



New York Water Environment Association, Inc.

The Water Quality Management Professionals

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Recent Environmental Legislative, Regulatory and Judicial Developments¹

January 29, 2009 through May 5, 2009

I. NEW YORK

A. 2009-2010 Budget

Expanded Bottle Bill (S.59B/A.159B, Part SS)

Amends the Environmental Conservation Law for the purpose of expanding the State returnable container act ("Bottle Bill") to include bottled water; requiring that 80% of the unclaimed deposits be collected by the Department of Taxation and Finance for deposit into the state's general fund. Increases the current handling fee paid to a vendor, operator of a redemption center, or distributor to three and one half cents for every beverage container accepted. All redeemable beverage containers must have a New York State-specific universal product code (UPC) to prevent redemption of beverage containers in other states. [Note, this provision will likely lead to a delay in the implementation date.] This measure is estimated to generate an additional \$115 million in revenue annually for the state.

Certain SPDES Program Fees Increased (S.59B/A.159B, Part JJ)

Amends the Environmental Conservation Law to increase certain SPDES program fees. The fee increases will raise revenues to be used to inspect and monitor regulated facilities. This will

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<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: 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.

generate additional revenue of \$5 million to be deposited into the Environmental Regulatory Account.

Increases Title V of the Federal Clean Air Act Fees (S.59B/A.159B, Part BBB)

Authorizes an increase in the maximum Title V facility per ton operating permit fee on regulated contaminants from \$45 to a maximum of \$65 depending on the level of emissions.

The fee is:

- \$45 a ton if emissions are less than 1,000 tons a year;
- \$50 a ton if emissions are more than 1,000 tons a year but less than 2,000 tons a year;
- \$55 a ton if emissions are more than 2,000 tons a year but less than 5,000 tons a year;
- \$65 a ton if emissions are 5,000 or more tons a year.

This measure increases the current annual cap from 6,000 tons per contaminant to 7,000 tons. This is estimated to raise an additional \$2.5 million annually.

Source: BCNYS at <http://www.bcnys.org/inside/nysbudget.htm#environment>

B. Other Legislation which is "Moving"

A4272 Brodsky (MS)/**S 1730** SCHNEIDERMAN Add Art 71 Title 45 SS71 – 71-4513, and S71-1311, En Con L Enacts "**private environmental law enforcement act**"; authorizes any private citizen who has an interest which is or may be adversely affected to commence civil judicial actions for injunctive or declaratory relief to remedy environmental ;harms under certain circumstances; provides that such action may be commenced against any person for any violation of an administrative or court order compelling an investigation or remediation of an inactive hazardous waste disposal site.

3/17/09 passed assembly

03/17/09 delivered to senate

3/17/09 REFERRED TO ENVIRONMENTAL CONSERVATION

A4110 (No same as) **Requires applicants for NYSDEC permits to disclose information concerning other permits held and/or revoked, enforcement actions, criminal convictions, fees or fines owed**, and other information relating to compliance by the applicant or any corporation of which he or she is an officer, director, or large stockholder with state, federal, or foreign environmental laws or regulations and certain other laws.

1/30/09 referred to environmental conservation

03/03/09 reported referred to codes

3/17/09 reported

3/19/09 advanced to third reading cal.265

A6363 Sweeney / **S 848** MARCELLINO Relates to the definition of freshwater wetlands; repeals section relating to the applicability of the freshwater wetlands article; **provides authority**

of DEC over wetlands which are one acre or more; amends permitting requirements for subdivision of land.

03/02/09 referred to environmental conservation

3/17/09 reported

3/19/09 advanced to third reading cal.271

S1564 THOMPSON (No same as) AN ACT to amend the environmental conservation law, the general municipal law, and the tax law, in relation to the brownfield cleanup program, the environmental restoration program, and the brownfield opportunity area program; and to amend the New York state urban development and research corporation act, in relation to the brownfields shovel-ready program

02/03/09 REFERRED TO ENVIRONMENTAL CONSERVATION

02/10/09 REPORTED AND COMMITTED TO FINANCE

C. Regulation and Policy

1. Water

New York Water Sheds are not major contributors of Nutrients to the Gulf of Mexico

Each of the 818 large watersheds in the Mississippi/Atchafalaya River Basin (MARB) has been ranked on the basis of model estimates of nitrogen and phosphorus yields delivered to the Gulf of Mexico by the U.S. Geological Survey (USGS), in cooperation with the U. S. Environmental Protection Agency. The Model findings show that 11 watersheds are reliably placed in the top 150 category for total nitrogen (three for total phosphorus) delivered to the Gulf of Mexico with 90 percent certainty. Although only a few watersheds could be placed into the top 150 category, numerous watersheds could be removed from the top 150 category. A total of 513 watersheds for total nitrogen and 505 watersheds for total phosphorus are reliably placed outside of the top 150 category with 90 percent uncertainty.

Source: Water and Wastewater News, April 7, 2009. The data can be found at http://water.usgs.gov/nawqa/sparrow/nutrient_yields/

NYWEA and NYSDEC WWTP Workshops

Local and Elected Official Panels

The 'Panels on Wastewater for Local and Elected Representatives' have been scheduled for September 29th in Lake Placid (Basic Session) and on November 4th in Albany (Advanced Session) at the DEC Headquarters at 625 Broadway. These outreach programs are intended for mayors, supervisors, administrators, clerks, and sewer board members. The focus is on the importance of the wastewater infrastructure and the need to maintain and invest in that valuable asset. Contact NYWEA at (315) 422-7811 to be added to the mailing list.

Aeration Systems

NYWEA has scheduled two workshops entitled 'Aeration Systems for Municipal WWTP's: Application, Design, and Energy Considerations'. Knights Inn in Little Falls on May 28 and IBM in East Fishkill on June 16. The agenda includes NYSERDA's 'Focus on Water & Wastewater Systems Program', energy efficient aeration systems, overview of aeration systems,

sequencing batch reactors, and blower and control systems. Contact NYWEA at (315) 422-7811 for registration.

