



# New York Water Environment Association, Inc.

*The Water Quality Management Professionals*

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## Recent Environmental Legislative, Regulatory and Judicial Developments<sup>1</sup> November 3, 2011 through July 30, 2012

### I. NEW YORK

#### A. Legislation:

#### **New York Appoints Members to Infrastructure Task Force**

Gov. Andrew M. Cuomo and legislative leaders announced their appointments to the NY Works Task Force, a panel created by statute earlier this year to coordinate the capital plans of 45 state agencies and some \$16 billion in capital expenditures. The task force will be co-chaired by Denis Hughes, former president of the New York State AFL-CIO, and Felix Rohatyn, the former chairman of the Municipal Assistance Corp. The executive director is Margaret Tobin, a former executive vice president of Thor Equities. Members of the task force include: Buffalo Mayor Byron Brown; Michael Fishman, president of SEIU Local 32BJ; Peter Goldmark, program director for climate and air for the Environmental Defense Fund; Gary LaBarbera, president of the New York City Building and Construction Trades Council; Carol Kellermann, president of the Citizens Budget Commission; *Syracuse Mayor Stephanie Miner*; Robert Yaro, president of the Regional Plan Association; *John Cameron, chairman of the Long Island Regional Planning Council*; Robert Mujica, chief of staff to Senate Majority Leader Dean Skelos (R); Assembly Majority Leader Ron Canestrari (D); and Assemblyman Herman D. Farrell (D), chairman of the Assembly Ways and Means Committee.

**Source:** Bloomberg BNA Infrastructure Investment & Policy Report, 5/4/2012.

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The NYWEA GAC thanks Nixon Peabody LLP for its on-going support of this newsletter. It also thanks WEF's Government Affairs Staff, The Business Council of New York and NACWA for much of the information in this newsletter. If you are not already a member of one or all of these organizations, visit their web pages and consider becoming a member. The WEF web page can be reached through the NYWEA web page at <http://www.nywea.org/index.htm>; the NACWA web page is at [www.nacwa.org](http://www.nacwa.org) and TBCNY is at [bcnys.org](http://bcnys.org). NYWEA gratefully acknowledges the following sources of the information contained in this newsletter: BNA Environmental Reporter, EPA Administrative Law Reporter, Water On-Line, Pollution On-Line and Environmental Protection E-News LAW360: these are excellent resources for the environmental manager, attorney or consultant.

## **B. Regulation and Policy**

### **1. Water**

#### **EPA Sets Schedule for National Stormwater Rulemaking**

After several short extensions, EPA has released official dates for the **National Stormwater Rulemaking: June 10, 2013 for release of the proposed rule** and **December 10, 2014 for release of the final rule**. These dates are a result of negotiations between EPA and the Chesapeake Bay Foundation (CBF), which was a legally required action consistent with the letter of agreement signed between these two groups that established initial rulemaking milestone dates. It is expected that EPA will continue work to gather information as well as analyze costs and benefits on the rule through the summer and into the fall before assembling a draft proposed rule likely to be submitted to the Office of Management and Budget in early 2013.

**Source:** WEF's This Week in Washington 6/29/2012.

#### **Mercury Deposition Greater Near Major U.S. Cities**

Atmospheric deposition of mercury is about four-times higher in lakes near several major U.S. cities compared to lakes in remote areas, according to a new study by the U.S. Geological Survey (USGS). This is the first study to quantify the relation between mercury fallout and distance from major urban centers. The study included lakes nearby, and remote from Boston, Mass., Albany, N.Y., Montreal, Canada, New Haven, Conn., Tampa and Orlando, Fla., Chicago, Ill., Minneapolis, Minn., Denver, Colo., Salt Lake City, Utah, and Portland, Ore.

To better understand geographic patterns of mercury deposition, the USGS analyzed sediment cores from 12 lakes with undeveloped watersheds near to (less than 30 miles) and remote from (more than 90 miles) several major urban areas in the United States. Mercury deposition in the near-urban lakes greatly exceeds amounts found in remote lakes. The full report can be found in the journal *Environmental Pollution*. Mercury emissions were previously known to contribute to global air pollution, but the importance of deposition near sources was less certain. Mercury deposition to South Reservoir, a protected water supply lake six miles north of downtown Boston, Mass., was five-times greater than mercury deposition to Crocker Pond, 130 miles to the north in western Maine. This pattern was repeated in near-urban and remote lakes in other parts of the country.

"This finding could have important implications for management of mercury emissions to reduce the risks mercury poses to humans and wildlife," said USGS scientist Peter Van Metre, author of the study. "The results illustrate the importance of reducing mercury emissions in the U.S. and not focusing only on emissions globally." The study is part of the USGS National Water Quality Assessment Program, which has been using age-dated lake sediment cores from across the United States to evaluate contaminant trends. Other lake coring studies have found elevated mercury levels in urban areas. However, many urban lakes are affected by urbanization in the watershed, which makes it difficult to distinguish atmospheric mercury deposition from other sources of mercury pollution. An important factor in this study was finding and sampling lakes in undeveloped, protected watersheds in and near major cities. The findings of this study support previous conclusions from models that indicate increased mercury deposition near major cities.

**Source:** Environmental Protection on-line, Jan 10, 2012

## **EPA Says New Plans for Chesapeake Bay Restoration Should Make Up for Previous 'Weak' Efforts**

Final plans being developed by the states for reducing pollution in the Chesapeake Bay during the next five years will need to make up for shortcomings in their plans covering the first phase of the cleanup, an Environmental Protection Agency told members of the Chesapeake Bay Commission. In a response to questions submitted by individual members of the commission and staff, EPA Region 3 Administrator Shawn Garvin said the states' Phase II watershed improvement plans (WIPs) should compensate for "weak Phase I WIP strategies." Asked how EPA will judge whether a state's plan is sufficiently rigorous, Garvin said EPA will examine four key areas:

- whether the WIP would achieve the necessary pollutant targets for all three pollutants in all major river basins;
- whether the jurisdictions addressed key concerns for sectors in which EPA assigned backstop allocations, adjustments, or enhanced oversight due to weak Phase I WIP strategies;
- whether they are demonstrating reasonable assurance at least as strong as in the Phase I plan with no backsliding; and
- whether the state demonstrated local partner engagement in development and future implementation of the Phase II plan.

**Source:** Bloomberg BNA Environment reporter, 1/13/12(*United States v. Wiehl*, D. N.H., No. 10-cr-112-01, *pleas entered* 1/6/12).

## **Nutrient Trading Could Cut Restoration Costs of Bay by 25 Percent, Research Indicates**

Nutrient trading has the potential to reduce by at least 25 percent the multibillion-dollar costs of restoring the Chesapeake Bay ecosystem, according to preliminary economic research findings delivered to the Chesapeake Bay Commission. The research suggests that highly effective agricultural conservation could deliver most of the nitrogen and phosphorus loading reductions required by the Environmental Protection Agency's total maximum daily load (TMDL) mandate.

Agricultural "best management practices" are by far the lowest-cost techniques to reduce nutrient loading, RTI International environmental economist George VanHoutven said in the Jan. 5 presentation to the commission. The economic research is being performed by RTI at the request of the commission, a tri-state legislative assembly representing Maryland, Virginia, and Pennsylvania. RTI is a nonprofit research institute based in Research Triangle Park, N.C. The cost of reducing an equal amount of nutrients by improving urban and suburban stormwater controls is orders of magnitude higher than agricultural management practices, the data indicate.

Maryland State Sen. Mac Middleton (D) commented that municipalities will be eager to buy credits from farmers.

**Source:** Bloomberg BNA Environment reporter, 1/13/12(*United States v. Wiehl*, D. N.H., No. 10-cr-112-01, *pleas entered* 1/6/12).

## **NYC Has a 'Dam' Good Idea to Fight CSOs**

Emulating its peers in Europe and Japan, the New York City Department of Environmental Protection has just completed work on two inflatable dams in Brooklyn. They are designed to work automatically during heavy rain so that raw sewage doesn't mix with storm water runoff

that flows untreated into surrounding surface waterways. According to Elizabeth Mooney's Blog ([http://www.nylcv.org/blog/elizabeth\\_mooney](http://www.nylcv.org/blog/elizabeth_mooney)), the inflatable dams are far less expensive than large sewage retention facilities. The dams, which cost about \$7.8 million each, are computer-controlled. They are placed underground in Brooklyn, within existing sewer lines, and monitored from nearby wastewater treatment plants. Once a storm subsides, the dams are deflated remotely, and the water proceeds to the plants. The dams are built to hold back about two million gallons of overflow each during a given rain event, Mercedes Padilla, DEP spokeswoman, said. That means they could stop more than 100 million gallons annually from entering the harbor.

Vincent Sapienza, deputy commissioner for the Department of Environmental Protection, told the New York Post that the dams are "really the next generation of our wastewater treatment program," adding the city is considering installing the dams in sewer lines by other polluted waterways like Brooklyn's Gowanus Canal and Queens' Flushing Bay. The project is part of the NYC Green Infrastructure Plan, which calls for investing \$2.4 billion over the next 20 years improve water quality.

*Eco Politics*, a publication of the NY League of Conservation Voters, concludes that New York City is doing a much better job controlling sewage pollution than in the past. DEP now captures about 72 percent of the sewage flow, up from 30 percent in the 1980s.

**Source:** NYLCV Eco Politics, 1/23/12.

### **New York State and City Reach Agreement to Reduce Combined Sewer Overflows in New York City**

On March 13, 2012, the New York State Department of Environmental Conservation ("DEC") and the New York City Department of Environmental Protection ("DEP") announced an agreement requiring New York City to improve the overall water quality in New York Harbor. The agreement requires New York City to invest approximately \$187 million over the next three years and an estimated \$2.4 billion of public and private funding over the next 18 years to install green infrastructure technologies to manage stormwater before it enters the City's combined sewer system. The settlement modifies a prior consent order, issued by DEC in 2005 that addressed numerous violations by the City relating to CSOs and consolidated prior consent orders dating back to 1992. Under the modified consent order, dated October 2011, the focus is on the development of green infrastructure that would divert stormwater away from the combined sewer system and direct it to areas where it can be infiltrated, evapotranspired (*i.e.*, dissolved into the atmosphere from surfaces such as soil or vegetation), reused or detained. Green infrastructure technologies include green roofs, trees and tree boxes, blue roofs, permeable pavement, rain collection equipment and gardens, vegetated swales, pocket wetlands, and infiltration planters. The modified consent order requires the City to spend \$187 million in green infrastructure projects sufficient to control the equivalent of stormwater generated by one inch of precipitation on 1.5% of the City's impervious surfaces by December 31, 2015. It also requires the City to undertake two green infrastructure demonstration projects, one within the Newtown Creek watershed and the other within the Bronx River watershed. The settlement also allows the City to defer decisions on the need for significant gray infrastructure projects, such as storage tunnels or holding tanks, until completion of the green infrastructure demonstration projects. This provides the City with an opportunity to incorporate green infrastructure into CSO control plans that will be developed with public input between 2013 and 2017. Over the next 18 years, the City must control the first inch of rain from 10% of the City's impervious surfaces with green

infrastructure. The modified consent order requires five-year incremental milestones to meet that goal, together with annual progress reports.

**Source:** Alert from Kramer Levin Naftalis & Frankel LLP, May 30, 2012

### **Draft EIS for Tappan Zee Crossing Finds Minimal Impact to Environment**

The proposed rebuilding of New York's Tappan Zee Bridge would have little adverse impact on the environment, according to a Draft Environmental Impact Statement released by state officials Jan. 24. The lack of significant or long-term adverse impacts to aquatic habitats, animal populations, plant life, emissions, and water resources stemming from construction of a new bridge is a positive step for state officials trying to break ground on the \$5 billion infrastructure project this year. Built 56 years ago, the seven-lane bridge located 13 miles north of New York City is a major crossing between Westchester and Rockland Counties and northern New Jersey for around 140,000 vehicles each weekday. New York officials have been advocating for an expedited timeline supported by Gov. Andrew Cuomo that could see construction on a new bridge begin later this year.

**Source:** Bloomberg BNA Infrastructure Investment Report 1/26/12 Discussing the Draft Environmental Impact Statement which can be found at [http://www.tzbsite.com/tzbsite\\_2/index\\_2.html](http://www.tzbsite.com/tzbsite_2/index_2.html).

