alleged violations and enforce the law.

Source: Law360, 11/25/ 2014 discussing *Appalachian Voices et al. v. Energy and Environment Cabinet* and *Frasure Creek Mining LLC*, case number 13-CI-584 in the Franklin Circuit Court of Kentucky; and *Energy and Environment Cabinet and Appalachian Voices et al. v Frasure Creek Mining LLC* et al, case number 10-CI-1867 in the Franklin Circuit Court of Kentucky.

Georgia Property Owner Settles Over Past Tenant's Runoff

The property owner of an abandoned Georgia industrial site agreed to finish the ongoing site cleanup and fund supplemental environmental projects in order to settle a Clean Water Act lawsuit. M&K Warehouses, the property owner, and the Chattahoochee Riverkeeper jointly filed the settlement agreement in the U.S. District Court for the Northern District of Georgia. The

riverkeeper had sued M&K on Nov. 25, 2014, alleging runoff pollution coming from the former site of an American Sealcoat Manufacturing facility after also suing American Sealcoat. M&K Warehouses has already spent more than $500,000 on site remediation under a plan approved by the Georgia Environmental Protection Division

Through the settlement, M&K agrees to complete site work to prevent pollution from draining into the Chattahoochee River or its tributaries, and to allow the riverkeeper to inspect its work. The property owner also will contribute up to about $100,000 for supplemental environmental projects, in addition to paying the Chattahoochee Riverkeeper for its legal fees and costs related to investigating the pollution. In its lawsuits, the riverkeeper said American Sealcoat had failed to develop a plan to prevent stormwater from carrying toxic chemicals off the site into nearby waters. Soil testing by the riverkeeper group and the Environmental Protection Agency revealed carcinogenic materials in the streambed of a Chattahoochee River tributary and on land downstream, Riverkeeper Jason Ulseth previously told Bloomberg BNA.

American Sealcoat reportedly shut down its Atlanta-area operation, where it manufactured an asphalt sealant, and left town after the riverkeeper filed suit against it in July 2014. That case concluded with a $10 million civil penalty against American Sealcoat.

Source: BNA Environment Reporter 10/23/2015 discussing *Chattahoochee Riverkeeper v. M&K Warehouses,* N.D. Ga., No. 1:14-cv-03798, 10/19/15.

High Court Denies California Lake Bed TMDL Petition

The U.S. Supreme Court has declined to hear oral argument on whether a total maximum daily load (TMDL) established by a California regional water board may be stated in terms of pollutant concentrations in lake bed sediment. The Supreme Court's denial of the petition for writ of certiorari lets stand a March 30 decision by the California Court of Appeal, Second Appellate District, which held that the Los Angeles Regional Water Quality Control Board "could reasonably determine" that "the lake waters and bed sediment form a single physical environment," rather than distinct environments. The court of appeals rejected arguments made by the owners of property bordering the northern part of McGrath Lake that had claimed that the TMDLs for the lake violates the Clean Water Act, the state water code and California Environmental Quality Act (*Conway v. State Water Res. Control Bd.*, 185 Cal.Rptr.3d 490, 235 Cal.App.4th 671, 2015 BL 88073 (Cal. Ct. App. 2015)). The plaintiffs had claimed the amendment would hold them responsible for remediating pesticides and polychlorinated byphenyls (PCB) from the sediment bed of the 12-acre lake located in Ventura County, northwest of Los Angeles. They had asked the high court whether, under the Clean Water Act, TMDLs for pollutants must be expressed in terms of the amount of pollutants being introduced, or "loaded," into the water?

Under Section 303(d) of the Clean Water Act, states identify waterbodies that do not meet standards for certain pollutants and set TMDLs limiting those pollutants to levels that can be assimilated in the water from both point and nonpoint sources. Although the State Water Resources Control Board generally develops TMDLs in California, the regional board established this one for concentrations of pollutants in the sediment by amendment to the water quality control plan, also called a basin plan. The amendment approved by the Environmental Protection Agency did not contain a remediation method, but instead set a goal of 14 years to

achieve the sediment cleanup envisioned by the TMDL and gave landowners in the watershed two years to enter into an agreement with the board. According to the amendment, natural processes would take longer than 14 years, which means capping and dredging are available methods, according to the court of appeal opinion.