FOG Management Overview - Controlling Collection System Impacts and Disposal Options

May 13, 2009 at the RIT Conference Center in Rochester, NY
ETC # 0971 for 7 renewal training contact hours
Cost is \$120 payable to NEIWPC - Contact NEIWPC at (978) 323-7929 or
DEC's Tim Miller at (518) 402-8106 or email tjmiller@gw.dec.state.ny.us

Identification of Filamentous Organisms in Activated Sludge

May 18 and 19, 2009 at the Webster Village Meeting Hall in Webster, NY – ETC # 0972
And May 21 and 22, 2009 at Ulster Community College in Stone Ridge, NY – ETC # 0973
Cost is \$250 payable to NEIWPC - 12 renewal training contact hours
Contact NEIWPC at (978) 323-7929 or DEC's Tim Miller at (518) 402-8106 or email
tjmiller@gw.dec.state.ny.us

Advanced Activated Sludge Workshop

September 1 and 2, 2009 at the Alexandria Bay Municipal Complex
RTC # 11586-09 for 12 renewal training contact hours
Cost is \$70 payable to NYWEA – Central Chapter
Contact DEC's Tim Miller at (518) 402-8106 or email tjmiller@gw.dec.state.ny.us
Source: NYSDEC MAY 2009 What's Up With Wastewater

2. Non-Water

Paterson Orders State to Review Regulations for Regional Climate Initiative

Gov. David A. Paterson has ordered a review of State regulations to implement the Regional Greenhouse Gas Initiative (RGGI), including provisions that grant free allowances to certain electric generators with long-term contracts. Reportedly, the review will involve "fine tuning" the regulations, State will remain "fully committed" to the RGGI program. One area to be reviewed is a provision that sets aside 1.5 million carbon dioxide emissions allowances to be granted free to electricity generators with long-term fixed-price contracts. Power generators had asked the State to set aside 6 million allowances. Under RGGI, electricity generators must purchase one allowance for every ton of carbon dioxide emissions. The justification for the free allowances is that generators with long-term fixed-price contracts, unlike other generators, are unable to pass the added costs of carbon dioxide allowances on to their customers. The decision to review the regulations comes about one month after a cogeneration plant sued the state to overturn RGGI. The main issue in the lawsuit is the allocation of free allowances, which the plaintiff, Indeck Corinth, claims are insufficient (*Indeck Corinth v. Paterson*, N.Y. Sup. Ct., No. 2009369, 1/29/09).

Source: BNA Environment Reporter 3/13/09

DEC Proposed Air Regulations Changes

- DEC is preparing to propose a rule which would limit emissions of volatile organic compounds (VOC's) from commercial and industrial adhesives, sealants and primers. The proposed rule is based on a model rule which was developed by the Ozone Transport Commission (OTC) as part of a regional effort to attain and maintain the eight-hour

ground-level ozone standard and reduce eight-hour ozone levels. The anticipated effective date for this rule is January 1, 2010. This proposed rule would amend 6 NYCRR Part 228.

- The Department intends to revise 6 NYCRR Subpart 202-2 "Emission Statements" to require the reporting of the six Greenhouse Gases (GHGs); Methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆), as well as other minor edits to update Subpart 202-1.

DEC - New Policy on Evaluating GHG in EISs

Guide for Assessing Energy Use and Greenhouse Gas Emissions in an Environmental Impact Statement, provides instructions to DEC staff for reviewing an environmental impact statement (EIS) that includes a discussion of energy use or greenhouse gas (GHG) emissions. Other state and local agencies may choose to use this guide when serving as lead agency for a project subject to an EIS that includes a discussion of energy use or GHG emissions.

Source: BCNYS March 9, 2009 Environmental Committee Update, April 24, 2009 (<http://www.dec.ny.gov/permits/52508.html>)

D. Judicial and Enforcement

Claims Alleging that Town and Village Negligently Maintained and Inspected Sewer Line and Storm Drainage System Reinstated

Homeowners in the Village of Piermont commenced an action seeking to recover damages caused by flooding on their properties during a tropical storm in 1999. The properties were located downhill from a former railroad bed running parallel to the Hudson River that is now used as a public park. The railroad bed contains a storm water drainage system that allows water to drain into the river. The homeowners claimed that the Village and the Town of Orangetown negligently designed and maintained the drainage system which caused sewage from the system to flow onto their properties. The defendants moved for summary judgment, which was granted by the trial court. On appeal, the Appellate Division reversed, holding that although the Village and Town were entitled to immunity from liability arising out of claims that they negligently designed the storm drainage system and sewer line, the trial court erred in dismissing the claims based on theories of negligent inspection and maintenance of the drainage system and sewer line given that neither defendant established that they did not negligently maintain and inspect these things.

Source: Environmental Law in New York, January 2009 discussing *Holmes v. Incorporated Village of Piermont* (54 A.D.3d 809; 863 N.Y.S.2d 774 (2d Dept. 2008).)

Challenge to Administrative SPDES Renewal Defeated (JFK Airport)

An environmental nonprofit group commenced an Article 78 proceeding seeking to review a determination by DEC that renewed the State Pollutant Discharge Elimination System permit for JFK Airport. In April 2007, the trial court denied the petition and dismissed the proceeding. On appeal, the Appellate Division affirmed, holding that the trial court properly determined that DEC did not violate the Environmental Conservation Law by issuing an administrative renewal before it had completed a substantive review of the permit.

Source: Environmental Law in New York, January 2009, discussing *Nation Resources Defense Council v. New York State Dept. of Env. Conservation*, 54 A.D.3d 866 (2d Dept. 2008).

Hudson River Dredging Delayed by Suit Over Water Supply

The lawsuit, filed in the U.S. District Court in Albany, asks for a temporary restraining order to delay the expected May start of the dredging project until EPA agrees to pay the cost of providing Troy water to Waterford and Halfmoon. EPA expects to begin dredging sometime in May to start the six-year, \$750 million Superfund cleanup project. The project will dredge PCBs that got into the river from General Electric plants in Fort Edward and Hudson Falls. Polluted river bottom sediments will be processed at a new facility in Fort Edward, and shipped by rail to a hazardous waste dump in Texas. EPA had offered to pay for Troy water only when PCB levels in the river become unsafe downriver at the towns' drinking water intakes or when there is not enough time to test river water before it reaches the intakes. About 30,000 people in the two Saratoga County towns, as well as the Mechanicville School District, rely on the Hudson for drinking water. GE is paying \$7 million toward the \$8.2 million cost of a new water line currently being built to connect Waterford and Halfmoon to Troy.