### **NY to Delay Strict New Regulations on Ballast Water**

New York State will delay the implementation of its strict new ballast water rules and work with other states and the Environmental Protection Agency on uniform national standards, has indicated Joseph J. Martens, the state environmental conservation commissioner, that the state will leave EPA's current standards in place until Dec. 19, 2013. Tougher state rules were scheduled to take effect in January 2013. EPA is working on national standards as part of a new vessel general permit under the Clean Water Act, and Martens is pressing the agency to strengthen the federal rules, which were issued in draft form in November. The proposed state rules would have required that vessels operating in New York waters install technology that could clean or treat ballast water to meet a water quality standard 100 times stronger than the standards established by the International Maritime Organization in 2004, according to the association. In addition, the rules would have required that newly constructed vessels include technology to treat ballast water to a level 1,000 times stronger than the IMO standard, it said. On Nov. 30, 2011, EPA released a draft vessel general permit that for the first time would set technology-based effluent limits to regulate the discharge of ballast water from large commercial ships, tankers, and other vessels. The new permit EPA is developing is intended to replace the existing general permit when it expires in December 2013.

**Source:** Bloomberg BNA Environment Reporter, 3/2/12 see, also <http://www.dec.ny.gov/press/80495.html>.

### **2 NY Cities Make NRDC's "Emerald Status" Green Infrastructure List NRDC provides new metrics for green infrastructure and stormwater practices**

During the past decade, green infrastructure has gained more prominence in the United States. In the 2011 report *Rooftops to Rivers II: Green strategies for controlling stormwater and combined sewer overflows*, the Natural Resources Defense Council (NRDC) highlighted 14 cities in North America with stellar green infrastructure programs. NRDC developed its list

using a six-point “Emerald City scale.” NRDC’s Emerald City scale includes

### **The ‘Emerald City’ List**

The full list of cities and their scores are listed below.

- Philadelphia (6 points)
- Milwaukee (5 points)
- New York City (5 points)
- Portland, Ore. (5 points)
- Syracuse, N.Y. (5 points)
- Washington, D.C. (5 points)
- Aurora, Ill. (4 points)
- Toronto (4 points)
- Chicago (3 points)
- Kansas City, Mo. (3 points)
- Nashville, Tenn. (3 points)
- Seattle (3 points)
- Pittsburgh (1 point)
- Detroit metro area and Rouge River Watershed in Michigan (1 point)

**Source:** WEF Highlights March, 2012, discussing NRDC’s *Rooftops to Rivers II* at <http://www.nrdc.org/water/pollution/rooftopsii/>

### **EPA Conducting Review of Hudson River Cleanup**

The Environmental Protection Agency is undertaking a five-year review of the superfund project to dredge polychlorinated biphenyls from the upper Hudson River, as required under the Comprehensive Environmental Response, Compensation, and Liability Act. According to an EPA statement, the purpose of the review, which is expected to be complete by the end of April, is “to ensure that the remedy is functioning as intended and continues to be protective of public health and the environment.” The agency will review the operation, maintenance, and monitoring of the superfund site, which is a 200-mile stretch of the river. The review will incorporate a comprehensive study that was undertaken after the first phase of the project by EPA and the General Electric Co., the sole responsible party for the cleanup. The second and final phase of the multi-year project began in June 2011.

**Source:** Bloomberg BNA Toxics Law reporter, 4/2/2012

### **NYSDEC Pesticide General Permit GP-0-001 Goes Into Effect**

The NYSDEC has issued a final State Pollutant Discharge Elimination System (SPDES) General Permit GP-0-11-001 for point source discharges to surface waters from pesticide applications. This permit became effective on November 1, 2011 and remains in effect until October 31, 2016. It authorizes point source discharges of registered pesticides (including herbicides) to surface waters of the state (including streams, state wetlands, and “unregulated” other wetlands) by

operators and licensed applicators, small, private pond applications are excluded from this permit.

Operators are required to submit a Notice of Intent (NOI) to the NYSDEC in Albany. A Pesticide Discharge Management Plan (PDMP) must be prepared by the operator. An Integrated Pest Management (IOM) evaluation is also required for operators that intend to apply pesticide applications that require Article 15 (Protection of Waters) and Article 24 (Freshwater Wetlands) Permits. The PDMP and the IPM are not submitted with the NOI, but must be maintained in the operator's records. This permit requirement affects rights-of-way maintenance and aquatic vegetation control applications. TES is working with utility clients on permit compliance.

**Source:** TES, Inc. Spring 2012 Newsletter

## 2. Non-water

### **Environmental Group's Report Criticizes State Brownfields Program Tax Credits**

The tax credits provided under New York State's brownfields program have been poorly targeted and have failed to provide relief to areas of the state most in need of development, according to a June 7 report from Environmental Advocates of New York, a government watchdog group. New York provided \$1 billion in tax credits under the program from 2006 to 2011, according to the report. The projects receiving the credits, however, were "rarely located in areas most in need of cleanup, areas of high unemployment, high poverty levels, or communities of color," the report said. The report also said that New York has cleaned up 114 sites since the program began 10 years ago, far fewer sites than in most other states. The report recommended that the state de-link eligibility for the brownfields program from eligibility for the tax credits. It said the high price tag for the program is due to the fact that tax incentives are based on the value of buildings constructed on sites, rather than on cleanup costs.

**Source:** Bloomberg BNA, Inc. Infrastructure Investment & Policy Report 6/7/2012; discussing the report, Off-Target Brownfield Cleanup Incentives Fail to Restore Communities in Need & Squander Taxpayer Money While Lining Developers' Pockets, is at [http://www.eany.org/images/Reports/eany\\_brownfieldtaxcreditanalysis\\_06072012.pdf](http://www.eany.org/images/Reports/eany_brownfieldtaxcreditanalysis_06072012.pdf).

## C. Enforcement and Judicial

### **New York High Court Upholds Standards for State Superfund Cleanup Program**

New York state's highest court upheld a provision in New York's superfund regulations requiring remediation "to pre-disposal conditions, to the extent feasible." The Court of Appeals affirmed that the Department of Environmental Conservation acted within its statutory authority in establishing the regulations.

The New York State Superfund Coalition, a group of companies that own superfund sites, argued that the state superfund statute only required "a complete cleanup of the site through the elimination of the significant threat." "In sum, there is no discernible difference between the use of the phrase 'complete cleanup' in section 27-1313 (5)(d) and 'pre-disposal conditions, to the extent feasible' in DEC's regulations," the court said, citing the section of the Environmental Conservation Law.

**Source:** BNA Toxics law Reporter, discussing *New York State Superfund Coalition Inc. v New York State DEC* at N.Y., No. 189, 12/15/11). (<http://www.nycourts.gov/ctapps/Decisions/2011/Dec11/189opn11.pdf>.)

### **Indian Point to Pay Penalty for Spill Related CWA Violations**

Entergy Corp. will pay a \$1.2 million civil penalty under a consent order with the New York Department of Environmental Conservation for Clean Water Act violations at its nuclear-powered Indian Point Energy Center. The company also agreed to upgrade the containment systems at the Buchanan, N.Y., facility to protect the Hudson River from accidental spills and unpermitted releases. The violations stem from a November 2010 explosion and fire at the facility when oil was released into the Hudson River. DEC Commissioner Joe Martens said in a statement

"The conditions at Entergy's Indian Point facility caused a failure of a transformer, resulting in an explosion and the release of thousands of gallons of petroleum into the Hudson River." The department said its investigation of the explosion and resulting spill showed longstanding structural conditions prevented the containment moat from retaining the oil as designed.

According to NYSDEC, more than 10,000 gallons of oil were recovered from the transformer, the containment moat and areas outside the containment moat including the discharge canal, the Hudson River and its shoreline. In addition, the department's investigation also revealed violations of chemical bulk storage regulations at the facility. \$600,000 of the \$1.2 million fine will be used for an unidentified environmental improvement project. The company also agreed to test, inspect and — if necessary — replace any and all of Indian Point's chemical bulk storage facilities; test, inspect, repair and maintain the remaining three main transformer containment structures to avoid similar environmental releases in the future; and complete all necessary repair work in 2012. In addition, an NRC confirmatory order required Entergy to reorganize its chain of command for quality control employees and conduct employee training on regulations prohibiting retaliation against workers.

**Source:** Law 360 3/26/2012

### **DOJ to Focus More on Municipal Stormwater Enforcement**

The Justice Department is going to focus more on enforcing stormwater regulations for municipal separate storm sewer systems rather than on violations that can lead to overflows at systems that carry combined wastewater and sewage, according an EPA official. Enforcement of combined sewer overflows and sanitary sewer overflows, which occur at systems that carry just wastewater, is "kind of coming to an end," said Sylvia Quast, who heads the Defensive Civil Litigation Unit for the U.S. Attorney for the Eastern District of California. According to Bloomberg BNA, Quast said the next area of enforcement focus will be municipal separate sewer systems, or MS4s, which transport only polluted stormwater runoff.

That does not mean the department will stop enforcing wet weather issues that encompass combined sewer overflows or sanitary sewer overflows, Quast said. To encourage compliance, the Justice Department is going to allow more use of green infrastructure in consent decrees to minimize combined sanitary sewer overflows, resulting from an excess of stormwater flowing into sewer systems conveying both sewage and stormwater. Reportedly, to qualify for inclusion in a consent decree, a green infrastructure project should be backed by science, that it shows that the project should result in improved water quality or reduced stormwater runoff.



**Source:** Bloomberg, BNA Infrastructure Investment and Policy, 3/26/12

### **Denial of Motion to Intervene in Water Allocation Dispute Affirmed**

The State of New York owned a reservoir and the Mohawk Valley Water Authority provided communities with water from the reservoir. A hydropower company commenced a lawsuit in 2009 against the state over a 1917 agreement concerning its entitlement to allocation in the state Court of Claims. The Authority sought to intervene in the action, which was denied. On appeal, the Appellate Division affirmed, holding that the Court of Claims' jurisdiction is limited to actions against the State of where the State is the real party in interest. Statutes pertaining to the Authority—incorporating notice provisions of the General Municipalities Law—do not place it within the Court of Claims' jurisdiction. The court held that absent language specifically placing jurisdiction in the Court of Claims, those notice provisions evince the legislature's intent to place jurisdiction in a court of general jurisdiction. *Erie Boulevard Hydropower, LP v. State of New York*, 935 N.Y.S.2d 349 (3d Dept. 2011).

**Source:** Environmental Law in New York, April 2012.

### **Erie County to Pay \$275,000 to Settle RCRA and CWA Charges**

On December 21, 2011, a proposed consent decree was filed in the Federal Court for the Western District of New York pursuant to which Erie County would pay a \$275,000 penalty to settle alleged violations of the Resource Conservation and Recovery Act and Clean Water Act. Pursuant to the proposed decree, the county, in addition to paying the fine, should implement spill prevention control and countermeasure plans to address oil stored at underground and above-ground tanks around the county and submit to a full RCRA audit. According to the Justice Department, each of the facilities was used for distribution, storage, and transfer of oil.

According to the complaint, the county allegedly failed to test corrosion-prevention systems frequently enough, maintain and release leak-detection information, test the pressurization of piping, and provide overfill protection for surface tanks under section 40 C.F.R. § 280. The county also allegedly violated Clean Water Act rules by not implementing plans at 11 above-ground storage tanks. Those violations were first discovered during a 2008 inspection. DOJ took public comments on the proposed consent decree until Feb. 6, 2012. *United States v. County of Erie*, No. 1:11-cv-01083 (W.D.N.Y., filed Dec. 21, 2011).

**Source:** Environmental Law in New York, April 2012.

## **II. FEDERAL**

### **A. Legislation and Policy**

#### **EPA Developing Report on Clean Water and U.S. Economy**

EPA announced in the November 14 Federal Register that the Office of Water will be developing a report on the importance of clean water to the U.S. economy. The report will consider how the availability of clean water may affect economic development, advantages clean water provides to different economic sectors, and what economic data are available to support strategic choices. EPA officials are frequently asked to justify and quantify the economic benefits of clean water in the context of proposed policies or regulations. This study seems intended to provide and update the information necessary to address these issues.

EPA has asked their Science Advisory Board to consult on the data and methodologies available to evaluate the economic value of clean water. On November 14, the SAB announced a public teleconference to solicit input on these topics. The teleconference will be held on December 5, 2011, from 12:30 to 5:00 pm EST. For additional information on this report and the teleconference, see the [FR notice](#).

**Source:** This Week in Washington, November 18, 2011

### **Stronger, Clearer Great Lakes Water Quality Pact**

A new version of the U.S.-Canadian Great Lakes Water Quality Agreement due to be signed this spring contains more specific objectives and streamlined approaches than the current agreement, adopted in 1987. According to EPA, the new agreement will “confirm the need to cooperate, coordinate, and consult” with provinces, states, and other entities, he said. Reportedly, the new agreement will place greater emphasis on preventing damage, as opposed to responding to it, and will address new threats such as nutrients and climate change. The amended agreement, currently undergoing legal review in both countries, also provides for a Great Lakes Executive Committee, which will include representatives from state and local governments and tribes, the officials said. There will also be “annex” committees dedicated to coordinating action on specific issues, such as nutrients. According to a Canadian official, one “significant” change is the updating of the agreement’s general objectives to reflect a broader view of the lakes’ ecosystem and uses. The updated agreement will be binding, and enforcement mechanisms will be the countries’ respective environmental laws—in the U.S. case, the Clean Water Act. Funding for measures taken to comply with the pact will come from the Great Lakes Restoration Initiative.