The court of appeal ruled that the regional board "could reasonably determine that the lake bed sediment is not …a distinct physical environment" from the water column. It also found that the CWA implementing regulations do not prohibit the regional board from framing TMDLs in terms of concentrations of pollutants in sediment and grant the regional board authority to determine their appropriate measure. Finally, the court of appeal ruled that the regional board complied with CEQA, which exempts a certified regulatory program such as the TMDL from full environmental review.

Source: BNA Environment Reporter 10/23/2015 discussing *Conway v. State Water Res. Control Bd.*, 2015 BL 342521, U.S., No. 15-337, *cert. denied* 10/19/15.

Federal Oil Spill Law Doesn't Extend to Groundwater Leaks

The scope of the federal oil spill law includes discharges into navigable waterways, but not oil released into groundwater, the U.S. District Court for the District of Maryland ruled Oct. 20, 2015. The ruling dismissed a claim by Chevron USA, Inc. under the Oil Pollution Act (33 U.S.C. §2701) against the owner of an underground pipeline for an oil leak that ended up in Baltimore Harbor. The oil allegedly leaked into ground water beneath the pipeline and migrated into the harbor, but that scenario isn't one covered by the Oil Pollution Act—even though the ground water ultimately connected to "navigable waters" covered by the law, the court said, citing the Fifth and Seventh circuits.

The Oil Pollution Act imposes liability on those who discharge oil "into or upon the navigable waters or adjoining shorelines," but the court said that doesn't include leaks into groundwater, citing decisions by the two circuit courts that have addressed the question (*Rice v. Harken Exploration Co.*, 250 F.3d 264 (5th Cir. 2001); *Vill. of Oconomowoc v. Dayton Hudson Corp.*, 24 F.3d 962 (7th Cir. 1994)). Here, Chevron's complaint "very clearly alleges" that oil leaked into ground water beneath the site, and therefore failed to state an Oil Pollution Act claim, the court said.

Source: BNA Environment Reporter 10/23/2015 discussing *Chevron USA, Inc. v. Apex Oil Co.*, 2015 BL 344596, D. Md., No. 15-cv-00341, 10/20/15

Stormwater Agreement Approved for Transport Company

A national bulk transportation company will have to seek coverage under Washington state's industrial stormwater general permit for discharges from its Kent facility as part of an agreement approved by a federal court. In an Oct. 16 order, the U.S. District Court for the Western District of Washington granted the motion for entry of consent decree codifying the agreement with the environmental advocacy group, *Waste Action Project*. The group alleged in a June 9 citizen suit that Quality Carriers, Inc., violated Sections 301(a) and 402 of the Clean Water Act, as well as its National Pollutant Discharge Elimination System permit, by discharging and allowing a tenant to discharge industrial stormwater and other pollutants from its Kent facility into Mill Creek, a navigable body of water in the Green River watershed. In addition to attorney fees, the

consent decree requires Quality Carriers to pay $55,000 to Green River Community College Foundation for environmental benefit projects in the watershed.

The consent decree directs Quality Carriers to apply for coverage under the NPDES general permit to the Washington Department of Ecology, which administers the discharge program in the state. If the department denies the permit application, Quality Carriers must ensure that Novirtis, a lessee at the facility, submits an application, according to the decree. It also directs Quality Carriers to comply, or ensure all tenants comply, with permit conditions authorizing stormwater discharges associated with industrial activity and to complete all stormwater monitoring, reporting and training obligations. The company must clean catch basins and stormwater lines on a regular basis and retain a qualified stormwater consultant to update its stormwater pollution prevention plan to meet general permit requirements.

Source: BNA Environment reported 10/23/2015 discussing *Waste Action Project v. Quality Carriers, Inc.*, W.D. Wash., No. 14-cv-00844, 10/16/15).

Judge Finds Coal Mine Discharges Harmed W.Va. Waters as Measured by Conductivity

A West Virginia coal mining operation has violated the Clean Water Act by damaging adjacent waterways with pollution as measured by electric conductivity, according to a federal judge. Ruling in a citizens' lawsuit brought by environmental advocates, the U.S. District Court for the Southern District of West Virginia said "a preponderance" of evidence presented by the groups has established that Fola Coal committed at least one violation of its mining permits by discharging high levels of ionic pollution into the waters of Stillhouse Branch, a stream in Nicholas County, W.Va. According to the decision, runoff from Fola's mine has caused, or materially contributed to, significant adverse impacts to the stream's aquatic ecosystem, in violation of narrative water quality standards. The plaintiffs were required to meet a legal standard of proof, not establish scientific certainty. With the legal standard in mind, "the Court is able to find that the weight of evidence shows that it is more likely than not that high conductivity in streams impacted by alkaline mine drainage causes or materially contributes to chemical and biological impairment," the Court said.