Source: Albany Times Union, Feb. 27, 2009

II. FEDERAL

A. Legislation

Clean Water SRF Funding and Affordability

The *Clean Water Affordability Act (S. 3443)*, a bill that would amend the Federal Water Pollution Control Act to update a program to provide assistance for the planning, design, and construction of treatment works to intercept, transport, control, or treat municipal combined sewer overflows (CSOs) and sanitary sewer overflows (SSOs), and to require the EPA Administrator to update certain guidance used to develop and determine the financial capability of communities to implement clean water infrastructure programs was recently re-introduced. *The Clean Water Affordability Act* is aimed at updating EPA's clean water affordability policy, which puts undue strain on the budgets of local communities. The current EPA affordability policy does not provide for a full and accurate representation of the financial impacts of clean water investment programs on communities struggling to meet federal regulations for improving their water infrastructure. *The Clean Water Affordability Act* authorizes \$1.8 billion over five years for a grant program to help financially distressed communities update their aging infrastructure. The program would provide a 75-25 cost share for municipalities to use for planning, design, and construction of treatment works to control combined and sanitary sewer overflows. The legislation would also establish that: the implementation schedule for water quality related improvements must be tailored to the affected community's unique financial condition; a financial capability assessment should consider more broadly each community's economic situation; and environmental improvements should be structured to mitigate the potential adverse impact of their cost on distressed populations. To view **S. 3443**, visit: <http://www.govtrack.us/congress/bill.xpd?bill=s110-3443>.

H.R. 1262, which was approved on March 5, authorized \$18.7 billion for the Clean Water state revolving funds program. In addition to financing state revolving funds, the bill authorizes \$1.8 billion over five years to control combined and sanitary sewer overflows; and would

provide a uniform, national standard for notifying the public of these overflows. To view **H.R. 1262**, visit: <http://www.govtrack.us/congress/billtext.xpd?bill=h111-1262>.

Source: WEF This Week in Washington 4/24/09

2010 Budget Plan Assumes Reinstatement of Superfund Tax

President Obama's proposed budget for fiscal year 2010 assumes that the superfund tax would be reinstated, resurrecting an issue that has been the subject of little debate in Congress since Republicans took control in 1995. With support from the White House and congressional committees, prospects could change for reinstating the "polluter pays" tax on oil and chemical companies that proponents say was a central principle of the 1980 superfund law, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA). The Administration's 2010 budget outline assumes \$17.2 billion in revenues will be generated from fiscal 2011 through 2019 by reinstating taxes that CERCLA imposed on oil and chemical companies, and on certain corporate profits. The budget proposal stipulates that the tax would take effect in 2011. The budget assumes the "same rates would apply as when the taxes expired in 1995." One bill (H.R. 832) would reinstate until 2019 a 9.7 cent-per-barrel tax on petroleum, a tax on 42 chemicals, and a corporate environmental income tax of 0.12 percent on taxable income in excess of \$2 million. Both bills were referred to the House Committee on Ways and Means. Sen. Frank Lautenberg (D-N.J.), who chairs the Senate Environment and Public Works Subcommittee on Superfund, Toxics and Environmental Health, also intends to introduce a bill, most likely after the administration's detailed budget for fiscal 2010 is released April 1.

Source: BNA Toxics Law Reporter, 3/12/09, discussing the *Superfund Polluter Pays Act of 2009* (H.R. 832), the *Superfund Reinvestment Act of 2009* (HR 564)

Bill to Strengthen BEACH Act Protection

U.S. Reps. Frank Pallone Jr. (D-N.J.), Tim Bishop (D-N.Y.), and Brian P. Bilbray (R-Calif.) and U.S. Sens. Frank R. Lautenberg (D-N.J.) and George Voinovich (R-Ohio) introduced legislation on April 24 requiring tough new beach water quality testing and public notification standards so that beachgoers are better informed about the safety of their beaches. The Clean Coastal Environment and Public Health Act of 2009 reauthorizes grants awarded to states through the Beaches Environmental Assessment and Coastal Health (BEACH) Act through 2013. It also will increase the annual grant levels from \$30 million to \$60 million. The legislation requires the U.S. Environmental Protection Agency to approve the use of rapid testing methods that detect bathing water contamination in two hours or less. Current water quality monitoring tests, only test for bacteria levels and take 24 to 48 hours to produce reliable results. During this time, many beachgoers can be unknowingly exposed to harmful pathogens. More immediate results would prevent beaches from remaining open when high levels of bacteria are found. In addition to the water quality monitoring and notification standards currently required under the BEACH Act, the legislation would expand the scope to include pollution source tracking and prevention efforts. The bill also requires that beach water quality violations are disclosed not only to the public but also to all relevant state agencies with beach water pollution authority. The Clean Coastal Environment and Public Health Act will hold states accountable by requiring the EPA administrator to conduct annual reviews of grantees' compliance with the BEACH Act process requirements. Grantees will have one year to comply with the new environmental standards or be required to pay at least a 50 percent match for their grant until they come back into compliance.

Source: Water and Wastewater News, May 1, 2009 (See <http://www.govtrack.us/congress/bill.xpd?bill=h111-2093>)

B. Regulatory and Policy

1. Water

Peter Silva Nominated as EPA Assistant Administrator for Water

President Obama has nominated Peter S. Silva, senior policy adviser for the Metropolitan Water District of Southern California, as the EPA assistant administrator for water. Silva is a civil engineer with nearly 32 years of experience in the water and wastewater fields. If confirmed by the Senate as head of EPA's Office of Water, Silva would be in charge of the agency's programs implementing the Clean Water Act and the Safe Drinking Water Act.

Prior to his position with the Southern California water district, Silva was the vice chairman of the California Water Resources Control Board for six years. He has served in various public sector positions specializing in water resources policy with extensive experience in U.S.-Mexico border issues. Silva was appointed by President Clinton to serve for three years on the board of the Border Environment Cooperation Commission, established under the North American Free Trade Agreement to protect and enhance the environment in the U.S.-Mexico border region. He also served as the commission's deputy general manager for three years in Ciudad Juarez, Mexico. His other experience includes 10 years with the city of San Diego and four years in charge of the San Diego office of the International Boundary & Water Commission, a joint U.S. - Mexican organization that helps implement the boundary and water treaties of the two countries. Silva also spent five years with the California Regional Water Quality Control Board in San Diego.

Source: This Week in Washington from WEF 4/9/09, updated Washington Post "Head Count" on April 28, 2009.

NCAR Study Blames Climate for River Water Loss

Rivers in some of the world's most populous regions are losing water, according to a comprehensive study of global stream flows. The research, led by scientists at the National Center for Atmospheric Research (NCAR) in Boulder, Colo., suggests that the reduced flows in many cases are associated with climate change and could potentially threaten future supplies of food and water. The results will be published May 15 in the American Meteorological Society's *Journal of Climate*. The research was supported by the National Science Foundation (NSF), NCAR's sponsor. The scientists, who examined stream flows from 1948 to 2004, found significant changes in about one-third of the world's largest rivers. Of those, rivers with decreased flow outnumbered those with increased flow by a ratio of about 2.5 to 1. In addition, the scientists reported greater stream flows over sparsely populated areas near the Arctic Ocean, where snow and ice are rapidly melting.