**Source:** Bloomberg BNA Environment Reporter 3/8/12, the agreement is available at [http://binational.net/glwqa\\_2011\\_e.html](http://binational.net/glwqa_2011_e.html).

### **White House Issues Federal Plan to Advance Obama Order on Infrastructure Permitting**

The White House has released a federal plan for expediting permitting and review processes for infrastructure projects. The plan is a step toward implementing a March 22 executive order by President Obama to improve regulatory approvals of projects for transportation, communications, water resources, renewable energy generation, electric power transmission, oil and gas pipelines, and other such sectors as determined by a steering committee.

Obama directed that the streamlined procedures be accompanied by improved environmental and community outcomes and an institutionalizing of best practices. He required all affected federal agencies to publish online an agency plan for improvements by July 31.

The June 2012 federal plan, *Implementing Executive Order 13604 on Improving Performance of Federal Permitting and Review of Infrastructure Projects: A Federal Plan for Modernizing the Federal Permitting and Review Process for Better Projects, Improved Environmental and Community Outcomes, and Quicker Decisions*, adds some more details on agency obligations. It said each agency must identify and publish online its major permit decisionmaking and review responsibilities, with associated estimated timelines for those responsibilities. Estimated baseline processing timelines must be reported by July 31 along with the improvement plans. The estimated baselines must be refined into target processing timelines by Dec. 31 and then reviewed and updated annually.

The plan requires metrics for tracking and assessing implementation of agency plans, including progress on projects judged to have national or regional significance. An appendix to the federal plan lists and describes examples of best regulatory practices already under way in federal agencies to illustrate ways in which agencies can improve their work. Executive Order 13,604 was issued by Obama against the background of political debate over one of the most contentious infrastructure plans, the Keystone XL oil pipeline([03 IIPR 13, 3/26/12](#)).

**Source:** Bloomberg BNA Infrastructure Investment & Policy Report: News Archive 6/13/2012. The federal plan for expediting permitting and review processes for infrastructure projects is available at [http://permits.performance.gov/sites/default/files/Federal\\_Infrastructure\\_Plan.pdf](http://permits.performance.gov/sites/default/files/Federal_Infrastructure_Plan.pdf).

**B. Regulatory**

**1. Water**

**a. Watersheds and Specific Waters**

**EPA Underestimated Cost of Adopting Standards for Florida Waters**

The Environmental Protection Agency underestimated the cost of implementing federal water quality criteria for Florida waters, according to a report released March 6 by the National Research Council. In its report, a research council committee did not quantify the underestimate but questioned the validity of several assumptions in EPA's cost analysis. It also found the agency did not adequately report on “the uncertainties” that could affect the cost of changing from narrative to numeric water quality standards. At issue is a 2010 final EPA rule for Florida's inland waters that would establish numeric criteria for several nutrients, including total nitrogen and total phosphorus, to reduce algal blooms caused by pollution. The state subsequently drafted its own rules and has forwarded them to EPA for review. In a related action March 5, the U.S. District Court for the Northern District of Florida approved an extension of the effective date of EPA's rule to July 6, essentially giving EPA time to review and approve the standards developed by Florida (*Florida Wildlife Federation Inc. v. EPA*, N.D. Fla., No. 4:08cv324, 3/5/12). EPA has said it would withdraw the federal rule after it approves the state water quality standards.

The cost of the EPA rule had been a prime target by opponents, who have charged that the agency's projections—\$135 million to \$206 million a year—were severely underestimated. Opponents have said the actual costs could be much higher, including \$21 billion in capital costs for municipal wastewater treatment and stormwater utilities and more than \$1.1 billion annually for Florida's agricultural. In April 2011, EPA asked the National Academy of Sciences to conduct an independent review of the rule's implementation cost. In the study, the council committee noted it did not project the costs of the EPA or state rule.

**Source:** Bloomberg BNA Environment Reporter 3/8/12. The National Research Council report, *Review of the EPA's Economic Analysis of Final Water Quality Standards for Lakes and Flowing Waters in Florida*, is available at [http://www.nap.edu/catalog.php?record\\_id=13376](http://www.nap.edu/catalog.php?record_id=13376).

**Report Says 226 Million Pounds of Toxics Discharged Into U.S. Waterways in 2010**

About 226 million pounds of toxic chemicals were dumped into U.S. waterways in 2010, according to a [report](#) by an environmental group.

Five states—Georgia, Indiana, Nebraska, Texas, and Virginia—accounted for 40 percent of the discharges, according to the report, *Wasting Our Waterways* by Environment America.

Food and beverage manufacturing—which includes slaughterhouses and rendering plants—accounted for some of the largest discharges, along with primary metals manufacturing, chemical plants, and petroleum refineries, the report said. In addition, industries discharged about 1.5 million pounds of cancer-causing chemicals, such as arsenic, chromium, and benzene, into waterways according to the report. Nitrates accounted for about 90 percent of the total volume of discharges to waterways reported in 2010. The report, citing USEPA figures stated that pollution from industrial facilities is responsible for fouling water in more than 10,000 miles of rivers and more than 200,000 acres of lakes, ponds, and estuaries. The report calls for industrial facilities to reduce their toxic discharges to waterways by switching from hazardous chemicals to safer alternatives. Moreover, EPA and state agencies should issue permits with “tough, numeric limits for each type of toxic pollution discharged, ratchet down those limits over time, and enforce those limits with credible penalties, not just warning letters.”

**Source:** Bloomberg BNA Environment Reporter, 3/30/2012 discussing *Wasting Our Waterways: Toxic Industrial Pollution and the Unfulfilled Promise of the Clean Water Act*, which is available at <http://www.environmentamerica.org/sites/environment/files/reports/Wasting-Our-Waterways-vAM.pdf>.

### **Decline Seen in Chesapeake Bay Health in 2011**

The overall environmental health of the Chesapeake Bay declined in 2011, with its grade falling from C- in 2010 to D+, the second lowest level in 25 years, thanks to an unusual series of significant weather events, according to the latest annual evaluation of the bay ecosystem conducted by scientists at the University of Maryland Center for Environmental Science and the National Oceanic and Atmospheric Administration. The new report card, announced April 17, found that five of six environmental health indicators fell in 2011. It blamed the Mid-Atlantic region's wet spring, hot dry summer, Hurricane Irene, and the substantial rainfall resulting from Tropical Storm Lee. Nick DiPasquale, director of the EPA's Chesapeake Bay Program, said the “silver lining” is that another recent study concluded that the frequency and severity of dead zones in the bay has declined over the last 60 years, as a direct result of implementing measures to reduce nitrogen and phosphorus pollution.

**Source:** Bloomberg BNA Environment Reporter 4/20/2012. The 2011 Chesapeake Bay report card at <http://ian.umces.edu/ecocheck/report-cards/chesapeake-bay/2011/overview>.

### **Welch, W.Va., has agreed to spend up to \$23 million to eliminate CSOs**

The city will implement a long-term control plan that will completely separate sanitary wastewater and storm sewers, resolving violations of the Clean Water Act and bringing Welch into compliance with its National Pollutant Discharge Elimination System permit. Under the consent decree, all work must be completed by Dec. 31, 2027. Welch must submit a plan to EPA within 60 days for an ongoing program aimed at identifying and eliminating sources of inflow and infiltration into the combined sewer system. Once accepted by the agency, the plan will be incorporated as an enforceable provision of the consent decree. In six months the city will submit a “nine minimum controls plan” to EPA and the West Virginia Department of Environmental Protection, as well as a plan for upgrading its treatment plant and monitoring system. Welch will also pay a \$5,000 penalty for past violations, to be split between the federal government and the state.

**Source:** Bloomberg BNA Environment Reporter 3/8/12 discussing *United States v. Welch*, S.D. W.Va., No. 11-cv-647, 3/1/12

b. *Other Water*

**Final Criteria for Recreational Waters Planned for October**

The Environmental Protection Agency reportedly plans to finalize water quality criteria for recreational waters in October and is considering increasing the frequency of recommended water sampling and specifying the method for calculating bacterial levels. Proposed in December 2011, the criteria include indicator levels for fecal bacteria in fresh water and marine waters designated for swimming, water skiing, and other recreational uses. The fecal bacteria levels in the proposed criteria are used as indicators for beach closures and advisories. These bacteria indicator levels remain the same as for the current criteria, which were issued in 1986. States may use the criteria to establish water quality standards that in turn would form the basis for controlling the discharge and release of pollutants and for assessing the health of water bodies.

The agency developed the draft criteria in response to a 2008 settlement to resolve a lawsuit over EPA's alleged failure to comply with the Beaches Environmental Assessment, Cleanup, and Health Act of 2000 (BEACH Act, Pub. L. No. 106-284) (*Natural Resources Defense Council v. EPA*, C.D. Cal., No. 06-4843, 8/7/08). EPA was required under the BEACH Act to study human illnesses caused by polluted beach water by October 2003 and to promulgate revised water quality criteria by October 2005.

The proposed criteria draw on the latest research and science and are based on epidemiological studies showing a link between illness and fecal contamination in recreational waters. The two bacterial indicators of fecal contamination used are E.coli and enterococci. EPA is recommending the use of two statistical estimates to calculate recreational criteria: a geometric mean of the water monitoring samples and a "statistical threshold value."

The statistical threshold value serves as the "backstop" or the secondary level that must be met. The statistical threshold value refers to the 75th percentile of the geometric mean of the samples for a particular water body, and that value must not be exceeded more than 25 percent of the time.

EPA's goal is for recreational waters to meet the geometric mean of the sampled water quality. EPA in the proposed criteria recommended that both the geometric mean and the statistical threshold value be met for permitting purposes. EPA recommended beach closings occur when the statistical threshold value is exceeded more than 25 percent of the time for samples of both marine and freshwaters. The agency is recommending a geometric mean of 35 colony forming units per 100 milliliters and a statistical threshold value of 104 colony forming units per 100 mL for marine waters. It also is recommending a geometric mean of 126 colony forming units per 100 mL and a statistical threshold value of 235 cfu per 100 mL for fresh waters.

The proposed criteria recommend that water samples be averaged over a period of 30 days to 90 days, with at least one sample taken per week. The 1986 criteria recommended a 30-day sampling period with at least five samples. EPA said the water quality level recommended in the 2012 recreational water quality criteria for marine waters and fresh waters corresponds to a mean estimate of illness of approximately six to eight cases of gastrointestinal illness per 1,000 people who use both fresh and marine waters for recreation.

**Source:** Bloomberg BNA Environmental Reporter 2/3/12. EPA's proposed ambient water quality criteria for recreational waters are available at [http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/upload/recreation\\_document\\_draft.pdf](http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/upload/recreation_document_draft.pdf).

A fact sheet summarizing the proposed ambient water quality criteria is available at <http://water.epa.gov/scitech/swguidance/standards/criteria/health/recreation/upload/factsheet2011.pdf>.

### **Report Says Simply Rebuilding Water Infrastructure Is Unsustainable, Inefficient**

The U.S. water infrastructure must be transformed, not just rebuilt, to make investments more efficient and to meet increasing demand, according to a Jan. 26 report. Released by Charting New Waters, the report is an attempt to identify cost-effective and sustainable ways to improve and rebuild the nation's water infrastructure in the 21st century. The report, *Financing Sustainable Infrastructure*, calls for a shift in emphasis from technologies that pump and treat water and those that conserve and reuse. The report also said water pricing should be based on how it is used and treated.

**Source:** Bloomberg BNA Environmental Reporter 2/3/12. The report, *Financing Sustainable Infrastructure*, is available at [http://www.johnsonfdn.org/sites/default/files/reports\\_publications/WaterInfrastructure.pdf](http://www.johnsonfdn.org/sites/default/files/reports_publications/WaterInfrastructure.pdf).

### **EPA Finalizes Update to Approved CWA Analytical Methods**

EPA has issued a final rule to approve several new or revised analytical methods, or test procedures, for measuring regulated pollutants in wastewater. Through the "*Guidelines Establishing Test Procedures for the Analysis of Pollutants Under the Clean Water Act; Analysis and Sampling Procedures*", EPA is adding to 40 CFR 136 new and revised methods. Some of these additional analytical methods are new methods (i.e., introduce a new technology or establish a method for a pollutant for the first time) to the NPDES program. Others are updated versions of previously approved methods. This rule also provides clarification of the process for requesting limited or nationwide review of alternate test procedures (ATP) and additional examples of allowed flexibility to modify approved analytical methods. It also includes new standardized quality assurance and quality control (QA/QC) requirements, and makes some changes to sample collection, preservation, and holding times.