Based on evidence presented at the bench trial, the judge said it's clear that there are significant levels of conductivity downstream from Fola Coal's mining operation and that streams affected by the pollution in this case were found to have significant biological damage compared with unpolluted streams. The lawsuit—brought jointly in March 2013 by the Ohio Valley Environmental Coalition, the West Virginia Highlands Conservancy and the Sierra Club—alleged that the company violated Section 301 of the Clean Water Act, as well as the Surface Mining Control and Reclamation Act, by failing to adequately control runoff from mountaintop removal mines. Last year, Fola tried to derail the case, arguing that the environmental advocates had failed at bench trial to demonstrate that its mining runoff is violating West Virginia's narrative water quality standards; the Judge denied the company's motion to dismiss.

The next step in the case will be determining appropriate remedies for the permit violations, in the form of civil penalties paid to the federal government and injunctive relief to clean up the streams. This judgment follows a similar decision last year that found that discharges—also resulting in high conductivity—from West Virginia coal mines are harming streams. That

decision, against Alpha Natural Resources subsidiaries, resulted in a December 2014 settlement that is expected to yield active first-time treatment of conductivity-related pollution in the area.

Source: BNA Environment Reporter 1/30/2015, discussing *Ohio Valley Envtl. Coal. v. Fola Coal Co. LLC,* S.D. W.Va., No. 2:13-5006, 1/27/15.

Kentucky General Permit Shields Mine From Selenium Charges

Kentucky's decision not to restrict, through a general permit, a surface mine's selenium runoff has been upheld by the U.S. Court of Appeals for the Sixth Circuit Ruling in a citizen suit brought by the Sierra Club under the Clean Water Act. The court found that the state's general permit issued to ICG Hazard LLC shields the company from liability, even though selenium levels in the mine's discharges exceed the state's water quality standard threshold. The "permit shield" covers ICG's discharges into surrounding waterways, the split court said, granting the company's request for summary judgment. A dissenting judge said this ruling "allows the silence of local Kentucky environmental regulators to turn the Clean Water Act on its head" by letting a general permit tacitly authorize toxic discharges of selenium.

The Sierra Club challenged the conduct of ICG's Thunder Ridge surface coal mine in Leslie County, which was issued a five-year general permit by the Kentucky Division of Water in accordance with the National Pollutant Discharge Elimination System. Under the general permit, ICG was allowed to discharge certain listed pollutants into Kentucky waterways, within set conditions that included effluent limitations for several specific pollutants, but not selenium. Aware that excessive selenium discharges were possible, the state permit called for one-time monitoring—a single sampling during the five-year life of the permit—to determine whether selenium levels in surrounding bodies of water were within acceptable levels.

The Sierra Club brought suit in U.S. District Court for the Eastern District of Kentucky, alleging that ICG's discharges of selenium violated the Clean Water Act (33 U.S.C. §1251) and the Surface Mining Control and Reclamation Act (30 U.S.C. §1201) (*Sierra Club v. ICG Hazard*, E.D. Ky., No. 11-148, 5/24/11). In September 2012 the court awarded summary judgment in ICG's favor on all claims, prompting the Sierra Club's appeal.

The district court said the Clean Water Act's permit shield protected ICG from liability and, because the general permit did not set limits for selenium discharges, ICG could lawfully discharge, provided it made proper disclosures. As a result, ICG was also protected from liability for violation of Kentucky water quality standards under the Surface Mining Act, the court said, otherwise the water quality standards would "supersede" the permit shield.

Source: BNA Environment Reporter 1/30/2015, discussing *Sierra Club v. ICG Hazard LLC,* 6th Cir., No. 13-05086, 1/27/15.

A Mine Superintendent Gets Six Months Prison

A former gold mine employee is headed to prison after the Eastern District of California imposed a six month sentence and $107,160 in restitution upon a plea to charges of illegally discharging pollution into U.S. waters and harming federal property. Under a plea agreement, the former employee pleaded guilty to two of the five charges stemming from his actions as superintendent at French Gulch Mine in Shasta County, Calif. The individual, a metallurgical engineer, pleaded

guilty to one charge under the Clean Water Act of negligent discharge of a pollutant into U.S. waters and one charge of depredation of U.S. property. The government alleged that the mine lacked a required permit under the National Pollution Discharge Elimination System.