Source: Water and Wastewater News, April 27, 2009 (<http://www.wwn-online.com/articles/71800>)

Guidance on the Development, Evaluation, and Application of Environmental Models

EPA has released the *Guidance Document on the Development, Evaluation, and Application of Regulatory Environmental Models* (EPA/100/K-09/003). EPA's Council for Regulatory

Environmental Modeling (CREM) developed the Models Guidance and its companion product, the "Models Knowledge Base," to improve the practices associated with the development, evaluation, and application of models for environmental decision making. EPA is attempting to increase transparency by providing access to its tools and methods to improve the public's understanding of how science is used to make environmental decisions. The Models Guidance does not impose legally binding requirements on EPA or the public, but provides recommendations on the principles of good modeling practice, stressing the importance of model quality, documentation, and transparency with the aim of helping to determine when and how a model can be used to inform a decision.

Source: This Week in Washington from WEF, 4/3/09. The *Guidance* is available electronically at: <http://www.epa.gov/crem>, see also: http://cfpub.epa.gov/crem/knowledge_base/knowbase.cfm.

EPA Withdraws Water Permit Fee Incentive Rule

EPA announced on April 9 that it is withdrawing a rule intended to provide financial incentives for states to use fees when administering a clean water permit program. The agency issued the rule in September 2008. EPA will continue to encourage states to establish and expand their permit fees for their National Pollutant Discharge Elimination System (NPDES) programs. Any funds that would have been used for incentive purposes will instead be allocated to states under an existing grant formula.

Source: This Week in Washington from WEF 4/9/09.

Great Lakes Cleanup and Possible \$5 Billion Trust Fund

President Obama is dedicated to cleaning up and protecting the Great Lakes, and his administration will back measures to support those goals, including setting up a \$5 billion trust fund, two administration officials told the Great Lakes Commission Feb. 24. The trust fund would pay for water infrastructure repairs, wetlands restoration, and cleanup of toxic hotspots, which could be turned into beaches and parks. No details on how the trust fund would be paid for were released. The president's fiscal-2010 budget request also would provide \$475 million for a new EPA-led, interagency Great Lakes Restoration Initiative. The program would target the most significant problems in the region, including invasive aquatic species, non-point source pollution, and contaminated sediment.

Source: BNA Environmental Reporter, 2/27/09

Court Vacates Exemption for S/NPDES Permit for Pesticide Application Near Water

EPA issued a final rule in November 2006 that authorized Clean Water Act exemptions for farmers, public health officials, and ranchers who apply pesticides into, over, or near water bodies to control mosquitoes and other pests. Under the 2006 rule, NPDES permits, were not required as long as the pesticides were sprayed in compliance with the Federal Insecticide, Fungicide, and Rodenticide Act (i.e., in accordance with label directions). That included applications directly over waters to control pests and applications near waters, such as those in nearby forest canopies. The Sixth Circuit vacated the rule in January 2009, holding that pesticide residues and biological pesticides are pollutants subject to regulation under the Clean Water Act. The Justice Department announced on April 8 that it will not seek rehearing of a federal appeals court decision defining pesticides as pollutants and requiring Clean Water Act permits for pesticide application in or near bodies of water. Industry organizations, farm groups,

and two farm-state senators had urged the government to request rehearing, and state water regulators had asked EPA to seek a stay of the court's mandate to enable the agency to work out a compliance regime. Meanwhile, State water pollution control officials have asked the Environmental Protection Agency to seek a two-year stay of this federal court decision. The Association of State and Interstate Water Pollution Control Administrators said, in a March 25 letter, that it wants to work with the agency to determine the best way to address pesticide applications over or near water bodies, adding that it was not sure National Pollutant Discharge Elimination System permits are the best way.

Source: This Week in Washington from WEF 4/9/09 discussing *National Cotton Council of America v. EPA*, 6th Cir., No. 06-4630, (<http://www.westernlaw.org/files-1/09a0004p-06.pdf>) Decision on rehearing announced 4/8/09. Also, BNA Toxics Law Reporter 4/2/09

2. Non-Water

EPA Reinstates Full TRI Reporting Requirements

EPA Administrator Lisa Jackson signed a final rule to reinstate stricter reporting requirements for industrial and federal facilities that release toxic substances that threaten human health and the environment. The final rule reinstates Toxics Release Inventory (TRI) reporting requirements that were replaced by the TRI Burden Reduction Rule in December 2006. The 2009 Omnibus Appropriations Act, signed by President Obama on March 11, 2009, mandated that prior TRI reporting requirements be reestablished. These changes will apply to all TRI reports due July 1, 2009. Following the rule signature, all reports on PBT chemicals must be submitted on the more detailed Form R. For all other chemicals, the shorter Form A may only be used if the annual reporting amount is 500 pounds or less and less than 1 million pounds of the chemical was manufactured, processed or otherwise used during the reporting year.

Source: Weekly Biosolids Update from NBP, April 23, 2009.

Report Criticizes EPA Program Management on Wide Range of Pollutants

The Government Accountability Office (GAO) issued a report on March 5 criticizing EPA for its management of basic responsibilities—controls on air pollution, water pollution, toxic chemicals, and hazardous waste cleanups. The Report stated that although EPA has made some progress in improving its operations, many management challenges persist, and “the repetitive and persistent nature of the shortcomings we have observed over the years points to serious challenges for EPA.” The criticisms were part of a review of major management challenges faced by the agency. The report made it clear that GAO believes many of those challenges stem from enabling legislation that imposes numerous requirements on EPA and from the sheer scale of so many responsibilities, and do not only reflect agency shortcomings. According to GAO: “Additional funds ... will ultimately be needed to narrow the enormous gap between water infrastructure needs and available resources” and EPA should develop better data to support much of its work.” The report said EPA needs more data on the extent of state compliance with standards; on chemicals, including risk assessments; on animal feeding operations that pose a threat of water pollution; and on perchlorate in the environment and in drinking water.

Source: This Week in Washington from WEF 3/13/09. The GAO Report on major management challenges for EPA is available at <http://www.gao.gov/new.items/d09434.pdf>.