**Source:** EPA Fact Sheet at [http://water.epa.gov/scitech/methods/cwa/upload/methods\\_factsheet.pdf](http://water.epa.gov/scitech/methods/cwa/upload/methods_factsheet.pdf). See also, the Federal Register notice at <http://www.epa.gov/scitech/methods>. In addition, the final rule will be available at <http://www.regulations.gov> under Docket ID: EPA-HQ-OW-2010-0192.

### **EPA Releases Post-Construction CSO Monitoring Guidance (Fed'l water regulatory)**

The Environmental Protection Agency has released [guidance](#) to help communities with combined sewer systems to develop post-construction compliance monitoring programs. A post-construction monitoring program involves various activities such as data collection, data validation, and monitoring to determine the effectiveness of combined sewer overflow (CSO) controls, according to the *CSO Post Construction Compliance Monitoring Guidance*. The document, which was posted June 12, provides technical assistance to National Pollutant

Discharge Elimination System (NPDES) authorities under the Clean Water Act, such as permit writers and water quality specialists and combined sewer overflow permittees.

It is intended to ensure that their post-construction compliance monitoring plans collect sufficient data for evaluating the effectiveness of combined sewer overflow controls in meeting performance goals and assessing compliance with water quality standards.

According to the guidance, a water quality compliance monitoring program should include a plan to be approved by the NPDES permitting authority that details monitoring protocols to be followed, including necessary effluent and ambient monitoring and, where appropriate, other monitoring protocols such as biological assessments, whole effluent toxicity testing, and sediment sampling. Permittees with CSOs are required to develop an adequate, long-term control plan designed to meet Clean Water Act requirements. One element of a long-term control plan cited in the 1994 CSO policy is the development of a post-construction compliance monitoring program sufficient to verify compliance with water quality-based requirements and ascertain the effectiveness of CSO controls.

Monitoring requirements in NPDES permits must result in the generation of appropriate information to determine the effectiveness of CSO controls and to verify CSO performance criteria and NPDES permit requirements, the document continued. The document includes elements addressing data quality to help permit writers and regulated entities ensure that the data collected are sufficient to meet expectations established by the CSO control policy. The guidance states that a monitoring program should include necessary CSO effluent and in-stream ambient monitoring and, where appropriate, other monitoring protocols such as biological assessment, toxicity testing, and sediment sampling. Post-construction compliance monitoring is a continuous process to determine whether the CSO long-term control plan is meeting the regulatory requirements as planned. It also states that monitoring programs will vary from community to community, depending on the CSO plan and the receiving waters.

**Source:** Bloomberg BNA Infrastructure Investment and Policy Report 6/14/12. The CSO Post Construction Compliance Monitoring Guidance is available at [http://www.epa.gov/npdes/pubs/final\\_cs0\\_pccm\\_guidance.pdf](http://www.epa.gov/npdes/pubs/final_cs0_pccm_guidance.pdf).

### **EPA Webinar on Tools for Developing State Nitrogen and Phosphorus Pollution Reduction Strategies**

EPA is sponsoring a free Watershed Academy Webinar, **Nitrogen and Phosphorus Webinar Series: Tools for Developing State Nitrogen and Phosphorus Pollution Reduction Strategies** on November 30 from 1:00 to 3:00 p.m. Eastern Time. This webinar will help states and others stakeholders understand key tools they can use to reduce nitrogen and phosphorous pollution. The webinar will demonstrate EPA's new nitrogen and phosphorus pollution data access tool designed to help states develop reduction strategies. The webinar will also demonstrate the new, interactive SPARROW decision support system, designed by U.S. Geological Survey. The system can be used by water managers, researchers and the general public to map long-term water quality conditions and source contributions by stream reach and catchment, as well as track nitrogen and phosphorus transport to downstream receiving waters, such as reservoirs and estuaries. This webinar is one in a series on the issue of nutrient pollution.

**Source:** This Week in Washington, November 18, 2011

## **EPA Sends OMB Revised Effluent Guidelines for Stormwater Runoff from Construction Sites**

On November 16, EPA sent to the Office of Management and Budget (OMB) a revised construction and development effluent limitations guidelines (ELG) that will set numeric turbidity limits for stormwater runoff based on new data on treatment performance. The ELG revisions are closely tied to EPA's construction general permit (CGP) for stormwater discharges because the permit relies on the ELG technology-based limits. In July 2011, EPA extended the expiration date for its current CGP to February 15, 2012 to provide time to revise and finalize the ELG in order to include this limit in the CGP following industry concern that it is difficult to provide meaningful comments on a new proposed CGP without knowing the associated ELG turbidity limit. Another industry concern is that a nationally applied numeric standard is problematic due to differences in terrain, geography, soil properties, vegetation and precipitation patterns and characteristics across the country. WEF voiced similar concerns in comments submitted on July 11, 2011 on the CGP.

**Source:** This Week in Washington, November 18, 2011

## **NRC Report Finds Wastewater Reuse Has Significant Potential to Increase Nation's Water Resources**

According to a report - *Water Reuse: Potential for Expanding the Nation's Water Supply Through Reuse of Municipal Wastewater* - issued on January 10 by the National Research Council (NRC), recent advances in technology and design, treating municipal wastewater and reusing it for drinking water, irrigation, industry, and other applications could significantly increase the nation's total available water resources, particularly in coastal areas facing water shortages. The report examines a wide range of reuse applications, including potable water, non-potable urban and industrial uses, irrigation, groundwater recharge, and ecological enhancement.

The report also outlines wastewater treatment technologies for mitigating chemical and microbial contaminants, including both engineered and natural treatment systems. These processes were determined to assist in tailoring wastewater reclamation plants to meet the quality requirements of intended reuse applications. The report notes that existing legislative tools could be applied to improve the quality of water for reuse, including updating the National Pretreatment Program's list of priority pollutants to include a wider inventory of known toxic substances. The report indicated that drinking water needs to be revised or adjusted to protect the quality of reclaimed water used for potable purposes. The study also recommended that EPA establish at a minimum federal risk-based standards under the Clean Water Act to regulate non-potable uses of treated municipal wastewater, municipal wastewater effluent, or reclaimed water. The report lists 14 areas of research to help guide the country on how to apply water reuse appropriately.

**Source:** WEF's This Week in Washington from WEF, 1/13/12. The report is available at [http://www.nationalacademies.org/morenews/20120110.html?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+nationalacademies%2Fna+%28News+from+the+National+Academies%29](http://www.nationalacademies.org/morenews/20120110.html?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+nationalacademies%2Fna+%28News+from+the+National+Academies%29)

## **Report Discusses Financial Approaches to Fund Stormwater Reduction Projects**

A Natural Resources Defense Council report found that cities, towns, and water utility districts may finance stormwater runoff reductions by using schemes similar to those used for energy efficiency retrofits. The report, *Financing Stormwater Retrofits in Philadelphia and Beyond*,



released Feb. 2, urged the use of financing schemes where a portion of future stormwater fee savings can be used for lender or project financier repayments of retrofit costs. The report also touted Philadelphia's parcel-based fee structure for stormwater retrofits as a model for other cities that are looking to reduce stormwater runoff. The report said this type of financing is used to finance energy efficiency retrofits, which often are repaid through future savings on energy bills. NRDC issued the report to discuss financing barriers that property owners face in securing funds to reduce stormwater runoff into combined sewer systems.

Traditional asset-based financing often does not work for stormwater retrofits on many commercial real estate properties because they are held by limited liability companies without credit ratings and thus cannot obtain loans for stormwater reduction projects, the report said.

The report recommended various types of alternative financing schemes, including one they call "off-balance sheet" financing. In this type of financing, a stormwater reduction project developer separate from the property owner takes on all the costs involved in the retrofit and is repaid by the owner over time from the owner's reduction in associated fees.

Philadelphia has taken the lead among U.S. cities for establishing a parcel-based stormwater billing structure, the report said. Philadelphia's Public Works Department offers a credit valued at nearly 100 percent of the stormwater fee to property owners that demonstrate management or retention of the first inch of stormwater over 100 percent of their total impervious area. The report said the parcel-based fee structure is fairer than a water meter-based fee because the stormwater fee is based on impervious area and total gross area instead of on the quantity of potable water used by a property owner. In Philadelphia, according to the report, the relatively unpaved University of Pennsylvania with high potable water usage saw its stormwater fee drop by roughly \$11,000 a month, while the Philadelphia airport, "which uses very little water but is almost entirely paved, will see its monthly stormwater fee raised by \$126,000 per month."

**Source:** Bloomberg BNA Environment Reporter, 2/10/12. The NRDC report *Financing Stormwater Retrofits in Philadelphia and Beyond* is available at <http://www.nrdc.org/water/files/StormwaterFinancing-report.pdf>.

### **Obama Orders Agencies to Identify Projects for Expedited Permitting, Approval**

President Obama has ordered federal agencies to take additional steps to expedite federal reviews and approvals for major infrastructure projects, including everything from renewable energy facilities and crude oil pipelines to roads, airports, ports, and waterways. The order, *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, calls on federal agencies **to identify by the end of April regional and national projects** that merit an expedited process. Projects covered under the directive will include roads and surface transportation, aviation, ports and **waterways, water resource projects**, renewable energy generation, electricity transmission, broadband, and pipelines. The projects identified under the executive order will be added to those that already are being tracked on the online Federal Infrastructure Projects Dashboard, which was established under the Aug. 31 presidential memorandum, *Speeding Infrastructure Development through More Efficient and Effective Permitting and Environmental Review*.

**Source:** Bloomberg BNA Infrastructure Investment and Policy Report, 3/26/12. Text of the *Improving Performance of Federal Permitting and Review of Infrastructure Projects*, executive order is available at <http://www.whitehouse.gov/the-press-office/2012/03/22/executive-order-improving-performance-federal-permitting-and-review-infr>. Text of the Aug. 31 *Speeding*

*Infrastructure Development through More Efficient and Effective Permitting and Environmental Review* memorandum is available at <http://www.whitehouse.gov/the-press-office/2011/08/31/presidential-memorandum-speeding-infrastructure-development-through-more>. The online Federal Infrastructure Projects Dashboard may be accessed at <http://permits.performance.gov/>.

### **EPA Publishes Human Health Benchmarks for Pesticides in Water**

EPA has published a table of human health benchmarks for approximately 350 pesticides to enable states, water systems and the public to better determine whether the detection of a pesticide in drinking water or source waters for drinking water may indicate a potential health risk. Advanced testing methods now allow pesticides to be detected in water at very low levels. These small amounts of pesticides detected in drinking water or source water for drinking water do not necessarily indicate a health risk. Concentrations of pesticides in drinking water that have the potential for cancer risk are not currently included in the human health benchmarks for pesticides table. EPA intends to include these concentrations later. The table includes pesticide active ingredients for which health advisories or enforceable National Primary Drinking Water Regulations have not been developed. EPA intends to update its online table of human health benchmarks for pesticides annually to ensure that the best available science is accessible to the public.

**Source:** WEF *This Week in Washington* 4/20/2012. The table is available at <http://iaspub.epa.gov/apex/pesticides/f?p=HHBP:home:3234317542875447>

### **EPA to Propose NPDES e-Reporting Rule**

EPA will soon propose the National Pollutant Discharge Elimination System (NPDES) Electronic Reporting Rule as part of EPA's ongoing efforts to advance electronic reporting. The proposal will encompass available IT technologies to improve the availability of NPDES information to EPA and the states through electronic reporting directly from the NPDES permittees. EPA believes that NPDES e-reporting will increase data accuracy and provide more efficient use of limited resources. EPA expects the proposed rule will be published in the *Federal Register* within the next few months, followed by a comment period and promulgation of the final rule by the end of 2012 or early in 2013.

EPA will host a free webinar on their proposed NPDES Electronic Reporting Rule on May 23 from 1-3 pm EDT. The webinar will include the purpose, requirements, implementation as well as the schedule for the proposed rule in order to help inform NPDES permittees on the proposed rule and clarify the requirements. To register for the webinar, go to: <https://www1.gotomeeting.com/register/633569249>

**Source:** This Week in Washington, April 30, 2012

### **EPA Updates Online Water Quality Standards Guidance**

EPA has updated the online version of its water quality standards handbook (<http://epa.gov/wqshandbook>) to make it more user-friendly and improve transparency by providing links to EPA's most recent policy documents. The handbook is a compilation of EPA's guidance on the water quality standards program and provides direction for states, territories and authorized tribes in reviewing, revising and implementing water quality standards. Look for the "updated information" boxes located throughout each chapter for links to recent

policy and guidance as well as hyperlinks to documents referenced in the handbook text. EPA has also consolidated its online water quality standards policy and guidance reference library (<http://epa.gov/wqslibrary>), which includes relevant water quality standards policy and guidance documents. The library is sortable by document title, issue date, topic and EPA publication number.