The former employee told officials from the California Central Valley Regional Water Quality Control Board in 2007 that the mine treated and recycled its water and didn't discharge it. In fact, the mine generated more waste water than its system could handle, and liquid wastes discharged many times into abandoned mines, an improvised leach field or other areas. The mine also improperly disposed of mine waste rock, with high concentrations of arsenic and lead, by using it to resurface a road on land owned by the Bureau of Land Management, according to the government. The metallurgical engineer ordered construction of a substandard pipe system to remove contaminated liquid waste from a mill and abandoned mine on BLM property, but the system broke for up to eight hours in 2006, allegedly spilling 10 tons of mine tailings into a creek that leads to the Whiskeytown National Recreation Area and eventually the Sacramento River.

According to his attorney, the owners and managers of the mine already were operating the facility when they hired the engineer to restore it, and they misled him by saying it had all the necessary permits. He admitted that he did not examine the permits himself. The original indictment, filed July 1, 2010, also named French Gulch Nevada Mine Corp., Bullion River Gold Corp. and the Mine Chief Executive Officer as defendants. However, the two corporations have declared bankruptcy, and the charges against them have been dropped. The Mine CEO hasn't been prosecuted because he has been out of the U.S. since he was indicted. This left the engineer as the only person prosecuted.

Source: BNA Toxics Law Reporter: News Archive 03/05/2015, discussing *United States v. Kim*, E.D. Cal., No. 2:10-CR-00255, *sentencing* 2/26/15.

Gallow Glass Co. Used Hazardous Sludge To Make Wine Bottles, California Alleges

A Modesto, Calif. glass company used hazardous sludge from its air pollution control equipment to make wine bottles, the California's Department of Toxic Substances Control alleges, in a suit announced March 2. The complaint against Gallo Glass Co. alleges multiple violations of the California Health and Safety Code (HWCL). California administers the HWCL in lieu of federal administration of the Resource Conservation and Recovery Act. The company had claimed it was recycling the sludge. The sludge is considered hazardous waste, exhibiting toxicity under the Toxicity Characteristics Leaching Procedure, and must be handled accordingly, the complaint alleges.

Gallo Glass agreed to stop using the sludge to make the bottles in 2014, the DTSC said in a written statement. According to the DTSC, the facility generates hundreds of pounds of sludge a day. State regulators are asking the court for a judgment declaring the company violated hazardous waste laws, unspecified penalties and an injunction to prevent future violations. The company also failed to comply with recycling requirements, regulators said. Specific allegations against Gallo Glass include improper storage of hazardous waste, illegal treatment of hazardous waste, failure to minimize releases to the environment and failure to train personnel. The suit also claims Gallo Glass failed to notify the DTSC of several fires that have occurred at the facility. The state is seeking civil penalties up to $25,000 per day for each violation.

Source: BNA Toxics Law Reporter: 3/10/2015 discussing *California v. Gallo Glass Co.,* Cal. Sup. Ct., No. RG15760440, 2/27/15.

Fragrance and Flavor Manufacturer Agrees To Rebuild Waste Water Treatment Facility

A manufacturer of bulk fragrance and flavor ingredients will close and rebuild its waste water treatment center to resolve hazardous waste allegations, under the terms of a proposed consent decree filed Jan. 2, 2015. The government alleged that Renessenz LLC violated Section 3005 of the Resource Conservation and Recovery Act by failing to obtain required hazardous waste permits and not submitting information on the waste generated at its facility, according to the proposed consent decree. Under the terms of the proposed settlement, the company would construct and install a new waste water treatment facility onsite that would be in compliance with all state and federal hazardous waste regulations. The company also would develop a draft closure plan that would be subject to review and approval by the EPA. If Renessenz cannot remove all waste from the various components of the system and surrounding soils cleanly, it would have to apply for a permit to perform post-closure care at the facility, according to the consent decree.

At issue is a 192-acre facility on Colonel's Island in Glynn County, Ga., that produces produced bulk fragrance and organic flavor ingredients. Since at least 2008, the facility has operated an on-site waste water treatment facility but has never obtained permits required for treatment, storage and disposal facilities nor submitted a characterization of its waste, according to the complaint. Samples taken of the waste during an on-site inspection revealed concentrations of certain compounds, including benzene, above regulatory permitted limits.