EPA Delays Effective Date of Changes to Spill Prevention Plans to Early 2010

The Environmental Protection Agency is delaying for an additional nine months—until early 2010—the effective date of a final rule that sought to ease requirements for businesses to develop plans for preventing spills of petroleum and other types of oil. The amendments to the Spill Prevention, Control, and Countermeasure (SPCC) regulations, issued in December 2008, will become effective on Jan. 14, 2010. EPA had previously delayed implementation of the rule from Feb. 3 to April 4. The agency is also requesting public comment on whether a further delay of the effective date beyond January 2010 may be warranted.

Source: BNA Toxics Law Reporter 4/2/09

C. Judicial and Enforcement

Key Ruling May Allow EPA Overfiling After State Administrative Fines

A federal appeals court has ruled for the first time that state administrative proceedings under the Clean Water Act (CWA) do not preempt citizen enforcement suits – and even EPA enforcement – in certain circumstances, creating the prospect of dual enforcement tracks for dischargers unless states initiate stricter and more costly judicial enforcement proceedings. Allowing citizen law suits to commence even as regulators have issued administrative penalties “accomplishes the goal of not placing obstacles in the way of citizen suits,” the U.S. Court of Appeals for the 11th Circuit ruled Nov. 13. The ruling affirms a decision from the U.S. District Court for the Northern District of Alabama. Federal district courts have issued conflicting rulings on the issue, but the 11th Circuit’s decision marks the first time an appellate court has weighed in on the issue, raising the possibility that dischargers will face higher fines for permit violations and state enforcement options will be limited to judicial proceedings. A review of EPA’s enforcement proceedings by *Inside EPA* found the average penalty, including costs of required environmental mitigation, levied by judicial enforcement proceedings in 2007 was \$1.54 million, while the average penalty for EPA administrative proceedings was \$10,664.

Source: Inside EPA, November 28, 2008 discussing *Black Warrior Riverkeeper, Inc. vs. Cherokee Mining, LLC*.

Sulfuric Acid Manufacturers to Close Plant, Pay \$2 Million Fine

DuPont and Lucite International Inc. agreed to pay \$2 million in civil penalties and to close a sulfuric acid manufacturing unit at a West Virginia facility to resolve alleged Clean Air Act violations. In a proposed consent decree lodged in the U.S. District Court for the Southern District of West Virginia, the companies voluntarily agreed to close a sulfuric acid manufacturing unit at the Belle, W.Va., plant by April 2010 as well as pay \$1 million each to the United States and the state of West Virginia. According to EPA, the companies modified the sulfuric acid plant in 1996 without first obtaining the necessary permits or installing the required emissions controls as required by the Clean Air Act. The New Source Review provisions of the CAA require large emissions sources in areas that are currently in nonattainment of the air quality standards to install updated pollution controls when expanding or modifying facilities in a way that increases emissions. The companies are also alleged to have violated the hazardous air pollution control requirements. With this proposed consent decree, EPA and the Justice Department have now agreed to 22 settlements with sulfuric acid manufacturers, representing 10 percent of the industry.

Source: BNA Toxics Law Reporter, 4/23/09, discussing *U.S. v. DuPont, S.D.W. Va.*, (docket number unavailable, proposed consent decree announced 4/20/09). More information and the proposed consent decree are available at <http://www.epa.gov/compliance/resources/cases/civil/caa/duPontLucite.html>.

River Terminal Operator to Pay \$3 Million Over Water Act Violations

The operator of a river terminal in the St. Louis area will pay a \$3 million fine after pleading guilty to discharging oil into the Mississippi River in violation of the Clean Water Act. The American River Transportation Co. pleaded guilty to knowingly violating the Clean Water Act, in addition, two ARTCO employees (the terminal manager and the maintenance superintendent, pleaded guilty to one felony count (each) of making a false statement. The employees each face a maximum sentence of five years in prison and a fine of up to \$250,000. Sentencing has been set for June 19. ARTCO owns and operates several terminals in the St. Louis area and also operates line boat vessels, hopper barges, harbor and fleeting services, and a fueling terminal. At one of its facilities, ARTCO cleans barges of residue, including grain, fertilizer, oil, and oil-based products. A release of oil was discovered in a cove of the Mississippi River near an ARTCO facility in June 2007. Baker reported the oil to the National Response Center and to other emergency responders, but he and Keilwitz denied knowing the source of the oil. But allegedly both employees knew that the ARTCO facility was the source of the oil, in part because of past events at the facility. Allegedly ARTCO had discharged wastewater with oil and grease above permit limits into the St. Louis-area sewer system, the Metropolitan Sewer District, and thereby into the Mississippi River, between April 2004 and June 2007. In addition, ARTCO directly discharged other pollutants into the Mississippi River during that time.

Source: BNA Toxics Law Reporter 4/9/09, discussing *United States v. Baker* (E.D. Mo., No. 4:09-CR-00253, plea entered 4/3/09)

Fertilizer Company, Owner Plead Guilty To Illegal Discharge of Waste in Sewers

The owner of a fertilizer manufacturer in Lawrence, Kan., pleaded guilty to illegally discharging manufacturing waste into the city's sewer system. The owner and the company, MagnaGro International Inc., pleaded guilty to one misdemeanor count of violating the Clean Water Act. The owner faces a maximum possible penalty of one year in prison and a fine of up to \$25,000 per day of the violation. MagnaGro faces a possible fine of \$50,000 per day of the violation. According to a statement the owner and the company admitted that the company discharged a large amount of industrial waste in March 2001 from fertilizer production into the sewer system of the city. The Kansas Department of Health and Environment and the city of Lawrence ordered MagnaGro to stop the discharges at that time. Later, in September 2007, agents of the Environmental Protection Agency's Criminal Investigation Division found the company discharging waste from the fertilizer operation into the sewer system via a hose inserted into a toilet stool. Investigators determined that MagnaGro had been discharging waste through the hose for 10 years and that the hose was used to pump material into the toilet from a waste pit surrounding a mixing vat.

Source: BNA Environmental Reporter, 2/27/09, discussing *United States v. Sawyer* (D. Kan., No. 5:08-CR-40045, plea entered 2/24/09).