**Source:** EPA Water Headlines 5/16/2012.

## 2. Non-Water

### **RGGI States Retiring Unsold Allowances, Signaling Possible Tightening of Carbon Cap**

Seven of the nine states participating in the Regional Greenhouse Gas Initiative intend to retire 87 million carbon dioxide emissions allowances that were not sold during the past six auctions, a move analysts say foreshadows a likely tightening of the regional emissions cap. Connecticut, Delaware, Massachusetts, New York, Rhode Island, and Vermont will retire 67.6 million allowances, while Maryland has proposed regulatory changes to allow it to retire 19.7 million allowances, according to RGGI. Maine and New Hampshire will reportedly decide what to do with their unsold allowances on an auction-by-auction basis. The 87 million allowances will be retired “in a manner consistent with each state's independent legal authority and state-specific process,” RGGI said. Retiring the allowances means they will not be available for resale to utilities within the regional initiative. Each allowance allows the holder to emit one ton of carbon dioxide. The RGGI states are undertaking a comprehensive review of the program, including the level of the emissions cap. A recent analysis by Environment Northeast showed that emissions from power plants in RGGI states in 2011 were expected to be 34 percent below the annual cap and that emissions showed no sign of increasing.

**Source:** Bloomberg BNA Environmental Reporter 2/3/12

### **Handbook Helps Managers Plan for Impact of Global Warming on Water Resources**

A group of federal and state agencies Dec. 1 released a publication to help water resource managers plan for the impact of climate change. The *Climate Change Handbook for Regional Water Planning*, developed by the California Department of Water Resources, the Environmental Protection Agency, and the U.S. Army Corps of Engineers in conjunction with the Resources Legacy Fund, outlines a framework for addressing water-related climate effects, including those of extreme weather events and temperature changes on water quality and availability. Although the framework is based on the California Integrated Regional Water Management Planning process, it can be used by water resource managers and planners across the country, according to the handbook. It contains a section on assessing regional vulnerability to climate change.

The handbook outlines a strategy for prioritizing water resources most likely to be affected by climate change and for determining which resources would have a significant impact on regional water management. Stakeholder involvement is crucial in determining the vulnerability of a watershed, according to the handbook. The handbook also includes:

- an overview of climate change science, including anticipated future climate trends;
- tools for conducting large-scale and project-scale greenhouse gas emissions inventories;
- tools for measuring regional impacts; and
- options for incorporating uncertainties into climate change planning.

**Source:** BNA Infrastructure Investment & Policy Report 12/1/11. *The Climate Change Handbook for Regional Water Planning* is available at [http://www.water.ca.gov/climatechange/docs/Climate\\_Change\\_Handbook\\_Regional\\_Water\\_Planning.pdf](http://www.water.ca.gov/climatechange/docs/Climate_Change_Handbook_Regional_Water_Planning.pdf).

### **3. Judicial and Enforcement**

#### **a. Wet Weather**

#### **Update on EPA Framework for Integrated Planning and Permitting Approach**

EPA's revised framework for instituting a voluntary integrated planning and permitting approach for managing stormwater and wastewater will now most likely be issued in May rather than the previously anticipated April. Both Nancy Stoner, acting EPA Assistant Administrator for Water, and Jim Hanlon, EPA's Director of the Office of Wastewater Management (OWM), Office of Water, confirmed this somewhat delayed release during last week's *National Environmental Policy Forum*, sponsored by the National Association of Clean Water Agencies (NACWA).

While the revised framework is not expected to differ greatly from the January draft, previous discussions between WEF and EPA staff indicate that the framework may now include explicit reference to using adaptive management approaches as part of a local integrated plan. EPA continues to emphasize that the framework is just that, a framework, and not specific guidelines. As Mr. Hanlon said at the NACWA Forum, "we [EPA] will not provide the recipe to municipalities for prioritizing their infrastructure needs." EPA officials also emphasized that States with delegated CWA authority will take the lead in working with local governments and utilities as such integrated plans are developed and incorporated into permits or compliance requirements. EPA encouraged communities interested in integrated planning to reach out to their state regulators as early in the process as possible. WEF will host a free webinar for its members after release of the final framework to discuss next steps.

**Source:** This Week in Washington, April 30, 2012.

#### **EPA Releases Report on Water-Climate Strategy**

The Environmental Protection Agency has released its third report highlighting progress toward achieving goals of its National Water Program Strategy for responding to climate change in 2010 and 2011. The strategy, first published in October 2008, described climate change impacts on water programs, defined goals and objectives for responding to climate change, and identified a set of key actions that could be undertaken. The strategy was organized into five areas—mitigation, adaptation, research, education, and management. The *National Water Program Strategy: Response to Climate Change, 2010-2011 National and Regional Highlights of Progress* is available at <http://water.epa.gov/scitech/climatechange/implementation.cfm>.

**Source:** Bloomberg BNA Environmental Reporter 2/3/12

#### **U.S. Supreme Court Declines to Clarify Test For Water Act Jurisdiction Set in *Rapanos***

The U.S. Supreme Court refused to consider an appeals court finding that either the plurality or the concurring standard the high court set in *Rapanos v. U.S.* can be used to establish Water Act jurisdiction over wetlands. The court decision not to hear the case lets stand a \$250,000 Clean Water Act fine for filling a parcel of wetlands. David H. Donovan, a Delaware resident, clashed

with the U.S. Army Corps of Engineers over his filling of an area designated as wetlands. Donovan lost his case in the U.S. District Court for the District of Delaware, which granted summary judgment in favor of the government, and then in the U.S. Court of Appeals for the Third Circuit. The appeals court agreed with the lower court that the land constitutes wetlands and is subject to jurisdiction under the Clean Water Act if it meets either of the two tests established by the 2006 Supreme Court decision in *Rapanos v. U.S.*, 547 U.S. 715 (2006).

Donovan then filed a petition for a writ of certiorari at the Supreme Court. He asserted that his property was not covered by the Clean Water Act and that federally protected wetlands are only lands owned by the federal.

**Source:** Bloomberg BNA Toxics Law Reporter latest developments 5/15/2012 discussing *Donovan v. U.S.*, U.S., No. 11-1210, *cert. denied* 5/14/12

### **EPA Reaches Agreement on DC Municipal Stormwater Permit Compliance Deadline Plan**

According to a May 18 agreement reached with environmental groups (*District of Columbia Municipal Separate Storm Sewer System, NPDES Permit No. DC0000221*, EPA EAB, NPDES Appeal No. 11-06, 5/18/12), **EPA will provide the District of Columbia with explicit and enforceable deadlines for meeting interim and final stormwater discharge permit requirements** and meeting water quality standards for the Chesapeake Bay and to provide opportunities for the public to participate in the development of the plan. EPA had issued a stormwater discharge permit in September 2011 for DC's municipal separate stormwater sewer system (MS4). Earthjustice, and several other environmental groups challenged this permit before the agency's Environmental Appeals Board in November 2011, alleging the permit lacked legally enforceable deadlines for meeting Clean Water Act obligations. EPA will now be required to issue a draft notice of proposed changes to the permit within 2 months and have another 6 months before it takes final action. Earthjustice Press Release

**Source:** This Week in Washington, May 25, 2012

### **New On-Line EPA Tool Allows Search of DMR and TRI Data**

The Discharge Monitoring Report (DMR) Pollutant Loading Tool is a new tool designed to help anyone determine **who is discharging, what pollutants they are discharging and how much, and where they are discharging**. The tool calculates pollutant loadings from permit and DMR data from EPA's Permit Compliance System (PCS) and Integrated Compliance Information System for the National Pollutant Discharge Elimination System (ICIS-NPDES). Data is available for the years 2007 through 2010. Pollutant loadings are presented as pounds per year and as toxic-weighted pounds per year to account for variations in toxicity among pollutants. In EPA's words "the tool ranks dischargers, industries, and watersheds based on pollutant mass and toxicity, and presents "top ten" lists to help you determine which discharges are important, which facilities and industries are producing these discharges, and which watersheds are impacted."

The tool also includes wastewater pollutant discharge data from EPA's Toxics Release Inventory (TRI). Data is available for the years 2007 through 2010. Users can search TRI data to find the facilities with the largest pollutant discharges to surface waters or POTWs. Users can also compare the DMR data search results against TRI data search results and vice versa. The tool clearly labels the source of data when displaying search results but does not mix TRI or DMR data when calculating pollutant discharges.

**Source:** <http://cfpub.epa.gov/dmr/>

b. ***Industrial Water Enforcement***

**DuPont to Pay Fine, Improve Handling of Waste Water**

DuPont will pay a \$500,000 civil penalty and conduct a comprehensive engineering study of the waste water collection and treatment systems at its Edge Moor titanium dioxide production facility in Delaware under a proposed settlement of alleged Clean Water Act violations. The proposed consent decree would resolve allegations in a civil lawsuit filed against DuPont by the Environmental Protection Agency and the Delaware Department of Natural Resources and Environmental Control (DNREC). EPA and DNREC claimed that discharges of waste water, storm water, and non-contact cooling water to the Delaware River from the Edge Moor plant's outfalls exceeded permit limits for unspecified pollutants on numerous occasions between 2005 and 2011. In addition, state and federal environmental regulators alleged that the facility's storm water pollution prevention plan and best management practices were deficient. Under the proposed settlement, which is subject to a 30-day public comment period, DuPont does not admit any of the allegations and denies liability to EPA and the state.

DuPont is required to pay a civil penalty of \$250,000 to the United States and the same amount to DNREC. In addition, the agreement mandates an environmental compliance assessment of the Edge Moor facility's waste water collection and treatment systems to identify possible deviations from process design, maintenance, inspection, or operating practices that may lead to unpermitted discharges and recommend corrective actions. Results, recommendations, and a schedule for implementing corrective measures must be submitted to EPA and DNREC for approval within 15 months after the settlement is approved by the court.

The agreement also includes a number of reporting requirements and stipulated penalties for late payment of the penalty, violations of effluent limits, failure to submit the environmental compliance assessment report or implement corrective actions on time, and violations of reporting and records retention requirements. DuPont already has completed a number of projects at the Edge Moor plant to improve procedures related to permitted discharges according to a DuPont spokesman.

**Source:** BNA Toxics Law Reported, 11/11/11 discussing *U.S. v. E.I. DuPont de Nemours & Co.*, D. Del, No. 11-cv-1057-UNA, 10/31/11

**Russell Stover Candies Fined for Clean Water Act Violations**

Russell Stover Candies, Inc., has agreed to pay a \$585,000 civil penalty to settle alleged violations of the federal Clean Water Act at its facility in Iola, Kan. In June 2008, EPA performed an audit of the City of Iola's pretreatment implementation activities. During the audit, EPA identified numerous program deficiencies, including Russell Stover's discharges of acidic wastewater to a publicly owned treatment works. In July 2009, EPA issued an administrative compliance order to Russell Stover to cease discharges of its acidic wastewater and provide monitoring and additional information to EPA. The violations were documented by sampling conducted by Russell Stover but did not stop until EPA issued the compliance order in 2009. After the 2009 order was issued, the company implemented pretreatment measures and enhanced its discharge monitoring.

**Source:** Water & Wastewater News, 6/27/12

### **\$8.74 Million Settlement with Lafarge Resolves Stormwater Violations in Five States**

Lafarge North America Inc. and four of its subsidiaries have agreed to pay a fine of \$740,000 and undertake \$8 million worth of projects to improve compliance with stormwater regulations in a Clean Water Act settlement to resolve violations at 21 facilities in five states. The settlement, filed Nov. 29 in the U.S. District Court for the District of Maryland, resolves violations stemming from unpermitted discharges of stormwater at stone, gravel, sand, asphalt, and ready-mix concrete facilities in Alabama, Colorado, Georgia, Maryland, and New York. The Clean Water Act requires that industrial facilities, such as ready-mix concrete plants and sand and gravel facilities, install controls to prevent chemicals, debris, sediment, and other pollutants from washing into the stormwater that is discharged into nearby streams, lakes, and rivers.

According to the Justice Department, Lafarge North America and its subsidiaries—Lafarge Building Materials Inc., Lafarge West Inc., Lafarge Mid-Atlantic L.L.C., and Redlands Quarries NY Inc.—engaged in a pattern of violations that go as far back as 2006. The companies were accused of making unpermitted stormwater discharges, violating effluent limits, inadequate management practices, missing compliance records for stormwater discharges, and inadequate stormwater discharge monitoring and reporting. In return for dropping all charges, Lafarge has agreed to purchase conservation easements on 140 acres in Maryland and 26 acres in Colorado, appraised at \$2.95 million, and to enforce Clean Water Act compliance plans based on comprehensive reviews at 189 of its facilities across the United States. As part of these reviews, the company will be required to conduct an inventory of all discharges to U.S. waters, identify best management practices, comply with all applicable effluent limits, and implement a management, training, inspection, and reporting program to enhance oversight of its operations and compliance with stormwater regulations. Of the \$740,000 in civil fines, the U.S. government will receive \$524,361, Maryland will get \$153,556, and Colorado \$62,083. Alabama, Georgia, and New York did not join in the complaint so they will not get any share of the civil penalty.