Source: BNA Toxics Law Reporter 1/16/2015 discussing United States v. Renessenz, S.D. Ga., No. 14-cv-00185, *consent decree* 1/2/15.

Barton to Pay $1.1 Million for RCRA Violations

Proposed Consent Decree for Barton Solvents

Barton Solvents Inc. agreed to pay a civil penalty of $1.1 million and take measures to ensure its blending and packaging facilities meet safety and environmental requirements, according to a proposed (consent decree filed Oct. 26, 2015. The proposed settlement resolves multiple environmental violations at five of the company's blending and distribution centers in Iowa, Kansas and Wisconsin.

In 2007, a spark caused an explosion at the Barton Solvents facility in Des Moines, leading to the evacuation of about 6,000 residents of the town and causing 12 people to seek medical attention. That explosion and an explosion and fires at another Barton facility were caused by violations of the Clean Air Act General Duty Clause, the Justice Department alleged. Inspections by the Environmental Protection Agency at Barton facilities found widespread violations of federal and state Resource Conservation and Recovery Act hazardous waste storage requirements and the Clean Water Act spill prevention, control and countermeasure requirements.

Source: BNA Toxics Law Reporter 10/29/2015, discussion *United States v. Barton Solvents Inc.*, S.D. Iowa, No. 15-378, *consent decree filed* 10/26/15. Available at:

http://www.justice.gov/sites/default/files/enrd/pages/attachments/2015/10/26/barton_consent_decree.pdf.

2. Municipal

a. Wet Weather

Sewer Authority Reaches $82 Million Deal With EPA

The City of Harrisburg and Capital Region Water, a wastewater authority in Pennsylvania reached an $82 million deal with the federal government after it allegedly released eight million gallons of raw sewage into the Susquehanna River and Paxton Creek over six years. Under the agreement, Capital Region Water must take major steps to improve its operations, including upgrades at its water treatment plant.

a. Other Municipal

New Jersey Man Steals $100,000 In Water

A New Jersey man pleaded guilty to stealing around $100,000 of water. The owner of Reliable Wood Products diverted the water from a pipe away from the water meter, according to CBS New York. Reliable Wood Products, which specialized in the processing and manufacturing of landscaping products, has two facilities in Jersey City, water was diverted water from both locations. According to the U.S. Attorney's office, District of New Jersey the crime spanned from 2007 to 2012. United Water New Jersey was responsible for collecting payment on behalf of the Jersey City Municipal Utilities Authority. The diversion of water around the meters resulted in a false calculation of the volume of water used by under-reporting such usage. As a result, Jersey City Municipal Utilities Authority was defrauded over $100,000. "The conspiracy charge to which Vene pleaded guilty carries a maximum potential penalty of five years in prison and a $250,000 fine. Sentencing is scheduled for Jan. 26, 2015," the U.S. Attorney's Office said.

Source: Water On-Line, 11/20/2014. See also, http://newyork.cbslocal.com/2014/10/20/new-jersey-businessman-admits-stealing-100000-worth-of-water/

EPA 'Formal Objection Letter' Appealable As Final Order, CA POTW Group Claims

An Environmental Protection Agency "formal objection letter," threatening to veto state-proposed Water Act discharge permits is appealable as a final order, advocates for publicly owned treatment works told the Ninth Circuit Dec. 31, 2014. The Southern California Alliance of Publicly Owned Treatment Works asked the U.S. Court of Appeals for the Ninth Circuit to review the formal objection letter the EPA issued to the California Regional Water Quality Control Board for the Los Angeles Region.

The letter from the EPA Region IX water division director, said the Board must include numeric and daily effluent limits for waste water toxicity in draft Clean Water Act permits for two water reclamation sites, the Whittier Narrows Water Reclamation Plant and the Pomona Water Reclamation Plant. The EPA letter said the agency would not lift its formal objection to the permits unless the changes articulated in the letter are made. The alliance claims the EPA's formal objection letter is tantamount to "functionally denying the permits."