Mountaintop Mining Lawsuit -- Corps Failed to Consider Impacts

A federal judge vacated a U.S. Army Corps of Engineers permit that would have allowed mining companies to place dirt and debris from mountaintop removal mining in valleys, after finding

that the Corps did not properly examine the potential environmental impacts. The court found that the Corps had issued a nationwide permit, NWP 21, without preparing an environmental impact statement as required by the National Environmental Policy Act. He also found that the Corps' findings under both NEPA and the Clean Water Act "relied on the success of a mitigation process to minimize the cumulative impacts" of the permit but did not provide a rational explanation for that reliance nor did it provide evidence that the mitigation process would be successful or adequately enforced. The decision requires that mining operations taking place under NWP 21 in the Southern District of West Virginia be halted. Those mining companies can seek individual permits from the Corps or appeal the decision. NWP 21 is a streamlined permitting process for surface mining. Under the terms of the permit, operators are required to file a pre-construction notification with the Corps and receive written authorization before beginning a project. Under NWP 21, the Corps' district engineers consider each project on a case-by-case basis, determine whether conditions of the permit are met, and evaluate whether the project's adverse environmental effects are both individually and cumulatively minimal. The U.S. Court of Appeals for the Fourth Circuit found in favor of the Corps in the 2002 lawsuit, noting that the Corps made the required minimal impact determinations before issuing the permit (*Ohio Valley Environmental Coalition v. Bulen*, 429 F.3d 493, 61 ERC 1513 (4th Cir. 2005)).

Source: BNA Environment Reporter: 4/03/2009 citing (*Ohio Valley Environmental Coalition v. Hurst*, S.D. W. Va., No. 3:03-cv-02281, 3/31/2009) Decision available at http://www.publicjustice.net/briefs/OVECvHurstdecision_033109.pdf.

Failure To Keep Records

Ionia Management S.A. appeals from a jury verdict convicting it of violating the Act to Prevent Pollution on Ships ("APPS") by failing to "maintain" an Oil Record Book ("ORB") while in U.S. Waters. The charges in this case derive from events aboard the M/T Kriton. During the period (January 2006 to April 2007), the Kriton delivered oil and petroleum products to ports along the east coast of the United States. While making these deliveries, Ionia's engine room crew, under the direction and participation of the Chief Engineers and Second Engineer, routinely discharged oily waste water into high seas through a "magic hose" designed to bypass the vessel's Oily Water Separator, which would have cleaned the waste to prepare it for disposal as required by law. Furthermore, the Kriton's crew made false entries in the ORB to conceal such discharges, and obstructed a federal investigation (a) by hiding the "magic hose" from Coast Guard inspectors and (b) by lying to Coast Guard officials. The Court held that APPS's requirement that subject ships "maintain" an ORB, mandates that these ships ensure that their ORBs are accurate (or at least not knowingly inaccurate) upon entering ports or navigable waters.

Source: *USA v. Ionia Management S.A.*, U.S. Court of Appeals for the Second Circuit, 2009 U.S. App. LEXIS 902

Independence, Mo. to Spend \$35 Million to Settle Case Over Raw Sewage Overflows

The Environmental Protection Agency has reached a settlement with the city of Independence, Mo., requiring the city to make an estimated \$35 million in improvements to its sanitary sewer system. In addition to making the required improvements, the city will pay a penalty of \$255,000 and spend \$450,000 on a supplemental environmental project involving soil and bank stabilization and improvements to its stormwater detention basins. Reportedly, EPA had documented numerous violations of the federal Clean Water Act by the city, including 430 sanitary sewage overflows resulting in the discharge of millions of gallons of untreated

sewage into the Missouri River since October 2000. Under the proposed consent decree, the city must do a comprehensive assessment of its sanitary sewer system, upgrade pump stations, and make improvements to the collection system and the wastewater treatment plant.

Source: BNA Environment Reporter, 4/3/09, discussing *United States v. City of Independence* (W.D. Mo., No. 4; 09-CV-00240, 3/31/09).

Fertilizer Manufacturer Guilty of Illegal Discharge of Waste in City Sewers

The owner of a fertilizer manufacturing company in Lawrence, Kan., pleaded guilty Feb. 24 to illegally discharging manufacturing waste into the city's sewer system. The owner and the company, MagnaGro International Inc., pleaded guilty to one felony count of violating the Clean Water Act. Sawyer faces a maximum possible penalty of one year in prison and a fine of up to \$25,000 per day of the violation. MagnaGro faces a possible fine of \$50,000 per day of the violation. The company discharged a large amount of industrial waste in March 2001 from fertilizer production into the sewer system of the city. The Kansas Department of Health and Environment and the city of Lawrence ordered Sawyer and the company to stop the discharges at that time. Later, in September 2007, agents of the Environmental Protection Agency's Criminal Investigation Division found the company discharging waste from the fertilizer operation into the sewer system via a hose inserted into a toilet stool. Investigators determined that Sawyer and the company had been discharging waste through the hose for 10 years and that the hose was used to pump material into the toilet from a waste pit surrounding a mixing vat.

Source: BNA Toxics Law Reporter, 3/5/09

Court Finds Right Under OPA To Jury Trial on Natural Resource Damages

A defendant in a natural resource damage action brought under the Oil Pollution Act (OPA) is constitutionally entitled to a jury trial, a federal district court held. While there is no right to a jury trial for a typical cost recovery claim under the OPA, there is such a right when the government is also seeking damages for injury to natural resources. A jury right is triggered by natural resource damage claims, the court said, because at least some portion of them are "legal" as opposed to "equitable" in nature. As a result, the court said, while the statute itself does not provide for a jury, the right to a jury trial under the Seventh Amendment, which applies when a statute contains "legal" rights and remedies, is applicable. In the suit, the United States alleges that in December 2004 more than 225 barrels, or 9,450 gallons, of oil was released from an oil storage tank near Hitchcock, Texas. The oil allegedly spilled not only onto the property where the tank was located but also onto wetlands adjacent to a local bayou which is a navigable tributary to Galveston Bay. The government asserted that the companies should be held liable for paying nearly \$650,000 in damages related to the spill. Of that amount, \$376,000 was related to oil removal costs and \$271,000 was attributable to injury to the area's land, fish, and other natural resources. The government sought recovery from these 2 companies because they were the last known oil and gas lessees of the property where the storage tank was located.

Source: BNA Environmental Reporter, 2/27/09, discussing *United States v. Viking Resources Inc.* (S.D. Tex., No. H-08-1291, 2/11/09)

Bayer to Pay More Than \$1 Million to Settle Discharge Permit, Right to Know Violations

Bayer CropScience has agreed to pay more than \$1 million to resolve a series of violations at its Institute, W.Va., plant, including discharge permit, air quality, waste, and right-to-know violations. Under an administrative agreement Bayer will spend about \$900,000 on new

equipment and pay \$112,500 in fines to resolve violations of the Clean Water Act, the Clean Air Act, the Resource Conservation and Recovery Act, and the Emergency Planning and Community Right-to-Know Act. The violations stem from a series of EPA inspections in 2001 and include 35 instances between 1999 and 2001 when water-discharged chemicals violated permit limits, EPA's Region 3 office said in a prepared statement. In addition to its failure to monitor releases, Bayer had not updated its environmental control technology in accordance with best management practices, according to the agreement, which calls for installation of a real-time waste water monitoring system at the plant. Other violations noted by EPA included improper labeling of chemical storage containers, improper disposal of waste water sludge, failure to maintain oil usage records, and underreporting, by a total of more than 1,000 pounds, of four chemicals in the plant's Toxics Release Inventory filings for 1999.