In a statement issued Nov. 29, the president of Lafarge North America's Aggregate & Concrete Division in the western United States maintained that Lafarge North America operated its plants in an environmentally responsible manner.

**Source:** BNA Infrastructure Investment & Policy Report: News Archive (11/30/11) discussing (*United States v. Lafarge North America Inc.*, D. Md., No. 1:11-cv-03426 *The proposed consent decree between Lafarge North America Inc. and the government is available at <http://www.epa.gov/compliance/resources/decrees/civil/cwa/lafargenorthamerica-cd.pdf>, 11/29/11*).

### **Fertilizer Company to Pay \$1.8 Million to Settle Hazardous Waste Allegations**

A fertilizer company has agreed to pay a \$1.8 million penalty to resolve allegations that it violated federal hazardous waste and clean air regulations at its Pasadena, Texas, facility. Agrifos, a former phosphoric acid and phosphate fertilizer producer, was allegedly processing and disposing of hazardous wastewater without a permit and improperly routing effluent from a scrubber through a cooling tower. The company's actions violated the Resource Conservation and Recovery Act and the Clean Air Act, according to the Dec. 7 administrative consent agreement. Agrifos currently produces sulfuric acid and ammonium sulfate fertilizers.

In addition to the penalty, the company will be required to construct a stormwater collection barrier around its fertilizer production facility to minimize the environmental impact from fertilizer production. The containment structure will collect contaminated stormwater runoff to be reused in the production process. The structure is expected to capture more than 1 million gallons of contaminated stormwater per year for reuse, based on average rainfall at the facility.

**Source:** BNA Environment Reporter 12/9/11.

### **Judge Weighs Paper Co.'s Liability in \$700M River Cleanup**

A Wisconsin federal judge on Monday ruled that Appleton Papers Inc. may be held liable for some of the \$700 million in environmental damages at Fox River, the country's biggest Superfund site, because API explicitly agreed to assume such liability when buying the company in 1978. The denial of API's motion for summary judgment was a reversal by U.S. District Judge William C. Griesbach, who said in July that it was unlikely that API had successor liability under the Comprehensive Environmental Response Compensation and Liability Act. At issue is whether API, which bought Appleton Papers from NCR Corp. in 1978, is liable for part of the estimated \$700 million in cleanup costs from PCBs that were dumped in the Wisconsin River by paper mills.

**Source:** Law360, 12/20/2011 discussing *United States of America et al v. NCR Corporation et al.*, case number 1:10-cv-00910, in the U.S. District Court for the Eastern District of Wisconsin.

### **Maple Coal Denied Appeal Bid in Sierra Club Suit**

Maple Coal Co.'s bid for interlocutory appeal in a \$14 million lawsuit by the Sierra Club for violations of the Clean Water Act was denied, with the judge concluding that the company's questions would have had no bearing on the outcome of the case. The Sierra Club sued Maple in January 2011, alleging it was violating the Clean Water Act by illegally dumping selenium from its southwestern West Virginia copper mines into nearby federally protected creeks.

The West Virginia Department of Environmental Protection had filed its own lawsuit against Maple in June 2010, but the Sierra Club claimed that lawsuit was a sham intended to allow pollution to continue at the sites. The Sierra Club filed its complaint in the U.S. District Court for the Southern District of West Virginia, asserting claims under the Clean Water Act and the Surface Mining Control and Reclamation Act. The alleged pollution comes from two mines in West Virginia's Fayette and Kanawha counties: the Sycamore South Surface Mine and the Sycamore South Extension. The Sierra Club claims Maple allows excessive levels of toxic selenium to flow into federally protected creeks nearby. The WVDEP's lawsuit would normally preclude the Sierra Club from filing a private action under the Clean Water Act, but the Sierra Club claimed the department really wanted to extend Maple Coal's right to pollute under a permit that has already expired. In September 2011, U.S. District Judge Robert C. Chambers ruled that the State had been non-diligent in the enforcement of its regulations and allowed the Sierra Club's lawsuit to continue. Maple took issue with the ruling, asking Judge Chambers to approve two questions for interlocutory appeal regarding his findings that the department had been non-diligent.

The first asked whether the district court could find a lack of diligent prosecution because the state did not seek to enforce pollution limits or a compliance schedule in its suit, while the second asked whether the court could find non-diligence if only seven months had passed since



the department filed its complaint. In denying Maple's request, Judge Chambers said that Maple has misread his September ruling and that the questions would not advance the case. Chambers said that a review of his determination of non-diligence would require a more detailed factual inquiry than is allowed under the rules for interlocutory appeals, and would conflict with federal policy against piecemeal appeals.

The State had asked the court to "set a new schedule of compliance," an action the U.S. Environmental Protection Agency refused to allow earlier.

"WVDEP has attempted to achieve through the judicial process precisely what U.S. EPA prohibited it from doing through the permitting process," the Sierra Club said in its complaint. "That action does not seek compliance with the selenium limits in that permit, and hence cannot preclude this action. Rather, WVDEP's complaint expressly seeks to delay the requirement that Maple comply with the limits."

**Source:** Law360, 12/20/2011 discussing Ohio Valley Environmental Coalition Inc. et al. v. Maple Coal Co., case number 11-cv-00009, in the U.S. District Court for the Southern District of West Virginia.

### **U.S. EPA Orders World's Largest Metals & Electronics Recycler to Immediately Cease Illegal Discharge of Toxic Pollutants to San Francisco Bay**

The U.S. Environmental Protection Agency has ordered Sims Metal Management, located at the Port of Redwood City, Calif., to comply with federal Clean Water Act laws following inspections that found evidence of unlawful discharges of PCBs, mercury, lead, copper and zinc into San Francisco Bay. The South Bay facility is home to one of the largest metal shredders in the Bay Area, and regularly shreds entire cars before exporting the metal overseas. Sims Metal claims to be the world's largest metals and electronics recycler. According to records provided by the Port of Redwood City, from July 2010 to June 2011, 20 large vessels, picked up and transported an average of 22,000 tons of shredded material from the facility bound for global destinations including China. The largest transport during the specified time period was 35,000 tons of shredded material.

In March 2011, EPA inspected the facility to determine compliance with their Industrial Storm Water Permit. During the inspection, enforcement officers found evidence at the facility's shipping and rail receiving areas that pollutants have been discharged to Redwood Creek, a direct tributary to San Francisco Bay. Redwood Creek flows between the Port of Redwood City and the Don Edwards National Wildlife refuge and is a tributary to San Francisco Bay. San Francisco Bay is an impaired water body and is listed on the State's 303(d) list of impaired waters for pesticides, mercury, PCBs (polychlorinated biphenyls), and trash. The Bay is also used by recreational boaters, anglers, windsurfers and swimmers.

In August 2011, EPA again inspected the facility and took samples of debris and soils in the areas that flow to San Francisco Bay, where the facility conducts shipping and receiving activities. The results of the samples demonstrated elevated PCBs, mercury, lead, copper and zinc. Sims Metal Management acknowledged receipt of the U.S. EPA Order on December 21, 2011. The order requires Sims to submit a revised storm water pollution prevention plan and to update monitoring and sampling within 30 days of the order; and to develop and implement storm water pollution counter measures. EPA's order also requires Sims Metal Management to develop and submit a plan within 90 days to eliminate these discharges to Redwood Creek within one year. The company must: sample storm water discharges monthly throughout the winter and

spring; revise their storm water pollution prevention plan to update monitoring and sampling; and develop and implement storm water pollution counter measures for all areas of activity. Sims is working cooperatively with the EPA to address requirements of the order.

**Source:** Environmental Protection, 1/10/2012

### **Foundry Admits Illegal Storage of Lead, Cadmium**

Franklin Non-Ferrous Foundry Inc. and its president pleaded guilty in the U.S. District Court for the District of New Hampshire to one count of unlawful storage of hazardous waste under the Resource Conservation and Recovery Act. Under a plea agreement, the government will recommend two years probation for the company and two years probation, including six months of home confinement, and a public apology from the Company President. The offense carries a maximum fine of \$500,000 for the company and \$250,000 for the president.

The foundry manufactured metal parts made of brass, bronze, aluminum, and metal alloys at its Franklin, N.H., plant and generated lead and cadmium byproducts in amounts that qualified as hazardous waste under RCRA. Inspectors from the Occupational Safety and Health Administration in 2009 found that the company had not shipped any hazardous waste from the facility since 2005. Executing a search warrant, officials from the Environmental Protection Agency discovered several 55-gallon drums with toxic levels of waste.

The president admitted that he knew he was required by law to remove the waste within 90 days to an approved off-site disposal facility but had not done so because he could not afford the expense.

**Source:** Bloomberg BNA Environment reporter, 1/13/12(*United States v. Wiehl*, D. N.H., No. 10-cr-112-01, *pleas entered* 1/6/12).

### **Aera to Face Punitive Damages Trial in Pollution Case**

A California appeals court affirmed a \$8.5 million jury verdict against oil and gas producer Aera Energy LLC — accused of polluting neighbor Starrh & Starrh Cotton Growers' groundwater. In addition it reversed the trial court's ruling denying punitive damages. The appeals court ordered a new trial on punitive damages, saying the trial court had erred when it submitted a factual question to the jury regarding the punitive damages without allowing the parties to argue or present evidence on the issue. The case dates to 2001, when Starrh sued Aera, a subsidiary of Shell Oil Co. and Exxon Mobil Corp., for allegedly shirking proper disposal of its oil field wastewater. Billions of barrels of produced water have been disposed of in the cheapest way available, by storage in basins that eventually contaminate the aquifer, according to Starrh. The defendants, meanwhile, argued that the native water was too salty for irrigation and that the cotton farm would be unable to use it regardless of the oil field contamination.

In November 2004, a jury awarded Starrh roughly \$7 million, which the plaintiff successfully appealed, claiming that the jury lacked sufficient evidence for its cost estimates. A 2009 jury increased the award to \$8.5 million. In the second trial, Starrh also requested punitive damages, claiming that Aera had operated with malice when it continued to improperly dispose of its wastewater after the 2004 verdict. Without allowing discussion on the issue, the judge in the second trial asked the jurors whether they believed the water that had trespassed onto Starrh's property by the time of the second verdict resulted from acts Aera had committed by 2004, according to the opinion. In addition to ordering the new trial on punitive damages, the appeals court rejected Starrh's argument that the compensatory damages award should take into account

the more than \$1 billion that Aera made while polluting the Starrh property, not just the costs Aera avoided by not properly containing the wastewater.

**Source:** Law 360, 1/25/12 discussing *Starrh and Starrh Cotton Growers v. Aera Energy LLC*, case numbers F058778 and F059660, in the Court of Appeal of the State of California, Fifth Appellate District.

### **GE Intentionally Arranged Disposal of PCBs When it Sent Them for Reuse**

The intent to dispose of hazardous substances under the superfund law may be inferred by a party's actions and inactions, a federal appeals court ruled, affirming that the United States may recover \$13 million from General Electric for response costs in the unfinished cleanup of a superfund site in New Hampshire. General Electric Co. used Pyranol—an insulating material made from polychlorinated biphenyls or PCBs—in the electric capacitors it manufactured at two New York plants. GE sold any “scrap Pyranol” that did not meet its purity standards to Fred Fletcher, a local paint manufacturer. Fletcher used the Pyranol as a plasticizer additive for his paints. Fletcher bought over 200,000 gallons of GE's scrap Pyranol over about ten years. The arrangement ended in 1968 when Fletcher stopped making payments because he disputed the quality of the Pyranol he received. In 1987, the Environmental Protection Agency discovered hundreds of drums leaking hazardous substances—including trichloroethylene, trichlorobenzene, and PCBs—at Fletcher's site. EPA placed a temporary cap on the site and added it to the Superfund list. The United States sued GE in 1991 as a party who “arranged for disposal ... of hazardous substances” under CERCLA, seeking to recoup costs associated with cleaning up the site.

The court found that the Supreme Court’s decision in *Burlington Northern & Santa Fe Railway Co. v. U.S.*, 556 U.S. 599 (2009) “settled the fact that arranger liability does not accrue in the *absence* of intent to dispose of a hazardous substance.” This holding, however, does not require the stated purpose of the arrangement to be disposal of hazardous substances. The court found that GE viewed scrap Pyranol as waste material and “availed itself of its relationship with Fletcher to rid itself of the scrap Pyranol in its inventory.” Specifically, the court pointed out that GE controlled the amount and quality of the materials shipped to Fletcher, the transfers increased drastically and continued even once Fletcher stopped payments, and GE refused to remove the drums Fletcher rejected as poor quality. GE also concluded that writing off Fletcher's debt and relieving itself of the responsibility for disposal was more financially advantageous than removing the drums from the site, the court found. The court concluded that GE's actions and “calculated *inactions*” showed sufficient intent to dispose of hazardous waste to justify arranger liability under CERCLA.