At issue are the objections the EPA raised regarding the board's failure to include specific whole effluent toxicity limits in the draft National Pollutant Discharge Elimination System permits for the two reclamation plants. Whole effluent toxicity, or WET, refers to the aggregate toxic effect to aquatic organisms from all pollutants contained in a facility's waste water effluent. WET is an indicator of toxic pollutants in waste water discharges. In its Sept. 4, 2014, letter, the EPA told the Regional Board to revise and resubmit the draft NPDES permits to include both numeric and daily effluent limits for chronic toxicity of waste water effluent, among other recommendations. The agency warned the board that it "shall" take over the exclusive NPDES authority over these discharges if the board failed to respond within 90 days. "The challenged USEPA action is the functional equivalent of a denial of state-proposed NPDES permits that required the imposition of specific provisions in the permits, including effluent limitations, which are unnecessary, inconsistent with law, infeasible to consistently comply with, and may place the petitioner's members in enforcement jeopardy from civil and even criminal enforcement actions or from third-party citizen suits under the Clean Water Act," the Southern Alliance said in its petition. The Alliance cited the 40 C.F.R. 122.44(d) and (k) that govern the establishment of numeric toxicity limits on waste water effluent in state NPDES permits, and 40 C.F.R. 122.45(d) governing outfalls from permitted facilities, saying the EPA's letter was inconsistent with existing published regulatory standards and requirements. For instance, 40 C.F.R. 122.45(d) states that publicly owned waste water treatment plants will use average weekly and average monthly discharge limits on continuous outfall discharges, whereas all other waste water discharges would use maximum daily and average monthly discharge limits. In its Sept. 4, 2014, letter, the EPA said such effluent limits would restrict highly toxic daily discharges that are of significant concern to protect water quality standards when they occur, ensure longer term compliance with toxicity water quality standards and clarify permit compliance requirements for everyone. The Ninth Circuit has given the petitioners until March 23 to file its opening brief, and the EPA until April 20 to respond.

Source: BNA, Inc. Toxics Law Reporter - Latest Developments 1/5/2015 discussing S. *California Alliance v. EPA,* 9th Cir., 14-74047, 12/31/14

b. Other

3. Non-Water

Groups Seek to Strip Wisconsin's NPDES Permit Authority

Wisconsin environmental advocates Oct. 20 petitioned the Environmental Protection Agency to strip the state of its authority to run its own clean water program, saying regulators have done a miserable job of implementing and enforcing water standards. They also charged that lawmakers have undermined regulatory efforts. The legal nonprofit, Midwest Environmental Advocates, filed a petition for corrective action with EPA on behalf of 16 Wisconsin environmental groups. The petition seeks federal intervention to remedy concerns over water degradation across the state. Specifically, the petitioners want EPA to strip the Wisconsin Department of Natural Resources of its authority to issue Wisconsin Pollutant Discharge Elimination System (WPDES) permits as delegated under the federal Clean Water Act. MEA accused the department of poorly implementing and enforcing Wisconsin's water program and failing to engage with citizens on clean water issues. Moreover, the organization asserted the agency does not have the financial and political support to properly operate the program. As a result, the petition said Wisconsin no

longer meets the requirements of the Clean Water Act. Wisconsin's NPDES program is not the only one under siege, EPA Region 5 reportedly is currently reviewing five petitions for withdrawal of state NPDES programs.

The petition argued EPA has a responsibility to withdraw delegated authority from Wisconsin because the DNR:

- no longer has legal authority to administer the WPDES program in full compliance with the Clean Water Act;
- operates the permit program in a manner that violates the CWA; and
- fails to operate an adequate regulatory program for water quality-based effluent limits for inclusion in state-issued discharge permits.

The MEA's petition highlights the Department's continued failures despite EPA's previous demands for improvement. Such demands were expressed in a July 2011 letter from Region 5 Administrator Susan Hedman to DNR Secretary Cathy Stepp that pointed to 75 "omissions" and "deviations'' between Wisconsin's water program and federal requirements. An EPA spokesman said the state has taken steps to address the concerns Hedman expressed in her July 2011 letter. "In July 2015, WDNR reported to EPA that 40 issues had been resolved. EPA is reviewing to confirm WDNR's assertions. WDNR must continue to report to EPA on progress to address the remaining issues."

Source: Bloomberg BNA Toxics Law Reporter - Full text of the petition for corrective action can be found at http://midwestadvocates.org/assets/resources/Petition%20for%20Corrective%20Action/2015-10-19_PCA_-_Signatures.pdf.