Source: BNA Toxics Law Reporter, 3/12/09

Town's Former Public Works Director Sentenced to Prison

The former director of public works for the town of Mocksville, N.C., has been sentenced to prison. The director was convicted of engaging in a conspiracy that included using town employees to violate the federal Safe Drinking Water Act and the Federal Water Pollution Control Act. He was sentenced to a prison term of 12 months and one day. The charges alleged that the director conspired with others to provide town residents with false drinking water data related to turbidity which understated the drinking water's turbidity. The false submissions allowed Mocksville to continue operating its drinking water system without fines or other penalties that would have been imposed if accurate information had been provided. Among the charges were that the director conspired to violate the Clean Water Act by pouring "massive amounts" of degreaser and caustic into the town's publicly owned treatment works. The director allegedly received a kickback for the town's purchase of such chemicals and dumped them to justify purchasing additional quantities. The director was also charged with using Mocksville employees and equipment to run a private company he owned, while the workers were "on the clock" for the town. As part of a plea agreement, the director pleaded guilty to one federal felony count for conspiracy (18 U.S.C. Section 371). The court's sentence was based on that plea.

Source: BNA Environment Reporter 3/13/09, discussing *United States v. Smith* (E.D.N.C., No. 5:08-cr-299, 3/11/09).

Prison Sentence for Amateur Chemist Working on Fuel Cell

A federal appeals court has upheld the a 21-month prison sentence of an amateur chemist for transporting and abandoning hazardous materials after his failed effort to develop a cheaper way of making a chemical compound used in the production of hydrogen fuel cells. After a jury trial the former owner of SBH Corp. of Idaho was convicted of illegally trucking sodium metal and other hazardous materials and waste on a public highway and then abandoning them at a facility not authorized to accept such waste. Reportedly, the violations of the Hazardous Materials Transportation Uniform Safety Act (HMTUSA) and the Resource Conservation and Recovery Act (RCRA) occurred after this individual spent more than a year trying to develop his self-described "revolutionary" and "far cheaper" method for making sodium borohydride, a chemical used to make fuel cells. In 2002, when the methodology employed by this "self-taught" chemist who only took a few college chemistry classes, didn't pan out, he shuttered his one-man chemical making business in Salmon, Idaho. Loading the sodium metal and other leftover materials he'd been using to try to make sodium borohydride on a trailer, the chemist had the waste, which lacked proper shipping papers, labeling and packaging, delivered to another business site in

Salmon. After the hazardous waste was left at the new site, which was not authorized to accept such waste, this individual went off to Alaska, apparently to pursue a gold mining project. In 2004, the EPA found the abandoned waste in Salmon, determined they presented an imminent threat, and then carried out an emergency removal and cleanup operation that cost \$421,000.

In affirming the three felony convictions against the would-be chemist, the Ninth Circuit said, "Viewing the evidence in the light most favorable to the prosecution, there is sufficient evidence to support the RCRA convictions beyond a reasonable doubt." After the chemist's efforts failed and he ran out of capital, he arranged and paid to store the materials for one year, but he left the materials for over two years (before the EPA intervened) without making any additional arrangements. The only part of Evertson's conviction that was overturned by the Ninth Circuit was the lower court's order that, as part of the sentence, he should also immediately pay \$421,000 in restitution for the EPA cleanup. Remanding the restitution award, the appeals court said that at the time the waste violations were committed, the federal sentencing guidelines did not allow a court to order such a payment to be made while a violator was serving in prison. Instead, the Ninth Circuit said, restitution could only be ordered as a condition of supervised release, i.e. payable after the violator's release from prison. Since the 2004 violations, Congress has added violations of the Hazardous Materials Transportation Uniform Safety Act to the list of offenses for which restitution could be ordered as part of a prison sentence.

Source: BNA Toxics Law Reporter 4/2/09, discussing *U.S. v. Evertson* (9th Cir., No. 07-30427, 3/20/09).

Developers Pay \$86,000 for Stormwater Violations at Idaho Construction Site

X Road Development Inc., Lonnie Bramon, and Terrace Lakes Inc. have reached an \$86,000 settlement with the Environmental Protection Agency to resolve alleged stormwater violations occurring at a 27-acre construction site adjacent to Easley Creek, a tributary to the Payette and Snake Rivers, in Garden Valley, Idaho. The settlement covered a long list of alleged Clean Water Act violations, including failure to obtain a Construction General Permit under the National Pollutant Discharge Elimination System permitting program and sediment discharge from the construction site into Easley Creek.

Source: OS&H News, April 23 2009

Federal Court Fines Oregon Pipeline Builder \$1.5 Million for CWA Violations

A federal judge ordered a construction company to pay a \$1.5 million fine for Clean Water Act violations during the building of a 60-mile natural gas pipeline project in southern Oregon. The ruling resolves a dispute that began in 2003, when Coos County hired MasTec Inc. to construct a 12-inch-diameter pipeline that links interior Oregon with the south coast. The county terminated the contract the following year and another company finished the pipeline. The Court stated that all parties in the project made environmental mistakes, including the U.S. Army Corps of Engineers; the construction firm, MasTec Inc.; and Coos County. The federal government listed among the Section 404 permit violations the destruction of stream channels and the improper discharge of water and dredged material into streams, according to the ruling. The government claimed that MasTec avoided more than \$6 million by not complying with the permit. Despite violations of the CWA Section 404 permit, there appeared to be no long-term environmental or fisheries damage. While the violations were numerous, the judge said, "the lack of guidance and notice from the Army Corps of Engineers, despite inspections revealing violations, mitigates MasTec's project specific history of violations." The judge found the company's lack of prior

violation to be “significant.” MasTec already has paid \$8.7 million to Coos County for environmental remediation in separate lawsuits involving the company and the federal government.

Source: BNA Environmental Reporter, 2/27/09, discussing *Sierra Club v. MasTec* (N.A., D. Or., No. 03-1697, 2/19/09).