**Source:** Bloomberg BNA Toxics Law Reporter, 3/6/2012, discussing *U.S. v. General Electric Co.*, 1st Cir., No. 11–1034, 2/29/12

### **Greek Shipping Co. Ordered to Pay \$2 Million**

The Ilios Shipping Co. was sentenced March 27 in federal court in New Orleans for violating the national maritime pollution law and obstructing justice and was ordered to pay a criminal penalty of \$2 million. The U.S. District Court for the Eastern District of Louisiana approved a plea agreement setting out the penalty, which includes a \$250,000 payment to the National Fish and Wildlife Foundation to restore marine and aquatic resources in the area. The Greek-owned shipping company pleaded guilty in December 2011 to violating the Act to Prevent Pollution

from Ships of 2000 and to obstructing justice during an investigation. Ilios operated a bulk carrier ship that transported grain from New Orleans to ports around the world.

According to DOJ, between April 2009 and April 2011, the ship routinely discharged oily bilge waste and sludge directly into the ocean without the use of required pollution prevention equipment and the crew intentionally covered up the illegal discharges by falsifying the vessel's oil record book and destroying evidence.

**Source:** Bloomberg BNA Environment Reporter, 3/30/2012 discussing *United States v. Ilios Shipping Co.*, E.D. La., No. 11-286, 3/27/12).

### **U.S. Supreme Court Declines to Clarify Test For Water Act Jurisdiction Set in *Rapanos***

The U.S. Supreme Court refused to consider an appeals court finding that either the plurality or the concurring standard the high court set in *Rapanos v. U.S.* can be used to establish Water Act jurisdiction over wetlands. The court decision not to hear the case lets stand a \$250,000 Clean Water Act fine for filling a parcel of wetlands. David H. Donovan, a Delaware resident, clashed with the U.S. Army Corps of Engineers over his filling of an area designated as wetlands. Donovan lost his case in the U.S. District Court for the District of Delaware, which granted summary judgment in favor of the government, and then in the U.S. Court of Appeals for the Third Circuit. The appeals court agreed with the lower court that the land constitutes wetlands and is subject to jurisdiction under the Clean Water Act if it meets either of the two tests established by the 2006 Supreme Court decision in *Rapanos v. U.S.*, 547 U.S. 715 (2006). Donovan then filed a petition for a writ of certiorari at the Supreme Court. He asserted that his property was not covered by the Clean Water Act and that federally protected wetlands are only lands owned by the federal.

**Source:** Bloomberg BNA Toxics Law Reporter latest developments 5/15/2012 discussing *Donovan v. U.S.*, U.S., No. 11-1210, *cert. denied* 5/14/12

### **Settlement in Ashtabula River CERCLA Action**

The U.S. Department of Justice reached a \$5.5 million proposed settlement agreement with 18 companies in a Comprehensive Environmental Response, Compensation and Liability Act suit over hazardous waste in Ohio's Ashtabula River. The consent decree includes new land use restrictions and habitat restoration projects. Among the companies participating are Sherwin-Williams Co., Union Carbide Corp. and Norfolk Southern Railway Co.

According to the complaint, a number of industrial facilities in Ashtabula owned by the various defendants polluted nearby waters with dangerous contaminants, including low-level radioactive materials. The government alleges the pollution has been taking place since the 1940s. Many of the defendants participating in the proposed settlement paid into the approximately \$23 million in cleanup costs to remove contaminated sediments from the Ashtabula River between 2006 and 2008, the settlement said. With that contamination already taken care of, this settlement focuses on protecting and enhancing wildlife habitats in and around the river.

The four railroad companies settling in the case, Norfolk Southern Corp., Norfolk Southern Railway, Consolidated Rail Corp. and Conrail Inc., will restore a six-acre parcel of land by, among other activities, replacing invasive plant species with native plants and establishing a wetland habitat. The remaining 14 parties will be responsible for several projects over more than 200 acres of land, including installing a canoe launch and boardwalk for public use at a local

park near the formerly contaminated area. The companies also agreed to spend \$1.45 million to acquire and restore additional properties identified by the government at a later date.

According to the DOJ, several federal agencies are also responsible for contributing to the restoration efforts and will pitch in approximately \$768,000. Along with the railroads, Sherwin-Williams and Union Carbide, Cabot Corp., CBS Operations Inc., Cleveland Electric Illuminating Co., Dextrex Corp., Elkem Metals Co. LP, Gencorp Inc., Mallinckrodt LLC, Millennium Inorganic Chemicals Inc., Occidental Chemical Corp., Ohio Power Co., Olin Corp. and RMI Titanium Co. Inc. joined in the settlement.

**Source:** Law360, New York (May 03, 2012) discussing *USA et al. v. Cabot Corp. et al.*, case number 1:12-cv-01097 in the U.S. District Court for the Northern District of Ohio.

### **DuPont Settles EPA Suit over Railcar Waste Disposal**

DuPont Co. settled a U.S. Environmental Protection Agency lawsuit by paying a \$250,000 civil penalty and agreeing to improve its wastewater treatment program at a New Jersey facility after being accused of failing to properly empty railcars used to transport caustic waste. DuPont owns and operates the Secure Environmental Treatment Facility in Deepwater, N.J., where it has the capacity to treat 40 million gallons of wastewater per day, according to the complaint. DuPont accepts industrial wastewater from other facilities, including shipments from a Franklin, Va., plant operated by GEO Specialty Chemicals Inc. From at least 2005 until 2008, GEO shipped caustic waste slurry from the Franklin plant to the SET facility for treatment, sending the waste in railcars. The waste included sodium hydroxide, or lye, a caustic hazardous waste with a pH of greater than 12.5. But because it failed to completely drain the railcars, which had a 110-gallon capacity, before sending them back to GEO, DuPont allegedly transported hazardous waste back to the generator in violation of its treatment, storage and disposal permit, issued by the N.J. Department of Environmental Protection. On several occasions, DuPont returned the railcars with more than 2.5 centimeters of residue at the bottom, sometimes with more than 0.3 percent of the capacity of the railcar by weight, according to the complaint.

After an EPA inspection found lye residue with a highly caustic pH of 14 in one of the railcars to be shipped back, the agency asked DuPont to demonstrate the process it used for emptying the railcars, which consisted of emptying the contents from the bottom valve on the tank car with a pump. DuPont agreed to empty another GEO railcar for EPA inspection, but allegedly used a water hose to clean the car more completely than it normally would, the complaint said. The EPA inspector interrupted the hosing, and after inspection, found that the railcar contained caustic residue similar to the earlier-inspected railcar, the complaint said. In addition to the civil penalty, DuPont agreed to increase EPA monitoring and more stringent internal inspections of railcars containing hazardous waste. DuPont also consented to monitor storm water runoff from the area where it stores railcars for potential pollution, and agreed to maintain records of its inspections for at least three years after the termination of the consent decree.

**Source:** Law 360, 12/2/11 discussing *United States of America v. E.I. DuPont de Nemours & Co.*, case number 1:11-cv-07003, in the U.S. District Court for the District of New Jersey.

### **SC Utility Dirtied River with Arsenic: Enviro Group**

A Carolinas environmental group sued South Carolina Electric & Gas Co. for allegedly polluting the Wateree River with arsenic from the utility's coal-fired power plant in Richland County. The Catawba Riverkeeper Foundation claims that SCE&G has allowed arsenic to seep into the river

from unlined ponds where wet coal ash, a byproduct of the plant, is stored. The utility does not have a permit for such discharges, which the suit claims could dump more than 90 pounds of arsenic into the river a year. The suit calls for an injunction forcing the utility to stop using the coal ash ponds and dispose of the byproduct using a dry method, in a lined facility, away from the river. The requested injunction would also have SCE&G clean up the ponds and contaminated groundwater underneath.

A spokesman for SCE&G said the utility has already begun the process of closing down the ash ponds and monitoring the groundwater, as called for in a memorandum of agreement SCE&G signed with the state Department of Health and Environmental Control in October 2011. The Foundation's lawsuit takes issue with the agreement, which it says is a violation of the state's Pollution Control Act and does little to ensure the public's interest. The agreement was done in secret, with no opportunity for public comment, and can be dissolved by either party at any time, the suit said. The suit also notes that, under the agreement, the cleanup will not be fully completed until 2022.

The suit also alleges that the ponds, which are within 150 feet of the river, could be breached in a flood or other disaster. Such a breach could dump millions of tons of toxic coal ash into the river, it said. SCE&G said inspectors and engineers have confirmed the structural integrity of the ponds.

**Source:** Law360, New York January 13, 2012, discussing *Catawba Riverkeeper Foundation Inc. v. South Carolina Electric and Gas Co.*, case number 3:12-cv-00124, in U.S. District Court for the District of South Carolina.

### **Town Demands Toxic Water Defense Coverage in 7th Circ.**

Pollution exclusions in policies issued by Scottsdale Insurance Co. do not bar coverage for defense costs a Chicago suburb incurred in suits alleging that it knowingly gave its citizens contaminated water, a lawyer for the village told the Seventh Circuit on Friday. The Town argued that the pollution exclusion was "overly broad" and that, in this case, the village of Crestwood, Ill., was a distributor of the contaminated water and was outside the policy's exclusion. Crestwood and several of its current or former employees are challenging an Illinois district court's March ruling that handed summary judgment to Scottsdale, finding that the insurer did have to defend them in more than two dozen underlying lawsuits for their decades-long use of water contaminated with dry-cleaning solvents in the municipal water system. According to that ruling, Illinois case law allows only "traditional environmental pollution" to trigger pollution exclusions, a limitation that is intended to prevent insurers from using pollution exclusions against claims for things like slips on spilled Drano.

Crestwood has argued that it should be covered by its insurers, two Scottsdale subsidiaries, and that the policies' pollution exclusion does not apply because the underlying claims are not of traditional pollution, but of the sale of dirty water as a defective product. The district court shot down that argument, finding that the underlying suits all stemmed from the contamination of a water supply, which is commonly understood as environmental pollution. The Town's appeal is based on an idea articulated in a question posed by U.S. Circuit Judge Diane Wood that entities that are innocent of causing pollution but knowingly or negligently distribute it are outside the policy's pollution exclusion.

An attorney for some of the citizen plaintiffs in the underlying litigation, who are also appellants in the coverage suit, told the court that his clients are arguing that the contaminated water was a

defective product of which the village should have warned. They are not, however, raising allegations that involve traditional environmental pollution, according to the attorney, who supported the Town's assertion that Crestwood was not the polluter in this case and that the pollution exclusion should not apply.

An attorney representing the insurers told the court that there should not be coverage, noting that the pollution exclusion bars coverage for any injuries "arising out of" the release of pollutants. The insurers' lawyer also argued that if Crestwood was merely a distributor of the pollution, coverage would still be barred. The plain language of the exclusion does not require a policyholder to be an original or active polluter, according to the insurers' brief. The insurers further argued in their brief that the village was a polluter by dispersing the contaminated water from the well at issue into its public water supply and then passing it on to consumers.

Plaintiffs in the underlying suits have alleged that the state told Crestwood in 1986 that its main water supply contained perchloroethylene, which breaks down into the cancer-causing chemicals vinyl chloride and dichloroethylene, according to filings by the district court judge. The village allegedly promised to source its water elsewhere, but, faced with cost pressures, continued to pump the polluted water into homes until federal regulators shut down its well in 2007.

**Source:** Law360, Chicago January 13, 2012 discussing *Scottsdale Indemnity Co. et al. v. Village of Crestwood et al.*, case numbers 11-2385, 11-2556 and 11-2583, in the U.S. Court of Appeals for the Seventh Circuit.

### **Appeals Court Affirms Conspiracy Conviction Stemming from Restaurant Grease Dumping**

A federal appeals court affirmed the criminal conspiracy conviction of a contractor for the illegal dumping of restaurant grease in Mobile, Ala., in violation of the Clean Water Act. The U.S. Court of Appeals for the 11th Circuit affirmed the conspiracy conviction of William L. Wilmoth Sr. of pollution and mail fraud violations. After a five-day trial, the jury convicted Wilmoth of conspiracy to violate the Clean Water Act but acquitted him of the mail fraud charges and of five water act counts out of 33 charged. For the 28 other water act charges, the jury found him guilty of only a lesser charge of violating the water act negligently, not intentionally. The appeals court held that the evidence was "easily sufficient" to sustain a finding that Wilmoth conspired to intentionally violate the water act.