Court Finds Right Under OPA To Jury Trial on Natural Resource Damages

A defendant in a natural resource damage action brought under the Oil Pollution Act (OPA) is constitutionally entitled to a jury trial, a federal district court held. While there is no right to a jury trial for a typical cost recovery claim under the OPA, there is such a right when the government is also seeking damages for injury to natural resources. A jury right is triggered by natural resource damage claims, the court said, because at least some portion of them are “legal” as opposed to “equitable” in nature. As a result, the court said, while the statute itself does not provide for a jury, the right to a jury trial under the Seventh Amendment, which applies when a statute contains “legal” rights and remedies, is applicable. In the suit, the United States alleges that in December 2004 more than 225 barrels, or 9,450 gallons, of oil was released from an oil storage tank near Hitchcock, Texas. The oil allegedly spilled not only onto the property where the tank was located but also onto wetlands adjacent to a local bayou which is a navigable tributary to Galveston Bay. The government asserted that the companies should be held liable for paying nearly \$650,000 in damages related to the spill. Of that amount, \$376,000 was related to oil removal costs and \$271,000 was attributable to injury to the area's land, fish, and other natural resources. The government sought recovery from these 2 companies because they were the last known oil and gas lessees of the property where the storage tank was located.

Source: BNA Environmental Reporter, 2/27/09, discussing *United States v. Viking Resources Inc.* (S.D. Tex., No. H-08-1291, 2/11/09)

Former Managers at New Jersey Pipe Plant Sentenced to Prison in Conspiracy Case

A federal trial court sentenced three former managers of a New Jersey ductile iron pipe manufacturing company to lengthy prison terms for their roles in a conspiracy to commit what the Justice Department called “flagrant abuses” of environmental and worker safety laws. The former plant manager of the Atlantic States Cast Iron Pipe Co. facility in Phillipsburg, N.J., was sentenced to 70 months in federal prison. The former human resources manager to 41 months, and the maintenance supervisor at the plant, to 30 months in prison. A sixth defendant in the case, the former engineering manager at the plant, was acquitted on the three counts with which he was charged.

Atlantic States and four of its managers were convicted in April 2006 on charges that they engaged in an eight-year conspiracy to pollute the air and Delaware River by violating the Clean Water Act and Clean Air Act. The defendants exposed employees to dangerous conditions and impeded federal regulatory and criminal investigations, according to the Environmental Protection Agency and the Justice Department. The Plant Manager was convicted on one count each of violating the Clean Water Act and Clean Air Act and on three counts of obstructing an investigation by OSHA. The HR Manager was found guilty on one count of making false statements to OSHA and guilty on two counts of obstructing an OSHA investigation. The Maintenance Supervisor was convicted on one count of making false statements to the New Jersey Department of Law and Public Safety and the FBI, on one count of obstructing an OSHA investigation, and on seven counts of violating the Clean Water Act. Prosecutors charge that the

defendants routinely allowed emissions of high levels of pollutants, including carbon monoxide, and concealed the releases, in violation of government permits and the Clean Air Act. Other charges included the pumping of petroleum-contaminated waste water into a storm drain on two days in 1999, causing an eight-and-a-half-mile oil slick on the Delaware River.

Prosecutors also cited the defendants' actions in relation to other employee safety incidents at the plant:

- The March 24, 2000, death of an employee who was run over by a forklift with faulty brakes. According to the indictment, the defendants repaired the forklift before OSHA inspectors arrived, then performed a misleading demonstration to make it look like the brakes were fully operational, then lied to inspectors and in a deposition in a lawsuit.
- Repeated cover-ups of crushing injuries to employees, broken bones, amputations, and burns from furnaces and molten iron.

Source: BNA Toxics Reporter (4/30/09), discussing *U.S. v. Atlantic States Cast Iron Pipe Co.*, (D. N.J., No. 3:03-cr-00852, 4/22/09).

Supreme Court Reverses Shell Spill Case, Limits Joint Liability of Two Railroads

The U.S. Supreme Court ruled May 4 that an appellate court misapplied the “arranger” liability doctrine under the superfund law and wrongly held Shell Oil Co. and two railroads jointly and severally liable for a cleanup in California (Burlington Northern & Santa Fe Railway Co. v. United States, U.S., No. 07-1601, 5/4/09). The opinion focused on the definition of “arranged for disposal” and stated that arranger liability may not “extend beyond the limits of the statute itself.” Knowledge that spills happened was not enough to show that Shell planned for the disposal or intended the spills of its pesticide product to occur, the court said.

The Supreme Court reversed and remanded a decision by the U.S. Court of Appeals for the Ninth Circuit stemming from a cleanup under the Comprehensive Environmental Response, Compensation, and Liability Act in Arvin, Calif. The Ninth Circuit had assessed joint and several liability against Shell, Burlington Northern & Santa Fe Railway Co., and the Union Pacific Railroad Co. for about \$8 million in cleanup and response costs at the former site of the Brown & Bryant agricultural chemical distribution business. The Ninth Circuit also held Shell liable as an entity that had “arranged for disposal” of a hazardous substance, the Shell pesticide D-D, under CERCLA. The railroads owned a portion of the property on which the Arvin agricultural chemical business was located.

On May 4th, the Supreme Court found, 8-1, that both conclusions of the Ninth Circuit were in error. The decision found that even though Brown & Bryant was a “sloppy operator” and consistently spilled the D-D pesticide it bought from Shell, Shell had taken steps to encourage the safe handling of its product. It noted that Shell had prepared safety manuals and required distributors to obtain inspections by engineers. In fact, the court noted that the Arvin facility had been inspected twice, and in 1981 Brown & Bryant “certified to Shell that it had made a number of recommended improvements to its facilities.”

Starting around 1960, the company bought pesticides and other chemicals from Shell Oil Co., including the pesticide D-D. In 1975, Brown & Bryant expanded its facility onto land owned jointly by the railroads. The opinion noted that the district court found that the primary pollution was in and around a pond located in the portion of the facility most distant from the railroads' parcel, and that the chemical spills on the railroad parcel contributed to no more than 10 percent

of the total site contamination. The district court had concluded that the railroads were liable for only 9 percent of the harm caused by the contamination at the facility. The majority opinion states the district court was correct in refusing to impose joint and several liability on Shell and the railroads for the entire response costs.

Source: BNA Toxics Reporter, May 4, 2009, discussing *Burlington Northern & Santa Fe Railway Co. v. United States* which is available at <http://www.supremecourtus.gov/opinions/08pdf/07-1601.pdf>.