Four employees testified they either illegally dumped grease with Wilmoth's knowledge or were encouraged by him to do so. The appeals court wrote: "Just as the jury could rationally conclude that Mr. Wilmoth conspired to violate the CWA, the jury could also rationally conclude that Mr. Wilmoth intentionally participated in a scheme to induce customers to pay for the legal disposal of grease when in fact the grease was dumped. And the mails were used as part of the scheme."

**Source:** Bloomberg BNA Environment Reporter 4/20/2012 discussing *United States v. Wilmoth*, 11th Cir., No. 11-10540, 4/17/12.

#### **c. *Municipal Water Other than Wet Weather***

### **Court Clears Detroit Plan on Water Agency**

Detroit will continue to operate its water and sewer department under a reorganization plan approved by a federal judge Nov. 4 that includes changes to collective bargaining agreements

and procurement procedures. The plan, prepared in response to a Sept. 9 court order, “paves the way for the City of Detroit to establish and maintain compliance with the Clean Water Act and put an end to more than 30 years of federal oversight,” Mayor Dave Bing (D) said at a Nov. 4 press conference announcing the plan's approval by Judge Sean Cox. Cox had directed local officials managing the department to address long-standing problems and devise a plan to fix them. Under the plan, the Detroit Department of Water and Sewerage will remain a city department, and the City Council will continue to have final approval authority over Detroit's water rates. Changes will be made to the collective bargaining agreements of the 20 unions representing the department's workforce. The agreements as they stand are “very onerous, very time-consuming,” Bing said, noting that it can take as long as 120 days to move an employee to another department. The changes include fewer employee classifications and more leeway for managers to make decisions about overtime and promotions. In his order approving the plan, Judge Cox said some provisions and work rules contained in the union agreements “are impeding the DWSD from achieving and maintaining both short-term and long-term compliance with its [National Pollutant Discharge Elimination System] permit and the Clean Water Act.” He directed the department to keep existing contracts except for those rules that “threaten short-term compliance,” such as those pertaining to subcontracting and outsourcing. He also directed DWSD to develop, along with union leaders, new training programs specific to water department employees. The committee said it did not have time to “perform an exhaustive review” of the department's procurement process, identified as “one of the key areas of concern throughout the court's oversight,” and therefore could not make specific recommendations to address that. As a start, the group appointed by the City to put together the Plan said the department should be relieved of the requirement that it comply with the city's procurement ordinance.

The city has not disputed that the department is in violation of its NPDES permit and of the Clean Water Act. Among other things, the city's wastewater treatment plant violated limits for suspended solids. The case has been in court since 1977. Bing said that while not everyone is pleased with the plan, it is likely to get results and allow the department to operate on its own. “The judge has made it clear he doesn't want federal oversight for a long period of time,” Bing said. “He's going to hold us accountable and make sure he can dismiss [the case] as soon as possible.”

**Source:** BNA Infrastructure Investment & Policy Report: 11/4/2011 discussing *United States v. Detroit*, E.D. Mich., No. 77-71100, 11/4/11

### **Small Illinois Water District Target of a Cyber-Attack**

A hacker infiltrated the SCADA system, forcing a pump to fail. The FBI and DHS are investigating but haven't issued a conclusive report. The same hacker allegedly infiltrated a system in Houston but caused no damage. In an online post, the hacker claimed he is trying to show U.S. infrastructure's security flaws. The system was apparently protected with only a three-digit password.

**Source:** American Water Intelligence, December 2011

### **WWTP Provided Sentenced for “Ordinary Negligence**

The Fifth Circuit on Tuesday affirmed the Clean Water Act and permit violation convictions and sentences of wastewater treatment provider Jeffrey Pruett and his two companies, ruling on a question of first impression *that only ordinary negligence is required for criminal penalties tied*



*to negligent violations of CWA permits.* In a published opinion, a three-judge panel affirmed Pruett's 21-month prison sentence and fines levied against him, LWC Management Co. Inc. and Louisiana Land & Water Co., shooting down the appellants' argument that the higher level of gross negligence is required for such penalties and that the jury that convicted them was erroneously instructed on that point. Prosecutors in the case alleged that the defendants' violations threatened local drinking water supplies and residents' health by illegally discharging pollutants and improperly operating and maintaining facilities. The panel held that it must be bound by the plain and unambiguous language in the CWA section that imposes the penalties, because that statute refers explicitly to "negligent" violations of the CWA and its legislative history did not show that Congress intended that word to be interpreted differently. Negligence is understood to mean the failure to exercise the standard of care that a reasonably prudent person would use, according to the opinion, while the defendants had wanted the jury to be instructed that gross negligence concerns a "gross deviation" from that reasonable standard of care.

The alleged violations arose during a series of inspections that the EPA and the State began in November 2007 at Pruett's facilities. Those inspectors discovered violations at six of those sites, and a 2009 indictment charged the defendants with failing to provide proper operation and maintenance of the facilities, failing to maintain monitoring results as required by their permits, making discharges in excess of effluent limitations and making unpermitted discharges. After a 10-day trial, the jury found all three defendants guilty of a knowing violation of effluent limitations and Pruett guilty of a negligent violation — a misdemeanor — of operation and maintenance requirements at one facility. They were acquitted on other charges.

A Louisiana federal judge sentenced Pruett to 21 months incarceration on the felony convictions and 12 months on the misdemeanor conviction, to run concurrently, as well as a \$310,000 fine. LLWC was fined \$300,000 and LWC Management was fined \$240,000. Upon appeal, the Fifth Circuit panel found that the government presented sufficient evidence to support the convictions, concluding that prosecutors presented evidence showing that the effluent violations were constant and that a rational juror could find that the defendants committed those violations knowingly. The panel also found that, in light of his experience, Pruett knew or should have known that he was required to maintain records for inspectors and that the permits themselves put him on notice of that fact, and that the misdemeanor conviction was also supported by an EPA inspector's testimony. The Ninth and Tenth circuits have similarly ruled that the statute requires only ordinary negligence, the opinion said. The panel also upheld Pruett's sentencing enhancement based on his position at the companies and found that the fines imposed were reasonable.

**Source:** Law360, Chicago (May 15, 2012) discussing *USA v. J. Pruett et al.*, case number 11-30572, in the U.S. Court of Appeals for the Fifth Circuit.

### **Suit Filed Over Sewage Sludge Incinerator Rule**

The National Association of Clean Water Agencies on May 30 [asked](#) the U.S. Court of Appeals for the District of Columbia Circuit to review the Environmental Protection Agency's [denial](#) of administrative petitions for reconsideration of a rule that would impose emissions limits on sewage sludge incinerators (*National Ass'n of Clean Water Agencies v. EPA*, D.C. Cir., No. 12-1236, 5/30/12). EPA published the final sewage sludge incinerator rule in March 2011, setting new source performance standards for new units and emissions guidelines for existing sources. The association in 2011 filed a lawsuit in the D.C. Circuit challenging the rule's legality. Nathan

Gardner-Andrews, the association's general counsel, told BNA May 31 the association intends to move to consolidate the new case with the existing case (*National Ass'n of Clean Water Agencies v. EPA*, D.C. Cir., No. 11-1131, *motion filed 5/31/12*). The May 30 petition for review is available at <http://op.bna.com/fcr.nsf/r?Open=jcos-8utqw6>.

**Source:** Bloomberg BNA, Inc. Environment Reporter (6/8/2012)

d. *Criminal*

**Former Mayor in Missouri Sentenced For Violations of Safe Drinking Water Act**

The former mayor of a city in central Missouri was sentenced Dec. 1 to 10 years of probation on charges related to violations of the Safe Drinking Water Act. The former mayor of Stover MS had been convicted in March of a felony and of making a false statement to a federal agent. In addition to probation, he was sentenced to five months of home confinement and 30 days in a halfway house. The court also ordered him to pay a \$10,000 fine. Beckmann's co-defendant, the former superintendent of the city's public works department, was sentenced in April to five years of probation and ordered to pay a \$5,000 fine after he pleaded guilty to submitting a false record to the Missouri Department of Natural Resources. The case arose from efforts by Beckmann and Sparks to mislead the DNR as to the levels of bacteriological contaminants, lead, and copper in the city's water supply. The former DPW superintendent was responsible for collecting and submitting city water samples to DNR. Federal law requires the city to submit water samples to be analyzed for bacteriological contaminants and to conduct lead and copper sampling. In August 2010, the former DPW superintendent admitted that he submitted a false water supply record to DNR. The former mayor knew about Sparks' conduct but concealed it from the Environmental Protection Agency and lied to a federal agent when he denied knowing that Sparks was adding chlorine to drinking water samples that were submitted to DNR.

**Source:** BNA Environment Reporter 12/9/11 discussing *United States v. Beckmann*, W.D. Mo., No. 2:10-CR-04021, 12/1/11.

e. *Other Enforcement Topics of Possible Interest*

**EPA Reg. 2 Battery Recycler to Spend \$3 Million on Upgrades to Settle RCRA Violations**

Battery Recycling Co. will spend at least \$3 million and potentially up to \$6.7 million on facility upgrades and pay a \$112,500 penalty to resolve alleged improper handling of hazardous materials at a facility in Arecibo, Puerto Rico, according to a [proposed administrative settlement](#) announced Feb. 23 by the Environmental Protection Agency. Battery Recycling processes used motor vehicle batteries and produces nearly 60 pounds of lead daily according to EPA. Under the settlement, Battery Recycling must take immediate steps to prevent release of lead and other pollutants from its Arecibo facility. The proposed settlement would resolve alleged violations of the Resource Conservation and Recovery Act. Specifically, Battery Recycling will run emissions through lead-dust collection systems, complete a new system to capture lead dust inside the work area, and enclose the lead-recycling processing areas. EPA said vehicles will be washed and inspected to reduce the spread of lead dust into the surrounding communities. Previously, workers were found to have carried lead dust into their homes and vehicles, placing the nearby community at risk. Battery Recycling also must purchase a street-cleaning vehicle to remove lead dust and other contaminants from nearby roadways, install equipment to convert

lead dust into pellets in collection storage bins, and provide assistance to local high schools in environmental education. The RCRA settlement follows two orders issued in August 2011, one under the Clean Air Act and one under the Clean Water Act. In that case, EPA had the company install additional monitoring and leak-detection systems and required it to submit a plan that would bring it into compliance with storm water regulations.

**Source:** Bloomberg BNA Toxics Law Reporter Latest Developments.2/24/12

### **CVS Pharmacy to Pay \$13.75 Million to Resolve Hazardous Waste Allegations**

A California trial court approved an agreement requiring CVS Pharmacy Inc. to pay \$13.75 million to resolve allegations that its California retail stores and distribution centers illegally disposed of pharmacy waste, photo waste containing silver, and other hazardous wastes. CVS must pay \$11 million in civil penalties, \$2 million on supplemental environmental projects that further consumer protection and environmental enforcement, and \$750,000 to reimburse attorneys' fees and investigative costs, according to the agreement. The company also agreed to implement measures, including training employees, to prevent further infractions of the state's hazardous waste laws. The final judgment also includes a permanent injunction barring future, similar violations of California medical and hazardous waste laws. California launched the investigation into CVS that led to the civil action after learning Connecticut regulators were investigating the retail chain's environmental practices. Inspectors found evidence of improper storage, handling, and disposal of batteries, fluorescent light bulbs, pharmaceuticals, pharmacy wastes, photo-processing waste containing silver, hypodermic needles, waste from spills, and consumer returns of hazardous products, according to court documents. Prosecutors alleged the violations occurred over a seven-year period at dozens of CVS branded stores, pharmacies, and distribution facilities in the state. Reportedly, the local compliance reviews of CVS stores in California found there were no protocols in place for the handling of hazardous wastes, Kass said.

**Source:** Bloomberg BNA Toxics Reporter, 4/20/2012 discussing *California v. CVS Pharmacy Inc.*, Cal. Super. Ct., No. 56-2012-00415450-CU-MC-VTA, 4/16/12.

### **EPA Enforcement Yielded \$19 Billion in Pollution Control Spending in Fiscal 2011**

Polluters paid a record \$19 billion for pollution controls in fiscal year 2011, the Environmental Protection Agency announced in its annual report on enforcement and compliance. EPA also secured \$168 million in civil penalties during the fiscal year, and enforcement actions were expected to reduce air, water, and chemical pollution by 1.8 billion pounds. The fiscal 2011 results are higher than in 2010, when polluters paid \$12 billion for controls and \$110 million in fines, reducing pollution by 1.4 billion pounds. In civil enforcement in fiscal 2011, EPA concluded 3,241 judicial and administrative cases and initiated 3,283 cases.

In criminal enforcement, EPA opened 371 environmental investigations and brought charges against 249 defendants: 197 people and 52 companies.

Defendants were sentenced to a total of 89.5 years of incarceration, and fines and restitution amounted to \$35 million plus \$2 million in court-ordered environmental projects.

**Source:** BNA Environment Reporter 12/9/11